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# Federal Register

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# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

### 7 CFR Part 905

**[Docket No. FV02–905–4 FIR]**

## Oranges, Grapefruit, Tangerines, and Tangelos Grown in Florida; Exemption for Shipments of Tree Run Citrus

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim final rule that changed the rules and regulations prescribed under the Florida citrus marketing order (order). The order regulates the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida and is administered locally by the Citrus Administrative Committee (committee). This rule continues to exempt shipments of small quantities of tree run citrus from the grade, size, and assessment requirements of the order. Producers can ship 150 1–3/5 bushel boxes per variety, per shipment, of their own citrus free from order regulations, not to exceed 1,500 boxes per variety for the season. This change is effective for the 2002–03 season only. The committee believes this action may be a way to increase fresh market shipments, develop new markets, and improve grower returns.

**EFFECTIVE DATE:** February 28, 2003.

**FOR FURTHER INFORMATION CONTACT:** Doris Jamieson, Southeast Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 799 Overlook Drive, Suite A, Winter Haven, Florida 33884–1671; telephone: (863) 324–3375, Fax: (863) 325–8793; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202)720–8938, or E-mail: *Jay.Guerber@usda.gov.*

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement No. 84 and Marketing Order No. 905, both as amended (7 CFR part 905), regulating the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

USDA is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule continues in effect changes to the rules and regulations under the order to exempt shipments of small quantities of tree run citrus from grade, size, and assessment requirements. Tree run citrus is wholesome citrus picked and boxed in the field and taken directly to market without being graded or sized. With this change, producers are allowed to ship 150 1–3/5 bushel boxes per variety, per shipment, of their own citrus free from marketing order regulations. Total shipments cannot exceed 1,500 boxes per variety for the season. This action was unanimously recommended by the committee at its meeting held on May 22, 2002.

Section 905.80 of the marketing order provides authority for the committee to exempt certain types of shipments from regulation. Exemptions can be implemented for types of shipments of any variety in such minimum quantities, or for such purposes as the committee with the approval of USDA may specify. No assessment is levied on fruit so shipped. The committee shall, with the approval of USDA, prescribe such rules, regulations, or safeguards as it deems necessary to prevent varieties handled under the provisions of this section from entering channels of trade for other than the purposes authorized by this section.

Section 905.149 is continued in effect. This section defines grower tree run citrus and outlines the procedures to be used for growers to apply to the committee to ship their own tree run citrus fruit exempt from grade, size, and assessment requirements under the order. Under this section, once the exemption has been approved, the grower must report to the committee the volume of fruit shipped, the date of the shipment, and type of transportation used.

According to Florida Department of Citrus (FDOC) regulation 20–35.006, ''Tree run grade is that grade of naturally occurring sound and wholesome citrus fruit which has not been separated either as to grade or size after severance from the tree.'' Also, FDOC regulation 20–62.002 defines wholesomeness as fruit free from rot, decay, sponginess, unsoundness, leakage, staleness, or other conditions showing physical defects of the fruit. By definition, this fruit is handled by the grower and bypasses normal handler operations. Prior to this change, all tree run citrus had to meet all requirements of the marketing order, as well as State

of Florida Statutes and Florida Department of Citrus regulations. Even with this change, tree run citrus must continue to meet applicable State of Florida Statutes and Florida Department of Citrus regulations, including inspection. Growers are able to pick, box, and ship directly to buyers, and avoid the costs incurred when citrus is handled by packinghouses.

Over the past few years, small producers of Florida citrus have expressed concerns regarding problems incurred when selling their citrus. These concerns include costs, returns, and available markets. These problems, along with market conditions, have driven a fair number of citrus growers and handlers out of the citrus industry. These concerns have been discussed at committee meetings, as well as meetings of other industry groups.

Some small growers have stated they have had difficulty getting packinghouses to pack their fruit. There is limited demand for certain varieties of citrus produced. In some cases, supply exceeds demand in the standard markets. According to committee data, over the past five years, fresh grapefruit sales have dropped 25 percent and fresh orange shipments are down 11 percent. In some cases, varieties may be out of favor with handlers and consumers, or there may be a glut on the market of a particular variety of fruit. As a result, packinghouses do not wish to become over stocked with fruit which is difficult to market and, therefore, will not pack less popular minor varieties of fruit or fruit that is in oversupply. Packinghouses do not want to pack what they cannot sell. These factors have caused wholesome fruit to be shipped to processing plants or left on the tree.

The costs of growing for the fresh market have been increasing, while in many cases, the returns to the grower have been decreasing. The cost of picking, packing, and hauling, and associated handling costs for fruit going to the fresh market, is sometimes greater than the grower's return on the fruit. The costs associated with growing for the fresh market are greater than the costs for growing for the processed market.

When citrus cannot be sold into the fresh market, it can be sold to the processing plants. However, the prices received are considerably lower. For example, during the last five years, only the 1999–2000 season produced on-tree returns for processed red seedless grapefruit that exceeded one dollar per box. Over the period from 1977 through 2000, the differential between fresh prices and processed prices has averaged $3.55 per box. The average on-tree price for processed Florida oranges during the 2000–02 season was $2.72 compared to $4.25 for fresh oranges.

In some cases, where the cost of harvesting citrus exceeds the returns to the grower or the grower cannot find a buyer for the fruit, economic abandonment can occur. According to information from the National Agricultural Statistics Service, the seasons of 1995–96, 1996–97, 1997–98, and 2000–01 had an average economic abandonment of two million boxes or more of red seedless grapefruit alone.

Consequently, growers are looking for other outlets to move their fruit in an effort to increase returns. Several growers at the meeting stated that regulations previously imposed on the citrus industry made it difficult for them to ship homegrown fruit into interstate markets. Some growers believe secondary markets exist (which previously could not be supplied) that will provide them additional outlets to sell their citrus. They think niche markets exist that could be profitable. They believe they can ship quality fruit directly to out-of-state markets and that it would be well received.

Growers want the opportunity to continue pursuing those niche markets. These growers contend tree run citrus does not need a minimum grade and size to be marketable, and that they can supply quality fruit to secondary markets not served by packed fruit. However, they believe to do it profitably, they need to bypass the normal handler operations and the associated costs.

The committee listened to the concerns of these small growers and the problems they have encountered. In an effort to allow these growers to pursue these niche markets, the committee, which consists of growers and handlers, unanimously voted to allow a minimum quantity of citrus to be shipped exempt from the grade, size, and assessment regulations. The committee recommended growers be allowed to ship up to 150 1-3/5 bushel boxes of each variety, per shipment, from their own groves, with total shipments for the season not to exceed 1,500 boxes per variety.

Throughout industry discussions, many different combinations of varieties and shipment totals were discussed. In making this recommendation, the committee determined that 150 boxes of each variety per shipment allows the grower to ship a sufficient amount of fruit to make the exemption cost effective and yet not allow too much fruit to enter market channels exempt from marketing order requirements. The committee believes this level of volume will help keep this fruit in non-competitive outlets.

The committee believes this tree run fruit will be sold primarily to non-competitive, niche markets, such as farmers' markets, flea markets, roadside stands, and similar outlets and will not compete with non-exempt fruit shipped under the order. Fruit is sold in similar markets within the state, and such markets have been successful. This change allows growers to sell directly to similar markets outside of the State. The committee believes this action allows the industry to service more non-traditional markets and that this may be a way to increase fresh market shipments and develop new markets. Granting this exemption allows growers to supply markets that might not otherwise be supplied. Some members expect that this tree run or grove fresh fruit may create greater consumer interest in fresh citrus fruit.

Under this provision, the grower is required to apply to the committee, on a ''Grower Tree Run Certificate Application'' form provided by the committee, for an exemption to ship tree run citrus fruit to interstate markets. On this form, the grower must provide the committee with their name; address; phone number; legal description of the grove; variety of citrus to be shipped; and the approximate number of boxes produced on the specified grove. The grower must also certify that the fruit to be handled comes from the grove owned by the grower applicant. The grower will also report to the committee the actual number of boxes per variety shipped under the exemption.

The Grower Tree Run Certificate Application form is submitted to the committee manager. The manager reviews the application for completeness and accuracy. The manager also verifies the information provided. After the application has been reviewed, the manager notifies the grower applicant in writing whether the application is approved or denied.

Once the grower has received approval for their application for exemption and begins shipping fruit, a ''Report of Shipments Under Grower Tree Run Certificate'' form, also provided by the committee, must be completed for each shipment. On this form, the grower provides the location of the grove, the amount of fruit shipped, the shipping date, and the type of transportation used to ship the fruit, along with the vehicle license number. The grower must supply the Road Guard Station with a copy of the grower certificate report for each shipment, and provide a copy of the report to the

committee. This report enables the committee to maintain compliance and gather data, which will be used to determine the effectiveness of the exemption. Failure to comply with these requirements may result in the cancellation of a grower's certificate.

The FDOC defines tree run grade and wholesomeness of citrus fruit. This fruit is handled by the grower and bypasses normal handler operations. Even with the change to the provisions under the order, tree run citrus must still meet the requirements of the State of Florida Statutes and FDOC regulations, including inspection. Consequently, growers will need to continue to have the fruit inspected to meet current State requirements.

This exemption is effective for the current season beginning October 8, 2002, and ending July 1, 2003, only. The committee determined that offering the exemption for one season will provide sufficient information on how the fruit shipped under the exemption was received on the market. It will also indicate whether or not other markets exist that packed fruit is not currently supplying, where these markets are located, and approximately how much fruit can be sold in such markets. It will also indicate the number of growers interested in utilizing the exemption and the volume of citrus shipped under the exemption. In addition, it will provide the committee with information regarding any potential impact on competitive outlets. The committee will also have information available regarding any compliance issues not previously discussed. At the end of the season, the committee will review all available information and decide whether the exemption should be continued.

This rule does not affect the provision that handlers may ship up to 15 standard packed cartons (12 bushels) of fruit per day exempt from regulatory requirements. Fruit shipped in gift packages that are individually addressed and not for resale, and fruit shipped for animal feed are also exempt from handling requirements under specific conditions. Also, fruit shipped to commercial processors for conversion into canned or frozen products or into a beverage base are not subject to the handling requirements under the order.

Section 8e of the Act requires that whenever grade, size, quality, or maturity requirements are in effect for certain commodities under a domestic marketing order, including citrus, imports of that commodity must meet the same or comparable requirements. This rule does not change the minimum grade and size requirements under the order. Therefore, no change is necessary in the citrus import regulations as a result of this action.

**Final Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 11,000 producers of Florida citrus in the production area and approximately 80 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $5,000,000.

Based on industry and committee data, and average annual f.o.b. price for fresh Florida citrus during the 2001–02 season was approximately $8.10 per 4/5-bushel carton for all shipments, and the total fresh shipments for the 2001–02 season were around 55 million 4/5-bushel cartons of Florida citrus. Approximately 50 percent of the handlers handled 94 percent of Florida citrus shipments. Using information provided by the committee, about 54 percent of citrus handlers could be considered small businesses under the SBA definition. Although specific data is unavailable, USDA believes that the majority of Florida citrus producers may be classified as small entities.

This rule continues in effect the addition of § 905.149 to the rules and regulations under the order exempting shipments of small quantities of tree run citrus from the grade, size, and assessment requirements of the order. This action allows growers to ship 150 1-3/5 bushel boxes per variety, per shipment, of their own tree run citrus free from marketing order regulations into interstate markets. Total shipments cannot exceed 1,500 boxes per variety for the season per individual grower. This change is effective for the 2002–03 season only. The committee believes this action may be a way to increase fresh market shipments, develop new markets, and improve grower returns. Authority for this action is provided in § 905.80(e).

According to a recent study by the University of Florida—Institute of Food and Agricultural Sciences, production costs for the 2001–02 season ranged from $1.71 per box for processed oranges to $2.41 per box for grapefruit grown for the fresh market. The average packing charge for oranges is approximately $6.50 per box, for grapefruit the charge is approximately $5.75 per box, and for tangerines the charge can be as high as $9 per box. In a time when grower returns are weak, sending fruit to a packinghouse can be cost prohibitive, especially for the small grower. This rule may provide an additional outlet for fruit that might otherwise be forced into the processing market or left on the tree altogether.

This rule will not impose any additional costs on the grower. This rule has the opposite effect. It reduces the costs associated with having fruit handled by a packinghouse. This rule enables growers to ship their tree run citrus free from grade, size, and assessment requirements under the order. This action allows growers to ship minimum quantities of their citrus directly into interstate commerce exempt from some order requirements and their related costs. With this action, growers can reduce handling costs and use those savings toward developing additional markets. This benefits all growers regardless of size but it is expected to have a particular benefit for the small grower.

The committee considered several alternatives to this action, including making no change to the current regulations. The committee believed that some change was necessary to help Florida citrus growers. The committee considered allowing growers to ship unlimited quantities of any grower's citrus. This option was rejected because it would have caused market disruption and compliance problems, because growers could become shippers for other growers. It would have also made it more difficult to keep this fruit in noncompetitive outlets. Other alternatives considered were increasing the number of boxes available to be shipped per load, and increasing the number of boxes available to be shipped per season. These options were also rejected amid concerns that too much fruit could be shipped and find its way into the competitive markets.

This action requires two additional forms. In accordance with the Paperwork Reduction Act of 1995 (44

U.S.C. chapter 35), AMS obtained emergency approval for a new information collection request under OMB No. 0581–NEW for Oranges, Grapefruit, Tangerines, and Tangelos Grown in Florida, Marketing Order No. 905. The emergency request was necessary because insufficient time was available to follow normal clearance procedures. This information collection will be merged with the forms currently approved for use under OMB No. 0581–0189 ''Generic OMB Fruit Crops.''

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

Further, the committee's meeting was widely publicized throughout the citrus industry and all interested persons were invited to attend the meeting and participate in committee deliberations. Like all committee meetings, the May 22, 2002, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue.

Also, the committee has a number of appointed subcommittees to review certain issues and make recommendations to the committee. A subcommittee met May 21, 2002, and discussed the tree run issue in detail. That meeting was also a public meeting and both large and small entities were able to participate and express their views.

An interim final rule concerning this action was published in the **Federal Register** on October 7, 2002. Copies of the rule were mailed by the committee's staff to all committee members and citrus handlers. In addition, the rule was made available through the Internet by the Office of the **Federal Register** and USDA. That rule provided for a 60-day comment period which ended December 6, 2002. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab.html.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the committee's recommendation, and other information, it is found that finalizing the interim final rule, without change, as published in the **Federal Register** (67 FR 62313, October 7, 2002) will tend to effectuate the declared policy of the Act.

**List of Subjects in 7 CFR Part 905**

Oranges, Grapefruit, Tangerines, Tangelos, Marketing agreements, Reporting and recordkeeping requirements.

## PART 905—ORANGES, GRAPEFRUIT, TANGERINES, AND TANGELOS GROWN IN FLORIDA

Accordingly, the interim final rule amending 7 CFR part 905 which was published at 67 FR 62313 on October 7, 2002, is adopted as a final rule without change.

Dated: January 23, 2003.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 03–2014 Filed 1–28–03; 8:45 am]

**BILLING CODE 3410–01–P**

## DEPARTMENT OF JUSTICE

### Immigration and Naturalization Service

### 8 CFR Parts 236 and 241

**[INS No. 2203–02]**

**RIN 1115–AG67**

## Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities

**AGENCY:** Immigration and Naturalization Service, Justice.

**ACTION:** Final rule.

**SUMMARY:** This final rule governs the public disclosure by any state or local government entity or by any privately operated facility of the name and other information relating to any immigration detainee being housed or otherwise maintained or provided service on behalf of the Immigration and Naturalization Service (INS or Service). This rule establishes a uniform policy on the public release of information on Service detainees and ensures the Service's ability to support the law enforcement and national security needs of the United States.

**DATES:** This rule is effective on January 29, 2003.

**FOR FURTHER INFORMATION CONTACT:** Dea Carpenter, Deputy General Counsel, Office of the General Counsel, Immigration and Naturalization Service, 425 I Street NW., Room 6100, Washington, DC 20536, telephone (202) 514–2895.

**SUPPLEMENTARY INFORMATION:** The Commissioner of the Immigration and Naturalization Service (''Service'') published this rule as an interim rule with request for comments on April 22, 2002. 67 FR 19508. In the 60-day comment period, the Service received only four comments.

The comments received may be described as follows: One commenter contended that the rule violates non-citizens' constitutional rights, the public's right to know under the First Amendment, the States' rights under the Tenth Amendment and the Guarantee Clause of Article IV of the Constitution. This comment also argued that the manner of promulgation of the interim rule violated the Administrative Procedure Act (APA), and that consent to the rule by a non-federal institution could not validate the rule. A second commenter asserted that the rule violates the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution; that the rule derogates treaty obligations of the United States under international law; that, in enacting the interim rule, the Service failed to comply with the notice and comment provisions of the APA; that the rule violates the Tenth Amendment; and that the rule exceeds the scope of delegated authority under the Immigration and Nationality Act (''Act''). The third comment also took the position that the rule exceeds the authority delegated under the Act. The fourth comment urged that the rule is impractical and affects the ability of third persons to communicate with detainees. All of the commenters were of the view that the rule reflects undesirable public policy.

Rather than respond to each comment individually, the Service believes that it is more functional to respond to the concerns raised, organized by subject matter. The Service has considered the comments and responds as follows:

1. The commenters' suggestion that the rule exceeds the Attorney General's authority under federal law is without merit. Federal control over matters regarding aliens and immigration is plenary and exclusive. ''Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere.'' *Nyquist* v. *Mauclet,* 432 U.S. 1, 10 (1977); *see* also, *e.g., Mathews* v. *Diaz,* 426 U.S. 67, 81 (1976) (''[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.''). Under federal law, the Attorney General is explicitly charged with the administration and enforcement of the Nation's immigration laws. 8 U.S.C. 1103(a)(1) (''[t]he Attorney General shall be charged with the administration and

enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens''); *see INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 424 (1999). Pursuant to those responsibilities, the Attorney General possesses broad and express authority to promulgate appropriate immigration regulations. *See* 8 U.S.C. 1103(a)(3) (the Attorney General ''shall establish such regulations; * * * issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.''). In addition, the Attorney General has explicit statutory authority to detain aliens in connection with removal proceedings, 8 U.S.C. 1226(a), 1231, and to enter into agreements with State and local governments for the housing of aliens detained under provisions of the immigration laws. 8 U.S.C. 1103(a)(9)(A). The Attorney General has delegated substantial immigration responsibilities to the Commissioner of the INS. *See* 8 U.S.C. 1103(c); 8 CFR 2.1.

These provisions plainly authorize the Attorney General or the Commissioner to set the terms of alien detention contracts and to provide by regulation that persons housing INS detainees on behalf of the federal government shall not publicly disclose the names and other information regarding those detainees, particularly where such disclosure would threaten harm to vital national interests. The regulation is further supported by the plenary federal authority with respect to matters of national security. *See, e.g.*, *Haig* v. *Agee,* 453 U.S. 280, 307 (1981) (''It is obvious and unarguable that no governmental interest is more compelling than the security of the nation'') (citation omitted); *Murphy* v. *Waterfront Comm'n of N.Y. Harbor,* 378 U.S. 52, 76 n.16 (1964) (noting ''the paramount federal authority in safeguarding national security'') (citation and internal quotation marks omitted). The rule is necessary because, as the New Jersey appellate court, in reviewing the legality and effect of interim rule, pointed out, ''The counties are not privy to the character and extent of federal investigations in progress nor, apparently, do they possess any independently acquired information regarding the role of the INS detainees in those investigations.'' *ACLU* v. *County of Hudson,* 799 A.2d 629, 643 (N.J. Super. App. Div.), certification denied, 803 A.2d 1162 (N.J. 2002).

Moreover, to the extent that the rule implicates contracts between the federal government and state, local or private entities, to house federal detainees, those contracts are governed by federal law. The ''rights of the United States under its contracts are governed exclusively by federal law,'' *Boyle* v. *United Technologies Corp.,* 487 U.S. 500, 504 (1988). With respect to contracts to house INS detainees, the regulation confirms what should always have been evident: that federal contractors with the INS may not use the information obtained in housing federal detainees to impair the federal government's enforcement of the immigration and criminal laws.

Further, the issue is not whether a non-federal entity consents to the regulation. Any non-federal entity providing housing for federal detainees may take steps to terminate its relationship with the Service if it so chooses. The rule simply relieves the non-federal entity of responsibility for releasing or withholding information regarding the detainees, and places that responsibility with the federal government subject to standards established by federal law.

The validity of the interim rule has recently been confirmed by the Superior Court of New Jersey, Appellate Division, in *ACLU* v. *County of Hudson,* 799 A.2d 629, 643 (N.J. Super. App. Div.), certification denied, 803 A.2d 1162 (N.J. 2002). In that decision, the court relied on the interim rule to reverse the judgment of a lower court requiring disclosure of information by county officials. The New Jersey court confirmed that ''the regulation falls within the authority delegated to the Commissioner by Congress through the Attorney General.'' *Id.,* at 649; *see* also, at 650. The court found that it need ''not assess the strength of the government's argument that national security interests create a generalized authority within the government to promulgate 8 CFR 236.6 or any other measures limiting the rights of individuals, for we view the government's argument based upon the delegation of authority under the INA to provide a sufficiently authoritative independent basis of support for the Commissioner's action.'' *Id.,* at 650.

2. Some of the commenters asserted that the interim rule was improperly promulgated under the Administrative Procedure Act (APA). As the Service explained in promulgating the interim rule, implementation of the rule as an interim rule, with provisions for post-promulgation public comments, was properly based on the APA's ''good cause'' exceptions found at 5 U.S.C. 553(b)(B) and (d)(3). 67 FR at 19510.

The statement accompanying the promulgation of the interim rule easily satisfied the requirements of 5 U.S.C. 553(b)(B) and (d)(3). The ''good cause'' exceptions may be used in ''emergency situations,'' *Util. Solid Waste Activities Group* v. *EPA,* 236 F.3d 749, 754 (D.C. Cir. 2001), and the circumstances surrounding promulgation of the interim rule easily met that criterion. Public disclosure of the information at issue would have endangered national security and undermined crucial federal law enforcement interests. Immediate promulgation of a rule to clarify federal law and ensure the protection of those national interests was vital. In those circumstances, the government was not required to await completion of a notice-and-comment period to take immediate action.

With the adoption of this final rule, it is the final rule, and not the interim rule, that is operative. Even if a court were to find that the interim rule was improperly adopted, the court would look to this final rule in determining the rule's legal efficacy.

3. The commenters' constitutional challenges lack force. First, the Tenth Amendment is not implicated. The rule against commandeering applies only when the federal government requires state legislatures to enact regulatory schemes, *New York* v. *United States,* 505 U.S. 144, 168–69, 173 (1992), or ''conscripts'' state officials to execute a federal program, *Printz* v. *United States,* 521 U.S. 898, 935 (1997). The rule has no application where the federal government requires a state *not* to release information pursuant to a framework, such as this rule, that applies equally to both state and private actors. Thus, in *Reno* v. *Condon,* 528 U.S. 141 (2000), the Supreme Court unanimously rejected a Tenth Amendment challenge to a federal law that prohibited states from disclosing a driver's personal information, such as a person's name and address.

The Supreme Court has also made clear that the ''anti-commandeering'' principle places no constraint on the federal government's ability to impose conditions on the receipt of federal funds. *See* New York, 505 U.S. at 168–69, 173. Pursuant to explicit congressional authority, the federal government has expended and is expending substantial funds in connection with the housing of immigration detainees by non-federal entities. The conditions attached to the receipt of those funds—funds which recipients are free to accept or reject as they please—do not implicate the Tenth Amendment. *See id.*

Second, the commenters' invocation of the Guarantee Clause of Article IV of the Constitution also fails. The Guarantee Clause provides that ''[t]he United States shall guarantee to every State in this Union a Republican Form

of Government.'' U.S. Const., Art. IV, § 4. That constitutional provision is not implicated here.

Third, the commenters' Due Process concerns are unfounded. Under federal law, INS detainees in removal proceedings are entitled to invoke a panoply of applicable administrative and judicial procedures. *See, e.g.*, 8 U.S.C. 1226–31; 8 CFR 240.10. The rule in no way abrogates any of those rights. Moreover, administrative removal proceedings are ''intended to provide a streamlined determination of eligibility to remain in this country, nothing more.'' *INS* v. *Lopez-Mendoza,* 468 U.S. 1032, 1039 (1984). Thus, due process requirements in this context are reduced, and hearings need not comply with ''the forms of judicial procedure.'' *Yamataya* v. *Fisher,* 189 U.S. 86, 97 (1903); *see* also, *e.g., United States* v. *Verdugo-Urquidez,* 494 U.S. 259, 271–273 (1990) (due process ''accord[s] differing protection to aliens than to citizens''); *Fiallo* v. *Bell,* 430 U.S. 787, 792 (1977) (political branches may adopt rules for aliens '' 'that would be unacceptable if applied to citizens' '' (citation omitted)); *Landon* v. *Plasencia,* 459 U.S. 21, 34 (1982) (''it must weigh heavily in the [due process] balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature''). The disclosure rule here invades no due process rights.

Fourth, the rule does not infringe upon any public First Amendment rights. Rather, the rule ensures that any disclosure of information pertaining to federal detainees will be governed by the federal Freedom of Information Act (FOIA), 5 U.S.C. 552. The FOIA provides generally for disclosure of records by federal agencies, but contains exceptions that Congress believed crucial to the effective functioning of the national government. *See, e.g.*, 5 U.S.C. 552(b)(1), (7)(A), (C), (E), (F). The rule here ensures that federal interests will be protected by channeling information requests through the FOIA. In addition, the rule guarantees that information regarding federal detainees will be released under a uniform federal scheme rather than the varying laws of fifty states. It is this Act of Congress and this implementing rule that are controlling, not the Constitutional bar to impairment of freedom of speech. ''The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.'' *Houchins* v. *KQED, Inc.,* 438 U.S. 1, 12 (1978) (quoting Stewart, ''Or of the Press,'' 26 Hastings L.J. 631, 636 (1975)). By channeling requests for information through the FOIA, which contains a privacy exception, the rule also protects detainees' privacy. Just as the government has a substantial interest in protecting legitimate national security, intelligence and law enforcement functions under the FOIA, detainees may have a substantial privacy interest in their names and the personal information connected with their status as detainees. 5 U.S.C. 552(b)(1), (6), (7)(A), (C), (E). For example, individuals who were originally detained because of their possible connection to terrorism, have an overwhelming interest in not being connected with such activity. And particularly with respect to those individuals cooperating with the government's law enforcement investigations, there are powerful reasons why such persons would wish to conceal their identities and whereabouts. Indeed, other INS regulations expressly shield from disclosure information pertaining to or contained in an asylum application. *See* 8 CFR 208.6(a). Contrary to some of the commenters' suggestions, the fact that certain detainees may wish to publicly identify themselves, which they are free to do, in no way undermines this assessment.

4. The contention that the rule violates international law is similarly without basis. Federal law explicitly addresses the issue of access to consular officials. The Vienna Convention requires that a detained individual be advised of his or her right to contact his or her country's consul, and consular notification upon request of the detainee. *See* Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820, Art. 36(1)(b). However, an alien detainee may not wish to have his nation's representatives advised of his detention and may wish to apply for refugee status or asylum. Consular notification is mandatory only if the bilateral consular convention specifically requires notifying consular officials of all arrests or detentions. *See* 8 CFR 236.1(e) (listing countries covered by such bilateral conventions).

5. Finally, all of the comments argue that the rule reflects unwarranted public policy choices. The Service disagrees. In this post-September 11, 2001, era of heightened national security concerns, it is necessary that information regarding aliens detained in the United States be released with great care. As explained in connection with promulgation of the interim rule, the inappropriate release of information concerning detained aliens can provide hostile interests with intelligence harmful to the national security and law enforcement interests of the United States. In upholding the regulation, the Appellate Division of the New Jersey Superior Court expressly accept[ed] the government's characterization of the interests affected as important, *i.e.*, facilitation of law enforcement operations, the protection of detainees, and promotion of national security.'' *ACLU* v. *County of Hudson, supra,* 799 A.2d at 652; *see* also *id.,* at 649 (''With regard to the government's national security argument, there can be no question that the government of the United States has a compelling interest in securing the safety of the nation's citizens against terrorist attack''). The Service continues to believe that the rule is fully warranted and adopts the analysis and legal authority in the supplementary information to the interim rule as support for the adoption of this final rule. 67 FR at 19501–19510.

The commenters' contention that the rule is impractical has not proven to be true. The FOIA has a long history of success in providing for proper public access to information while also protecting appropriate public safety, national security, and individual privacy interests. The Service is fully capable of carrying out this mandate in the context of federal immigration detainees housed in non-federal facilities, and the commenters have supplied no evidence to the contrary.

Accordingly, the Service is adopting the interim rule as a final rule without amendment.

**Regulatory Flexibility Act**

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule applies only to release of information about Service detainees being housed or maintained in a state or local government entity or a privately operated detention facility. It does not have any adverse on small entities as that term is defined in 5 U.S.C. 601(6).

**Unfunded Mandates Reform Act of 1995**

This rule will not 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, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

**Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

**Executive Order 12866**

This rule is considered by the Department of Justice, Immigration and Naturalization Service, to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget for review.

**Executive Order 13132**

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule merely pertains to the public disclosure of information concerning Service detainees housed, maintained or otherwise served in state or local government or privately operated detention facilities under any contract or other agreement with the Service. In effect, the rule will relieve state or local government entities of responsibility for the public release of information relating to any immigration detainee being housed or otherwise maintained or provided service on behalf of the Service. Instead, the rule reserves that responsibility to the Service with regard to all Service detainees. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient Federalism implications to warrant the preparation of a federalism summary impact statement.

**Executive Order 12988, Civil Justice Reform**

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

**Paperwork Reduction Act**

This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

**List of Subjects**

*8 CFR Part 236*

Administrative practice and procedure, Aliens, Immigration.

*8 CFR Part 241*

Administrative practice and procedure, Aliens, Immigration.

Accordingly, the interim rule amending 8 CFR parts 236 and 241 which was published at 67 FR 19508 on April 22, 2002, is adopted as a final rule without change.

Dated: January 23, 2003.

**Michael J. Garcia,**

*Acting Commissioner, Immigration and Naturalization Service.*

[FR Doc. 03–1958 Filed 1–28–03; 8:45 am]

BILLING CODE 4410–10–P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. 2002–NM–307–AD; Amendment 39–13025; AD 2003–03–01]**

**RIN 2120–AA64**

## Airworthiness Directives; Boeing Model 737–600, –700, –700C, –800, and –900 Series Airplanes

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD) that is applicable to all Boeing Model 737–600, –700, –700C, –800, and –900 series airplanes. This action requires reviewing the airplane maintenance records to determine whether an engine has been removed from the airplane since the airplane was manufactured. For airplanes on which an engine has been removed, this action requires an inspection of the aft engine mount to determine if the center link assembly is correctly installed, and follow-on actions if necessary. This action also prohibits installation of an engine unless the aft engine mount is inspected and the center link assembly is found to be installed correctly. This action is necessary to prevent increased structural loads on the aft engine mount, which could result in failure of the aft engine mount and consequent separation of the engine from the airplane. This action is intended to address the identified unsafe condition.

**DATES:** Effective February 13, 2003.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 13, 2003.

Comments for inclusion in the Rules Docket must be received on or before March 31, 2003.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–307–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9–anm-iarcomment@faa.gov*. Comments sent via fax or the Internet must contain ''Docket No. 2002–NM–307–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Sue Lucier, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2186; fax (425) 227–1181.

**SUPPLEMENTARY INFORMATION:** The FAA has received reports indicating that operators found that the center link assembly for the aft engine mount was reversed on several Model 737–700 series airplanes and one Model 737–800 series airplane. Investigation revealed that the center link assembly had been reversed during re-assembly after overhaul of the airplane engine. Because of the nearly symmetrical design of this assembly, it is susceptible to being reversed during installation. Reversal of the center link assembly increases the structural load on the aft engine mount. This condition, if not corrected, could result in failure of the aft engine mount and consequent separation of the engine from the airplane.

The design of the center link assembly for the aft engine mount is common to

all Model 737–600, –700, –700C, –800, and –900 series airplanes. Therefore, Model 737–600, –700C, and –900 series airplanes may be subject to the same unsafe condition revealed on the Model 737–700 and –800 series airplanes.

**Explanation of Relevant Service Information**

The FAA has reviewed and approved Boeing Alert Service Bulletin 737–71A1462, Revision 1, dated November 7, 2002. That service bulletin describes procedures for a one-time general visual inspection to determine if the center link assembly of the aft engine mount is correctly installed, and follow-on actions if necessary. If the center link assembly is incorrectly installed, follow-on actions include:

- Removing the assembly and installing it correctly;
- Performing a detailed inspection of the engine mounting lugs and engine turbine rear frame for cracking, yielding, buckling, or wear damage; and
- Performing a detailed inspection of the hardware for the aft engine mount (including the center link assembly, right link assembly, aft mount hanger assembly, and link pins) for cracking, yielding, buckling, or wear damage.

Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition.

**Explanation of the Requirements of the Rule**

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design, this AD is being issued to prevent increased structural loads on the aft engine mount, which could result in failure of the aft engine mount and consequent separation of the engine from the airplane. This AD requires a one-time review of the airplane maintenance records to determine if an engine has been removed since the airplane's date of manufacture. For any engine that has been removed since the airplane's date of manufacture, this AD requires accomplishment of the actions specified in the service bulletin described previously, except as discussed under the heading, ''Differences Between This AD and the Service Bulletin.'' This AD also prohibits installation of an engine unless the aft engine mount is inspected and the center link assembly is found to be installed correctly.

**Differences Between This AD and the Service Bulletin**

Operators should note that, while the service bulletin's effectivity is limited to certain airplane line numbers, this AD is applicable to all Boeing Model 737–600, –700, –700C, –800, and –900 series airplanes. The design of the center link assembly of the aft engine mount on all of these airplanes is the same. Therefore, all of these airplanes may be subject to the same unsafe condition. This issue has been coordinated with Boeing, and Boeing concurs with making this AD applicable to all Boeing Model 737–600, –700, –700C, –800, and –900 series airplanes.

Operators should note that the service bulletin specifies that the engine manufacturer may be contacted for instructions for repair of any cracking, yielding, buckling, or wear damage that is found. However, this AD requires the repair of those conditions to be accomplished per a method approved by the FAA, or per data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the FAA to make such findings. Alternatively, this AD allows replacement of the subject parts with new parts per the airplane maintenance manual.

Operators also should note that, although the Accomplishment Instructions of the referenced service bulletin describe procedures for reporting certain findings to the airplane manufacturer, this AD does not include such a requirement.

**Determination of Rule's Effective Date**

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

**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 shall 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.

Submit comments using the following format:

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

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the 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 comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2002-NM–307-AD.'' The postcard will be date stamped and returned to the commenter.

**Regulatory Impact**

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 the following new airworthiness directive:

**2003–03–01 Boeing:** Amendment 39–13025. Docket 2002–NM–307–AD.

*Applicability:* All Model 737–600, –700, –700C, –800, and –900 series airplanes; certificated in any category.

**Note 1:** This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (g) 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 increased structural loads on the aft engine mount, which could result in failure of the aft engine mount and consequent separation of the engine from the airplane, accomplish the following:

**Review of Maintenance Records**

(a) Within 90 days after the effective date of this AD, review the airplane maintenance records to determine whether either engine has been removed since the airplane's date of manufacture. If neither engine has been removed since the airplane's date of manufacture, no further action is required by this paragraph.

**Inspection To Determine if Center Link Assembly is Installed Correctly**

(b) For any installed engine that is found to have been removed from the airplane since the airplane's date of manufacture: Within 90 days after the effective date of this AD, do a one-time general visual inspection to determine if the center link assembly of the aft engine mount is installed correctly, per the Accomplishment Instructions of Boeing Alert Service Bulletin 737–71A1462, Revision 1, dated November 7, 2002. If the center link assembly is installed correctly, as specified in the service bulletin, no further action is required by paragraphs (b), (c), or (d) of this AD for that engine. However, paragraph (f) of this AD continues to apply.

**Note 2:** For the purposes of this AD, a general visual inspection is defined as: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to enhance visual access to all exposed surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

**Follow-on and Corrective Actions**

(c) For any center link assembly that is found installed incorrectly during the inspection required by paragraph (b) of this AD: Before further flight, do the actions in paragraphs (c)(1), (c)(2), and (c)(3) of this AD, per the Accomplishment Instructions of Boeing Alert Service Bulletin 737–71A1462, Revision 1, dated November 7, 2002, except that it is not necessary to submit a report of findings to the airplane manufacturer.

(1) Remove the center link assembly and install it correctly.

(2) Perform a detailed inspection of the engine mounting lugs and engine turbine rear frame for cracking, yielding, buckling, or wear damage.

(3) Perform a detailed inspection of the hardware for the aft engine mount; including the center link assembly, right link assembly, aft mount hanger assembly, and link pins; for cracking, yielding, buckling, or wear damage.

**Note 3:** For the purposes of this AD, a detailed inspection is defined as: ''An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required.''

**Repair**

(d) If any cracking, yielding, buckling, or wear damage is found during the inspections required by paragraphs (c)(2) and (c)(3) of this AD: Before further flight, replace the discrepant part with a new or serviceable part per the applicable section of the airplane maintenance manual, or repair per a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or per data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the Manager, Seattle ACO, to make such findings. For a repair method to be approved, the approval must specifically reference this AD.

**Credit for Actions Accomplished Previously**

(e) Inspections and correction of the installation of the center link assembly accomplished before the effective date of this AD per the Accomplishment Instructions of Boeing Alert Service Bulletin 737–71A1462, dated August 29, 2002, are acceptable for compliance with the requirements of paragraphs (b) and (c) of this AD.

**Parts Installation**

(f) As of the effective date of this AD, no person may install an engine on any airplane unless the inspection specified by paragraph (b) of this AD is accomplished and the center link assembly of the aft engine mount is found to be installed correctly.

**Alternative Methods of Compliance**

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

**Note 4:** Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

**Special Flight Permits**

(h) 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 airplane to a location where the requirements of this AD can be accomplished.

**Incorporation by Reference**

(i) Unless otherwise specified in this AD, the actions shall be done in accordance with Boeing Alert Service Bulletin 737–71A1462, Revision 1, dated November 7, 2002. 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 Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

**Effective Date**

(j) This amendment becomes effective on February 13, 2003.

Issued in Renton, Washington, on January 21, 2003.

**Vi L. Lipski,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 03–1815 Filed 1–28–03; 8:45 am]

BILLING CODE 4910–13–P

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

**[Docket No. 99–NM–83–AD; Amendment 39–13031; AD 2003–03–07]**

**RIN 2120–AA64**

## Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–145 Series Airplanes

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD), applicable to certain EMBRAER Model EMB–145 series airplanes, that requires the installation of reinforcements in the lower portion of wing rib 15 on the left-hand and right-hand sides of the airplane. This amendment is prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified by this AD are intended to prevent reduced structural integrity of the wing flap support structure.

**DATES:** Effective March 5, 2003.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of March 5, 2003.

**ADDRESSES:** The service information referenced in this AD may be obtained from Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Robert D. Breneman, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1263; fax (425) 227–1149.

**SUPPLEMENTARY INFORMATION:** A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain EMBRAER Model EMB–145 series airplanes was published in the **Federal Register** on February 2, 2000 (65 FR 4902). That action proposed to require the installation of reinforcements in the lower portion of wing rib 15 on the left-hand and right-hand sides of the airplane.

### Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the single comment received.

### Request To Add Revised Service Information

The commenter asks that EMBRAER Service Bulletin 145–57–0008, Change No. 02, dated April 7, 1999, and Change No. 03, dated May 14, 1999, be added to paragraph (a) and Note 2 of the proposed AD as another source of service information for accomplishment of the specified actions. EMBRAER Service Bulletin 145–57–0008, Change No. 01, dated February 12, 1999, was referenced in the proposed AD as the appropriate source of service information for accomplishment of the actions.

The FAA agrees with the commenter. We have reviewed and approved EMBRAER Service Bulletin 145–57–0008, Change No. 02, dated April 7, 1999, and Change No. 03, dated May 14, 1999. We find that the revisions incorporated in these changes are not substantive, meaning that airplanes modified per Change No. 01 of the service bulletin are not subject to any additional work under Change No. 02 or 03 of the service bulletin. Therefore, we have revised paragraph (a) of this final rule to specify that Changes No. 02 and 03 of the service bulletin are considered to be acceptable methods of compliance with this AD.

### Explanation of Change to Final Rule

Because the language in Note 2 of the proposed AD is regulatory in nature, that note has been redesignated as paragraph (b) of this final rule. Subsequent paragraphs have been reordered accordingly.

### Conclusion

After careful review of the available data, including the comment noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes described previously. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

### Cost Impact

The FAA estimates that 33 airplanes of U.S. registry will be affected by this AD, that it will take approximately 20 work hours per airplane to accomplish the required actions, and that the average labor rate is $60 per work hour. Required parts will cost approximately $3,124 per airplane. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $142,692, or $4,324 per airplane.

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

### Regulatory Impact

The regulations 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.

For the reasons discussed above, I certify that this action (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it 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 the following new airworthiness directive:

**2003–03–07 Embraer:** Amendment 39–13031. Docket 99–NM–83–AD.

*Applicability:* Model EMB–145 series airplanes, serial numbers 145004 through 145058 inclusive, and 145060; certificated in any category.

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

*Compliance:* Required as indicated, unless accomplished previously.

To prevent reduced structural integrity of the wing flap support structure, accomplish the following:

**Reinforcement Installation**

(a) Prior to the accumulation of 8,000 total flight cycles, or within 45 days after the effective date of this AD, whichever occurs later, install reinforcements in the lower portion of rib 15 on the left-hand and right-hand sides of the airplane in accordance with EMBRAER Service Bulletin 145–57–0008, Change No. 01, dated February 12, 1999; Change No. 02, dated April 7, 1999; or Change No. 03, dated May 14, 1999.

(b) Installation in accordance with EMBRAER Service Bulletin 145–57–0008, dated October 21, 1998, accomplished prior to the effective date of this AD, is also acceptable for compliance with the requirements of paragraph (a) of this AD.

**Alternative Methods of Compliance**

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

**Note 2:** Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

**Special Flight Permits**

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

**Incorporation by Reference**

(e) Unless otherwise specified by this AD, the installation shall be done in accordance with EMBRAER Service Bulletin 145–57–0008, Change No. 01, dated February 12, 1999; EMBRAER Service Bulletin 145–57–0008, Change No. 02, dated April 7, 1999; or EMBRAER Service Bulletin 145–57–0008, Change No. 03, dated May 14, 1999. EMBRAER Service Bulletin 145–57–0008, Change No. 01, dated February 12, 1999, contains the following effective pages:

| Page number | Change no. shown on page | Date shown on page |
|---|---|---|
| 1, 2 | 01 | February 12, 1999. |
| 3–10 | Original | October 21, 1998. |

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 Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

**Note 3:** The subject of this AD is addressed in Brazilian airworthiness directive 1999–01–02R1, dated March 15, 1999.

**Effective Date**

(f) This amendment becomes effective on March 5, 2003.

Issued in Renton, Washington, on January 22, 2003.

**Vi L. Lipski,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 03–1830 Filed 1–28–03; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. 2001–NM–274–AD; Amendment 39–13029; AD 2003–03–05]**

**RIN 2120–AA64**

## Airworthiness Directives; Boeing Model 737–300, –400, and –500 Series Airplanes

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment supersedes an existing airworthiness directive (AD), applicable to certain Boeing Model 737–300, –400, and –500 series airplanes, that currently requires replacement, with new parts, of the existing actuators or the rod ends on the existing actuators at wing leading edge slat positions 1, 2, 5, and 6. This amendment adds a one-time inspection of all the rod ends on the actuators of the wing leading edge slats to determine if vibro-engraving was used to identify the parts, and corrective action, if necessary. This amendment is prompted by reports indicating that vibro-engraving was found on new rod ends during installation; such part markings create stress risers that reduce the fatigue life of the rod ends. The actions specified by this AD are intended to prevent fatigue cracking, which could result in failure of the rod ends, uncommanded deployment of the wing leading edge slat, and consequent reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

**DATES:** Effective March 5, 2003.

The incorporation by reference of Boeing Alert Service Bulletin 737–27A1243, dated July 26, 2001, excluding Evaluation Form; and Boeing Alert Service Bulletin 737–27A1211, Revision 2, dated December 21, 2000, including Information Notice 737–27A1211 IN 03, dated July 26, 2001, excluding Evaluation Form; as listed in the regulations, is approved by the Director of the Federal Register as of March 5, 2003.

The incorporation by reference of Boeing Alert Service Bulletin 737–27A1211, dated November 19, 1998; and Revision 1, dated December 9, 1999; as listed in the regulations, was approved

previously by the Director of the Federal Register as of February 29, 2000 (65 FR 3801, January 25, 2000).

**ADDRESSES:** The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Douglas Tsuji, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98055–4056; telephone (425) 227–1506; fax (425) 227–1181.

**SUPPLEMENTARY INFORMATION:** A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 2000–02–03, amendment 39–11521 (65 FR 3801, January 25, 2000), which is applicable to certain Boeing Model 737–300, –400 and –500 series airplanes, was published in the **Federal Register** on June 18, 2002 (67 FR 41355). The action proposed to continue to require replacement, with new parts, of the existing actuators or the rod ends on the existing actuators at wing leading edge slat positions 1, 2, 5, and 6. The new action proposed to add a one-time inspection of all the rod ends on the actuators of the wing leading edge slats to determine if vibro-engraving was used to identify the parts, and corrective action, if necessary.

**Comments**

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received. One commenter has no comments.

**Request To Change Summary Section**

One commenter asks that the summary section of the proposed AD be changed to include the part number(s) of the rod ends that are affected by vibro-engraving. The commenter's understanding is that only the new rod end having part number (P/N) 69–73485–9, and the rod end and switch assembly having P/N 65–44760–28, are affected by the vibro-engraving. The same commenter states that the summary section should specify only slat actuators that have been modified by Boeing Alert Service Bulletin 737–27A1211 (referenced in the proposed AD as the appropriate source of service information for accomplishment of certain actions) and have the rod end P/Ns specified above.

The FAA does not agree to change the summary section in the final rule. The summary section in the AD already states that, ''This proposal is prompted by reports indicating that vibro-engraving was found on new rod ends. * * *''

**Request To Change Paragraphs (a) and (c)**

One commenter states that the paragraph (a) of the proposed AD be changed to specify line numbers (L/N) 1001 through 3063 inclusive. The commenter adds that L/Ns 3064 through 3132 inclusive should be removed from paragraph (a) of the proposed AD because airplanes having L/Ns 3075, 3109, and 3116 have actuators with the new rod end that were installed during production.

Another commenter asks that paragraph (c) of the proposed AD be changed to specify that the general visual inspection only be done on slat actuators that have been modified by Service Bulletin 737–27A1211, and that have rod ends with P/N 69–73485–9.

We do not agree that paragraph (a) should be changed to specify the line numbers suggested by the commenter, nor do we agree that the general visual inspection specified in paragraph (c) need only be done on slat actuators that have been modified by Boeing Alert Service Bulletin 737–27A1211 and have P/N 69–73485–9. Some of the vibro-engraved rod ends were shipped as spares and could now be installed on production airplanes having L/Ns 3064 through 3132 inclusive, which were not listed in the effectivity specified in Service Bulletin 737–27A1211. We find that no change to the final rule is necessary in this regard.

We do agree to add the part numbers of the rod ends that are affected by vibro-engraving to paragraph (c) of this final rule for clarification, as they were not specified in the proposed AD.

**Credit for Previous Accomplishment of Certain Actions**

One commenter asks that paragraph (c) of the proposed AD be changed to give credit for doing the actions required by that paragraph per the two notes listed before the inspection procedures specified in the Work Instructions of Boeing Alert Service Bulletin 737–27A1243. Another commenter asks that operator record verification be added to the proposed AD as an alternative method of compliance (AMOC).

We partially agree with the commenters. We agree to add a new paragraph (d) to this final rule to give credit for accomplishment of the actions done per the notes. We do not agree that an AMOC is necessary, because credit for the applicable actions has been added in paragraph (d) of this final rule.

**Change to Final Rule**

We have changed the compliance time specified in paragraph (c)(1) of this final rule to add a grace period for airplanes on which the rod ends were replaced per Boeing Service Bulletin 737–27A1211, dated November 19, 1998; or Boeing Alert Service Bulletin 737–27A1211, Revision 2, dated December 21, 2000. The grace period was inadvertently omitted in the proposed AD.

**Explanation of Editorial Change**

We have changed the service bulletin citations throughout this final rule to exclude the Evaluation Form. (The form is intended to be completed by operators and submitted to the manufacturer to provide input on the quality of the service bulletins; however, this AD does not include such a requirement.)

**Conclusion**

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes previously described. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

**Cost Impact**

There are approximately 1,963 airplanes of the affected design in the worldwide fleet. The FAA estimates that 799 airplanes of U.S. registry will be affected by this AD.

Replacement of the leading edge slat actuator with an actuator that has a new rod end is one option for compliance with the actions currently required by AD 2000–02–03. Replacement of the actuators on slat positions 1, 2, 5, and 6 takes approximately 3 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. Required parts cost approximately $32,252 per airplane. Based on these figures, the cost impact of the installation of actuators with new rod ends, as provided by AD 2000–02–03 as one option, is estimated to be $32,432 per airplane.

In lieu of installation of an actuator with a new rod end, AD 2000–02–03

provides an option for replacement of the rod ends on the existing actuators. This action takes approximately 4 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. Required parts cost between approximately $5,928 and $21,544 per airplane. Based on these figures, the cost impact of the replacement of the rod ends, as provided by AD 2000–02–03 as a second option, is estimated to be between $6,168 and $21,784 per airplane.

The new inspection that is required in this AD action will take approximately 2 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the inspection required by this AD on U.S. operators is estimated to be $95,880, or $120 per airplane.

Should an operator be required to accomplish the replacement of the rod end, it would take approximately 1 work hour per rod end to accomplish the replacement, at an average labor rate of $60 per work hour. Required parts would cost between $2,917 and $5,527 per rod end. Based on these figures, the cost impact of any replacement action is estimated to be between $2,977 and $5,587 per rod end.

Should an operator be required to accomplish the rework of the rod end, it would take approximately 2 work hours per rod end to accomplish the rework, at an average labor rate of $60 per hour. Based on these figures, the cost impact of the rework is estimated to be $120 per rod end.

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

## Regulatory Impact

The regulations 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.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it 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 removing amendment 39–11521 (65 FR 3801, January 25, 2000), and by adding a new airworthiness directive (AD), amendment 39–13029, to read as follows:

**2003–03–05 Boeing**: Amendment 39–13029. Docket 2001–NM–274–AD. Supersedes AD 2000–02–03, Amendment 39–11521.

*Applicability:* Model 737–300, –400, and –500 series airplanes; line numbers 1001 through 3132 inclusive; certificated in any category.

**Note 1:** This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (g)(1) 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 fatigue cracking of the rod ends of the actuators of the leading edge slats, which could result in failure of the rod ends, uncommanded deployment of the wing leading edge slat, and consequent reduced controllability of the airplane, accomplish the following:

**Restatement of Requirements of AD 2000–02–03**

*Replacement*

(a) Within 24 months after February 29, 2000 (the effective date of AD 2000–02–03, amendment 39–11521): Replace the leading edge slat actuator with an actuator that has a new rod end, or replace the rod end on the existing slat actuator with a new rod end, at slat positions 1, 2, 5, and 6; in accordance with the Accomplishment Instructions in Boeing Alert Service Bulletin 737–27A1211, dated November 19, 1998; Revision 1, dated December 9, 1999; or Revision 2, dated December 21, 2000, including Information Notice 737–27A1211 IN 03, dated July 26, 2001, excluding Evaluation Form. As of the effective date of this AD, only Revision 2 of the service bulletin shall be used.

*Part Installation*

(b) As of February 29, 2000, no person shall install any part having a part number identified in the ''Existing Part Number'' column of Section 2.E. of Boeing Alert Service Bulletin 737–27A1211, dated November 19, 1998, on any airplane.

**New Requirements of This AD**

*One-Time Inspection*

(c) For airplanes on which the actions specified in Boeing Alert Service Bulletin 737–27A1211, Revision 2, dated December 21, 2000, including Information Notice 737–27A1211 IN 03, dated July 26, 2001, excluding Evaluation Form; have not been done: Do a one-time general visual inspection of the rod ends on the actuators of the wing leading edge slats, part numbers (P/N) 65–44760–28 and 69–73485–9, to determine if vibro-engraving was used to identify the rod ends, at the time specified in paragraph (c)(1) or (c)(2) of this AD; as applicable, per the Work Instructions of Boeing Alert Service Bulletin 737–27A1243, dated July 26, 2001, excluding Evaluation Form. If no vibro-engraving is found, no further action is required by this paragraph.

**Note 2:** For the purposes of this AD, a general visual inspection is defined as: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to enhance visual access to all exposed surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

(1) For airplanes on which the rod ends were replaced as required by paragraph (a) of this AD, do the inspection at the later of the

times specified in paragraphs (c)(1)(i) and (c)(1)(ii) of this AD.

(i) Within 12,000 flight cycles or 42 months after doing the replacement per paragraph (a) of this AD, whichever is first.

(ii) Within 12 months after the effective date of this AD.

(2) For all other airplanes: Within 12,000 flight cycles or 42 months after the effective date of this AD, whichever is first.

(d) For airplanes having actuators with rod end assemblies P/Ns 65–44760–28 and 69–73485–9: If maintenance records show that the assemblies on the airplane were never changed, or were exchanged with a rod end assembly directly acquired from Boeing or Parker Hannifin, and were not part-marked by vibro-engraving or other part markings that penetrate the surface, this is considered acceptable for compliance with the actions specified in paragraph (c) of this AD.

*Corrective Action*

(e) If vibro-engraving is found during the inspection required by paragraph (c) of this AD: Before further flight, rework or replace the affected rod end with a new rod end, as applicable, per the Work Instructions of Boeing Alert Service Bulletin 737–27A1243, dated July 26, 2001, excluding Evaluation Form.

*Part Installation*

(f) After the effective date of this AD, no person shall install on any airplane a rod end having vibro-engraving, or other part markings that penetrate the surface, unless that part has been reworked as required by this AD.

*Alternative Methods of Compliance*

(g)(1) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

(2) Alternative methods of compliance, approved previously in accordance with AD 2000–02–03, amendment 39–11521, are approved as alternative methods of compliance with paragraph (a) of this AD.

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

*Special Flight Permits*

(h) 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 airplane to a location where the requirements of this AD can be accomplished.

*Incorporation by Reference*

(i) Unless otherwise specified in this AD, the actions shall be done in accordance with Boeing Alert Service Bulletin 737–27A1211, dated November 19, 1998, Boeing Alert Service Bulletin 737–27A1211, Revision 1, dated December 9, 1999, or Boeing Alert Service Bulletin 737–27A1211, Revision 2, dated December 21, 2000, including Information Notice 737–27A1211 IN 03, dated July 26, 2001, excluding Evaluation Form; and Boeing Alert Service Bulletin 737–27A1243, dated July 26, 2001, excluding Evaluation Form; as applicable.

(1) The incorporation by reference of Boeing Alert Service Bulletin 737–27A1243, dated July 26, 2001, excluding Evaluation Form; and Boeing Alert Service Bulletin 737–27A1211, Revision 2, dated December 21, 2000, including Information Notice 737–27A1211 IN 03, dated July 26, 2001, excluding Evaluation Form; is approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The incorporation by reference of Boeing Alert Service Bulletin 737–27A1211, dated November 19, 1998; and Boeing Alert Service Bulletin 737–27A1211, Revision 1, dated December 9, 1999; was approved previously by the Director of the Federal Register as of February 29, 2000 (65 FR 3801, January 25, 2000).

(3) Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

*Effective Date*

(j) This amendment becomes effective on March 5, 2003.

Issued in Renton, Washington, on January 22, 2003.

**Vi L. Lipski,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 03–1832 Filed 1–28–03; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. 2002–NM–308–AD; Amendment 39–13026; AD 2003–03–02]**

**RIN 2120–AA64**

## Airworthiness Directives; Boeing Model 767 Series Airplanes

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** This amendment supersedes an existing airworthiness directive (AD), applicable to all Boeing Model 767 series airplanes, that currently requires repetitive detailed and eddy current inspections to detect cracks of certain midspar fuse pins, and replacement of any cracked midspar fuse pin with a new fuse pin. This amendment reduces certain compliance times for certain inspections, expands the detailed and eddy current inspections, and limits the applicability in the existing AD. This amendment also provides for optional terminating action, which ends the repetitive inspections. The actions specified in this AD are intended to prevent loss of the strut and engine due to corrosion damage and cracking of both fuse pins on the same strut. This action is intended to address the identified unsafe condition.

**DATES:** Effective February 13, 2003.

The incorporation by reference of a certain publication, as listed in the regulations, is approved by the Director of the Federal Register as of February 13, 2003.

The incorporation by reference of Boeing Alert Service Bulletin 767–54A0062, dated April 14, 1994, as listed in the regulations, was approved previously by the Director of the Federal Register as of June 10, 1994 (59 FR 27229, May 26, 1994).

Comments for inclusion in the Rules Docket must be received on or before March 31, 2003.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–308–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-iarcomment@faa.gov.* Comments sent via fax or the Internet must contain ''Docket No. 2002–NM–308–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, PO Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Suzanne Masterson, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2772; fax (425) 227–1181.

**SUPPLEMENTARY INFORMATION:** On May 18, 1994, the FAA issued AD 94–11–02, amendment 39–8918 (59 FR 27229, June 10, 1994), applicable to all Boeing Model 767 series airplanes, to require repetitive detailed visual and eddy current inspections to detect cracks of certain midspar fuse pins, and replacement of any cracked midspar fuse pin with a new fuse pin. That action was prompted by reports of longitudinal fatigue cracks on certain midspar fuse pins installed on Boeing Model 767 series airplanes. The actions required by that AD are intended to prevent loss of the strut and engine due to cracking of both fuse pins on the same strut.

**Actions Since Issuance of Previous Rule**

Since the issuance of AD 94–11–02, an operator has reported a fractured outboard midspar fuse pin (part number (P/N) 311T3102–1) of the left engine pylon, which was found during a scheduled maintenance visit. The fuse pin also had corrosion on the pin and within the bore. The airplane had accumulated 9,456 total flight cycles, and 38,911 total flight hours. The initial inspection for airplanes with midspar fuse pins having P/N 311T3102–1, as required by AD 94–11–02, begins prior to the accumulation of 15,000 total landings on the fuse pin, or within 90 days after the effective date of the existing AD, whichever occurs later. In light of this information, the FAA finds it necessary to reduce the compliance time for the initial inspection for airplanes with midspar fuse pins. This AD also includes inspecting for corrosion of the midspar fuse pins, in addition to cracks, and limits the applicability in the existing AD.

**Explanation of Relevant Service Information**

The FAA has reviewed and approved Boeing Alert Service Bulletin 767–54A0062, Revision 5, dated November 11, 2002 (Boeing Alert Service Bulletin 767–54A0062, dated April 14, 1994, was referenced in the existing AD for accomplishment of the actions specified). Revision 5 of the service bulletin reduces certain compliance times, references certain actions specified in related service bulletins that would eliminate the need for the repetitive inspections, and clarifies certain procedures. Revision 5 describes procedures for repetitive detailed and eddy current inspections for cracks and corrosion of certain midspar fuse pins, and replacement of any cracked midspar fuse pin with a new fuse pin. The service bulletin also describes procedures for a magnetic particle inspection to verify cracks if the fuse pins are removed from the strut. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition.

**Related ADs**

This AD provides an optional terminating action for the repetitive inspections by accomplishment of the modification of the nacelle strut and wing structure required by the following ADs:

AD 2000–19–09, amendment 39–11910 (65 FR 58641, October 17, 2000), which is applicable to certain Boeing Model 767 series airplanes powered by Rolls-Royce RB211 series engines;

AD 2001–02–07, amendment 39–12091 (66 FR 8085, March 5, 2001), which is applicable to certain Boeing Model 767 series airplanes powered by Pratt & Whitney engines; and

AD 2001–06–12, amendment 39–12159 (66 FR 17492, May 7, 2001), which is applicable to certain Boeing Model 767 series airplanes powered by General Electric engines.

All the previous ADs require prior or concurrent accomplishment of the following service bulletins, which are specified in Service Bulletin 767–54A0062, Revision 5, as the appropriate sources of service information for accomplishment of the rework of the side load fitting and tension fasteners, as applicable, and replacement of midspar fuse pins or modification of the nacelle strut and wing structure. Doing either of these actions would eliminate the need for the repetitive inspections specified in Service Bulletin 767–54A0062, Revision 5.

- Boeing Service Bulletin 767–54–0069, Revision 1, dated January 29, 1998, describes procedures for rework of the side load fitting and tension fasteners, as applicable, and replacement of midspar fuse pins with new, higher-strength midspar fuse pins. The rework involves increasing the size of the tension bolts of the inboard and outboard side load fittings. The replacement also involves installing new, higher-strength bolts and radius fillers in the side load fittings and backup support structure, and installing higher-strength fasteners common to the front spar and rib number 8 rib post.
- Boeing Service Bulletin 767–54–0080, dated October 7, 1999, describes procedures for modification of the nacelle strut and wing structure. The modification consists of replacing many of the significant load-bearing components of the strut (*e.g.*, the side link fittings assemblies, the midspar fittings, the side load fittings, certain fuse bolt assemblies) with improved components.
- Boeing Service Bulletin 767–54–0081, dated July 29, 1999, describes procedures for modification of the nacelle strut and wing structure. The modification consists of replacing many of the significant load-bearing components of the strut and wing (*e.g.*, the side link fittings, the midspar fittings, the side load fittings, certain fuse pin assemblies) with improved components.
- Boeing Service Bulletin 767–54–0082, dated October 28, 1999, describes procedures for modification of the nacelle strut and wing structure. The modification consists of replacing many of the significant load-bearing components of the strut-to-wing attachment (*e.g.*, midspar fuse pins, side links, side link fuse pins, diagonal brace, and diagonal brace fuse pins) with improved components.

**Explanation of Requirements of Rule**

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of this same type design, this AD supersedes AD 94–11–02 to continue to require repetitive detailed and eddy current inspections to detect cracks of certain midspar fuse pins, and replacement of any cracked midspar fuse pin with a new fuse pin. This AD reduces certain compliance times for certain inspections, expands certain detailed and eddy current inspections, and limits the applicability in the existing AD.

**Difference Between This AD and Service Bulletin**

Boeing Alert Service Bulletin 767–54A0062, Revision 5, specifies that all actions for which the Boeing 767 Airplane Maintenance Manual (AMM) is specified as the appropriate source of service information for work instructions may instead be done according to an ''operator's equivalent procedure.'' However, this AD requires that engine removal and support, when any fuse pin is removed from a strut, must be accomplished per the procedures specified the applicable section of the AMM. An ''operator's equivalent procedure'' may be used only if approved as an alternative method of compliance per paragraph (o)(1) of this AD.

**Explanation of Change Made to Existing Requirements**

The FAA has changed all references to a ''detailed visual inspection'' in the existing AD to ''detailed inspection'' in this AD. Additionally, a note has been

added to this AD to define that inspection.

**Determination of Rule's Effective Date**

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

**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 shall 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.

*Submit comments using the following format:*

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

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the 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 comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2002–NM–308–AD.'' The postcard will be date stamped and returned to the commenter.

**Regulatory Impact**

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 removing amendment 39–8918 (59 FR 27229, June 10, 1994), and by adding a new airworthiness directive (AD), amendment 39–13026, to read as follows:

**2003–03–02 Boeing:** Amendment 39–13026. Docket 2002–NM–308–AD. Supersedes AD 94–11–02, Amendment 39–8918.

*Applicability:* Model 767–200, –300, and –300F series airplanes, as listed in Boeing Alert Service Bulletin 767–54A0062, Revision 5, dated November 11, 2002; certificated in any category.

**Note 1:** This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (o)(1) 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 loss of the strut and engine due to corrosion damage and cracking of both fuse pins on the same strut, accomplish the following:

**Restatement of Requirements of AD 94–11–02**

*Repetitive Inspections*

(a) For airplanes having midspar fuse pins, part number (P/N) 311T3102–1: Perform a detailed inspection and an eddy current inspection to detect cracks of the midspar fuse pins, in accordance with Boeing Alert Service Bulletin 767–54A0062, dated April 14, 1994; or Boeing Alert Service Bulletin 767–54A0062, Revision 5, dated November 11, 2002; at the time specified in paragraph (a)(1), (a)(2), (a)(3), or (a)(4) of this AD, as applicable. Repeat these inspections thereafter at intervals not to exceed 3,000 landings until accomplishment of the initial inspections specified in paragraph (h) of this AD.

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

(1) For airplanes having midspar fuse pins that have accumulated 18,000 or more total landings as of June 10, 1994 (the effective date of AD 94–11–02, amendment 39–8918), accomplish the inspections within 60 days after June 10, 1994.

(2) For airplanes having midspar fuse pins that have accumulated 15,000 or more total landings, but less than 18,000 total landings, as of June 10, 1994, accomplish the inspections within 90 days after June 10, 1994.

(3) For airplanes having midspar fuse pins that have accumulated 10,000 or more total landings, but less than 15,000 total landings, as of June 10, 1994, accomplish the inspections within 120 days after June 10, 1994.

(4) For airplanes having midspar fuse pins that have accumulated less than 10,000 total landings as of June 10, 1994, accomplish the inspections prior to the accumulation of 10,000 total landings on the fuse pin, or within 120 days after June 10, 1994, whichever occurs later.

(b) For airplanes having a midspar fuse pin, P/N 311T3102–2 or 311T2102–1: Prior to the accumulation of 15,000 total landings on the fuse pin, or within 90 days after June 10, 1994, whichever occurs later, perform a detailed inspection and an eddy current inspection to detect cracks on the midspar fuse pins, in accordance with Boeing Alert Service Bulletin 767–54A0062, dated April 14, 1994; or Boeing Alert Service Bulletin 767–54A0062, Revision 5, dated November 11, 2002. Repeat these inspections thereafter at intervals not to exceed 3,000 landings until accomplishment of paragraph (h) of this AD.

*Replacement/Repetitive Inspections*

(c) If any crack is found during an inspection required by paragraph (a) or (b) of this AD, prior to further flight, replace the cracked midspar fuse pin with a new fuse pin, in accordance with Boeing Alert Service Bulletin 767–54A0062, dated April 14, 1994; or Boeing Alert Service Bulletin 767–54A0062, Revision 5, dated November 11, 2002. Thereafter, perform the detailed and eddy current inspections specified in paragraph (a) or (b) of this AD, as applicable, on the new fuse pin at the time specified in paragraph (c)(1) or (c)(2) of this AD.

(1) For airplanes having midspar fuse pins, P/N 311T3102–1: Perform the initial inspection of the new fuse pin prior to the accumulation of 10,000 total landings on the new fuse pin. Repeat the inspection thereafter at intervals not to exceed 3,000 landings until accomplishment of paragraph (j) of this AD.

(2) For airplanes having midspar fuse pins, P/Ns 311T3102–2 and 311T2102–1: Perform the initial inspection of the new fuse pin prior to the accumulation of 15,000 total landings on the new fuse pin. Repeat the inspection thereafter at intervals not to exceed 3,000 landings until accomplishment of paragraph (j) of this AD.

*Fuse Pin Removal*

(d) When any fuse pin is removed from a strut equipped with a General Electric engine, the engine must be removed in accordance with procedures described in the Boeing 767 Maintenance Manual, subject 71–00–02; or supported in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate.

(e) When any fuse pin is removed from a strut equipped with a Pratt & Whitney engine, the engine must be removed in accordance with procedures described in the Boeing 767 Maintenance Manual, subject 71–00–02; or supported in accordance with procedures described in the Boeing 767 Maintenance Manual, subject 54–51–02, Temporary Revisions (TR), dated April 22, 1994; or supported in accordance with a method approved by the Manager, Seattle ACO.

(f) When any fuse pin is removed from a strut equipped with a Rolls-Royce engine, the engine must be removed in accordance with procedures described in the Boeing 767 Maintenance Manual, subject 71–00–02; or supported in accordance with procedures described in the Boeing 767 Maintenance Manual, subject 54–51–02; or supported in accordance with a method approved by the Manager, Seattle ACO.

(g) Any midspar fuse pin, P/N 311T3102–1, 311T3102–2, or 311T2102–1, that has been removed from the strut and inspected for cracks using the 100 percent magnetic particle inspection technique described in Boeing Alert Service Bulletin 767–54A0062, dated April 14, 1994; or Boeing Alert Service Bulletin 767–54A0062, Revision 5, dated November 11, 2002; may be reinstalled on the strut provided that the fuse pin is found to be crack-free during the magnetic particle inspection. Prior to the accumulation of 3,000 total landings after reinstallation of the fuse pin, the fuse pin must be inspected in accordance with the requirements of paragraph (a), (b), or (h) of this AD, as applicable.

**New Requirements of this AD**

*Initial and Repetitive Inspections*

(h) For airplanes having midspar fuse pins, P/Ns 311T3102–1, 311T3102–2, 311T3102–3, 311T3102–4, 311T2102–1 or 311T2102–2: Do a detailed inspection and an eddy current inspection for cracks and corrosion per Boeing Alert Service Bulletin 767–54A0062, Revision 5, dated November 11, 2002. Do the inspections at the later of the times specified in paragraphs (h)(1) and (h)(2) of this AD. Repeat the inspections at least every 3,000 landings or 5 years, whichever is first. Accomplishment of the initial inspections in this paragraph ends the repetitive inspections required by paragraphs (a) and (b) of this AD.

(1) Before the accumulation of 5,000 total landings on the fuse pin or within 5 years after fuse pin installation, whichever is first.

(2) Within 30 days after the effective date of this AD.

*Corrective Action*

(i) If any crack or corrosion is found during any inspection required by paragraph (h) of this AD, before further flight, do the actions required by paragraph (i)(1) or (i)(2) of this AD, as applicable, per Boeing Alert Service Bulletin 767–54A0062, Revision 5, dated November 11, 2002.

(1) If any crack is found, replace the midspar fuse pin with a new fuse pin.

(2) If any corrosion is found, repair the midspar fuse pin or replace with a new fuse pin.

*Repetitive Inspections*

(j) For airplanes identified in paragraph (h) of this AD: After the installation of a new midspar fuse pin, inspect the new fuse pin per paragraph (h) of this AD before the accumulation of 5,000 total landings on the fuse pin or within 5 years, whichever is first. Repeat the inspections at least every 3,000 landings or 5 years, whichever is first Accomplishment of this paragraph ends the repetitive inspections required by paragraph (c) of this AD.

*Optional Terminating Action*

(k) For all airplanes: Accomplishment of the rework of the side load fitting and tension fasteners, as applicable, and replacement of midspar fuse pins per Boeing Service Bulletin 767–54–0069, dated October 9, 1997; Revision 1, dated January 29, 1998; or Revision 2, dated August 31, 2000; ends the repetitive inspections required by this AD.

(l) Modification of the nacelle strut and wing structure as required by AD 2000–19–09, amendment 39–11910 (applicable to certain Boeing Model 767 series airplanes powered by Rolls-Royce RB211 series engines); AD 2001–02–07, amendment 39–12091 (applicable to certain Boeing Model 767 series airplanes powered by Pratt & Whitney engines); or AD 2001–06–12, amendment 39–12159 (applicable to certain Boeing Model 767 series airplanes powered by General Electric engines); as applicable; ends the repetitive inspections required by this AD.

*''Operator's Equivalent Procedure''*

(m) Though Boeing Alert Service Bulletin 767–54A0062, Revision 5, dated November 11, 2002, specifies that an ''operator's equivalent procedure'' may be used for all actions for which the Boeing 767 Airplane Maintenance Manual (AMM) is specified as the appropriate source of service information: Engine removal and support, when any fuse pin is removed from a strut, must be done according to the applicable section of the Boeing 767 Airplane Maintenance Manual, as specified in the service bulletin.

*Actions Done per Previously Issued Service Information*

(n) Inspections and replacements done before the effective date of this AD per Boeing Alert Service Bulletin 767–54A0062, Revision 1, dated May 11, 1994; Revision 2, dated December 21, 1994; Revision 3, dated June 15, 1995; or Revision 4, dated May 7, 1998; are acceptable for compliance with the applicable actions specified in this AD.

*Alternative Methods of Compliance*

(o)(1) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle ACO. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

(2) Alternative methods of compliance, approved previously in accordance with AD 94–11–02, amendment 39–8918, are approved as alternative methods of compliance with the applicable actions specified in this AD.

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

*Special Flight Permits*

(p) 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 airplane to a location where the requirements of this AD can be accomplished.

*Incorporation by Reference*

(q) Unless otherwise provided in this AD, the actions shall be done in accordance with Boeing Alert Service Bulletin 767–54A0062, dated April 14, 1994; and Boeing Alert Service Bulletin 767–54A0062, Revision 5, dated November 11, 2002.

(1) The incorporation by reference of Boeing Alert Service Bulletin 767–54A0062, Revision 5, dated November 11, 2002, is approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The incorporation by reference of Boeing Alert Service Bulletin 767–54A0062, dated April 14, 1994, was approved previously by the Director of the Federal Register as of June 10, 1994 (59 FR 27229, May 26, 1994).

(3) Copies may be obtained from Boeing Commercial Airplane Group, PO Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

*Effective Date*

(r) This amendment becomes effective on February 13, 2003.

Issued in Renton, Washington, on January 22, 2003.

**Vi L. Lipski,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 03–1827 Filed 1–28–03; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. 2001–NM–340–AD; Amendment 39–13030; AD 2003–03–06]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Model A330 and A340 Series Airplanes

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment supersedes an existing airworthiness directive (AD), applicable to certain Airbus Model A330 and A340 series airplanes, that currently requires a one-time inspection of the rail release pins and parachute pins of the escape slide/raft pack assembly for correct installation, and corrective actions, if necessary. This amendment adds a requirement to modify the escape slides/slide rafts on the passenger, crew, and emergency exit doors. The actions specified by this AD are intended to prevent improper deployment of the escape slide/raft and blockage of the door in the event of an emergency evacuation. This action is intended to address the identified unsafe condition.

**DATES:** Effective March 5, 2003.

The incorporation by reference of Airbus Service Bulletin A330–25–3126, dated August 7, 2001; and Airbus Service Bulletin A340–25–4152, dated August 7, 2001; as listed in the regulations, is approved by the Director of the Federal Register as of March 5, 2003.

The incorporation by reference of Airbus Industrie Service Bulletin A330–25–3086, including Appendix 01, Revision 01, dated June 11, 1999; and Airbus Industrie Service Bulletin A340–25–4115, including Appendix 01, Revision 01, dated June 11, 1999; as listed in the regulations, was approved previously by the Director of the Federal Register as of November 26, 1999 (64 FR 56963, October 22, 1999).

**ADDRESSES:** The service information referenced in this AD may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

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

**SUPPLEMENTARY INFORMATION:** A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 99–22–07, amendment 39–11385 (64 FR 56963, October 22, 1999), which is applicable to certain Airbus Model A330 and A340 series airplanes, was published in the **Federal Register** on September 13, 2002 (67 FR 57982). The action proposed to continue to require a one-time inspection of the rail release pins and parachute pins of the escape slide/raft pack assembly for correct installation, and corrective actions, if necessary. The action also proposed to require modification of the escape slides/slide rafts on the passenger, crew, and emergency exit doors.

### Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

**Request To Allow Part Installations**

Two commenters request that the notice of proposed rulemaking (NPRM) be revised to allow installation of an unmodified slide on Model A330 series airplanes, until the compliance deadline. These commenters state that if the AD does not allow unmodified slides to be installed after the effective date of the AD, all unmodified spares would become unserviceable at that time. This would require the personnel at the slide shops to complete spares modification at an accelerated rate, which would increase the cost of this modification.

The FAA does not agree. This AD does not contain any provisions that prohibit operators from installing an unmodified slide on an airplane before they accomplish the modification required by paragraph (b) of this AD. However, once the compliance threshold (*i.e.*, 36 months after the effective date of this AD) has been reached for modification, operators are prohibited from replacing an improved part with an old part under 14 Code of Federal Regulations (CFR) 39.3. No change to the final rule is necessary.

**Conclusion**

After careful review of the available data, including the comments noted above, we have determined that air safety and the public interest require the adoption of the rule as proposed.

**Cost Impact**

There are approximately nine airplanes of U.S. registry that will be affected by this AD.

The inspection currently required by AD 99–22–07 takes approximately 7 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the currently required actions on U.S. operators is estimated to be $3,780, or $420 per airplane.

The modification required in this AD action will take approximately 11 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. Required parts will cost approximately $3,136 per airplane. Based on these figures, the cost impact of the requirements of this AD on U.S. operators is estimated to be $34,164, or $3,796 per airplane.

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

**Regulatory Impact**

The regulations 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.

For the reasons discussed above, I certify that this action (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it 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 removing amendment 39–11385 (64 FR 56963, October 22, 1999), and by adding a new airworthiness directive (AD), amendment 39–13030, to read as follows:

**2003–03–06 Airbus:** Amendment 39–13030. Docket 2001–NM–340–AD. Supersedes AD 99–22–07, Amendment 39–11385.

*Applicability:* Model A330 and A340 series airplanes, certificated in any category; excluding those modified in production by Airbus Modification 48840, 48841, 48842, or 48843.

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

*Compliance:* Required as indicated, unless accomplished previously.

To prevent improper deployment of the escape slide/raft and blockage of the door in the event of an emergency evacuation, accomplish the following:

**Restatement of Requirements of AD 99–22–07**

*Inspection*

(a) Within 2,000 flight hours or 6 months after November 26, 1999 (the effective date of AD 99–22–07, amendment 39–11385), whichever occurs later, except as provided by paragraph (b) of this AD: Perform a one-time detailed inspection of the rail release pins and parachute pins of the escape slide/raft pack assembly installed on all passenger/crew doors (type A) and emergency exit doors (type A or type 1) for correct installation, in accordance with Airbus Industrie Service Bulletin A330–25–3086 (for Model A330 series airplanes) or A340–25–4115 (for Model A340 series airplanes), both Revision 01, both dated June 11, 1999.

(1) During the inspection performed in accordance with paragraph (a) of this AD, if a rail release pin of the escape slide/raft pack assembly is found to be missing or incorrectly installed: Prior to further flight, re-install the rail release pin into the release rail or, if re-installation is not possible, remove the discrepant escape slide/raft pack assembly and replace with a new pack assembly of the same part number; in accordance with the applicable service bulletin.

(2) During the inspection performed in accordance with paragraph (a) of this AD, if a parachute pin of the escape slide/raft pack assembly is found to be missing or incorrectly installed: Prior to further flight, remove the discrepant escape slide/raft pack assembly and replace with a new pack assembly of the same part number; in accordance with the applicable service bulletin.

**New Requirements of this AD**

**Note 2:** For the purposes of this AD, a detailed inspection is defined as: ''An intensive visual examination of a specific structural area, system, installation, or

assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required.''

*Modification*

(b) Within 36 months after the effective date of this AD: Modify the escape slides/slide rafts on the passenger, crew, and emergency exit doors. The modification includes replacing—with new or modified parts—the alignment bushing in the release rails, the existing rail release pin lanyards from the girt or girt attachment, and the rail adapters from the packboard. Do the modification in accordance with Airbus Service Bulletin A330–25–3126 (for Model A330 series airplanes) or A340–25–4152 (for Model A340 series airplanes), both dated August 7, 2001. If the modification is done within the compliance time for the inspection specified in paragraph (a) of this AD, the inspection is not required.

**Note 3:** Airbus Service Bulletins A330–25–3126 and A340–25–4152 refer to BF Goodrich Service Bulletin 25–306, dated July 30, 2001, as an additional source of service information for the modification.

*Alternative Methods of Compliance*

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

**Note 4:** Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

*Special Flight Permits*

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

*Incorporation by Reference*

(e) Unless otherwise specified in this AD, the actions shall be done in accordance with Airbus Service Bulletin A330–25–3126, dated August 7, 2001; Airbus Service Bulletin A340–25–4152, dated August 7, 2001; Airbus Industrie Service Bulletin A330–25–3086, including Appendix 01, Revision 01, dated June 11, 1999; and Airbus Industrie Service Bulletin A340–25–4115, including Appendix 01, Revision 01, dated June 11, 1999; as applicable.

(1) This incorporation by reference of Airbus Service Bulletin A330–25–3126, dated August 7, 2001; and Airbus Service Bulletin A340–25–4152, dated August 7, 2001; is approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The incorporation by reference of Airbus Industrie Service Bulletin A330–25–3086, including Appendix 01, Revision 01, dated June 11, 1999; and Airbus Industrie Service Bulletin A340–25–4115, including Appendix 01, Revision 01, dated June 11, 1999; was approved previously by the Director of the Federal Register as of November 26, 1999 (64 FR 56963, October 22, 1999).

(3) Copies may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

**Note 5:** The subject of this AD is addressed in French airworthiness directives 2001–465(B) R1 and 2001–464(B) R1, both dated October 17, 2001.

*Effective Date*

(f) This amendment becomes effective on March 5, 2003.

Issued in Renton, Washington, on January 22, 2003.

**Vi L. Lipski,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 03–1829 Filed 1–28–03; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF COMMERCE

## Office of the Secretary

## 15 CFR Part 6

**[Docket No.: 030108003–3003–01]**

**RIN 0680–AA33**

## Civil Monetary Penalties; Adjustments

**AGENCY:** Office of the Secretary, Commerce.

**ACTION:** Final rule.

**SUMMARY:** This final rule is being issued to adjust civil monetary penalties provided by law within the jurisdiction of the Department of Commerce (the Department). As required by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, the Secretary of Commerce adjusted the Department's civil monetary penalties for inflation on October 24, 1996, and subsequently on November 1, 2000. On September 30, 2002, the United States General Accounting Office (GAO) sent the Secretary of Commerce a letter indicating that the Department's November 1, 2000, adjustment was inconsistent with the requirements of the statute, and recommending corrective action. The purpose of this rule is to bring the Department into compliance with GAO's interpretation of the statute.

**DATES:** This rule is effective January 29, 2003.

**ADDRESSES:** Office of Financial Management, Department of Commerce, 14th and Constitution Avenue, MS 6827, Washington, DC 20230.

**FOR FURTHER INFORMATION CONTACT:** Lisa Casias, 202–482–0766.

**SUPPLEMENTARY INFORMATION:** The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410), provided for the regular evaluation of civil monetary penalties to ensure that they continued to maintain their deterrent value and that penalty amounts due to the Federal Government were properly accounted for and collected. On April 26, 1996, the Federal Civil Penalties Inflation Adjustment Act of 1990 was amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134) to require each agency to issue regulations to adjust its civil monetary penalties (CMP) for inflation at least every four years. The amendment further provides that any resulting increases in a CMP due to the inflation adjustment should apply only to the violations that occur subsequent to the date of the publication in the **Federal Register** of the increased amount of the CMP. The first inflation adjustment of any penalty shall not exceed ten percent of such penalty.

The amount of CMP adjustments is based on changes to the Consumer Price Index from June of the calendar year in which penalties were last set or adjusted through June of the year prior to the adjustment. The stated purpose for such adjustments is to keep civil penalties in pace with inflation.

A civil monetary penalty is defined as any penalty, fine, or other sanction that:

1. Is for a specific monetary amount as provided by Federal law; and
2. Is assessed or enforced pursuant to Federal law; and
3. Is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.

On October 24, 1996, the Department published in the **Federal Register** a schedule of CMPs adjusted for inflation as required by law. In one instance, the initial CMP inflation adjustment was zero, and was published accordingly. In two cases, the adjustment was nine percent. All other CMPs adjusted at that time were increased by the ten percent maximum amount. In the October 24,

1996, publication, however, ten then-existing CMPs were not included.

On November 1, 2000, the Department again adjusted CMPs for inflation as prescribed by law. In the case of the CMPs that were not previously adjusted, the 2002 CMPs were increased by ten percent, the initial inflation adjustment limitation. For various reasons, other CMPs were adjusted by lesser amounts, kept at the same levels, or deleted.

In early 2002, GAO conducted a government wide review of the implementation of the Federal Civil Penalties Inflation Adjustment Act of 1990. During that review, GAO determined that the Department had adjusted its civil penalties in a manner inconsistent with the requirements of the statute, and on September 30, 2002, sent a report explaining that determination to the Secretary of Commerce. Specifically, GAO asserted that the Department's method of rounding is inconsistent with the requirements of the statute.

In adjusting its CMPs, the Department noted that the statute requires the raw inflation amounts to be rounded, and also that the categories of rounding were determined by the size of the penalty increase. GAO disagreed, asserting that the ''plain language'' of the statute requires that the appropriate category of rounding be determined by the size of the penalty, not the size of the increase. GAO did, however, recognize that there exist certain advantages to rounding on the basis of the size of the increase rather than the size of the penalty.

Although the Department believes that the GAO reading of the Federal Civil Penalties Inflation Adjustment Act of 1990 produces a result which is inconsistent with the stated purpose of the statute (*i.e.*, to keep civil penalties in pace with inflation), the Department will nevertheless comply with the recommendation contained in the September 30, 2002, letter. Accordingly, this rule adjusts the civil penalties that are established by law and assessed or enforced by the Department in the manner suggested by GAO. The actual penalty assessed for a particular violation will continue to be dependent upon a variety of factors.

**Rulemaking Requirements**

It has been determined that this rule is not significant for purposes of Executive Order 12866.

The Department for good cause finds that notice and an opportunity for comments required by 5 U.S.C. 553(b)(B) of the Administrative Procedure Act are unnecessary for this rulemaking because the Debt Collection Improvement Act of 1996 (the Act) requires the head of each agency to adjust its civil monetary penalties for inflation by regulation at least every four years, and the Federal Civil Monetary Penalty Inflation Adjustment Act of 1990, as amended by the Act, states how to calculate the inflation adjustment. This rule merely adjusts the Department's CMPs according to the statutory requirements, as interpreted by GAO. Because the Department adjusted the CMPs in 2000 in a manner that was not in compliance with GAO's reading of the law, the Department is adjusting the CMPs sooner than four years. The Department does not have any discretion in making the adjustments. For the same reason, and because the published amounts of some penalties have been in error for approximately two years, there also exists good cause to waive the thirty day delay in effectiveness, pursuant to 5 U.S.C. 553(d)(3).

Because notice and opportunity for comment are not required by 5 U.S.C. 553, or any other law, a Regulatory Flexibility Analysis is not required and was not prepared for the purposes of the Regulatory Flexibility Act.

This rule does not contain information collection requirements for purposes of the Paperwork Reduction Act.

**List of Subjects in 15 CFR Part 6**

Law enforcement, Penalties.

**James L. Taylor,**

*Deputy Chief Financial Officer and Director for Financial Management.*

For the reasons set forth in the preamble, subtitle A of title 15 of the Code of Federal Regulations is amended as follows:

## PART 6—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

1. The authority citation for part 6 continues to read as follows:

**Authority:** Sec. 4, as amended, and sec. 5, Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 104–134, 110 Stat. 1321, 28 U.S.C. 2461 note.

2. Section 6.4 is revised to read as follows:

### § 6.4 Adjustments to penalties.

(a) Bureau of Industry and Security.

(1) 15 U.S.C. 5408(b)(1), Fastener Quality Act, violation, from $100,000 to $110,000.

(2) 22 U.S.C. 7661(a)(1)(A), Chemical Weapons Implementation Acts—Inspection Violation, from $25,000 to $25,000.

(3) 22 U.S.C. 7661(a)(1)(B), Chemical Weapons Implementation Acts—Record Keeping Violation, from $5,000 to $5,000.

(4) 50 U.S.C. 1705(a), International Emergency Power Act—Import Violations, from $10,000 to $11,000.

(5) 50 U.S.C. App. 2410(c), Export Administration Act, Non-National Security Violation, from $11,000 to $11,000.

(6) 50 U.S.C. App. 2410(c), Export Administration Act and Section 3 Arms Export Control Act, National Security Violation, from $110,000 to $120,000

(7) 50 U.S.C. App. 1705(b), International Emergency Powers Act, Export Violations, from $10,000 to $11,000.

(b) Economic Development Administration.

(1) 19 U.S.C. 2349, Trade Act of 1974, False Statements or Submissions with Applications for Assistance, from $5,500 to $5,500.

(c) Economics and Statistics Administration.

(1) 13 U.S.C. 304, Delinquency on Delayed Filing of Export Documentation, from $110 per day (up to $1,100) to $110 per day (up to $1,100).

(2) 13 U.S.C. 305, Collection of Foreign Trade Statistics/Violations, from $1,100 to $1,100.

(3) 22 U.S.C. 3105(a), International Investment and Trade in Services Act, Failure to Furnish Information, from $27,500 to $27,500.

(d) Import Administration.

(1) 19 U.S.C. 81s, Foreign Trade Zone Violation, from $1,100 to $1,100.

(2) 19 U.S.C. 1677(f)(4), U.S.-Canada FTA Protective Order Violation, from $110,000 to $120,000.

(e) National Oceanic and Atmospheric Administration.

(1) 15 U.S.C. 4243(a)(3), Land Remote-Sensing Commercialization Act, Violations, from $10,000 to $11,000.

(2) 15 U.S.C. 5623(a)(3), Land Remote Sensing Policy Act of 1992, Violations, from $11,000 to $11,000.

(3) 15 U.S.C. 5658(c), Land Remote Sensing Policy Act of 1992, Violations, from $11,000 to $11,000.

(4) 16 U.S.C. 773f(3), Northern Pacific Halibut Act of 1982, violations, from $27,500 to $27,500.

(5) 16 U.S.C. 783, Sponge Act Violations, Catching or Taking Within Specified Areas, from $550 to $550.

(6) 16 U.S.C. 957, Tuna Convention Act of 1950:

(i) Violation/subsection a: from $27,500 to $27,500.

(ii) Subsequent violation/subsection a: from $55,000 to $60,000.

(iii) Violation/subsection b: from $1,100 to $1,100.

(iv) Subsequent violation/subsection b: from $5,500 to $5,500.

(v) Violation/subsection c: from $110,000 to $120,000.

(7) 16 U.S.C. 971e(e)(1), Atlantic Tuna Convention Act of 1975:

(i) Violation/subsection a: from $25,000 to $27,500.

(ii) Subsequent violation/subsection a: from $50,000 to $55,000.

(iii) Violation/subsection b or c: from $1,000 to $1,100.

(iv) Subsequent violation/subsection b or c: from $5,000 to $5,500.

(v) Violation/subsection d: from $110,000 to $120,000.

(8) 16 U.S.C. 972f(b), Eastern Pacific Tuna Licensing Act:

(i) Violations/subsections (a)(1)–(3): from $27,500 to $27,500.

(ii) Subsequent violations/subsections (a)(1)–(3): from $55,000 to $60,000.

(iii) Violations, subsections (a)(4)–(5): from $5,500 to $5,500.

(iv) Subsequent violations/subsections (a)(4)–(5): from $5,500 to $5,500.

(v) Violations, subsection (a)(6): from $110,000 to $120,000.

(9) 16 U.S.C. 973f(a), South Pacific Tuna Fishing, violations, from $275,000 to $300,000.

(10) 16 U.S.C. 1030(a)(1) North Pacific Fisheries Act of 1954, from $25,000 to $27,500.

(11) 16 U.S.C. 1174(b), Fur Seal Act Amendment of 1983, from $10,000 to $11,000.

(12) 16 U.S.C. 1375(a)(1), Marine Mammal Protection Act of 1972:

(i) Violations, from $11,000 to $11,000.

(ii) Knowing Violations, from $22,000 to $22,000.

(13) 16 U.S.C. 1385(e), Dolphin Protection Consumer Information Act, from $100,000 to $110,000.

(14) 16 U.S.C. 1437(c)(1), Marine Protection, Research and Sanctuaries Act, from $110,000 to $120,000.

(15) 16 U.S.C. 1462(a), Deep Sea-Bed Hard Mineral Resources Act, from $25,000 to $27,500.

(16) 16 U.S.C. 1540(a)(1), Endangered Species Act of 1973:

(i) Knowing violations, from $27,500 to $27,500.

(ii) Other knowing or business-related violations, from $13,200 to $13,200.

(iii) Otherwise violations, from $550 to $550.

(17) 16 U.S.C. 1858(a), Magnuson-Stevens Fishery Conservation and Management Act, from $110,000 to $120,000.

(18) 16 U.S.C. 2437(a)(1), Antarctic Marine Living Resources Convention Act:

(i) Knowing violation, from $11,000 to $11,000.

(ii) Violation, from $5,500 to $5,500.

(19) 16 U.S.C. 2465(a), Antarctic Protection Act of 1990:

(i) Knowing violation, from $10,000 to $11,000.

(ii) Violation, from $5,000 to $5,500.

(20) 16 U.S.C. 3373(a), Lacey Act:

(i) Purchase and sale violation, from $11,000 to $11,000.

(ii) Marking violations of fish, plants and wildlife, from $275 to $275.

(iii) False labeling violation, from $11,000 to $11,000.

(iv) Other than marking violation, from $10,000 to $11,000.

(21) 16 U.S.C. 3606(b), Atlantic Salmon Convention Act of 1982, from $110,000 to $120,000.

(22) 16 U.S.C. 3637(b), Pacific Salmon Treaty Act of 1985, from $110,000 to $120,000.

(23) 16 U.S.C. 4016(b)(1)(B), Fish and Seafood Promotion Act of 1986, from $5,000 to $5,500.

(24) 16 U.S.C. 5010(a), North Pacific Anadromous Stocks Act of 1992, from $100,000 to $110,000.

(25) 16 U.S.C. 5103(b)(2), Atlantic Coastal Fisheries Cooperative Management Act, from $100,000 to $110,000.

(26) 16 U.S.C. 5507(a), High Seas Fishing Compliance Act of 1995, from $100,000 to $110,000.

(27) 16 U.S.C. 5606(b), Northwest Atlantic Fisheries Convention Act of 1995, from $100,000 to $110,000.

(28) 22 U.S.C. 1978(e), Fishermen's Protective Act of 1967:

(i) Violation, from $10,000 to $11,000.

(ii) Subsequent violation, from $25,000 to $27,500.

(29) 30 U.S.C. 1462(a), Deep Seabed Hard Mineral Resources Act, from $27,500 to $27,500.

(30) 42 U.S.C. 9152(c)(1), Ocean Thermal Energy Conversion Act of 1980, from $27,500 to $27,500.

3. Section 6.5 is revised to read as follows:

**§ 6.5 Effective date of adjustments.**

The adjustments made by § 6.4 of this part, of the penalties there specified, are effective on January 29, 2003, and said penalties, as thus adjusted by the adjustments made by § 6.4 of this part, shall apply only to violations occurring after January 29, 2003, and before the effective date of any future inflation adjustment thereto made subsequent to January 29, 2003, as provided in § 6.6 of this part.

[FR Doc. 03–1895 Filed 1–28–03; 8:45 am]

BILLING CODE 3510–17–P

## DEPARTMENT OF TRANSPORTATION

## Coast Guard

## 33 CFR Part 117

**[CGD08–02–042]**

**RIN 2115–AE47**

## Drawbridge Operation Regulation; Mississippi River, Dubuque, IA

**AGENCY:** Coast Guard, DOT.

**ACTION:** Final rule; correction.

**SUMMARY:** The Coast Guard published a final rule on December 27, 2002, temporarily changing the regulation governing the Illinois Central Railroad Drawbridge, Mile 579.9, Upper Mississippi River. The section number for the temporary change was incorrect. This document corrects the section number for the temporary change.

**DATES:** This correction is effective January 29, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mr. Roger K. Wiebusch, Eighth Coast Guard District Bridge Branch, Bridge Administrator, (314) 539–3900, extension 2378.

**SUPPLEMENTARY INFORMATION:**

*Background and Purpose*

The Coast Guard published a temporary rule in the **Federal Register** on December 27, 2002 (67 FR 78975), adding section 117.T408.

*Need for Correction*

As published, the section number used in the regulatory text was incorrect.

*Correction of Publication*

In rule FR Doc. 02–32724 published on December 27, 2002 (67 FR 78975), make the following correction. On page 78977, in the first column, in lines 17 and 18, change ''117.T408'' to read ''117.T410''

Dated: January 21, 2003.

**J. R. Whitehead,**

*Captain, U.S. Coast Guard, Commander, Eighth Coast Guard District, Acting.*

[FR Doc. 03–2060 Filed 1–28–03; 8:45 am]

BILLING CODE 4910–15–P

**DEPARTMENT OF TRANSPORTATION**

**Coast Guard**

**33 CFR Part 165**

**[CGD14–02–002]**

**RIN 2115–AA97**

## Regulated Navigation Areas and Security Zones; Escorted Vessels—Philippine Sea, Guam, Apra Harbor, Guam and Tanapag Harbor, Saipan, Commonwealth of the Northern Mariana Islands

**AGENCY:** Coast Guard DOT.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard is establishing regulated navigation areas (RNAs) and security zones for vessels determined to be in need of a Coast Guard escort by the Captain of the Port (COTP) Guam. The security zones for these escorted vessels will close all waters of Philippine Sea, Guam, Apra Harbor, Guam (including Cabras Island Channel), and Tanapag Harbor, Saipan, Commonwealth of the Northern Mariana Islands, within a 100-yard radius around an escorted vessel while in the RNA. This action is necessary to protect personnel, vessels, and facilities from sabotage or other subversive acts, accidents, or other events of a similar nature. The RNAs will require vessels within 500 yards of an escorted vessel to travel at minimum safe speed and the security zones will prohibit unauthorized entry within a 100-yard radius of an escorted vessel in these RNAs. This rule is not intended to replace or modify the existing RNAs and zones found in 33 CFR 165.1401, 33 CFR 165.1402, and 33 CFR 165.1404.

**DATES:** This rule is effective January 29, 2003.

**ADDRESSES:** Commanding Officer, Coast Guard Marine Safety Office Guam, PSC 455 Box 176, FPO AP 96540–1057. Marine Safety Office Guam maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of this docket and are available for inspection or copying at this location between 7 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Fred Meadows, Coast Guard Marine Safety Office Guam at (671) 339–2001.

**SUPPLEMENTARY INFORMATION:**

### Regulatory Information

On September 26, 2002, we published a notice of proposed rulemaking (NPRM) entitled ''Regulated Navigation Areas and Security Zones; Escorted Vessels-Philippine Sea, Guam, Apra Harbor, Guam and Tanapag Harbor, Saipan, Commonwealth Northern Mariana Islands'' in the **Federal Register** (67 FR 60630). We received two letters commenting on the proposed rule. No public hearing was requested and none was held. Under 5 U.S.C. 553(d)(3), the Coast Guard finds good cause for making this rule effective less than 30 days after publication in the **Federal Register**. Any delay in the effective date of this regulation would be contrary to the public interest since prompt action is needed to ensure the security of vessels, ports, facilities, and the maritime communities of this region. Prompt implementation would provide adequate security measures needed to protect vulnerable vessels and maritime infrastructure from potential threats.

### Background and Purpose

Terrorist incidents within the United States on September 11, 2001 have called for the implementation of measures to protect U.S. seaports and transportation infrastructure. In addition, national security and intelligence officials warn that future terrorist attacks against civilian targets are anticipated and that U.S. seaports are particularly vulnerable. These rules are intended to provide for the safety and security of the public, maritime commerce, and transportation by protecting persons, vessels, and seaport facilities in the waters of Philippine Sea, Guam, Apra Harbor, Guam, and Tanapag Harbor, Saipan, Commonwealth of the Northern Mariana Islands (CNMI). These rules are intended to enable the COTP Guam to provide effective port security, while minimizing the publics' confusion and ease the administrative burden of implementing separate temporary security zones for each escorted vessel.

### Discussion of Comments and Changes

The Coast Guard received two letters following the publication of the notice of proposed rulemaking (67 FR 60630). Both letters fully supported the proposed rules. However, one letter raised two issues concerning the impact of the rules on harbor traffic.

One issue is that shipyards may find it difficult for their vessels to transit and moor near Navy vessels needing repair. The other issue raised the concern that recreational water activities (banana boats, jet skis, sea walker, and divers) near Hotel Wharf might be temporarily relocated to alternative sites during periods when the security zones are in effect. The Coast Guard considers these issues to be minimal given the small size and the short duration of the security zones in any given area. In addition, persons or vessels that must enter a security zone may request and receive permission from the COTP via telephone or VHF channel 16 on a case-by-case basis. The Coast Guard has considered these issues and has determined no change to the proposed rule is required.

### Regulatory Evaluation

The rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040, February 26, 1979). The U.S. Coast Guard expects the economic impact of this rule to be so minimal that a full Regulatory Evaluation under paragraph 10(e) of the regulatory policies and procedures of DOT is unnecessary. This expectation is based on the limited duration of the zones. Vessels will also be able to transit the RNAs freely outside of any security zones. In addition, the COTP may allow vessels in the security zones on a case-by-case basis.

### Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. No small business impacts are anticipated due to the small size of the zones and the short duration of the security zones in any one area.

### Assistance for Small Entities

Under section 231(a) of the Small Business Regulatory Enforcement Fairness Act of 1968 (Pub. L. 104–121),

we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Lieutenant Fred Meadows, Coast Guard Marine Safety Office Guam, at (671) 339–2001.

**Collection of Information**

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

**Federalism**

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local government and would either preempt State law or impose a substantial direct cost of compliance on them. The Coast Guard has analyzed this rule under that Order and has determined that it does not have implications for federalism.

**Unfunded Mandates Reform Act**

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $ 100,000,000 or more in any one year. Though this rule will not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

**Taking of Private Property**

This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

**Civil Justice Reform**

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

**Protection of Children**

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

**Indian Tribal Governments**

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

**Energy Effects**

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that Order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

**Environment**

We have considered the environmental impact of this rule and concluded that, under figure 2–1, paragraph (34)(g) of Commandant Instruction M16475.1D, this rule is categorically excluded from further environmental documentation. A ''Categorical Exclusion Determination'' is available in the docket where indicated under **ADDRESSES**.

**List of Subjects in 33 CFR Part 165**

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons set out in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; 49 CFR 1.46.

2. Add § 165.1405 to read as follows:

**§ 165.1405 Regulated Navigation Areas and Security Zones; Designated Escorted Vessels-Philippine Sea and Apra Harbor, Guam (including Cabras Island Channel), and Tanapag Harbor, Saipan, Commonwealth of the Northern Mariana Islands (CNMI).**

(a) *Regulated navigation area.* The following areas, designated by coordinates referencing World Geodetic Datum (1984), are regulated navigation areas (RNAs).

(1) *Philippine Sea, Guam*—All waters from the surface to the bottom of the Philippine Sea, Guam, encompassed by lines connecting the following points, beginning at 13°27′10″ N, 144°35′05″ E, thence easterly to 13°27′17″ N, 144°37′27″ E, thence south westerly to 13°26′52″ N, 144°37′05″ E, thence westerly to 13°26′37″ N, 144°35′05″ E, thence due north back to point of origin.

(2) *Apra Harbor, Guam*—All waters from surface to bottom of Apra Harbor, Guam, shoreward of the COLREGS Demarcation as described in 33 CFR part 80.

(3) *Tanapag Harbor, Saipan*—The waters from surface to bottom of Tanapag Harbor, Saipan (CNMI), encompassed by lines connecting the following points, beginning at 15°12′10″ N, 145°40′28″ E, thence north easterly to 15°14′08″ N, 145°42′00″ E, thence due east to 15°14′08″ N, 145°44′02″ E, thence south easterly to 15°13′54″ N, 144°44′20″ E, thence south westerly along the shoreline to 15°13′11″ N, 145°43′01″ E, thence south westerly to 15°12′10″ N, 145°40′28″ E.

(4) *Cabras Island Channel, Guam*—All waters from surface to bottom of Cabras Island Channel, Guam, beginning at point 13°27′34″ N, 144°39′39″ E and extending south easterly to position 13°27′24″ N, 144°39′59″ E then heading easterly along the shoreline to position 13°27′31″ N, 144°40′22″ E then heading north to position 13°27′37″ N, 144°40′22″ E following the shoreline in a westerly direction back to point of origin.

(b) *Security zones.* A 100-yard radius security zone is established around, and is centered on, each escorted vessel within the regulated navigation areas in paragraph (a) of this section. A security zone is activated when an escorted vessel enters an RNA and remains active until the escorted vessel leaves the RNA. This is a moving security zone when the escorted vessel is in transit and becomes a fixed zone when the escorted vessel is anchored or moored. A security zone will not extend beyond the boundary of the RNA in this section.

(c) *Definitions.* As used in this section:

(1) *Designated representative* means any Coast Guard commissioned, warrant, or petty officer that has been authorized to act on behalf of the COTP.

(2) *Escorted Vessel* means any vessel operating in the RNA deemed by the COTP to be in need of escort protection for security reasons or under other circumstances. A designated representative aboard a Coast Guard cutter or patrol boat will accompany vessels deemed in need of escort protection into the RNA.

(3) *Navigation rules* mean international and inland navigation rules in 33 CFR chapter I, subchapters D and E.

(4) *Vessel* means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, except U.S. Coast Guard or U.S. naval vessels.

(d) *Regulations.* (1) No person or vessel may enter into the security zones under this section unless authorized by the COTP Guam or a designated representative.

(2) A vessel in the RNA established under paragraph (a) of this section operating within 500 yards of an escorted vessel must proceed at a minimum speed necessary to maintain a safe course, unless required to maintain speed by the navigation rules.

(3) When an escorted vessel in the RNA approaches within 100 yards of a vessel that is moored, or anchored in a designated anchorage area, the stationary vessel must stay moored or anchored while it remains within the escorted vessel's security zone unless it is either ordered by, or given permission from the COTP Guam or a designated representative to do otherwise.

(4) The COTP will inform the public of the existence or status of the security zones around escorted vessels in the RNA periodically by Broadcast Notice to Mariners.

(5) Persons or vessels that must enter a security zone or exceed speed limits established in this section may contact the COTP at command center telephone number (671) 339–6100 or on VHF channel 16 (156.8 Mhz) to request permission.

(6) All persons and vessels within 500 yards of an escorted vessel in the RNA must comply with the orders of the COTP Guam or his designated representatives.

(e) *Authority.* In addition to 33 U.S.C. 1231 and 50 U.S.C. 191, the authority for this section includes 33 U.S.C. 1226.

Dated: January 17, 2003.

**G.A. Wiltshire,**

*Captain, Coast Guard, Commander, Fourteenth Coast Guard District (Acting).*

[FR Doc. 03–2061 Filed 1–28–03; 8:45 am]

**BILLING CODE 4910–15–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 82

### Protection of Stratospheric Ozone

*CFR Correction*

In Title 40 of the Code of Federal Regulations, Parts 81 to 85, revised as of July 1, 2002, on page 346, part 82 is corrected by removing the second § 82.7.

[FR Doc. 03–55502 Filed 1–28–03; 8:45 am]

**BILLING CODE 1505–01–D**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 112

### Oil Pollution Prevention

*CFR Correction*

In Title 40 of the Code of Federal Regulations, Parts 100 to 135, revised as of July 1, 2002, Appendix F to part 112 is corrected as follows:

1. In section 1.0 paragraph B, by adding the words ''required by'' before 40 CFR 112.3;

2. In section 1.8.3 by revising '' 267–4085–4065'' to read ''(202) 267–4085''; and

3. In Attachment F–1, add footnote 1 to read:

Attachment F–1–Response Plan Cover Sheet

* * * * *

Dun & Bradstreet number: [1]

* * * * *

[1]These numbers may be obtained from public library resources.

[FR Doc. 03–55500 Filed 1–28–03; 8:45 am]

**BILLING CODE 1505–01–D**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

**[OPP–2002–0245; FRL–7199–4]**

### 4-(Dichloroacetyl)-1-Oxa-4-Azaspiro[4.5]Decane; Pesticide Import Tolerance

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes import tolerances for residues of 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane (CAS No. 71526–07–3) in or on corn commodities. Monsanto Company requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act (FQPA) of 1996.

**DATES:** This regulation is effective January 29, 2003. Objections and requests for hearings, identified by docket ID number OPP–2002–0245, must be received on or before March 31, 2003.

**ADDRESSES:** Written objections and hearing requests may be submitted electronically by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit VI. of the **SUPPLEMENTARY INFORMATION**.

**FOR FURTHER INFORMATION CONTACT:** By mail: Bipin Gandhi, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW.,Washington, DC 20460–0001; telephone number: (703) 308–8380; e-mail address: gandhi.bipin@epa.gov.

**SUPPLEMENTARY INFORMATION:**

#### I. General Information

*A. Does this Action Apply to Me?*

You may be affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected categories and entities may include, but are not limited to:

• Industry, (NAICS 111, 112, 311, 32532), Crop production, Animal production, Food manufacturing, Pesticide manufacturing

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. How Can I Get Copies of this Document and Other Related Information?*

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPPT–2002–0245. The official public docket consists of the documents

specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the EPA Docket Center, Rm. B102-Reading Room, EPA West, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The EPA Docket Center Reading Room telephone number is (202) 566–1744 and the telephone number for the OPPT Docket, which is located in EPA Docket Center, is (202) 566–0280.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at http://www.epa.gov/fedrgstr/. A frequently updated electronic version of 40 CFR part 180 is available at http://www.access.gpo.gov/nara/cfr/cfrhtml_00/Title_40/40cfr180_00.html, a beta site currently under development. To access the OPPTS Harmonized Guidelines referenced in this document, go directly to the guidelines at http://www.epa.gov/opptsfrs/home/guidelin.htm.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at http://www.epa.gov/edocket/ to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select ''search,'' then key in the appropriate docket ID number.

## II. Background and Statutory Findings

In the **Federal Register** of January 28, 1998 (63 FR 4252) (FRL–5763–6), EPA issued a notice pursuant to section 408 of the FFDCA, 21 U.S.C. 346a, as amended by the FQPA (Public Law 104–170), announcing the filing of a pesticide petition (PP 5E4503) by Monsanto Company, 800 North Lindbergh Blvd., St. Louis, MO 63167. This notice included a summary of the petition prepared by Monsanto Company, the petitioner. There were no comments received in response to the notice of filing.

Previously, time-limited tolerances had been established (40 CFR 180.465) for the residues of 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane, in or on corn commodities (April 14, 1993) (58 FR 19387). These tolerances expired on January 31, 1998.

In the above mentioned pesticide petition (5E4503) Monsanto Corporation requested permanent tolerances for 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane in or on corn commodities at 0.005 ppm.

The petitioner asked in a letter dated January 15, 2002, that 40 CFR 180.465 be amended by establishing an import tolerance for residues of the herbicide safener 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane, in or on corn commodities at 0.005 parts per million (ppm) with no U.S. registrations.

In the United States a tolerance is the maximum residue level of a pesticide permitted in or on food or feed grown in the United States and food or feed imported into the United States from other countries. Typically, EPA would establish tolerance(s) or exemption(s) from the requirement of a tolerance at the same time that it registered the use of a pesticide for that commodity in the United States. Where no U.S. registration exists, interested persons may submit a petition requesting that EPA establish an import tolerance for a pesticide residue that would allow treated food to be legally imported into the United States. The term ''import tolerance'' is used as a convenience to refer to a tolerance that exists where there is no accompanying registration under the Federal Insecticide, Fungicide, Rhodenticide Act (FIFRA). There is no statutory or regulatory distinction between an ''import tolerance'' and any other tolerance issued by EPA. The same food safety standards apply to both domestically produced and imported food.

Section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of the FFDCA defines ''safe'' to mean that'' there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of the FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensurethat there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue....''

EPA performs a number of analyses to determine the risks from aggregate exposure topesticide residues. For further discussion of the regulatory requirements of section 408 of the FFDCA and a complete description of the risk assessment process, see the final rule on Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997) (FRL–5754–7).

## III. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D) of the FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure, consistent with section 408(b)(2) of the FFDCA, for a tolerance for residues of 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane on corn commodities at 0.005 ppm. EPA's assessment of exposures and risks associated with establishing the tolerance follows.

### *A. Toxicological Profile*

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane are discussed in the following Table 1 as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies reviewed.

TABLE 1.—SUBCHRONIC, CHRONIC, AND OTHER TOXICITY

| Guideline No. | Study Type | Results |
|---|---|---|
| 870.3100 | 90–Day oral toxicity rodents | NOAEL = 48 mg/kg/day<br>LOAEL = 192 mg/kg/day based on decreased mean body weights, increased platelets , changes in clinical parameters and histopathological findings. |
| 870.3150 | 90–Day oral toxicity in nonrodents | NOAEL = would be equal to or greater than 30 mg/kg/day<br>LOAEL = not determined; but would be greater than 30 mg/kg/day. |
| 870.3700 | Prenatal developmental in rodents-rats (1989 study) | Maternal NOAEL = 10 mg/kg/day<br>mg/kg/day based on decreased body weight gain, decreased food consumption, increased preimplantation loss.<br>Developmental NOAEL = 75 mg/kg/day<br>LOAEL = 150 mg/kg/day based on increased incidences of skeletal malfunctions and variations. |
| | Prenatal developmental in rodents-rat (1985 study) | Maternal NOAEL = 80 mg/kg/day<br>LOAEL = 200 mg/kg/day based on clinical signs (alopecia, wet fur with urinary staining, piloerection.<br>Developmental NOAEL = 80 mg/kg/day<br>LOAEL = 200 mg/kg/day based on increased fetal malfunctions. |
| 870.3700 | Prenatal developmental in rabbits-nonrodents | Maternal NOAEL = 10 mg/kg/day<br>LOAEL = 30 mg/kg/day based on decreased body weight gain.<br>Developmental NOAEL = would be equal to or greater than 30 mg/kg/day<br>LOAEL = would be greater than 30 mg/kg/day . |
| 870.3800 | Reproduction and fertility effects | Parental/Systemic NOAEL = 6.34/7.32 male/female mg/kg/day<br>LOAEL = 61.48/72.30 male/female mg/kg/day based on reduced body weight and body weight gain in P & F1a.<br>Reproductive NOAEL = 6.34/7.32 male/female mg/kg/day<br>LOAEL = 61.48/72.30 male/female mg/kg/day based on decreased pup body weights. |
| 870.4200 | Carcinogenicity mice | NOAEL = 10.71/16.82 male/female mg/kg/day<br>LOAEL = 107.50/166.57 male/female mg/kg/day based on increased absolute and relative liver weights as well as histopathological lesions in the liver, and stomach mucosa. |
| 870.4300 | Chronic/Carcinogenicity rats | NOAEL = 2.21/2.78 male/female mg/kg/day<br>LOAEL = 22.09/29.18 male/female mg/kg/day based upon histopathological changes in the liver and stomach including cystic liver degeneration, periportal hepatocellular vacuolation, and pyloric intestinal metaplasia of the stomach. |
| 870.5300 | Gene Mutation | *In vitro* gene mutation in CHO cells. Negative for mutagenicity. |
| 870.5300 | Cytogenetics | *In vitro* bone marrow assay did not induce a clastogenic response. |
| 870.5550 | Gene Mutation | *In vitro* UDS assay did not induce a genotoxic effect. |
| 870.5100 | Gene Mutation | *S.typhimurium*/mammalian microsome assay did not induce a genotoxic effect. |
| 870.7600 | Dermal penetration | There were no dermal absorption studies and no appropriate toxicity studies available to allow an estimation of the dermal absorption by a route-to-route comparison of toxicity. However, two structurally related chemicals, acetochlor and alachlor, have experimentally derived dermal data indicating that absorption is 20 to 25 percent, respectively. Therefore, the estimated dermal absorption is 25% |

*B. Toxicological Endpoints*

The dose at which the NOAEL from the toxicology study identified as appropriate for use in risk assessment is used to estimate the toxicological level of concern (LOC). However, the LOAEL is sometimes used for risk assessment if no NOAEL was achieved in the toxicology study selected. An uncertainty factor (UF) is applied to reflect uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. An UF of 100 is routinely used, 10X to account for interspecies differences and 10X for intra species differences. An additional 3x uncertainty factor was applied due to the data gap for a chronic toxicity study in dogs.

For dietary risk assessment (other than cancer) the Agency uses the UF to calculate an acute or chronic reference dose (acute RfD or chronic RfD) where the RfD is equal to the NOAEL divided by the appropriate UF (RfD = NOAEL/UF). Where an additional safety factor is retained due to concerns unique to the FQPA, this additional factor is applied to the RfD by dividing the RfD by such additional factor. The acute or chronic Population Adjusted Dose (aPAD or cPAD) is a modification of the RfD to accommodate this type of FQPA Safety Factor.

For non-dietary risk assessments (other than cancer) the UF is used to determine the LOC. For example, when 100 is the appropriate UF (10X to

account for interspecies differences and 10X for intraspecies differences) the LOC is 100. To estimate risk, a ratio of the NOAEL to exposures (margin of exposure (MOE) = NOAEL/exposure) is calculated and compared to the LOC.

The linear default risk methodology (Q*) is the primary method currently used by the Agency to quantify carcinogenic risk. The Q* approach assumes that any amount of exposure will lead to some degree of cancer risk. A Q* is calculated and used to estimate risk which represents a probability of occurrence of additional cancer cases (e.g., risk is expressed as 1 x $10^{-6}$ or one in a million). Under certain specific circumstances, MOE calculations will be used for the carcinogenic risk assessment. In this non-linear approach, a ''point of departure'' is identified below which carcinogenic effects are not expected. The point of departure is typically a NOAEL based on an endpoint related to cancer effects though it may be a different value derived from the dose response curve. To estimate risk, a ratio of the point of departure to exposure ($MOE_{cancer}$= point of departure/exposures) is calculated. A summary of the toxicological endpoints for 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane used for human risk assessment is shown in the following Table 2:

TABLE 2.—SUMMARY OF TOXICOLOGICAL DOSE AND ENDPOINTS FOR 4-(DICHLOROACETYL)-1-OXA-4-AZASPIRO[4.5]DECANE FOR USE IN HUMAN RISK ASSESSMENT

| Exposure Scenario | Dose Used in Risk Assessment, UF | FQPA SF* and Level of Concern for Risk Assessment | Study and Toxicological Effects |
|---|---|---|---|
| Acute Dietary (Females 13–50 years of age) | NOAEL = 10 mg/kg/day<br>UF = 100<br>Acute RfD = 0.1 mg/kg/day | FQPA SF = 3<br>aPAD = acute RfD/FQPA SF<br>= 0.033 mg/kg/day | Development toxicity in rabbits<br>LOAEL = 75 mg/kg/day based on decreased body weight gain on day 3 of dosing. |
| Acute Dietary (General population, including infants and children) | NOAEL = 10 mg/kg/day<br>UF = 100<br>Acute RfD = 0.1 mg/kg/day | FQPA SF = 1<br>aPAD = acute RfD/FQPA SF<br>= 0.1 mg/kg/day | Development toxicity in rabbits<br>Material LOAEL = 75 mg/kg/day based on decreased body weight gain on day 3 of dosing. |
| Chronic Dietary (All populations) | NOAEL = 2.21 mg/kg/day<br>UF = 300<br>Chronic RfD = 0.007 mg/kg/day | FQPA SF = 1<br>cPAD = chronic RfD/FQPA SF = 0.007 mg/kg/day | Chronic/Carcinogenicity in rats<br>LOAEL = 22.09 mg/kg/day based on histopathological changes in liver and stomach including cystic liver degeneration, periportal hepatocellular vacuolation, and pyloric intestinal metaplasia of the stomach |
| Short-, intermediate Term Dermal | Dermal (or oral) study<br>NOAEL = 10 mg/kg/day (dermal absorption rate = 25 %) | LOC for MOE = 100 (Residential) | Development toxicity in rabbit<br>LOAEL = 75 mg/kg/day based on decreased body weight gain on day 3 of dosing. |
| Long-Term Dermal | Oral study NOAEL= 2.21 mg/kg/day<br>(dermal absorption rate = 25 %when appropriate) | LOC for MOE = 100 (Residential) | Chronic/Carcinogenicity in rats<br>LOAEL = 22.09 mg/kg/day was used for deriving the chronic RfD. |
| Inhalation any time period | Oral study<br>NOAEL = 10 mg/kg/day (inhalation absorption rate = 100%) | LOC for MOE = 100 (Residential) | Development toxicity in rabbit<br>LOAEL = 75 mg/kg/day based on decreased body weight gain on day 3 of dosing |
| Cancer (Oral, dermal, inhalation) | $Q_1$* =4.85x$10^{-2}$ (mg/kg/day)$^{-1}$ | | Likely to be carcinogenic to humans (combined hepatocellular adenoma and /or carcinoma in male mice). |

*C. Exposure Assessment*

1. *Dietary exposure from food and feed uses.* The tolerances to be established are import tolerances. Thus, the only dietary exposure would be residues of 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane, in imported corn commodities. Therefore, risk assessments were conducted by EPA to assess dietary exposures from 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane in food as follows:

i. *Acute exposure.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a one day or single exposure. The Dietary Exposure Evaluation Model (DEEM™) analysis evaluated the individual food consumption as reported by respondents in the USDA 1989–1992 nationwide Continuing Surveys of Food Intake by Individuals (CSFII) and accumulated exposure to the chemical for each commodity. The following assumptions were made for the acute exposure assessments:

The acute dietary (food only) assessment is based on Tier 1 assumptions (tolerance level residues, 100% crop treated). For all population subgroups the estimated dietary (food only) risks are less than 1% of the acute population-adjusted dose (PAD). This is well below the Agency's level of concern for the dietary exposure (100% of the PAD).

ii. *Chronic exposure.* In conducting this chronic dietary risk assessment the Dietary Exposure Evaluation Model (DEEM™) analysis evaluated the individual food consumption as reported by respondents in the USDA 1989–1992 nationwide Continuing

Surveys of Food Intake by Individuals (CSFII) and accumulated exposure to the chemical for each commodity. The following assumptions were made for the chronic exposure assessments:

The chronic dietary (food only) assessment is based on Tier 2 assumptions (tolerance-level residues and 25% crop treated estimates). For all population subgroups, the estimated dietary (food only) risks are less than 1% of the chronic PAD.

iii. *Cancer*. The cancer dietary (food only) assessment is based on Tier 2 assumptions (tolerance-level residues and 25% crop treated estimates). Based on these assumptions, the estimated dietary exposure for the U.S. Population is 0.000013 mg/kg/day. Applying a $Q^{1*}$ of $4.85x10^{-2}$ $(mg/kg/day)^{-1}$ results in a cancer risk estimate of $6.5x10^{-7}$. Generally the Agency is not concerned with cancer risk less than the range of $1x10^{-6}$.

iv. *Anticipated residue and percent crop treated (PCT) information*.Section 408(b)(2)(F) of the FFDCA states that the Agency may use data on the actual percent of food reated for assessing chronic dietary risk only if the Agency can make the following findings: Condition 1, that the data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain such pesticide residue; Condition 2, that the exposure estimate does not underestimate exposure for any significant subpopulation group; and Condition 3, if data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area. In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by section 408(b)(2)(F) of the FFDCA, EPA may require registrants to submit data on PCT.

The Agency used PCT information as follows:

For the acute dietary risk assessment, the Agency assumed 100% crop treated i.e., that the entire crop was treated. For chronic (non-cancer and cancer) dietary analyses it was assumed that 25% of the corn was treated.

For assessing chronic dietary risk, the Agency believes that the three conditions listed above have been met. With respect to condition 1, it was assumed that 25% of the corn was treated. The information was based on the percent crop treated data for acetochlor since 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane can be used as a safener with acetochlor to treat corn. This 25% crop treated estimate is likely to significantly overestimate the percentage of corn treated with 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane. According to information supplied by the USDA, Economic Research Service, the total production of corn in the United States. was 239.55 and 251.85 million metric tons for the growing seasons of 1999–2000 and 2000–2001 respectively. United States corn imports were 328.393 and 195.603 metric tons for the years 1999 and 2000 respectively. Thus, treated amount of imported corn is less than 1% of domestic U.S. corn production.

As to conditions 2 and 3, regional consumption information and the consumption information for significant subgroups is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment procedure ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue evels higher than those estimated by the agency. Other than the data available through national food consumption surveys, EPA does not have available information on the regional consumption of food.

2. *Dietary exposure from drinking water*. Residues in drinking water (either ground water or surface water) are not expected to result as a consequence of establishing an import tolerance for 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane residues in or on corn commodities. There are currently no registered products containing 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane being distributed or sold in the United States. The one registered product containing 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane is pending request for cancellation (October 16, 2002, 67 FR 63909; FRL–7276–6). Therefore, exposure through drinking water is unlikely.

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane is not registered in the United States and the petition is for import tolerances only, therefore, there would be no residential exposure.

4. *Cumulative exposure to substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of the FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA does not have, at this time, available data to determine whether 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the final rule for Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997).

### *D. Safety Factor for Infants and Children*

1. *In general*. Section 408 of the FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base on toxicity and exposure unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans.

2. *Prenatal and postnatal sensitivity*. There are two developmental toxicity studies in the rat. In a 1995 study, fetal malfunctions were observed at 200 mg/kg/day in the presence of minimal maternal toxicity (clinical signs), Both maternal and developmental OAEL's are 80 mg/kg/day. In a 1989 study, resorption and malfunctions were observed in the presence of a maternal clinical signs including decreased body

weight gain and food consumption at 150 mg/kg/day. Maternal toxicity at 75 my/kg/day is a conservative call based on decreased food consumption. The susceptibility assumption is based on effects at the high dose.

In a development toxicity study with rabbits there is no evidence of increased susceptibility since there was no evidence of developmental toxicity at the highest dose tested in the presence of maternal toxicity. In the two generation reproductive toxicity study in rats, there is no evidence of increased susceptibility of offspring.

3. *Conclusion*. The Agency determined that the FQPA safety factor of 10x for protection of infants and children be reduced to 3x since:

i. The toxicity data base is complete for an FQPA assessment;

ii. No increase in susceptibility was seen in the rabbit developmental study or in the 2–generation reproduction in rats;

iii. A developmental neurotoxicity study is not required for 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane; and

iv. The exposure data are understood and the food exposure assessment will not underestimate the residues resulting from the use of 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane.

*E. Aggregate Risks and Determination of Safety*

1. *Aggregate risks*. The Agency has concluded that exposure to 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane from food imported corn commodities will utilize less than 1% of the aPAD and cPAD for all population groups.

The cancer risk estimates from aggregate exposure to 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane in food has also been assessed. For the U.S. population, the cancer dietary risk from food is $6.5 \times 10^{-7}$ which is below the Agency's concern for excess lifetime cancer risk.

There are no uses for 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane that will result in drinking water or residential exposure.

2. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, and to infants and children from aggregate exposure to 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane residues.

**IV. Other Considerations**

*A. Analytical Enforcement Methodology*

An adequate enforcement method (gas chromatography method using electron capture detection) is available to enforce the tolerance expression. The method may be requested from: Calvin Furlow, PRRIB, IRSD (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington DC 20460–0001; telephone number; (703) 305–5229; e-mail address: furlow.calvin@epa.gov.

*B. International Residue Limits*

There are no CODEX, Canadian or Mexican limits for residues of 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5] decane in corn.

**V. Conclusion**

Therefore, import tolerances are established for residues of 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane, in or on corn commodities at 0.005 ppm.

**VI. Objections and Hearing Requests**

Under section 408(g) of the FFDCA, as amended by the FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to the FFDCA by the FQPA, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) of the FFDCA provides essentially the same process for persons to ''object'' to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d) of the FFDCA, as was provided in the old sections 408 and 409 of the FFDCA. However, the period for filing objections is now 60 days, rather than 30 days.

*A. What Do I Need to Do to File an Objection or Request a Hearing?*

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2002–0245 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before March 31, 2003.

1. *Filing the request*. Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

Mail your written request to: Office of the Hearing Clerk (1900C), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. You may also deliver your request to the Office of the Hearing Clerk in Rm. 104, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (703) 603–0061.

2. *Tolerance fee payment*. If you file an objection or request a hearing, you must also pay the fee prescribed by 40 CFR 180.33(i) or request a waiver of that fee pursuant to 40 CFR 180.33(m). You must mail the fee to: EPA Headquarters Accounting Operations Branch, Office of Pesticide Programs, P.O. Box 360277M, Pittsburgh, PA 15251. Please identify the fee submission by labeling it ''Tolerance Petition Fees.''

EPA is authorized to waive any fee requirement ''when in the judgement of the Administrator such a waiver or refund is equitable and not contrary to the purpose of this subsection.'' For additional information regarding the waiver of these fees, you may contact James Tompkins by phone at (703) 305–5697, by e-mail at tompkins.jim@epa.gov, or by mailing a request for information to Mr. Tompkins at Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

If you would like to request a waiver of the tolerance objection fees, you must mail your request for such a waiver to: James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

3. *Copies for the Docket*. In addition to filing an objection or hearing request with the Hearing Clerk as described in

Unit VI.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in Unit I.B.2. Mail your copies, identified by docket ID number OPP–2002–0245, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in Unit I.B.2. You may also send an electronic copy of your request via e-mail to: opp-docket@epa.gov. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

*B. When Will the Agency Grant a Request for a Hearing?*

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

## VII. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of the FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866 due to its lack of significance, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of the FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of the FFDCA. For these same reasons, the Agency has determined that this rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' This rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

## VIII. Submission to Congress and the Comptroller General

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

## List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: January 10, 2003.

**Peter Caulkins,**

*Acting Director, Registration Division, Office of Pesticide Programs.*

Therefore, 40 CFR chapter I is amended as follows:

## PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346(a) and 371.

2. Section 180.465 is revised to read as follows:

**§ 180.465 4-(Dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane.**

(a) *General.* Tolerances are established for the residues of 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane, (CAS No. 71526–07–3 ) when used as an inert ingredient (safener) in or on the following raw agricultural commodities:

| Commodity[1] | Parts per million |
|---|---|
| Corn, field, forage | 0.005 |
| Corn, field, grain | 0.005 |
| Corn, field, stover | 0.005 |
| Corn, pop, grain | 0.005 |
| Corn, pop, stover | 0.005 |

[1]There are no U.S. registered products containing 4-(dichloroacetyl)-1-oxa-4-azaspiro[4.5]decane as of June 17, 2002.

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

[FR Doc. 03–1768 Filed 1–28–03; 8:45 am]

**BILLING CODE 6560–50–S**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 268

### Land Disposal Restrictions

*CFR Correction*

In Title 40 of the Code of Federal Regulations, Parts 266 to 299, revised as of July 1, 2002, § 268.44 is corrected in the table by adding footnote 8 to read as follows:

**§ 268.44 Variance from a treatment standard.**

**Table–Wastes Excluded From the Treatment Standards Under § 268.40**

* * * * *[8]

[8]Dupont Environmental Treatment–Chambers Works must dispose of this waste in their on–site Subtitle C hazardous waste landfill.

[FR Doc. 03–55501 Filed 1–28–03; 8:45 am]

**BILLING CODE 1505–01–D**

## CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

### 40 CFR Part 1610

### Transcripts of Witness Testimony in Investigations

**AGENCY:** Chemical Safety and Hazard Investigation Board.

**ACTION:** Final rule.

**SUMMARY:** The Chemical Safety and Hazard Investigation Board (''CSB'' or ''Board'') implements a new rule concerning transcripts of the testimony of witnesses appearing at Board depositions. The rule provides that witnesses have the right to petition to procure a copy of a transcript of their testimony, except that due to the nonpublic nature of Board depositions, witnesses (and their counsel) may for good cause be limited to inspection of the official transcript of their testimony.

**DATES:** Effective February 28, 2003.

**FOR FURTHER INFORMATION CONTACT:** Raymond C. Porfiri, 202–261–7600.

**SUPPLEMENTARY INFORMATION:** The Chemical Safety and Hazard Investigation Board is mandated by law to ''investigate (or cause to be investigated), determine and report to the public in writing the facts, conditions, and circumstances and the cause or probable cause of any accidental release [within its jurisdiction] resulting in a fatality, serious injury or substantial property damages.'' 42 U.S.C. 7412(r)(6)(C)(i). The Board has developed practices and procedures for conducting investigations under this provision in 40 CFR 1610 and has spelled out the rights of witnesses to be represented in such proceedings (section 1610.1) and rules concerning attorney misconduct, (section 1610.2) and sequestration of witnesses and exclusion of counsel (section 1610.3). The Board has determined that it would be useful to add a provision concerning the taking, handling, and inspection of transcripts of Board depositions.

In the **Federal Register** of December 9, 2002 (67 FR 72890), the CSB published a proposed rule setting forth new practices and procedures for the taking, handling, and inspection of transcripts of Board depositions. The proposed rule provided for a 30-day comment period. No comments were received in response to the proposed rule and invitation for comments. This final rule is unchanged from the proposed rule.

In promulgating this regulation, the Board is following section 555(c) of the Administrative Procedure Act, which provides:

> A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

On its face, section 555(c) recognizes that it is sometimes necessary to balance a compelled witness' right to have access to his or her testimony, and an agency's need to limit the dissemination of sensitive matters revealed in such testimony.

Board depositions are nonpublic investigatory proceedings. Attendance at depositions is limited to the minimum number of necessary CSB staff, the witness, and one attorney representing the witness. Depositions are not open to multiple attorneys representing the witness, non-attorney representative of the witness, or representatives of other parties (40 CFR part 1610). The Board's regulations on Freedom of Information Act requests (40 CFR part 1601) and on Production of Records in Legal Proceedings (40 CFR part 1612) further demonstrate that the Board recognizes that some of the information obtained in its investigation may not be appropriate for public dissemination.

Several considerations have led the Board to conclude that it is necessary to establish a mechanism to ensure appropriate control over the dissemination of deposition transcripts while also respecting witness' rights under the Administrative Procedure Act. Because of the nature of Board investigations, deposition testimony may contain sensitive information. For example, testimony may reveal trade secrets and confidential business information, which are protected by the Trade Secrets Act, 18 U.S.C. 1905.

Protection of the integrity of Board investigations also necessitates control over the dissemination of deposition transcripts. First-hand witness accounts are an invaluable source of information about the events leading to, and causes of, chemical incidents. Witnesses can be reluctant to cooperate, though, out of fear of whistleblower retaliation. The CSB would likely have greater difficulty obtaining vital testimony if witnesses believed that their testimony could easily become known to their employers and to other witnesses. Reasonable limits, such as those included in this regulation, on the dissemination of transcripts also helps to prevent the coaching of future witnesses based on testimony already given. Such preparation is undesirable in health and safety investigations, where it is important to gather unvarnished facts and untainted recollections.

Ultimately, the Board's duty is to obtain the facts about chemical incidents and to report objectively based on those facts. The Administrative Procedure Act provision limiting the release of transcripts in non-public proceedings is intended to facilitate missions such as the Board's. It protects

against harms that would be caused by premature circulation of such transcripts, while protecting the witness' rights by allowing him or her to inspect the official transcript. This approach, embodied in this regulation, is also consistent with the principles of Attorney General Ashcroft's October 12, 2001, ''Memorandum for Heads of All Federal Departments and Agencies,'' on the Freedom of Information Act, in which he said, ''Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.''

This proposal is modeled on the rules of the Securities and Exchange Commission (17 CFR 203.6) and those of other agencies which also follow the APA and permit the agency to limit witnesses to inspection of transcripts in non-public investigatory proceedings for good cause. The Board has followed the APA process by allowing witnesses, after their testimony, to ask the General Counsel for the opportunity to procure a copy of the transcript, provided, of course, that for good cause, the General Counsel may deny the petition and limit the witness (and his or her counsel) to an inspection of the witness' testimony. This regulation also makes it clear that this right to inspect the transcript is a right guaranteed by the APA and that witnesses who seek copies of the transcript are informed by the General Counsel of their right to inspect it.

As the court stated in *SEC* v. *Sprecher,* 594 F.2d 317, 319 (2nd Cir 1979), ''[I]t is obviously impractical for the Commission to determine prior to the testimony of a witness whether there will be 'good cause' to withhold a copy of the testimony from that witness, and we do not read the APA as requiring such an advance determination.''

Moreover, the courts have made it clear that the APA ''does not require [the agency] to spell out the 'good cause' which was the basis for the refusal to sell copies of the transcript.'' *Commercial Capital Corp.* v. *SEC,* 360 F. 2d 856, 858 (7th Cir. 1966).

In summary, this regulation largely tracks the language of the APA. The courts have recognized that such regulations are properly designed to ''permit the [agency] to enjoy confidentiality, where it is necessary, in order effectively to complete its investigation.'' *Zients* v. *La Morte,* 319 F. Supp 956, 958 (S.D.N.Y 1970) (discussing purpose of the SEC regulation), accord *Lamorte* v. *Mansfield,* 438 F.2d 448 (2d Cir 1971), (Friendly, J.) (''to the extent that a privilege exists, it is the agency's not the witness'').

**Regulatory Flexibility Act**

The Board, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and certifies that it will not have a significant economic impact on a substantial number of small entities.

**Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48.

**Federalism (E.O. 13132)**

The CSB has determined this regulation conforms to the federalism principals of Executive Order 13132. It also certifies that to the extent a regulatory preemption occurs, it is because the exercise of State and tribal authority conflicts with the exercise of Federal authority under the U.S. Constitution's supremacy clause and Federal statute.

**Paperwork Reduction Act**

This regulation contains no reporting or record keeping requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3510 *et seq.*

**List of Subjects in 40 CFR Part 1610**

Administrative practice and procedure, Investigations.

For the reasons set forth in the preamble, the Chemical Safety and Hazard Investigation Board amends 40 CFR part 1610 as follows:

## PART 1610—ADMINISTRATIVE INVESTIGATIONS

1. The authority citation for part 1610 is revised to read as follows:

**Authority:** 42 U.S.C. 7412(r)(6)(C)(i), 7412(r)(6)(L), 7412(r)(6)(N).

Section 1610.4 also issued under 5 U.S.C. 555.

2. Add § 1610.4 to read as follows:

**§ 1610.4 Deposition Transcripts.**

(a) Transcripts of depositions of witnesses compelled by subpoena to appear during a Board investigation, shall be recorded solely by an official reporter designated by the person conducting the deposition.

(b) Such a witness, after completing the compelled testimony, may file a petition with the Board's General Counsel to procure a copy of the official transcript of such testimony. The General Counsel shall rule on the petition, and may deny it for good cause. Whether or not such a petition is filed, the witness (and his or her attorney), upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony. If such a petition is denied by the General Counsel, he shall inform the petitioner of the right to inspect the transcript.

(c) Good cause for denying a witness' petition to procure a transcript of his or her testimony may include, but shall not be limited to, the protection of: trade secrets and confidential business information contained in the testimony, security-sensitive operational and vulnerability information, and the integrity of Board investigations.

Dated: January 23, 2003.

**Christopher W. Warner,**

*General Counsel.*

[FR Doc. 03–2001 Filed 1–28–03; 8:45 am]

BILLING CODE 6350–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[DA 03–159, MB Docket No. 02–91, RM–10411]**

### Digital Television Broadcast Service; Cheboygan, MI

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission, at the request of WPBN/WTOM License Subsidiary, Inc., substitutes DTV channel 35 for DTV channel 14 at Cheboygan, Michigan. *See* 67 FR 31170, May 9, 2002. DTV channel 35 can be allotted to Cheboygan, Michigan, in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates 45–39–01 N. and 84–20–37 W. with a power of 80, HAAT of 168 meters and with a DTV service population of 68 thousand. Since the community of Cheboygan is located within 400 kilometers of the U.S.-Canadian border, concurrence from the Canadian government has been obtained for this allotment. With this action, this proceeding is terminated.

**DATES:** Effective March 10, 2003.

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

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MB Docket No. 02–91, adopted January 16, 2003, and released January 23, 2003. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

**List of Subjects in 47 CFR Part 73**

Digital television broadcasting, Television.

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

## PART 73—[AMENDED]

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 Michigan, is amended by removing DTV channel 14 and adding DTV channel 35 at Cheboygan.

Federal Communications Commission.

**Barbara A. Kreisman,**

*Chief, Video Division, Media Bureau.*

[FR Doc. 03–1966 Filed 1–28–03; 8:45 am]

**BILLING CODE 6712–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

### 49 CFR Part 383

**[Docket Nos. FMCSA–2001–9709 and FMCSA–00–7382]**

**RINs 2126–AA60 and 2126–AA55**

### Commercial Driver's License Standards, Requirements, and Penalties; Commercial Driver's License Program Improvements and Noncommercial Motor Vehicle Violations

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The FMCSA amends its Commercial Driver's License (CDL) rules concerning disqualification of drivers to make a technical correction in response to a petition for reconsideration filed by the International Brotherhood of Teamsters, the Transport Workers Union of America, the Transportation Trades Department of the AFL–CIO, and the Amalgamated Transit Union (collectively, ''the Petitioners''). The technical correction provides that disqualifications for offenses committed by a CDL holder while operating a non-commercial motor vehicle (non-CMV) would be applicable only if the conviction for such offenses results in the revocation, cancellation, or suspension of the CDL holder's license or non-CMV driving privileges. The agency denies the Petitioners' request to: shorten the disqualification periods driving a non-CMV while under the influence of controlled substances or alcohol; and establish a means to disqualify foreign drivers for offenses committed in a non-CMV in the country of domicile. The FMCSA believes these issues were adequately explained in the July 31, 2002, final rule concerning the CDL program, and that the petitioners have not presented any new information that would warrant reconsideration of the agency's decisions.

**DATES:** The effective date of this final rule is January 29, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert Redmond, Office of Safety Programs, (202) 366–9579, Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 8:30 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

### Background

Section 201(b) of the Motor Carrier Safety Improvement Act of 1999 (MCSIA) (Pub. L. 106–159, 113 Stat. 1759) requires that the FMCSA issue regulations providing for the disqualification of CDL holders who are convicted of a serious offense involving a non-CMV that results in the revocation, cancellation, or suspension of the person's driver's license, or a drug or alcohol related offense involving a non-CMV. The MCSIA also requires FMCSA to establish minimum disqualification periods for non-CMV offenses based on the seriousness of the offense. However, the disqualification periods for non-CMV offenses must not exceed the disqualification periods for offenses involving a CMV.

On July 31, 2002, the FMCSA published a final rule (67 FR 49742) implementing several MCSIA provisions concerning the CDL program, including the requirements of section 201(b).

### Petition for Reconsideration

On August 30, 2002, the Petitioners requested that the agency reconsider three issues covered in the final rule. A copy of the petition is in both of the dockets identified at the beginning of this notice. The following is a summary of the three issues raised by the petitioners, followed by the FMCSA's response.

*Issue 1: Disqualification Periods for Driving Under the Influence (DUI).*

The Petitioners believe the disqualification periods for driving under the influence of controlled substances or alcohol are excessive and can result in unfair sanctions against CDL holders by potentially disqualifying them from working in the motor carrier industry for life. The Petitioners argue that the disqualification periods are significantly longer than State penalties and that the States generally do not impose lifetime disqualification for second offenses.

*FMCSA Response:* The FMCSA denies the Petitioners' request to shorten the disqualification periods established by the July 31, 2002, final rule. Section 201(b) of the MCSIA clearly provides FMCSA with the statutory authority to establish disqualification periods for DUI offenses committed by CDL holders while operating non-CMVs, that are identical to the disqualification periods for DUI offenses committed while operating a CMV. Although the FMCSA could have proposed and adopted less stringent penalties, the agency chose to impose the maximum penalties provided by the statute to ensure the highest level of safety. To achieve our safety objectives, we must disqualify CDL holders who represent an unacceptable safety risk to the motoring public by failing to refrain from the use of controlled substances, and consuming alcoholic beverages prior to driving a motor vehicle. There is no readily apparent reason why the agency should consider DUI committed by a professional CMV driver to be less severe when committed in a non-CMV during off-duty hours, than in a CMV while on duty. The conviction for such a serious offense in the non-CMV suggests that the CDL holder is more likely to commit the same offense in a CMV, than a CDL holder who has never committed such an offense. The FMCSA

must take action to reduce to the greatest extent practicable, the likelihood of unsafe drivers being allowed to operate CMVs on public roads.

With the publication of the July 31, 2002, final rule, all CDL holders should now be aware that a conviction for DUI while operating a non-CMV could have a significant adverse impact on their driving careers. These drivers have a choice between sharing the road responsibly with other motorists at all times, regardless of the type of vehicle being operated, or engaging in unsafe driving practices with the potential of being subjected to enforcement actions and ultimately disqualification. The agency's decision represents an appropriate use of its statutory authority, and will help to ensure national uniformity and consistency in the administration of the CDL program.

*Issue 2: Less Stringent Penalties for Foreign-Domiciled Drivers*

The Petitioners argued that the penalties discriminate against U.S. drivers because foreign drivers' CDLs are not subject to suspension, cancellation or revocation for the same offenses in non-CMVs. They believe that convictions for non-CMV offenses must be enforced in a non-discriminatory manner against all drivers operating on U.S. highways.

*FMCSA Response:* The FMCSA denies the Petitioners' request because all CDL holders, including foreign domiciled drivers, operating in the U.S. are held to the same standard for offenses committed in the U.S. The agency recognizes that the July 31, 2002, final rule leaves unresolved differences between the consequences for a U.S. driver convicted of a disqualifying offense in a non-CMV, and a foreign domiciled driver who commits similar offenses in his/her country of domicile. However, this is an issue that cannot be resolved through the rulemaking process because it involves offenses in countries that have not adopted laws to disqualify commercial drivers for offenses committed in private vehicles. As indicated in the preamble of the July 31, 2002, final rule, the FMCSA will initiate discussions with Mexico and Canada to modify existing CDL reciprocity agreements to include non-CMV convictions for offenses committed in the drivers' country of domicile.

The FMCSA urges all States to implement the disqualification standards adopted on July 31, 2002, and corrected by today's final rule, because doing so is necessary to safeguard the motoring public. Implementation of the disqualification standards should not be delayed because of concerns about the status of reciprocity negotiations between the U.S., Canada and Mexico. The governments of Canada and Mexico share our commitment to ensuring the safety of cross-border motor carrier operations, and we expect to complete appropriate reciprocity agreements.

*Issue 3: Inconsistency Between the Regulatory Language and MCSIA*

The Petitioners stated that MCSIA provides for disqualification based on a serious offense involving a motor vehicle (other than a commercial motor vehicle) that has resulted in the revocation, cancellation, or suspension of the individual's license. However, the rule adopted by the FMCSA does not include the limiting language concerning the revocation, cancellation, or suspension of the license by the State. The Petitioners argue that rule must be amended to make it consistent with MCSIA.

*FMCSA Response:* The FMCSA agrees with the Petitioners that a CDL driver may only be disqualified for offenses committed while operating a non-CMV if the conviction for the offense results in the revocation, cancellation, or suspension of the driver's license. The preamble to the 2002 final rule includes a discussion that explicitly acknowledges that offenses are not disqualifying unless the State also finds that the circumstances of the offense warrant revocation, cancellation, or suspension. However, Table 2 to § 383.51 does not include the required reference to revocation, cancellation, or suspension. Therefore, the agency is revising Table 2 to include the required reference to revocation, cancellation, or suspension.

**Rulemaking Analyses and Notices**

Under the Administrative Procedure Act (APA)(5 U.S.C. 553(b)) an agency may waive the normal notice and comment requirements if it finds, for good cause, that they are impracticable, unnecessary, or contrary to the public interest. In this case, additional notice and comment are unnecessary. This final rule makes a technical correction to the FMCSA's July 31, 2002, final rule concerning disqualifying offenses committed by CDL holders while operating non-CMVs. This correction is necessary to make the regulatory language in Table 2 of § 383.51 consistent with section 201(b) of MCSIA. The agency requested public comment in response to its May 4, 2001, notice of proposed rulemaking, and intended to adopt the necessary regulatory language on July 31, 2002. However, certain regulatory text was omitted, and the agency must now correct that error. Therefore, the FMCSA finds good cause to adopt this final rule without prior notice or opportunity for public comment [5 U.S.C. 553(b)].

For the same reasons, the FMCSA finds, pursuant to 5 U.S.C. 553(d)(3) that there is good cause for making the rule effective upon publication. The final rule is a technical correction to Table 2 of § 383.51 to make the regulations consistent with MCSIA. Therefore, good cause exists under 5 U.S.C. 553(d) to dispense with the 30-day delay in the effective date requirement and the FMCSA is making the rule effective upon publication in the **Federal Register**. The final rule does not change the susbstance of the requirements.

*Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures*

The FMCSA has determined that this action is not a significant regulatory action within the meaning of Executive Order 12866 or significant within the meaning of Department of Transportation regulatory policies and procedures. Since this rulemaking action makes only technical corrections to the current regulations, it is anticipated that the economic impact of this rulemaking will be minimal; therefore, a full regulatory evaluation is not required. Although the July 2002 final rule establishing the current requirements was a significant regulatory action under section 3(f) of Executive Order 12866, the Office of Management and Budget does not consider this amendment of the final rule to be a significant action.

*Regulatory Flexibility Act*

This action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The original rule did not have a significant effect on a substantial number of small entities, and this rule simply amends Table 2 to § 383.51 to reflect the statutory language in the MCSIA.

*Unfunded Mandates Reform Act of 1995*

This rule does not impose an unfunded Federal mandate, as defined by the Unfunded Mandates Reform Actof 1995 (2 U.S.C. 1532 *et seq.*) that will 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. This rule does not impose a Federal mandate resulting 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. (2 U.S.C. 1531 *et seq.*).

*Executive Order 12988 (Civil Justice Reform)*

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

*Executive Order 13045 (Protection of Children)*

We have analyzed this action under Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks.'' This rule is not economically significant and does involve an environmental risk to health or safety that would disproportionately affect children.

*Executive Order 12630 (Taking of Private Property)*

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

*Executive Order 13132 (Federalism)*

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999, and it has been determined this action does not have substantial direct Federalism implications that would limit the policymaking discretion of the States. This action will not have a significant effect on the States' ability to execute traditional State governmental functions, and any additional administrative cost borne by the States should be negligible. Nothing in this document directly preempts any State law or regulation.

*Executive Order 12372 (Intergovernmental Review)*

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

*Paperwork Reduction Act*

This action does not contain information collection requirements for purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. Although the July 31, 2002, final rule affected the information collection burden associated with OMB Control No. 2126–0011, titled ''Commercial Driver Licensing and Test Standards,'' this rulemaking does not result in any additional changes to the approved information collection.

*National Environmental Policy Act*

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have any effect on the quality of the environment.

*Executive Order 13211 (Energy Supply, Distribution, or Use)*

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. This action is not a significant energy action within the meaning of section 4(b) of the Executive Order because it is not economically significant and not likely to have a significant adverse effect on the supply, distribution, or use of energy. Additionally, the Administrator of the Office of Information and Regulatory Affairs has not designated this rule as a significant energy action. For these reasons, a Statement of Energy Effects under Executive Order 13211 is not required

**List of Subjects in 49 CFR Part 383**

Administrative practice and procedure, Alcohol abuse, Commercial driver's license, Commercial motor vehicles, Drug abuse, Highway safety, Motor carriers, Motor vehicle safety.

In consideration of the foregoing, the FMCSA amends title 49, Code of Federal Regulations, Chapter III, part 383 as set forth below:

1. The authority citation for part 383 continues to read as follows:

**Authority:** 49 U.S.C. 521, 31136, 31301 *et seq.*, 31502; sec. 214 of Pub.L. 106–159, 113 Stat. 1766; and 49 CFR 1.73.

**§ 383.51 [Amended]**

2. Revise Table 2 to § 383.51 to read as follows:

* * * * *

TABLE 2 TO § 383.51

| If the driver operates a motor vehicle and is convicted of: | For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a CMV, a person required to have a CDL and a CDL holder must be disqualified from operating a CMV for . . . | For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a non-CMV, a CDL holder must be disqualified from operating a CMV, if the conviction results in the revocation, cancellation, or suspension of the CDL holder's license or non-CMV driving privileges, for . . . | For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a CMV, a person required to have a CDL and a CDL holder must be disqualified from operating a CMV for . . . | For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a non-CMV, a CDL holder must be disqualified from operating a CMV, if the conviction results in the revocation, cancellation, or suspension of the CDL holder's license or non-CMV driving privileges, for . . . |
|---|---|---|---|---|
| (1) Speeding excessively, involving any speed of 24.1 kmph (15 mph) or more above the posted speed limit. | 60 days | 60 days | 120 days | 120 days. |

TABLE 2 TO § 383.51—Continued

| If the driver operates a motor vehicle and is convicted of: | For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a CMV, a person required to have a CDL and a CDL holder must be disqualified from operating a CMV for . . . | For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a non-CMV, a CDL holder must be disqualified from operating a CMV, if the conviction results in the revocation, cancellation, or suspension of the CDL holder's license or non-CMV driving privileges, for . . . | For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a CMV, a person required to have a CDL and a CDL holder must be disqualified from operating a CMV for . . . | For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a non-CMV, a CDL holder must be disqualified from operating a CMV, if the conviction results in the revocation, cancellation, or suspension of the CDL holder's license or non-CMV driving privileges, for . . . |
|---|---|---|---|---|
| (2) driving recklessly, as defined by State or local law or regulation, including but, not limited to, offenses of driving a motor vehicle in willful or wanton disregard for the safety of persons or property. | 60 days | 60 days | 120 days | 120 days. |
| (3) making improper or erratic traffic lane changes. | 60 days | 60 days | 120 days | 120 days. |
| (4) following the vehicle ahead too closely. | 60 days | 60 days | 120 days | 120 days. |
| (5) Violating State or local law relating to motor vehicle traffic control (other than a parking violation) arising in connection with a fatal accident. | 60 days | 60 days | 120 days | 120 days. |
| (6) driving a CMV without obtaining a CDL. | 60 days | Not applicable | 120 days | Not applicable. |
| (7) driving a CMV without a CDL in the driver's possession[1]. | 60 days | Not applicable | 120 days | Not applicable. |
| (8) driving a CMV without the proper class of CDL and/or endorsements for the specific vehicle group being operated or for the passengers or type of cargo being transported. | 60 days | Not applicable | 120 days | Not applicable. |

[1]*Any individual who provides proof to the enforcement authority that issued the citation, by the date the individual must appear in court or pay any fine for such a violation, that the individual held a valid CDL on the date the citation was issued, shall not be guilty of this offense.*

* * * * *

Issued on: January 22, 2003.

**Annette M. Sandberg,**

*Acting Administrator.*

[FR Doc. 03–2053 Filed 1–28–03; 8:45 am]

BILLING CODE 4910–EX–P

# Proposed Rules

Federal Register
Vol. 68, No. 19
Wednesday, January 29, 2003

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 TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. 2001–NM–232–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Boeing Model 747 Series Airplanes Equipped with General Electric CF6–45 or CF6–50 Series Engines

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This document proposes the adoption of a new airworthiness directive (AD) that is applicable to Boeing Model 747 series airplanes equipped with General Electric CF6–45 and CF6–50 series engines. This proposal would require an inspection to detect chafing of the fuel line or incorrect clearance between the fuel line and pneumatic duct insulation blanket; a fuel leak check and strut drain test; corrective action if necessary; replacement of the outboard strut fuel line coupling O-rings and retaining rings with new parts; replacement of the pneumatic duct boot with a new part; and, for certain airplanes, installation of a flame arrestor and drain line entry screens. This action is necessary to prevent leaking fuel line couplings, chafed fuel lines, restricted or clogged strut drain lines, migrating fluids or vapors toward ignition sources, and flashback of external flame into the strut; these conditions could result in an uncontained engine strut fire. This action is intended to address the identified unsafe condition.

**DATES:** Comments must be received by March 17, 2003.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket 2001–NM–232–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain ''Docket No. 2001–NM–232–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

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

**FOR FURTHER INFORMATION CONTACT:** Dan Kinney, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2666; fax (425) 227–1181.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

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

Submit comments using the following format:

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket 2001–NM–232–AD.'' The postcard will be date stamped and returned to the commenter.

### Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket 2001–NM–232–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

### Discussion

The FAA has received reports of fires inside and outside the outboard struts of Boeing Model 747 series airplanes equipped with General Electric CF6–45 and CF6–50 series engines. The fires were caused by leaking strut fuel line couplings, improperly installed fuel lines that chafed against a pneumatic duct insulation blanket, and clogged or restricted strut drain lines. Fuel leakage into the hot engine compartment and/or onto the hot engine case can ignite and result in a fire. In certain cases, external flame flashback through the strut drain holes has ignited fuel that had leaked and accumulated in the strut. These fires have occurred outside a designated ''fire zone'' where there is no means to detect, contain, or extinguish a fire. All known cases of engine strut fires have occurred on the ground during taxi-in after landing; such fires could result in airplane damage and an emergency evacuation. Leaking fuel line couplings, chafed fuel lines, restricted or clogged strut drain lines, fluids or vapors migrating to ignition sources, and flashback of external flame into the strut, if not corrected, could result in an uncontained engine strut fire.

**Explanation of Relevant Service Information**

The FAA has reviewed and approved the service information listed in the following table:

| Service information | Procedures described |
|---|---|
| Boeing Service Bulletin 747–36–2111, dated February 20, 1992. | Inspection to detect chafing of the fuel line and measure the clearance between the fuel line and the pneumatic duct insulation blanket; and follow-on and corrective actions (including rework of the fuel line by blending nicks and scratches, determining the maximum thickness of the damaged area, and performing a penetrant inspection to detect cracking of the damaged area; remeasuring the clearance between the fuel line and the insulation blanket; adjusting the duct and fuel line positions; and performing repetitive inspections for chafing). |
| Boeing Service Bulletin 747–28–2162, dated July 30, 1992. | Replacement of the number 4 strut fuel tube with a new part if sufficient clearance between the fuel line and the insulation blanket cannot be achieved by incorporation of Service Bulletin 747–36–2111. |
| Boeing Service Bulletin 747–28–2230, dated September 30, 1999. | Fuel pressure leak check of the fuel line in the strut area, a strut drain test for the aft strut drain tubes to detect blockage, and corrective action for any discrepancy. |
| Boeing Service Letter 747–SL–28–052–B, dated August 30, 1998. | Repetitive replacement of the outboard strut fuel line coupling O-rings and retaining rings with new parts. |
| Boeing Service Bulletin 747–36–2118, dated January 28, 1993. | Replacement of the pneumatic duct boot with a new part. |
| Boeing Service Bulletin 747–54–2137, dated February 6, 1992. | Installation of a flame arrestor in each aft condensate drain hole of the engine struts. |
| Boeing Service Bulletin 747–54–2122, Revision 4, dated August 29, 1991. | Installation of a drain line entry screen at each drain tube entry. |

The FAA has reviewed Notice of Status Change 747–54–2122 NSC 2, dated May 14, 1992, which revises Boeing Service Bulletin 747–54–2122, Revision 4, and was issued to notify certain operators of part number changes. The FAA has also reviewed Information Notice 747–54–2122 IN 03, dated August 19, 1999, which was issued to notify operators of errors in certain Figures in Boeing Service Bulletin 747–54–2122, Revision 4.

Accomplishment of the actions specified in the service information is intended to adequately address the identified unsafe condition.

Boeing Service Bulletins 747–28–2230 and 747–36–2122 recommend accomplishment of certain actions specified by other service bulletins; however, those additional actions are not included in this proposed AD because they are required by existing ADs or are not necessary to address the identified unsafe condition of this proposed AD. Those other service bulletins are described in the following table:

| The actions specified in Boeing Service Bulletin— | Are included in— | Which applies to Model 747 series airplanes equipped with— | To require— | Within— |
|---|---|---|---|---|
| 747–28–2155, Revision 3, dated September 28, 1984. | Telegraphic (emergency) AD 86–01–51 R1, amendment 39–5269 (51 FR 10820, March 31, 1986). | GE CF6 engines ..... | Clearing of the engine strut drains. | 72 hours after the effective date of April 18, 1986. |
| 747–28–2160, dated July 23, 1992, or Revision 1, dated December 16, 1993. | AD 95–02–07, amendment 39–9126 (60 FR 8292, February 14, 1995). | Certain GE or Pratt & Whitney T9D series engines. | Installation of a seal on the wing front spar at each engine strut. | 18 months after the effective date of March 16, 1995. |
| 747–54A2117, Revision 1, dated November 8, 1985. | AD 86–08–03, amendment 39–5289 (51 FR 12836, April 16, 1986). | Certain General Electric and Pratt & Whitney engines. | An inspection for cracking in the brace and application of sealant in the strut lower aft bulkhead. | 200/400 landings after the effective date of May 27, 1986. |

In addition, Boeing Service Bulletin 747–54–2122 recommends the prior or concurrent accomplishment of the actions specified in Boeing Service Bulletin 747–54–2083, which addresses hydraulic fluid leak problems; however, those actions would not be required by this proposed AD because there has been no evidence of a recent hydraulic fluid leak problem.

**Explanation of Requirements of Proposed Rule**

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

**Differences Between Proposed AD and Relevant Service Information**

Although Boeing Service Bulletin 747–28–2230 recommends

accomplishing the leak check and drain inspection within 18 months (after the release of the service bulletin), we have determined that an interval of 18 months would not address the identified unsafe condition in a timely manner. In developing an appropriate compliance time for this proposed AD, we considered not only the manufacturer's recommendation, but the degree of urgency associated with addressing the subject unsafe condition, the average utilization of the affected fleet, and the time necessary to perform the actions. In light of all of these factors, we find a 12-month compliance time for completing the proposed actions to be warranted, in that it represents an appropriate interval of time allowable for affected airplanes to continue to operate without compromising safety.

Boeing Service Bulletin 747–36–2111 specifies that, if the ultimate corrected clearance achieved between the fuel line and the pneumatic duct insulation blanket (for any strut position) is 0.50 inch or less, operators may repetitively inspect the area every 1,000 flight hours. However, this proposed AD would require replacement of the fuel tube on the number 4 engine strut position, as specified in Boeing Service Bulletin 747–28–2162, if clearance of at least 0.40 inch cannot be achieved during accomplishment of the actions specified in Boeing Service Bulletin 747–36–2111.

Boeing Service Bulletin 747–54–2122 specifies that accomplishment of some of the actions that are specified in this proposed AD are to be done in accordance with either the Boeing 747 Airplane Maintenance Manual (AMM) or an ''operator's equivalent procedure.'' However, this proposed AD would require that the actions be accomplished in accordance with the procedures specified in the applicable subject of the Boeing 747 AMM. An ''operator's equivalent procedure'' may be used only if approved as an alternative method of compliance in accordance with paragraph (i) of this AD.

In addition, Boeing Service Bulletin 747–36–2111 recommends that operators ''tell Boeing'' if the fuel line is chafed. Operators may report these findings to Boeing, but this proposed AD would not require a report.

The applicability of this proposed AD is different from the effectivity of some of the cited service bulletins. The unsafe condition identified by this proposed AD is limited to the outboard struts on Model 747 series airplanes equipped with General Electric CF6–45 and CF6–50 series engines. However, the effectivity in Service Bulletins 747–54–2122, 747–36–2118, and 747–28–2162, and Service Letter 747–SL–28–052–B is broader to encompass additional features common to other engine model structures not addressed by this proposed AD.

**Cost Impact**

The following table provides the cost estimates to accomplish the proposed actions:

| Boeing service information for proposed actions | Work hours per airplane | Labor rate per hour | Parts cost per airplane | Per-airplane cost | Number of U.S. airplanes affected | U.S. fleet cost |
|---|---|---|---|---|---|---|
| Service Bulletin 747–36–2111 | 10 | $60 | $0 | $600 | 32 | $19,200 |
| Service Bulletin 747–28–2230 | 4 | 60 | 0 | 240 | 32 | 7,680 |
| Service Letter 747-SL–28–052B | 4 | 60 | 0 | 240 | 32 | 7,680 |
| Service Bulletin 747–36–2118 | 10 | 60 | 1,269 | 1,869 | 32 | 59,808 |
| Service Bulletin 747–54–2137 | 48 | 60 | 3,047 | 5,927 | 30 | 177,810 |
| Service Bulletin 747–54–2122 | 56 | 60 | 2,590 | 5,950 | 30 | 178,500 |

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

**Regulatory Impact**

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

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

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Safety.

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

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

**Boeing:** Docket 2001–NM–232–AD.

*Applicability:* Model 747 series airplanes equipped with General Electric CF6–45 or CF6–50 series engines, certificated in any category.

**Note 1:** This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (i) 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 leaking fuel line couplings, chafed fuel lines, restricted or clogged strut drain lines, fluids or vapors migrating to ignition sources, and flashback of external flame into the strut, which could result in uncontained engine strut fire, accomplish the following:

**Inspection for Chafing and Clearance**

**Note 2:** Paragraph (a) of this AD refers to certain portions of Boeing Service Bulletin 747–36–2111, dated February 20, 1992, for information regarding inspection and measurement actions. Further, paragraph (a) of this AD requires replacement of the fuel tube as corrective action for certain repair conditions; that action is not included in the service bulletin. Where this AD and Service Bulletin 747–36–2111 differ, the AD prevails.

(a) Within 1,000 flight hours after the effective date of this AD, perform a detailed inspection to detect chafing of the fuel line and measure the clearance between the fuel line and the insulation blanket on the pneumatic duct; in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–36–2111, dated February 20, 1992. Before further flight, accomplish all applicable corrective actions (including reworking the fuel line, remeasuring the clearance between the fuel line and the insulation blanket, adjusting the pneumatic duct and fuel line positions, adjusting the insulation blanket installation, and inspecting and cleaning the strut and strut drain ports/screens); and, if applicable, repeat the fuel line inspection at the applicable time in the Accomplishment Instructions of the service bulletin. Do the corrective and follow-on actions in accordance with Service Bulletin 747–36–2111. If, after corrective actions have been performed, a clearance of at least 0.40 inch on the number 4 strut cannot be achieved: Before further flight, replace the fuel tube with a new part in accordance with Boeing Service Bulletin 747–28–2162, dated July 30, 1992.

**Note 3:** For the purposes of this AD, a detailed inspection is defined as: ''An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required.''

**Fuel Leak Check and Strut Drain Inspection**

(b) Within 12 months after the effective date of this AD, perform a fuel pressure leak check of the fuel line in the strut area, and perform a strut drain test for the aft strut drain tubes to detect blockage; in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–28–2230, dated September 30, 1999. If any discrepancy is found, before further flight, perform applicable corrective actions (including performing the fuel pressure check procedure, clearing the strut drain tubes, and repairing seal leaks) in accordance with the service bulletin.

**Replacement of O-Rings and Retaining Rings**

(c) At the earliest of the times specified by paragraphs (c)(1), (c)(2), and (c)(3) of this AD, replace the fuel line coupling O-rings and retaining rings in the outboard strut positions with new Nitrile O-rings, part number MS29513–330, in accordance with Boeing Service Letter 747–SL–28–052–B, dated August 30, 1998. Replace the rings thereafter at the time specified by paragraph (d) of this AD.

(1) Within 21,000 flight hours after the effective date of this AD.

(2) Within 5 years after the effective date of this AD.

(3) Before further flight after a coupling has been disassembled for any reason.

**Repetitive Ring Replacement**

(d) Replace the rings as required by paragraph (c) of this AD at intervals not to exceed the earliest of the times specified by paragraphs (d)(1), (d)(2), and (d)(3) of this AD.

(1) Every 21,000 flight hours.

(2) Every 5 years.

(3) Before further flight after a coupling has been disassembled for any reason.

**Replacement of Pneumatic Duct Boot**

(e) At the earlier of the times specified in paragraphs (e)(1) and (e)(2) of this AD: Replace the pneumatic duct boot with a new part, in accordance with Boeing Service Bulletin 747–36–2118, dated January 28, 1993.

(1) Within 12 months after the effective date of this AD; or

(2) Before further flight following detection of any torn boot; or within 5 days following detection of any torn boot, provided there are no leaks, liquid fuel, or vapors in the affected strut compartment.

**Installation of Flame Arrestor**

(f) For airplanes identified in Boeing Service Bulletin 747–54–2137, dated February 6, 1992: Within 24 months after the effective date of this AD, install a flame arrestor in each aft condensate drain hole of the engine struts, in accordance with the Accomplishment Instructions of the service bulletin.

**Installation of Drain Screen**

(g) For Group 2 and Group 4 airplanes listed in Boeing Service Bulletin 747–54–2122, Revision 4, dated August 29, 1991; as revised by Notice of Status Change 747–54–2122 NSC 2, dated May 14, 1992; and Information Notice 747–54–2122 IN 03, dated August 19, 1999: Within 24 months after the effective date of this AD, install a drain line entry screen at each drain tube entry at the outboard strut positions, in accordance with the Accomplishment Instructions of the service bulletin. Where the service bulletin specifies that certain actions may be accomplished in accordance with an operator's ''equivalent procedure'': Those actions must be accomplished in accordance with the applicable Boeing 747 Airplane Maintenance Manual subject specified in the service bulletin.

(h) Installation of drain screens before the effective date of this AD is also acceptable for compliance with the requirements of paragraph (g) of this AD if accomplished in accordance with Boeing Service Bulletin 747–54–2122, Revision 1, dated December 14, 1989; Revision 2, dated May 3, 1990; or Revision 3, dated October 4, 1990.

**Alternative Methods of Compliance**

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

**Note 5:** Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

**Special Flight Permits**

(j) 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 airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on January 22, 2003.

**Vi L. Lipski,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 03–1957 Filed 1–28–03; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

## 18 CFR Part 35

**[Docket No. RM01–12–000]**

## Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design

January 22, 2003.

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Notice of technical conference.

**SUMMARY:** Commission staff will convene a technical conference on February 4, 2003 to discuss issues relating to the proposed rules for cyber-security of entities interacting on the nation's electric grid. The conference will build upon the concepts found in

the original and revised cyber-security standards, with particular focus on issues pertaining to implementation and timing of, and compliance with, the standards. There will be an opportunity for interested persons to make very brief public statements at the conference.

**DATES:** The conference will take place on February 4, 2003.

**ADDRESSES:** The conference will take place at: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

**FOR FURTHER INFORMATION CONTACT:** Sarah McKinley, Office of External Affairs, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8004.

**SUPPLEMENTARY INFORMATION:**

**Notice of Technical Conference**

1. Take notice that a technical conference will be held on February 4, 2003, from approximately 9:30 a.m. to 3 p.m. in Hearing Room 1 on the second floor of the offices of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC. The goal of the conference is to discuss issues relating to the proposed rules for cyber-security of entities interacting on the nation's electric grid.

2. The Commission's proposed cyber-security standard was described in section M and appendix G of the Notice of Proposed Rulemaking (NOPR) published in this docket on July 31, 2002. That proposal was developed by the Critical Infrastructure Protection Advisory Group (CIPAG) of the North American Electric Reliability Council (NERC), which has since proposed a set of revisions to the standard that have been approved by the NERC Board.

3. Copies of the NOPR security proposal may be obtained from: *http://www.ferc.gov/Electric/RTO/Mrkt-Strct-comments/discussion_paper.htm.* Copies of the NERC security proposal are available in Attachment A at: *ftp://www.nerc.com/pub/sys/all_updl/docs/ferc/RM01-12-000-SMD.pdf.*

4. This conference will build upon the concepts found in the original and revised cyber-security standards. The discussions will focus on the following questions pertaining to implementation and timing of, and compliance with, the standards:

• When should compliance with the standard become mandatory? The original NOPR would require compliance in January 2004, but recent discussions have suggested that this standard be advisory in 2004 and mandatory in 2005.

• What is the best way to establish a verification and compliance process for the standards? What is the current and expected process that NERC uses to determine compliance with the NERC standards, and would it be appropriate for the cyber-security standards as well? Should regular audits be used as part of the compliance and verification effort? Should there be a role for third-party testing or investigation of complaints about the compliance of wholesale market participants?

• What are the appropriate penalties and remedies for non-compliance or inadequate compliance with the cyber-security standards, once they are in effect?

• Should new technical issues that were neither technologically nor commercially ripe for resolution in the proposed standard be identified and recognized now so the wholesale industry and the information technology industry can anticipate the issues and requirements ahead? What issues and cyber-security challenges were not addressed in the proposed standard but should be ready for inclusion in the next standard, if the next standard is adopted in two to three years?

5. Other than with respect to the last bullet above, this workshop will not discuss the substance of the NERC-approved cyber-security standard.

6. The bulk of this workshop will be discussion between attendees. Commission staff has asked selected individuals to speak at this conference, and is not entertaining requests to make presentations. However, interested persons will be permitted to make very brief public statements that are not repetitive of materials already filed in the public record of this docket.

7. All interested persons may attend the technical conference, and registration is not required. However, in-person attendees are asked to notify the Commission of their intent to attend by sending an e-mail message to *conferences@ferc.gov.*

8. Transcripts of the conference will be immediately available from Ace Reporting Company (202–347–3700 or 1–800–336–6646), for a fee. They will be available for the public on the Commission's FERRIS system two weeks after the conference. Additionally, Capitol Connection offers the opportunity for remote listening of the conference for a fee. Persons interested in this service should contact David Reininger or

9. Julia Morelli at the Capitol Connection (703–993–3100) as soon as possible or visit the Capitol Connection Web site at *http://www.capitolconnection.gmu.edu* and click on ''FERC.''

10. For more information about the conference, please contact Sarah McKinley at (202) 502–8004 or *sarah.mckinley@ferc.gov.*

**Magalie R. Salas,**

*Secretary.*

[FR Doc. 03–1972 Filed 1–28–03; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF THE TREASURY

## Bureau of Alcohol, Tobacco and Firearms

## 27 CFR Part 55

**[Notice No. 969]**

**RIN 1512–AC80**

## Explosive Pest Control Devices (2002R–285P)

**AGENCY:** Bureau of Alcohol, Tobacco and Firearms (ATF), Department of the Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** Based, in part, on a petition we have received, the Bureau of Alcohol, Tobacco and Firearms (ATF) is proposing to amend the regulations to provide a limited exemption from the requirements of part 55 for individuals having a legitimate need to use explosive pest control devices for wildlife management purposes. The proposed regulations are intended to facilitate the acquisition of these devices by those individuals who have a legitimate pest control need.

**DATES:** ATF must receive all comments on or before February 28, 2003.

**ADDRESSES:** Send written comments to: James P. Ficaretta, Program Manager; Room 5150; Bureau of Alcohol, Tobacco and Firearms; PO Box 50221; Washington, DC 20091–0221; *ATTN: Notice No. 969.* Written comments must be signed and may be of any length.

E-mail comments may be of any length and should be submitted to: *nprm@atf.gov.* E-mail comments must contain your name, mailing address, and e-mail address. They must also reference this notice number and be legible when printed on paper that is 8½″ × 11″ in size. We will treat e-mail as originals and we will not acknowledge receipt of e-mail. See the Public Participation section at the end of this notice for requirements for submitting written comments by facsimile.

**FOR FURTHER INFORMATION CONTACT:** James P. Ficaretta, Firearms, Explosives, and Arson, Bureau of Alcohol, Tobacco and Firearms, 650 Massachusetts

Avenue, NW., Washington, DC 20226; telephone (202) 927–8210.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Bureau of Alcohol, Tobacco and Firearms (ATF) is responsible for implementing Title XI, Regulation of Explosives (18 United States Code (U.S.C.) chapter 40), of the Organized Crime Control Act of 1970. One of the stated purposes of the Act is to reduce the hazards to persons and property arising from misuse of explosive materials. Under section 847 of title 18, U.S.C., the Secretary of the Treasury ''may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter.'' Regulations that implement the provisions of chapter 40 are contained in title 27, Code of Federal Regulations (CFR), part 55 (''Commerce in Explosives'').

The term ''explosive materials,'' as defined in section 55.11, means explosives, blasting agents, water gels, and detonators. The term includes, but is not limited to, all items in the ''List of Explosive Materials'' provided for in section 55.23. Section 55.202 provides that there are three classes of explosive materials: (1) High explosives (*e.g.,* dynamite, flash powders, and bulk salutes); (2) low explosives (*e.g.,* black powder, safety fuses, igniters, igniter cords, fuse lighters, and display fireworks (except bulk salutes)); and (3) blasting agents (*e.g.,* ammonium nitrate-fuel oil and certain water gels).

Under the law and its implementing regulations (section 55.41), persons engaging in the business of manufacturing, importing, or dealing in explosive materials are required to be licensed. In general, persons acquiring or receiving explosive materials in interstate commerce for their own use are required to obtain a permit.

Licensees and permittees must comply with the provisions of part 55, including those relating to storage and other safety requirements, as well as recordkeeping and theft reporting requirements. However, certain items and activities have been given exempt status under the law (18 U.S.C. 845) and its implementing regulations (section 55.141). For example, the provisions of part 55 do not apply to the transportation, shipment, receipt, or importation of explosive materials for delivery to any agency of the United States or to any State or its political subdivision.

**Explosive Pest Control Devices**

Explosive pest control devices contain black powder, flash powder, and/or a similar pyrotechnic composition. Many of these devices contain flash powder, a high explosive, as the component that produces the audible report. These devices are used for wildlife management purposes as an effective deterrent and are necessary for pest control efforts within the agricultural, aquacultural (commercial fishing operations), horticultural, and aviation industries. Commonly known as ''bird bombs,'' ''shell crackers,'' ''seal bombs,'' etc., explosive pest control devices are used to deter wildlife pests without harming them.

Generally, the current regulations in part 55 require that persons acquiring or receiving explosive materials in interstate commerce must possess a license or permit. Thus, prior to acquiring any explosive pest control devices in interstate commerce, persons must submit an application for a license or permit to ATF along with the appropriate fee. The issuance of a license or permit can be a lengthy process. Consequently, the threat and damage to crops, aircraft, etc., may have long passed before a person with a legitimate need for the devices has obtained the necessary license or permit. In addition, the requirement to obtain a license or permit can be cost prohibitive, particularly in instances where persons have only an intermittent need for using explosive pest control devices.

**Reed-Joseph Petition**

ATF received a petition, dated April 30, 2001, filed by Reed-Joseph International Company (Reed-Joseph), requesting an amendment of the explosives regulations. Specifically, Reed-Joseph requested an amendment of section 55.141(a) to provide that the requirements of part 55 not apply to the importation and distribution of certain 15 mm and 18.2 mm pyrotechnic devices used for wildlife damage control purposes. As suggested by Reed-Joseph, a new exception would specify that the provisions of part 55 would not apply to:

The importation and distribution of 15 MM and 18.2 MM pyrotechnic devices for animal damage control purposes with U.S. Department of Transportation ''Classification of Explosives'' as follows:

*U.N. Proper Shipping Name and Number:* Articles, Explosive, n.o.s., UN 0471. *U.N. Classification Code:* 1.4E. *Reference Number:* EX–9810074. *Product Designation/Part Number:* (F105 AZ F 0626 073 Ind A). CAPA Cartridge (18.2 MM). and

*U.N. Proper Shipping Name and Number:* Articles, Explosive, n.o.s., UN 0349. *U.N. Classification Code:* 1.4 S. *Reference Number:* EX–9806011. *Product Designation/Part Number:* Screamer Siren Scare Cartridge 15 MM. and

*U.N. Proper Shipping Name and Number:* Articles, Explosive, n.o.s. (Bird scaring devices), UN 0471. *U.N. Classification Code:* 1.4 E. *Reference Number:* EX–9704086. *Product Designation/Part Number:* Report Cartridge—Bird Banger 15 MM. and

*U.N. Proper Shipping Name and Number:* Articles, Explosive, n.o.s. (Bird scaring devices), UN 0471. *U.N. Classification Code:* 1.4 E. *Reference Number:* EX–8602015. *Product Designation/Part Number:* Pest Control Cartridge (15 MM). and

*U.N. Proper Shipping Name and Number:* Articles, Explosive, n.o.s. (Bird scaring devices), UN 0349. *U.N. Classification Code:* 1.4 S. *Reference Number:* EX–8304001. *Product Designation/Part Number:* Bird Whistler (15 MM).

In its petition, Reed-Joseph states that to its knowledge, no 15 mm or 18.2 mm wildlife damage control pyrotechnic devices are manufactured in the United States and that there are only two companies that import and distribute 15 mm or 18.2 mm pyrotechnics used for wildlife damage control, Reed-Joseph and Sutton Ag Enterprises of Salinas, California. As such, the petitioner contends that by limiting exemptions to 15 mm and 18.2 mm wildlife damage control pyrotechnics imported by reputable and licensed firms, ATF will be able to separate firms meeting legitimate wildlife control damage control needs from those that will sell these devices to the general public. The petitioner also states that these pyrotechnics ''may only be fired from hand-held launchers that use .22 caliber blank cartridges as ignition source or Very-type flare launchers.''

**Discussion/Proposed Amendments**

ATF recognizes that the use of explosive pest control devices can be an important part of an effective wildlife management program within the agricultural, aquacultural, horticultural, and aviation industries. We also recognize that the current regulations in part 55 impose a significant hardship on these affected industries, particularly with respect to licensing and permit requirements and requirements concerning the storage of explosives. As indicated, farmers, ranchers, etc. often have an immediate need for these pest control devices and any delay in

acquiring them can result in serious and significant consequences.

Accordingly, we are proposing to amend the regulations to provide a limited exemption from the requirements of part 55 for persons having a legitimate need to use explosive pest control devices. As proposed, the term ''explosive pest control device'' will be defined as any explosive device that is designed and intended solely for use in controlling wildlife pests and that has a container that is a cardboard/pasteboard-type tube not exceeding 4 inches in length and 3/4 inch in diameter or a shotgun shell type container. Explosive pest control devices may contain only pyrotechnic compositions, *e.g.*, black powder, flash powder, or smokeless powder. The component that produces the audible report may not contain more than 40 grains (2.592 grams) of explosive composition. These devices must have been tested, classified, and approved by the U.S. Department of Transportation.

The proposed definition of the term ''explosive pest control device'' is not limited to 15 mm and 18.2 mm wildlife damage control pyrotechnic devices (that can only be fired from hand-held launchers) as requested by Reed-Joseph in its petition. Based on information we have obtained, it is clear that there are many types of explosive pest control devices available to those persons who have legitimate pest control needs. For example, according to the U.S. Department of Agriculture, problems associated with large concentrations of birds, *e.g.*, depredation of agricultural crops, creation of health hazards, etc., can be reduced through the use of 12-gauge exploding shells (also known as ''shell crackers'') fired from a shotgun, or 15 mm or 17 mm pyrotechnics fired from a pistol. The Department of Agriculture states that rope firecrackers (also known as ''rope salutes'') are also useful in frightening birds. With this particular device, the fuses of large firecrackers are inserted through cotton rope. As the rope burns, the fuses are ignited.

To ensure that explosive pest control devices will not be obtained for illicit purposes, the proposed regulations require that persons acquiring such devices must complete an ATF form certifying, under penalty of perjury, that their use of the devices will be solely for legitimate wildlife pest control purposes and that they are not prohibited by law from possessing explosive materials. The form will be retained by the licensee or permittee as part of his permanent records.

In considering the appropriate storage of explosive pest control devices, we have noted that these devices often contain flash powder as the audible charge used to frighten wildlife pests. Therefore, they are considered high explosives and would ordinarily be required to be stored in a type-1 or type-2 storage magazine. ATF believes that persons acquiring explosive pest control devices will, for the most part, be storing these devices at intermittent times for specific uses and will only be storing small quantities. In addition, we believe that acquiring type-1 and type-2 explosives storage magazines will be cost prohibitive for most end-users due to the infrequent need and use of these devices. Accordingly, we are proposing that explosive pest control devices that are maintained in their original shipping packages may be stored in a type-4 magazine or other similar storage container that is approved by the Director in accordance with the provisions of § 55.22 and that provides an equivalent level of safety and security. We believe that this will ensure a sufficient level of security from theft and, if the explosive pest control devices are maintained in their original shipping packages, will provide a sufficient safeguard against accidental mass explosion.

Except as provided, the proposed regulations do not apply to persons operating businesses that provide on-site wildlife pest control services using explosive pest control devices. Such persons will be required to obtain, at a minimum, a Federal explosives permit and must comply with all applicable provisions of 18 U.S.C. chapter 40 and the regulations in part 55. Unlike farmers and others whose crops, etc., might be endangered if they were made to await issuance of an explosives permit, businesses providing pest control services using explosive pest control devices do not operate under the same time constraints. Moreover, these businesses are likely to maintain large quantities of explosive pest control devices. Similarly, those engaged in the business of dealing, importing, and/or manufacturing explosive pest control devices must obtain Federal explosives licenses and must comply with the applicable provisions of 18 U.S.C. chapter 40 and the regulations in part 55.

## How This Document Complies With the Federal Administrative Requirements for Rulemaking

### *A. Executive Order 12866*

We have determined that this proposed regulation is not a significant regulatory action as defined by Executive Order 12866. Therefore, a Regulatory Assessment is not required.

### *B. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. We hereby certify that this proposed regulation, if adopted, will not have a significant economic impact on a substantial number of small entities. Indeed, the proposed regulations will reduce the burden placed on small businesses.

### *C. Paperwork Reduction Act*

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the Office of Management and Budget, Attention: Desk Officer for the Bureau of Alcohol, Tobacco and Firearms, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Chief, Document Services Branch, Room 3110, Bureau of Alcohol, Tobacco and Firearms, at the address previously specified. Comments are specifically requested concerning:

- Whether the proposed collections of information are necessary for the proper performance of the functions of the Bureau of Alcohol, Tobacco and Firearms, including whether the information will have practical utility;
- The accuracy of the estimated burden associated with the proposed collections of information (*see* below);
- How the quality, utility, and clarity of the information to be collected may be enhanced; and
- How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology.

The collections of information in this proposed regulation are in 27 CFR 55.141(c). This information is required to ensure that persons acquiring explosive pest control devices will be using such devices for legitimate wildlife pest control purposes. The collections of information are

mandatory. The likely respondents are individuals and businesses.

- Estimated total annual reporting and/or recordkeeping burden: 3,000 hours.
- Estimated average burden hours per respondent and/or recordkeeper: 0.33 hours (20 minutes).
- Estimated number of respondents and/or recordkeepers: 4,500.
- Estimated annual frequency of responses: 2.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget. This collection is associated with the forthcoming certification form, ATF F 5430.1. The estimated burden for this regulation revision is 1 hour.

**Public Participation**

We are requesting comments on the proposed regulations from all interested persons. In addition, we are specifically requesting comments on the clarity of this proposed rule and how it may be made easier to understand.

Comments received on or before the closing date will be carefully considered. Comments received after that date will be given the same consideration if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before the closing date.

ATF will not recognize any material in comments as confidential. Comments may be disclosed to the public. Any material that the commenter considers to be confidential or inappropriate for disclosure to the public should not be included in the comment. The name of the person submitting a comment is not exempt from disclosure.

*A. Submitting Comments by Fax*

You may submit written comments by facsimile transmission to (202) 927–8525. Facsimile comments must:

- Be legible;
- Reference this notice number;
- Be 8½″ × 11″ in size;
- Contain a legible written signature; and
- Be not more than five pages long.

We will not acknowledge receipt of facsimile transmissions. We will treat facsimile transmissions as originals.

*B. Request for Hearing*

Any interested person who desires an opportunity to comment orally at a public hearing should submit his or her request, in writing, to the Director within the 30-day comment period. The Director, however, reserves the right to determine, in light of all circumstances, whether a public hearing is necessary.

*C. Disclosure*

Copies of this notice and the comments received will be available for public inspection by appointment during normal business hours at: ATF Reference Library, Room 6480, 650 Massachusetts Avenue, NW., Washington, DC; telephone (202) 927–7890.

*D. Regulation Identification Number*

A regulation identification 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 the **Federal Register** in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

*E. Drafting Information*

The author of this document is James P. Ficaretta, Firearms, Explosives, and Arson, Bureau of Alcohol, Tobacco and Firearms.

**List of Subjects in 27 CFR Part 55**

Administrative practice and procedure, Authority delegations, Customs duties and inspection, Explosives, Hazardous materials, Imports, Penalties, Reporting and recordkeeping requirements, Safety, Security measures, Seizures and forfeitures, Transportation, and Warehouses.

**Authority and Issuance**

For the reasons discussed in the preamble, the Bureau of Alcohol, Tobacco and Firearms proposes to amend 27 CFR Part 55 as follows:

## PART 55—COMMERCE IN EXPLOSIVES

**Paragraph 1.** The authority citation for 27 CFR Part 55 continues to read as follows:

**Authority:** 18 U.S.C. 847.

**Par. 2.** Section 55.141 is amended by adding new paragraph (c) to read as follows:

**§ 55.141 Exemptions.**

* * * * *

(c) *Explosive pest control devices.* (1) For purposes of this paragraph (c), ''explosive pest control device'' means any explosive device that is designed and intended solely for use in controlling wildlife pests and that has a container that is a cardboard/pasteboard-type tube not exceeding 4 inches in length and ¾ inch in diameter or a shotgun shell type container. Explosive pest control devices may contain only pyrotechnic compositions, *e.g.*, black powder, flash powder, or smokeless powder. The component that produces the audible report may not contain more than 40 grains (2.592 grams) of explosive composition. Explosive pest control devices must have been tested, classified, and approved by the U.S. Department of Transportation.

(2)(i) Except for the provisions applicable to persons required under subpart D to obtain licenses or permits, this part does not apply to the receipt, possession, transportation, or shipment of explosive pest control devices when acquired by persons who have a legitimate wildlife pest control use for the devices and who have completed ATF Form 5400.XX certifying, under penalty of perjury, that their use of the devices will be for legitimate wildlife pest control purposes. Form 5400.XX will be retained by the licensee or permittee as part of his permanent records in accordance with § 55.121. This exemption does not apply to persons operating businesses that provide on-site wildlife pest control services using explosive pest control devices.

(ii) Explosive pest control devices are subject to the storage requirements prescribed in subpart K; however, explosive pest control devices that will be used for legitimate wildlife pest control purposes may be stored in a type-4 magazine or other similar storage container that is approved by the Director in accordance with the provisions of § 55.22 and that provides an equivalent level of safety and security if such devices remain in packaging designed to prevent mass detonation (*e.g.*, the type of packaging in which explosive pest control devices are generally shipped).

Signed: December 18, 2002.

**Bradley A. Buckles,**

*Director.*

Approved: January 14, 2003.

**Timothy E. Skud,**

*Deputy Assistant Secretary, (Regulatory, Tariff and Trade Enforcement).*

[FR Doc. 03–1945 Filed 1–28–03; 8:45 am]

BILLING CODE 4810–31–P

**DEPARTMENT OF THE TREASURY**

**Bureau of Alcohol, Tobacco and Firearms**

**27 CFR Part 55**

**[Notice No. 968]**

**RIN 1512–AB48**

## Commerce in Explosives (2000R–9P)

**AGENCY:** Bureau of Alcohol, Tobacco and Firearms (ATF), Department of the Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Bureau of Alcohol, Tobacco and Firearms (ATF) is issuing this notice of proposed rulemaking, in part, pursuant to the Regulatory Flexibility Act (RFA) which requires an agency to review within ten years of publication, rules for which an agency prepared a final regulatory flexibility analysis addressing the impact of the rule on small businesses or other small entities. Based on comments we have received in response to the RFA analysis, this document proposes amendments to the explosives regulations relating to fireworks. In addition, this document proposes to incorporate into the regulations the provisions of an ATF Ruling 76–18, concerning alternate construction standards for storage facilities for explosive materials. This document also proposes amendments to the regulations that have been initiated by ATF, as well as amendments that have been proposed by members of the explosives industry.

**DATES:** Comments must be received on or before April 29, 2003.

**ADDRESSES:** Send written comments to: James P. Ficaretta, Program Manager; Room 5150; Bureau of Alcohol, Tobacco and Firearms; P.O. Box 50221; Washington, DC 20091–0221; *ATTN: Notice No. 968.* Written comments must be signed and may be of any length.

E-mail comments may be submitted to: *nprm@atf.gov.* E-mail comments must contain your name, mailing address, and e-mail address. They must also reference this notice number and be legible when printed on paper that is 8½″ x 11″ in size. We will treat e-mail as originals and we will not acknowledge receipt of e-mail. See the Public Participation section at the end of this notice for requirements for submitting written comments by facsimile.

**FOR FURTHER INFORMATION CONTACT:** James P. Ficaretta, Firearms, Explosives, and Arson, Bureau of Alcohol, Tobacco and Firearms, 650 Massachusetts Avenue, NW., Washington, DC 20226, telephone (202) 927–8210.

**SUPPLEMENTARY INFORMATION:**

### I. Background

*A. T.D. ATF–293*

On February 5, 1990, ATF published a final rule in the **Federal Register** amending certain regulations contained in 27 CFR part 55 (T.D. ATF–293, 55 FR 3717). The final rule, which became effective on March 7, 1990, implemented storage and recordkeeping requirements for industry members engaged in manufacturing, importing, dealing in, or using fireworks and implemented the provisions of Public Law 99–308, 100 Stat. 449 (1986) relating to black powder. Some of the major provisions of the amendments were:

1. Extending the definition of high explosives to cover, for storage purposes, flash powder and bulk salutes, since these materials can be made to detonate by means of a blasting cap when unconfined (ATF has subsequently held that flash powder and bulk salutes are high explosives for all purposes of part 55);

2. Limiting to no more than 10 pounds the amount of flash powder used in special (display) fireworks that can be kept outside an approved magazine and in any one processing building during a day's assembling operations;

3. Limiting to no more than 500 pounds the amount of other explosive materials that can be kept outside an approved magazine and in any processing building or area during a day's assembling operations;

4. Requiring that, under certain conditions, processing buildings or areas holding no more than 10 pounds of flash powder or 500 pounds of other explosive materials used in special fireworks be located in accordance with the table of distances in section 55.218;

5. Establishing new minimum separation of distance tables applicable to fireworks plants, fireworks process buildings, and fireworks plant magazines;

6. Amending the recordkeeping requirements to include information regarding quantity and description of special fireworks; and

7. Eliminating the recordkeeping requirements for licensees and permittees selling or disposing of exempt quantities of black powder for sporting, recreational, or cultural purposes in antique firearms or antique devices.

*B. Regulatory Flexibility Act—Periodic Review of Rules*

Section 610 of the Regulatory Flexibility Act (RFA), 5 U.S.C. 610, requires an agency to review within 10 years of publication rules for which the agency prepared a final regulatory flexibility analysis addressing the impact of the rule on small businesses or other small entities. In that regard, ATF prepared a final regulatory flexibility analysis with respect to T.D. ATF–293. (*See* 55 FR 3719.)

The periodic review of regulations under section 610(b) of RFA requires agencies to consider the following factors: (1) The continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other Federal rules and, to the extent feasible, with State and local governmental rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

*C. Notice No. 845*

To comply with section 610 of RFA, on January 10, 1997, we published a General Notice in the **Federal Register** (Notice No. 845, 62 FR 1386) initiating the review of T.D. ATF–293. In the notice we requested comments from members of the explosives industry and other interested persons as to the effectiveness of the regulations issued in that final rule. We also reviewed the regulations issued in T.D. ATF–293 addressing the factors specified in section 610(b) of RFA, which include the continued need for the rule, the nature of the complaints received, the complexity of the rule, the extent to which the rule overlaps, duplicates, or conflicts with other Federal rules, and changes in the area affected by the rule.

The comment period for Notice No. 845 closed on April 10, 1997.

### II. Notice No. 845—Analysis of Comments

We received six comments in response to Notice No. 845. Two commenters recommended amendments to the marking requirements for fireworks as set forth in section 55.109.

One commenter suggested that this section require only a part number and size of shell. We are not proposing this suggestion since it would negatively affect the traceability of fireworks. Generally, licensees and permittees must record the manufacturer's marks of

identification on all explosives they receive. These requirements help ensure that explosive materials can be effectively traced for criminal enforcement purposes, *i.e.*, the explosives can be tracked through the records kept by licensees and permittees. This process often provides valuable information in explosion and bombing investigations and is useful for inspection purposes in verifying inventory and proper conduct of business practices.

The other commenter suggested that this section be amended to require the size and type of shell and a date of production, omitting the shift code. ATF believes that the additional burden of requiring each shell to be marked with the size and type of shell is not warranted because it would provide no additional information useful to ATF in tracing the origin of explosives used in crime. Therefore, we are not proposing this portion of the suggestion. However, we agree that amending the date code to omit the shift of manufacture would not significantly affect traceability in instances where fireworks manufacturers are operating only a single shift. This issue is being addressed in a separate rulemaking proceeding. Accordingly, we are not now proposing this suggestion.

Two comments addressed the recordkeeping requirements for display fireworks aerial shells under sections 55.123 and 55.124. The commenters stated that the current requirement that all manufacturer's marks of identification be recorded for acquisitions and dispositions is burdensome to proprietors due to large numbers of shells manufactured, acquired, and disposed of in most fireworks businesses. The commenters suggested that recordkeeping requirements for manufacture, acquisition, and distribution of aerial fireworks shells be amended to require that the number and size of shells be recorded in lieu of the current requirement that all manufacturer's marks be recorded. We believe that adoption of this suggestion would have a significant negative effect on our ability to trace fireworks. To trace fireworks, ATF must have access to markings reflecting the name of the manufacturer, as well as the location and date of manufacture. Without these markings, tracing is impossible. In consideration of ATF's mission to reduce violent crime and protect public safety, we are not proposing this suggestion.

We received four comments regarding the classification of flash powder as a high explosive. As specified in section 55.202(a), ''high explosives'' are explosive materials that can be caused to detonate by means of a blasting cap when unconfined (*e.g.*, dynamite, flash powders, and bulk salutes).

Two commenters contended that this classification was not appropriate and they questioned the validity of past tests on flash powder. ATF may rely upon several sources for information and expertise regarding explosive materials, including ATF and industry experts, associations (*e.g.*, the National Fire Protection Association (NFPA)), publications, and scientific tests. According to ATF's explosives experts and others, flash powders can detonate when unconfined. Further, ATF's classification of flash powder as a high explosive is consistent with the NFPA 1124 (''Code for the Manufacture, Transportation, and Storage of Fireworks and Pyrotechnic Articles'') recommendation that bulk flash powders be stored in accordance with the regulations governing storage for high explosives (section 55.218). In the interest of public safety, we are not proposing to change the classification of flash powder.

Another commenter suggested that ATF provide a better description of flash powder based on its chemical makeup. Due to the variety of combinations of fuels and oxidizers that can be used to make flash powder, we believe that basing a definition solely on the chemical makeup would prove cumbersome and may restrict ATF's discretion to accurately determine whether new explosive materials are flash powders. Furthermore, the definition that is being proposed in this notice is sufficient to enable ATF to accurately classify the various types of flash powders. Therefore, we are not proposing this suggestion.

The fourth commenter suggested that the regulations be revised to state that in addition to flash powder, ''any specific quantity of pyrotechnic composition capable of detonation by means of a blasting cap when unconfined'' is a high explosive. We believe that this is unnecessary because the definition of high explosives found at section 55.202(a) prescribes that all explosive compositions that can be caused to detonate when unconfined are to be classified as high explosives. Accordingly, we are not proposing this suggestion.

ATF received four comments regarding operations in fireworks process buildings as follows:

1. Current regulations at sections 55.221 and 55.222 mandate that no more than 10 pounds of flash powder be present in any fireworks process building. Three commenters contended that the 10-pound limit is overly restrictive. They suggested increasing the maximum allowable quantity of flash powder in a fireworks process building to 50 pounds. Due to the volatile nature of flash powder, we believe that allowing more than 10 pounds of flash powder in a fireworks process building would pose an excessive and unnecessary risk of injury to employees in the fireworks plant and to the general public.

2. All of the commenters argued that the 500-pound limitation on pyrotechnic compositions used in a process building or area is too restrictive. One commenter suggested that in-process compositions and materials not be considered explosives for tables of distances purposes. ATF believes that, due to the possibility for accidental explosions of pyrotechnic compositions, it is in the interest of public safety to require that pyrotechnic compositions in assembly processes be subject to table of distances requirements. Therefore, we are not proposing to exempt in-process materials from the regulations.

3. Two commenters suggested that partially completed display fireworks be allowed to remain in process buildings overnight. They argued that the movement of explosives to and from magazines over the course of a business day may have an adverse effect on safety. They suggested that the buildings could be ''securely locked'' when unoccupied. ATF has adopted minimum security standards for the storage of explosives, including construction and locking requirements. Permanent magazines used for overnight storage of explosives must meet the prescribed minimum standards. Further, we believe that the employment of proper safety practices when handling or moving explosive materials used in the assembly of fireworks will minimize safety risks. The threat to public safety posed by leaving display fireworks components overnight in process buildings outweighs any risks associated with the movement of the materials to and from storage magazines. Therefore, we are not proposing this suggestion.

4. Two commenters suggested that ATF adopt by reference NFPA 1124 standards to establish limits for pyrotechnic materials in process buildings. That is, the commenters suggested that ATF's regulations be amended to require persons to comply with NFPA 1124 standards. ATF relies upon groups such as the American Pyrotechnics Association (APA) and the NFPA for guidance on certain

explosives issues. ATF often incorporates sections of NFPA guidelines into its regulations. However, adopting an outside organization's guidelines by reference may limit ATF's control over its own regulations because regulatory requirements could be changed based upon decisions made by NFPA to revise its code. Therefore, we are not proposing to adopt the NFPA standards by reference.

5. Finally, two commenters suggested that the 500-pound limitation (on the amount of pyrotechnic compositions allowed in fireworks process buildings) not apply to drying operations that are part of the manufacturing process and that these operations be subject to the table of distances in section 55.219. The tables at sections 55.222 and 55.223 currently require that process operations, including drying, be located specific distances from, among other things, fireworks process and nonprocess buildings, fireworks plant buildings, and fireworks shipping buildings. The table at section 55.219 applies to the storage of low explosives other than display fireworks. Although some drying operations may present less of a mass explosion hazard than others, we believe that the application of the low explosives table to display fireworks, which sometimes contain high explosives, would not be in the interest of public safety. Therefore, we are not proposing this suggestion.

ATF received four comments on the application of the table of distances in section 55.224. Those comments are discussed as follows:

1. Two commenters suggested modifying the table such that it would provide distance requirements specifically for display fireworks up to 200,000 pounds. Under the current table, persons are required to refer to section 55.218 for the storage of display fireworks in excess of 10,000 pounds to calculate separation distances of magazines from inhabited buildings, public highways, passenger railways, and other magazines. The problem presented is that the distance requirements change drastically when going from section 55.224 (for weights up to 10,000 pounds) to section 55.218 (for weights over 10,000 pounds). In comparing the two tables, there are also discrepancies in separation requirements for distances between magazines. The proposed table provides for more proportionate increases in distances for weights of materials above 10,000 pounds, and it provides for a smooth transition to the table at section 55.218 for weights above 200,000 pounds. ATF agrees that the adoption of this table will not jeopardize public safety. Accordingly, we are proposing this suggestion. (*See* section IV (''Proposed Amendments to Part 55''), amendment of section 55.224.)

2. One commenter suggested that the table in section 55.219, rather than the table in section 55.218 (as currently required), be used for weights over 10,000 pounds. The transition from the distance requirements in the table in section 55.224 to those in the table in section 55.219 would not be consistent. In fact, the requirements for slightly over 10,000 pounds in the table in section 55.219 are less than those for up to 10,000 pounds in the table in section 55.224. We have determined that this does not further public safety. Therefore, we are not proposing this suggestion. However, as stated above, we are proposing a revision to the table in section 55.224 that remedies this problem by providing for more proportionate increases in distances for weights of materials above 10,000 pounds, and by providing for a smooth transition to the table at section 55.218 for weights above 200,000 pounds.

3. Finally, one commenter stated that the table in section 55.224 is unnecessarily restrictive for hobbyists storing less than 1,000 pounds of fireworks. The commenter suggested that the table be further broken down to account for smaller weight categories, with corresponding shorter distances than those currently required for up to 1,000 pounds. The commenter submitted a specific table of distances for consideration. We have determined through consultation with the APA that the suggested table would apply to certain shell sizes only. We believe that implementation of such a provision would result in confusion as to the applicability of the table in situations in which a variety of sizes and types of fireworks shells are stored together. Accordingly, in the interest of clarity and administration, we are not proposing this suggestion.

Two commenters proposed that ATF implement regulations relaxing the requirements for explosives storage at a display site. The commenters suggested that the language formerly contained on ATF Form 5400.21, ''Application for Permit User Limited Display Fireworks,'' be incorporated into the regulations. The language formerly used in the instructions on Form 5400.21 has been changed specifically because it tended to cause a misconception that fireworks could be stored in a manner not in compliance with the regulations in part 55. ATF believes that adoption of this language would not be consistent with our mission to protect the public from unsafe storage of explosives. Therefore, we are not proposing this suggestion.

ATF received three comments regarding shipping operations. Two commenters stated that ATF regulations should address ''shipping buildings,'' in which articles commonly used to pack and prepare fireworks for shipping, such as empty cardboard boxes, chairs, telephones, and computers, could be used and kept. The commenters suggested that the regulations be amended to allow such items, as well as certain operations, such as unpacking and handling of fireworks, in separate shipping buildings. ATF regulations currently define the term ''fireworks shipping building.'' The regulations do not prohibit the use or presence of the noted articles or the unpacking or handling of fireworks in a fireworks shipping building. Therefore, we are not proposing this suggestion.

One commenter suggested that ATF allow packing items, such as tape and empty containers to be stored in magazines. The housekeeping requirements in section 55.215 generally prohibit the presence of empty containers and certain other items in magazines, in the interest of reducing fire and explosion hazards in magazines. We believe that implementing provisions allowing for the storage of these items in magazines would be contrary to the regulations and ATF's goal of protecting the public. Therefore, we are not proposing this suggestion.

## III. IME Correspondence

In addition to the comments regarding Notice No. 845, ATF received correspondence from the explosives industry concerning additional amendments to part 55. In a letter to ATF dated October 31, 2000, the Institute of Makers of Explosives (IME) submitted suggestions for amending the Federal explosives regulations in part 55. IME stated in its letter that it is the safety association of the commercial explosives industry and that its mission is to promote safety and the protection of employees, users, the public, and the environment, and to encourage the adoption of uniform rules and regulations in the manufacture, transportation, storage, handling, use, and disposal of explosive materials used in blasting and other essential operations. In the following paragraphs, we will summarize IME's suggested amendments to the regulations, along with our evaluation of each proposal.

1. ATF regulations currently require that licensees and permittees maintain all required records in permanent form (*i.e.*, commercial invoices, record

books). The regulations do not currently provide for computer recordkeeping, although ATF has allowed computer recordkeeping on a case-by-case basis by variance. IME has suggested that ATF standardize the requirements for computer recordkeeping in order to eliminate the necessity for variances for such recordkeeping systems. In this notice, for reasons similar to those noted by IME, ATF is proposing guidelines for computer recordkeeping systems. (*See* section IV (''Proposed Amendments to Part 55''), amendment of section 55.121.)

2. IME has proposed that ATF eliminate the provisions requiring the use of non-sparking materials in the construction of magazines where spark-insensitive materials are stored. It stated that modern high explosives and blasting agents are not sensitive to frictional sparks. However, IME further proposed that the requirement should be retained for spark-sensitive materials such as powders and fireworks. ATF's magazine construction requirements are based upon the type of magazine (*e.g.*, type 1, type 2, etc.) in question, not the spark-sensitivity of the explosives to be stored. This is because magazines used for the storage of spark-insensitive explosives may also be used for the storage of spark-sensitive explosives such as black powder and flash powder. We believe that basing construction standards on the spark-sensitivity of the explosives stored, rather than on the type of magazine and class of explosives, may lead to confusion and ambiguity. Furthermore, there would be a burden on proprietors to determine whether the materials being stored are sensitive to sparks. Due to the potential for creating a public safety hazard, we are not proposing this suggestion.

3. IME has suggested that ATF accept Department of Defense (DOD) specifications for DOD magazines that are used to store explosives as an alternative to compliance with ATF requirements. IME has stated that companies sometimes lease DOD magazines for storage of commercial explosives and that companies storing commercial explosives in compliance with DOD requirements are sometimes not in compliance with ATF standards. Explosive materials manufactured under DOD contracts and subject to DOD requirements, however, often differ significantly from materials manufactured for commercial use and distribution and subject to ATF requirements. Additionally, DOD generally requires that a level of physical security be maintained (*e.g.*, armed guards) to reduce the threat of bullet penetration and thefts. Conversely, ATF's magazine construction requirements contemplate a lack of physical security, which is common practice in commercial operations. Therefore, we believe that it is appropriate to ensure that any storage of commercial explosive materials be in compliance with these ATF regulations developed specifically for commercial explosive materials and operations. Accordingly, we are not proposing IME's suggestion.

4. IME has suggested that ATF convert to United Nations terminology for hazard classifications in determining the appropriate storage for explosive materials. It stated that ATF should accept for purposes of explosives storage, the hazard classifications assigned by the U.S. Department of Transportation (DOT), which uses United Nations terminology in classifying hazardous materials for transportation purposes. DOT assigns United Nations hazard classifications for transportation of explosives based, in part, upon the performance of the packaging of the explosives. For example, where packaging that will reduce the likelihood of mass detonation is used, DOT will assign a ''lower'' hazard classification (triggering less stringent transportation requirements) than would be assigned if the explosive materials were not packaged in such a manner. ATF often encounters instances in which explosives are removed from DOT-mandated packaging when placed in magazines, potentially changing the mass detonation/deflagration qualities of the explosives. Adoption of the UN hazard classification standards for storage of explosive materials could result in unpackaged high explosives being stored in magazines intended for storage of low explosives. Therefore, we are not proposing IME's suggestion.

5. IME has suggested that ATF adopt its standards for bullet-resistant magazine construction. IME states that the requirements in the regulations (sections 55.207 and 55.208) and the standards found in ATF Ruling 76–18 (1976–ATF C.B. 106) are inconsistent with respect to bullet-resistance standards. It suggested that ATF adopt the bullet-resistance standards found in IME's Safety Library Publication No. 1. These standards were derived from research and testing sponsored by IME and ATF. IME stated that most magazines used in the commercial industry already meet the ¼-inch steel and 3-inch hardwood standard, so this amendment should not prove particularly burdensome to the industry. ATF agrees that bullet-resistance standards should be consistent throughout part 55. Therefore, we are adopting IME's suggestion and we are proposing amendments to the regulations to reflect IME's standards. (*See* section IV (''Proposed Amendments to Part 55''), amendment of sections 55.207 and 55.208.) We are also proposing that the requirement be effective one year from the date of publication of the final rule. In addition, the provisions of ATF Ruling 76–18 are being incorporated into the proposed regulations. (*See* section IV (''Proposed Amendments to Part 55''), amendment of sections 55.207 and 55.208.) This ruling will become obsolete upon the effective date of the final rule.

6. IME has stated that outdoor type 2 magazines are often located on terrain that precludes a bullet from being fired through the roof. It proposed that ATF amend the regulations (section 55.208) to require bullet-resistant roofs on outdoor type 2 magazines only when it is possible for a bullet to be fired directly through the roof and at such an angle that the bullet would strike the explosives within. This is similar to language used for type 1 magazines in section 55.207. Type 2 magazines are mobile or portable magazines. As such, they are commonly relocated to suit the needs of companies engaged in construction and similar activities. Implementing this amendment could cause proprietors to unwittingly create a bullet-penetration risk by placing a magazine whose roof does not meet bullet-resistance standards in a location where bullet penetration is a potential problem. By requiring bullet-resistant roofs, ATF helps protect against this risk, regardless of how often type 2 magazines are relocated. Therefore, we are not proposing IME's suggestion.

7. Section 55.63 requires that proprietors notify ATF of newly acquired magazines and of certain changes to explosives magazines, with the exception of mobile or portable type 5 magazines. IME suggested that ATF amend the regulation to expand and clarify the exception to include all portable magazines. Type 4 portable magazines are occasionally relocated or added to maximize the amount of material that can be safely stored at fireworks premises. We believe that it is important for ATF to be notified of such changes in order to help the proprietor maintain compliance with the tables of distances. Furthermore, we believe that the public safety benefits of requiring this notification far outweigh the minimal burden to these proprietors. However, we recognize that type 3 and type 5 magazines are commonly used for transportation by construction, quarrying, and mining companies on a

daily basis. The requirement to notify ATF in advance of additions and relocations would create a substantially greater burden on proprietors in these cases. Therefore, we are adopting IME's suggestion, in part, and we are proposing to except type 3 and type 5 mobile and portable magazines from the notification requirements of section 55.63. We would note that all magazines used to store explosives must meet all applicable construction and table of distance requirements, regardless of how long they are in a particular location.

8. IME has stated that the industry has taken measures to promote usage of the term ''detonator'' in place of ''blasting cap.'' It has encouraged ATF to uniformly adopt this term throughout the regulations in part 55. The term ''detonator'' is commonly referred to as ''blasting cap'' and ATF believes that there are many users of detonators who actually use that term. In addition, although IME is trying to promote usage of the term ''detonator,'' many of the makers and users of explosives are not members of IME. These persons routinely use the term ''blasting cap'' and might be confused were IME's suggestion to be adopted. ATF is also concerned that if only the term ''detonator'' is used, certain explosives information may not be reported to us because of the limited terminology. Accordingly, we are not proposing IME's suggestion.

9. IME has suggested that ATF require any person storing explosives to post a warning sign advising against fighting fires in explosives storage magazines. It has stated that one of its most important policies is to never fight a fire that involves explosive materials. IME also stated that it is aware of instances where fires were fought that involved explosives and those materials detonated, killing and injuring firefighters. As such, IME proposes a requirement that all normal access routes to explosive material storage facilities be posted with a sign warning against fighting explosive fires and advising of a specific emergency phone number.

On August 24, 1998, ATF published in the **Federal Register** a final rule amending the regulations in section 55.201 to require persons storing explosive materials to notify the local fire authority of the type, magazine capacity, and location of each site where such explosive materials are stored (T.D. ATF–400, 63 FR 44999). We believe that this requirement ensures that local fire authorities are apprised of explosive materials storage and the possibility that these materials may be involved in a fire at explosives premises. We also believe that it would be inappropriate to require those proprietors storing explosives in a non-industrial setting to place outside their homes or businesses a warning sign such as that suggested by IME. In addition to placing an undue burden on proprietors, such a requirement would create a security risk by drawing attention to the fact that explosives are stored on the premises. Accordingly, ATF is not proposing IME's suggestion. However, ATF will not require the removal of warning signs that have been posted.

10. IME has suggested that ATF revise the prohibition on storing explosive materials against interior walls of magazines. It has stated that this restriction is not necessary for modern solid explosive products, such as cutters and perforators. Section 55.214 requires that explosive materials not be placed directly against interior walls and that they must be stored so as not to interfere with ventilation. The ventilation afforded by storage in this manner benefits certain explosive materials (*e.g.*, dynamite, boosters, fireworks) and also helps maintain the integrity of the packaging of the explosives, regardless of the configuration or type of explosive materials. Accordingly, ATF is not proposing IME's suggestion.

11. IME has suggested that ATF amend the permit requirement for interstate transportation of explosives in section 55.141, noting in this regard that DOT regulates both interstate and intrastate transportation of explosives and that, therefore, the exemption at section 55.141(a)(1) makes the requirement for a permit for interstate transportation under section 55.41 superfluous. It has suggested that ATF remove the requirement that a person who intends to transport explosive materials interstate acquire a permit. Title XI of the Organized Crime Control Act of 1970 (18 U.S.C. 842(a)(3)) prohibits persons without a license or permit from transporting or shipping explosive materials interstate (except in cases where the individual's State specifically allows the interstate purchase, transport, and shipment from a contiguous State). Accordingly, legislative action would be necessary to relax this requirement.

12. IME has proposed an amendment to the requirement in section 55.104 that a license or permit furnished for the purpose of purchasing explosives contain an original signature. It has suggested that this section be amended to require that the licensee or permittee retain an original signed copy at his or her premises and furnish a photocopy thereof for verification purposes when purchasing explosives. Under the current regulations, licensees and permittees are required to furnish a copy of their license or permit prior to receiving explosive materials. This copy must contain an original signature certifying that the license or permit is a true copy of a valid license or permit. In the past, ATF has considered similar suggestions to relax the requirement for an original signature. However, we are concerned about the possibility of persons unlawfully acquiring explosives on a stolen copy of a license with a photocopied signature. We believe that this concern is still valid. Accordingly, we are not proposing IME's suggestion.

## IV. Proposed Amendments to Part 55

This section contains a compilation of all the proposed amendments to part 55, including those initiated by ATF, those based on comments received in response to Notice No. 845, and those suggested by IME.

### *A. Subpart B—Definitions (Section 55.11)*

Currently, ''bulk salutes'' are defined in section 55.11 as salute components prior to final assembly into aerial shells, and finished salute shells held separately prior to being packed with other types of display fireworks. This definition allows packages containing a majority of salute shells and a minimal number of display fireworks to be stored as display fireworks, rather than as high explosives. This is a problem because storage requirements for display fireworks are less stringent than requirements for the storage of bulk salutes, which are high explosives. Therefore, we are amending the definition of ''bulk salutes'' to specify that the term includes a collection of salute shells packaged with other types of aerial shells in quantities such that the salute shells comprise more than 50 percent of the total number of shells in the package. This will ensure that packages containing mostly salute shells will be stored properly, as high explosives. This change is consistent with NFPA guidelines.

The term ''business premises,'' as currently defined in the regulations, includes the property where the records of a manufacturer, importer, or dealer are kept if different than the premises where explosive materials are manufactured, imported, stored, or distributed. ATF has encountered situations in which an inspection could not be conducted properly or in a timely manner due to the fact that the records were not at the actual location listed on the license. Therefore, we are amending the definition of ''business premises'' to

specify that the term, when used with respect to a manufacturer, importer, or dealer, means the property on which explosive materials are manufactured, imported, stored, or distributed. Similarly, when used with respect to an explosives permittee, the term will mean the property on which the explosive materials are received or stored.

The definitions for the terms ''articles pyrotechnic,'' ''consumer fireworks,'' and ''display fireworks'' are being amended for clarification purposes. In addition, technical non-substantive changes are being made to the definition of the term ''fireworks process building.''

A definition for the term ''fireworks process area'' is being added in order to ensure that open-air processing operations are conducted in compliance with the tables of distances in sections 55.222 and 55.223. This is being done in the interest of public safety.

The definition of the term ''fireworks shipping building'' is being amended to clarify that such a building may be used for the packing of assorted display fireworks into shipping cartons for individual displays or for the loading of packaged displays for shipment to purchasers.

The definition of the term ''flash powder'' is being amended in order to be more descriptive of the possible ingredients of this explosive.

The definition of the term ''hardwood'' is being amended to be consistent with the well-recognized industry standards of the NFPA.

As defined in the regulations, the term ''highway'' means any public street, public alley, or public road, including a privately financed, constructed, or maintained road that is regularly and openly traveled by the general public. It has come to our attention that there is confusion as to the meaning of the term ''general public.'' We believe that even small segments of the general public traveling on roads near explosives magazines are entitled to protections similar to those afforded to large numbers of persons traveling on similar roadways. Moreover, we believe that individuals employed by, or otherwise associated with, one explosives facility should be deemed to be members of the ''general public'' with respect to any other explosives facility. We are amending the definition of the term ''highway'' to clarify that any road regularly and openly traveled by any member of the general public would be subject to the table of distance requirements.

The definition of ''inhabited building'' is being amended to clarify specific conditions where a building would be considered to be occupied in connection with the manufacture, storage, transportation, and use of explosive materials and, therefore, not be considered an inhabited building. For example, where there are two explosives businesses (Business A and Business B), a building occupied solely by Business A will be considered an ''inhabited building'' with respect to the explosives storage magazines that are maintained by Business B. However, this same building would fall within the exception for ''buildings occupied in connection with the manufacture, transportation, storage, or use of explosive materials'' with respect to explosives storage magazines maintained by Business A. This clarification ensures that personnel employed by or otherwise associated with one explosives facility will not ''assume the risk'' associated with another explosives facility's operations.

The definition of the term ''manufacturer'' is being amended to include persons who assemble explosive materials from other explosive materials and/or non-explosive materials, such as fireworks and pyrotechnics. By adding ''assemblers'' to the definition, the marking requirements of section 55.109 will apply to persons assembling explosive materials.

The definition of the term ''softwood'' is being amended to be consistent with the well-recognized industry standards of the NFPA.

*B. Subpart C—Administrative and Miscellaneous Provisions*

Section 55.22 is being amended to clarify that copies of approved variances (rather than the applications) are to be kept by the permittee or licensee to whom they are issued so that they can be reviewed by ATF officers. This section is also being amended to provide that the Director may require the resubmission of all variances for the purpose of re-evaluation. For example, the Director may require the resubmission of all variances when there is a change of ownership, control, or personnel; at the time of renewal; or upon disclosure of a person's possible inability or unwillingness to comply with the terms of a variance.

Section 55.46 is being amended to provide that the Chief, Firearms and Explosives Licensing Center (now known as the ''Chief, National Licensing Center'') may, in writing, require the applicant for license or permit renewal to file an original application for license or permit as required by section 55.45. This would be in addition to filing an application for license renewal on ATF F 5400.14 (part III), or application for permit renewal on ATF F 5400.15 (part III). This ensures compliance with existing requirements in part 55 and is consistent with the firearms regulations in part 178 of this chapter with respect to the renewal of Federal firearms licenses.

Several amendments are being made to section 55.63, relating to changes in explosives magazines:

1. Paragraph (a)(1) is being amended to clarify that magazines used for storage of explosives are subject to the table of distances and magazine construction requirements prescribed in sections 55.206 through 55.211.

2. Paragraphs (a)(2) and (a)(3) are being removed. The provisions of these paragraphs are considered unnecessary because they duplicate the standards specified in sections 55.206 through 55.211.

3. Paragraph (a)(4) is being revised for clarification purposes and is being redesignated as paragraph (e).

4. Paragraph (b), which exempts mobile or portable type 5 magazines from the requirements of section 55.63, is being amended by redesignating the paragraph as paragraph (f) and by providing that type 3 magazines are also exempt from the requirements of this section. We are not proposing to exempt type 4 magazines from the notification provisions of this section, as such magazines are often used and relocated at the premises of fireworks companies. Due, in part, to the seasonal nature of their business, such companies often relocate type 4 magazines during periods of high volume. In the interest of public safety, we will still require that such businesses notify ATF of relocations of type 4 magazines.

5. Paragraphs (c) and (d) provide that the regional director (compliance) (now known as the ''Director of Industry Operations'') must be notified prior to repairing, reconstructing, or acquiring new magazines. These paragraphs further require that the regional director (compliance) be notified prior to commencing storage in a new or repaired magazine. We believe that the additional burden of this second notification to ATF after acquisition or repair and prior to storing is not justified. Accordingly, we are amending these paragraphs by redesignating them as paragraphs (b) and (c), respectively, and by removing the requirement that the regional director (compliance) be notified after the acquisition of a new magazine or the repair or reconstruction of an existing magazine.

6. Finally, we are amending section 55.63 by adding a new paragraph (d) to

require licensees and permittees to notify ATF prior to the relocation of magazines. ATF has encountered recurring instances where industry members have relocated their explosives storage magazines to new locations. This has caused difficulty in administration of the regulations and has disclosed unsafe storage conditions in some instances where magazine relocations have been discovered. In the interest of public safety and the effective administration of the regulations, we believe that the notification provisions of this section should apply to the relocation of magazines.

Sections 55.105(g), 55.106(d), and 55.108(b) are being removed as they are redundant. The exemption provisions contained in section 55.141(b) make it clear that, except for the provisions pertaining to licensees, the requirements of part 55 do not apply to certain distributions of black powder under certain conditions. The sections noted above simply reiterate the applicable portions of section 55.141(b). With the removal of paragraph (b) in section 55.108, paragraphs (c) and (d) of that section are being redesignated as paragraphs (b) and (c), respectively.

*C. Subpart G—Records and Reports*

Section 55.121(a)(1) states that licensees and permittees must keep records pertaining to explosive materials in permanent form, *i.e.,* in commercial invoices or record books. This section is being amended to specify that records may be kept in computer format, provided certain conditions are met. Computer recordkeeping has become a common industry practice and we have approved numerous variances allowing this practice. Paragraph (b) of section 55.121 is being amended by adding the word ''business'' before ''premises'' in the first sentence to clarify that this subsection refers to ''business premises'' as defined in section 55.11.

Section 55.122(a), introductory text, is being amended to provide that the physical inventory required to be taken by licensed importers must consist of all the information specified in paragraph (b) of section 55.122, such as the manufacturer's marks of identification. This will facilitate the tracing of explosives that may be intended for criminal use. Paragraph (a)(4) is being amended to provide that all discrepancies disclosed between the physical inventory of explosive materials and the records required by part 55 must be reconciled in the importer's records by the close of the next business day. This will ensure that thefts and losses of explosives are more quickly detected. Paragraph (c) of section 55.122 is being amended to add the term ''use'' to the recordkeeping requirements for licensed importers. This will require importers using explosive materials they import to keep records of such use. This is consistent with requirements that are being proposed for licensed manufacturers and dealers.

Section 55.123, which relates to records maintained by licensed manufacturers, is being amended by revising the introductory text of paragraph (a) to provide that the physical inventory required to be taken by licensed manufacturers consists of all the information specified in paragraph (b) of this section, such as the manufacturer's marks of identification. This will facilitate the tracing of explosives that may be intended for criminal use. Paragraph (a)(4) is being amended to provide that all discrepancies disclosed between the physical inventory of explosive materials and the records required by part 55 must be reconciled in the manufacturer's records by the close of the next business day. This will ensure that thefts and losses of explosives are more quickly detected. Paragraphs (b)(2) through (b)(4) are being redesignated as paragraphs (b)(3) through (b)(5), respectively. New paragraph (b)(2) provides that records of acquisition kept by manufacturers of explosive materials must contain the importer's or manufacturer's name or brand name when explosives are acquired other than by their own manufacture. This is consistent with the requirements for manufacturer's disposition records and with the required records of acquisition for importers, dealers, and permittees. Paragraph (c) is being amended to require manufacturers to record their use of explosive materials, regardless of the source. This will require manufacturers using explosive materials they manufacture to keep records of such use. Since paragraph (d) is no longer necessary, it is being removed and paragraphs (e) and (f) are being redesignated as paragraphs (d) and (e), respectively.

Section 55.124, regarding records maintained by licensed dealers, is being amended by providing in the introductory text of paragraph (a) that the physical inventory required to be taken by licensed dealers consists of all the information specified in paragraph (b) of this section, such as the manufacturer's marks of identification. This will facilitate the tracing of explosives that may be intended for criminal use. Paragraph (a)(4) is being amended to provide that all discrepancies disclosed between the physical inventory of explosive materials and the records required by part 55 must be reconciled in the dealer's records by the close of the next business day. This will ensure that thefts and losses of explosives are more quickly detected. Paragraph (c)(1) is being amended to require licensed dealers to record their use of explosive materials. This will require dealers using explosive materials that they are not distributing to other persons to keep records of such use.

Section 55.125(a), introductory text, is being amended to provide that the physical inventory required to be taken by permittees consists of all the information specified in paragraph (b) of section 55.125, such as the manufacturer's marks of identification. This will facilitate the tracing of explosives that may be intended for criminal use. Paragraph (a)(4) is being amended to provide that all discrepancies disclosed between the physical inventory of explosive materials and the records required by part 55 must be reconciled in the permittee's records by the close of the next business day. This will ensure that thefts and losses of explosives are more quickly detected.

Section 55.126(b) is being amended to require licensees and permittees to verify the identity of nonlicensees and nonpermittees purchasing explosive materials. Under the current regulations, ATF Form 5400.4 must be executed by the buyer for purchases of explosive materials. A Federal explosives licensee or permittee who purchases explosive materials is not required to complete Form 5400.4. Before explosive materials are distributed to nonlicensees or nonpermittees, Form 5400.4 provides that the licensee or permittee must verify the identity of the buyer (distributee), either by acknowledging on the form that the buyer is known to the licensee or permittee or by obtaining from the buyer proof of identification (*e.g.,* a driver's license). ATF believes that the phrase ''is known to me,'' as it currently appears on Form 5400.4, is ambiguous and lends itself to confusion and misinterpretation. We believe that it is in the best interests of public safety and our enforcement efforts to require that all nonlicensed/nonpermitted purchasers provide proof of identification prior to the distribution of explosive materials. Accordingly, we are amending section 55.126(b) to require that licensees and permittees obtain proof of identification from all nonlicensees or nonpermittees purchasing explosive materials. This requirement is consistent with respect

to purchases of firearms by nonlicensed individuals.

Section 55.129 is being amended to require that where commercial explosives (except for defense articles subject to the Arms Export Control Act) are exported, exportation is to be in compliance with the Export Administration Act. We are also amending this section to require licensees to maintain proof of exportation of explosive materials to the actual end user. This is intended to prevent diversion activities.

*D. Subpart H—Exemptions*

Section 55.141 is being amended by revising paragraph (a)(7) to clarify the items exempt from the requirements of part 55. Paragraph (a)(9) is being amended to remove the DOT's regulation cite (49 CFR parts 100 to 177) in order to eliminate possible confusion in the event these regulations are subsequently revised or removed.

*E. Subpart K—Storage*

Section 55.206(a) currently states that magazines in which high explosives are stored must be a minimum distance from other high explosive magazines. This section is being amended to clarify that, except where magazines are ''combined'' as provided in footnote 2 of section 55.218, magazines in which high explosives are stored must be located no closer to magazines in which any explosive materials are stored, than the minimum distances specified in the table of distances for storage of explosive materials in section 55.218. This will ensure that all types of explosive materials will be stored appropriately when located in proximity to magazines containing high explosives. To be consistent with the proposed amended definition of ''highway,'' the word ''public'' is being removed in paragraph (b) of section 55.206. Paragraph (c)(1) of section 55.206 is being amended to require that minimum separation distances be placed between outdoor magazines containing any amount of blasting agents and inhabited buildings, highways, and passenger railways, per the table in section 55.218. This was previously unclear in the notes to the tables of distances in sections 55.218 and 55.220, and the fact that section 55.206 only specifies minimum separation distances for amounts over 50 pounds.

Several amendments are being proposed with respect to section 55.207:

1. IME has suggested that ATF make all references to bullet resistance within part 55 consistent with its standard of ¼-inch steel lined with 3 inches of hardwood. In its letter, IME referred to section 55.207(a)(7)(ii) that describes the bullet-resistance standard for roof construction for type 1 magazines. Accordingly, this section is being amended to reflect the suggested standard of ¼-inch steel and 3 inches of hardwood. However, 3/16-inch steel lined with 4 inches of hardwood, which is currently prescribed in section 55.207(a)(7)(ii), will still be considered bullet-resistant construction as referenced in ATF Ruling 76–18. We are also removing the parenthetical text in section 55.207(a)(7)(ii) to ensure that the exteriors of magazines are constructed with a sufficient amount of fire-resistant materials. In addition, this section is being amended to remove the word ''plate'' in the phrase ''plate steel.'' This provides consistency with the standards prescribed for other high explosives storage magazines.

Paragraph (a)(8) of section 55.207 is being amended to increase the thickness of hardwood required for magazine door linings from 2 inches to 3 inches. Previously, ATF believed that a wall or door constructed of ¼-inch steel lined with 2 inches of hardwood would resist the penetration of a bullet, based on the standard test. The standard test involves firing a 150 grain M2 ball ammunition having a nominal muzzle velocity of 2700 feet per second from a .30 caliber rifle from a distance of 100 feet perpendicular to the wall or door (*see* ATF Rul. 76–18). Examination of bullet-resistance tests conducted by IME indicates that the previous standard is not sufficient. Paragraph (a)(8) is being amended to reflect the standard recommended by IME. Accordingly, effective 1 year from the date of publication of the final rule in the **Federal Register**, all type 1 magazines must have ¼-inch steel doors lined with 3 inches of hardwood. This is consistent with the provisions of ATF Rul. 76–18. For the same reason explained above, this paragraph is also being amended to remove the word ''plate'' in the phrase ''plate steel.''

2. Paragraph (a)(9)(v) of section 55.207 provides that, with respect to type 1 magazines, padlocks must have at least five tumblers and a case-hardened shackle of at least ⅜-inch diameter. We believe that a ⅜-inch diameter requirement is insufficient to prevent cutting the shackle. Accordingly, we are proposing that case-hardened shackles be at least ½-inch diameter.

3. Finally, section 55.207 is being amended by adding a new paragraph (c) that incorporates the provisions of ATF Ruling 76–18.

Sections 55.208, 55.210, and 55.211 require that magazines be equipped with 2 hooded locks with at least ⅜-inch shackles and five tumblers. In past years, ATF issued a number of variances allowing mobile outdoor type 2 and type 4 magazines to have only one lock, with no hood requirement. This variance was subsequently extended to the entire explosives industry. A review of explosives theft data indicates that in a significant number of explosives thefts access was gained to the explosives by cutting or prying the padlocks. Based on these findings, ATF has determined that the reduction in explosives magazine security allowed by these variances is inappropriate. Therefore, we are proposing to amend the regulations to require that all types 1, 2, 4, and 5 outdoor magazines (except for type 5 bins used to load bulk trucks), including vehicular/mobile magazines, be secured with 2 hooded locks with ½-inch (rather than ⅜-inch) shackles and five tumblers. We are proposing the same requirement for types 2, 4, and 5 indoor magazines. Upon the effective date of the final rule, the above-mentioned variances will no longer be valid. ATF is soliciting comments from the industry on the economic burden these actions will impose. Commenters should address such issues as whether it is physically and economically viable to lock all magazines as stated in the proposed regulations in sections 55.207 through 55.211 and whether such actions will afford increased security. In addition, commenters should address the costs associated with increasing the lock size requirements as stated above. Comments should contain specific estimates of the monetary cost of this action.

Several other amendments are being proposed with respect to section 55.208:

1. The word ''exterior'' in the heading of paragraphs (a)(2) and (b)(2) is being removed for clarification purposes.

2. Paragraph (a)(2) is being amended to impose a bullet-resistance standard of ¼-inch steel and 3 inches of hardwood for the construction of type 2 magazines. We are proposing that the effective date of this particular amendment be one year from the date of publication of the final rule in the **Federal Register**.

3. Paragraphs (a)(2) and (b)(2) are being amended to add the exposed metal restriction specified in section 55.207(a)(11) in order to ensure that construction of type 2 magazines is such that there will exist a reduced chance of a sparking hazard.

4. Paragraph (b)(1) is being amended to increase the poundage allowable for indoor storage of explosives from 50 pounds to 60 pounds. This is consistent with the standards for indoor storage set forth by IME. It also reflects the fact that

commercial explosives are now shipped in 55 and 60 pound cases. ATF believes that adoption of this proposal would not compromise safety.

5. Paragraph (c) is being amended to clarify that a detonator box is a specific type of indoor magazine and that, therefore, detonator boxes must be stored indoors. There has been some confusion as to the requirements for the location of detonator boxes, and this amendment is intended to eliminate the confusion.

6. Paragraph (c) is also being amended to ensure that construction of detonator boxes is such that there will exist a reduced chance of a sparking hazard. This will afford greater public safety.

7. Finally, new paragraph (d) is being added to incorporate the provisions of ATF Ruling 76–18.

Section 55.209 provides that for type 3 magazines one steel padlock (which need not be protected by a steel hood) having at least five tumblers and a case-hardened shackle of at least 3/8-inch diameter is sufficient for locking purposes. We are amending this section to replace the 3/8-inch diameter requirement with 1/2-inch for purposes of added security. We are also amending this section to ensure that construction of type 3 magazines is such that there will exist a reduced chance of a sparking hazard. We are not proposing to incorporate the provisions of ATF Ruling 76–18 because bullet-resistance standards with respect to type 3 magazines were removed pursuant to T.D. ATF–87 (46 FR 40382, Aug. 7, 1981).

Section 55.210 is being amended to provide in paragraph (a)(1) an additional method (*i.e.*, use of a steering wheel locking device) by which vehicular magazines may be immobilized. Storage in this additional manner must be attended at all times. This is consistent with the requirements that have been imposed by ATF in issuing variances for temporary storage. The primary purpose of this amendment is to allow the temporary storage of low explosives on vehicles prior to use or shipment. ATF has processed numerous variance requests from the fireworks industry to temporarily store display fireworks (except for bulk salutes) on trucks prior to the delivery or set up of fireworks shows. ATF is aware that this practice promotes safety in that trucks are not hastily packed. Since other low explosives are subject to substantially the same security and safety-related requirements as display fireworks (except bulk salutes), we are also providing for temporary storage of these other low explosives. These provisions do not remove the construction requirements specified in section 55.210. It should also be noted that we are not proposing to amend the regulations to allow for similar temporary storage of high explosives (including bulk salutes) on trucks. This is due to the fact that most trucks used for transportation do not meet the bullet resistance requirements for storage of high explosives. Therefore, temporary storage of high explosives on trucks could pose a public safety hazard. However, ATF will consider variances for the temporary storage of high explosives on vehicles in cases in which the construction of the vehicle ensures that a bullet will not penetrate the vehicle. Paragraphs (a)(2) and (b)(2) are being amended to ensure that construction of type 4 magazines is such that there will exist a reduced chance of a sparking hazard. Paragraph (b)(1) is being amended to increase the indoor storage of low explosives from 50 to 60 pounds. This is consistent with industry shipment standards and IME recommendations.

Several amendments are being proposed with respect to section 55.211:

1. Paragraph (a)(1) is being amended to provide that vehicular magazines must be immobilized by one of the following methods: (a) Have the wheels removed; (b) be equipped with a kingpin locking device; or (c) be equipped with a steering wheel locking device and, if unattended, secured by a fence and locked gate. Any person storing explosives in a magazine immobilized by use of a steering wheel locking device must inspect such magazine at least every 72 hours. This amendment allows the temporary storage of blasting agents on vehicles. ATF has processed numerous requests from the blasting industry to temporarily store blasting agents on trucks. We are aware that this practice promotes safety in that explosive materials are handled less frequently. This proposed amendment sets forth conditions for the temporary storage of blasting agents.

2. Paragraph (a)(4) provides that, in general, padlocks for type 5 magazines must have at least five tumblers and a case-hardened shackle of at least 3/8-inch diameter. This paragraph also provides that trailers, semitrailers, and similar vehicular magazines may, for each door, be locked with one steel padlock (which need not be protected by a steel hood) having at least five tumblers and a case-hardened shackle of at least 3/8-inch diameter, if the door hinges and lock hasp are securely fastened to the magazine and to the door frame. As mentioned, a review of explosives theft data indicates that in a significant number of explosives thefts access was gained to the explosives by cutting the padlock. We believe a general requirement that type 5 magazines be secured with two hooded locks with 1/2-inch (rather than 3/8-inch) diameter shackles is necessary. However, in the case of bins, we believe that the two hooded locks requirement is unwarranted due to the difficulty in accessing the bins. Accordingly, we are proposing to amend paragraph (a)(4) to provide that type 5 magazines must be secured with two hooded locks with 1/2-inch diameter shackles and that bins used to load bulk trucks may be locked with one steel padlock (which need not be protected by a steel hood) having at least five tumblers and a case-hardened shackle of at least 1/2-inch diameter.

3. Paragraph (b)(1) is being amended to increase the indoor storage of blasting agents from 50 to 60 pounds. This is consistent with industry shipment standards and IME recommendations.

Section 55.213(b)(1) is being amended to allow shock tube to be stored with detonators that will not mass detonate with electric squibs, safety fuse, igniters, and igniter cord in a type 4 storage magazine because these materials when stored together do not pose a mass detonation hazard.

Section 55.217(b) is being amended to reference the correct NFPA publication and to clarify that all electrical outlets, switches, and devices containing electrical switches must be located outside magazines.

Section 55.218 is being amended to remove the word ''public'' with respect to highways wherever it appears in the table headings, since under the proposed regulations the term ''highway'' can mean a private road. In addition, while not a specific regulatory proposal, we are considering amending the table of distances in this section to eliminate the column titled ''Public highways with traffic volume 3000 or fewer vehicles/day.'' ATF believes that this table reference allows a diminished level of protection to travelers on smaller highways than is afforded to travelers on highways with greater traffic volume. Moreover, because roads may become more heavily traveled due to population growth, magazines that may have initially been placed to comply with the low-volume traffic column of the table can become noncompliant. We are also considering amending the table of distances in this section by changing the heading from ''Passenger railways—public highways with traffic volume of more than 3,000 vehicles/day'' to ''Highways and passenger railways.'' We believe that this change would provide for the

consistent application of this table where highways are concerned and further facilitate consistent application of the proposed definition of ''highway.'' ATF is soliciting comments on these issues.

To be consistent with the proposed amended definition of ''highway,'' the word ''public'' is being removed from footnote six at the end of the table in section 55.220.

Section 55.222 is being amended to include fireworks process areas in the table heading. The footnotes at the end of the table are being amended to indicate that this table applies to outdoor areas in which fireworks are processed.

Section 55.223 is being amended to clarify that the placement of explosive materials in a fireworks process area must comply with the requirements of the table of distances contained in this section at all times. We are also amending this section by removing the word ''public'' with respect to highways in the title heading of the table, since under the proposed amended definition of the term a ''highway'' can be a private road.

Section 55.224 is being amended to incorporate a table for the storage of display fireworks developed by the APA. The current table requires the storer to refer to section 55.218 for the storage of display fireworks in excess of 10,000 pounds to calculate distances separating magazines from inhabited buildings, public highways, passenger railways, and other magazines. The problem presented is that the distance requirements change drastically when going from section 55.224 (for weights up to 10,000 pounds) to section 55.218 (for weights over 10,000 pounds). In comparing the two tables, there are also discrepancies in separation requirements for distances between magazines. APA proposed revising the table at section 55.224 to increase maximum allowable storage under section 55.224 to 200,000 pounds. The revised table provides for more proportionate increases in distances for weights of materials above 10,000 pounds, and it provides for a smooth transition to the table at section 55.218 for weights above 200,000 pounds. ATF has reviewed the table and agrees that the adoption of APA's table will not jeopardize public safety. Bulk salutes remain subject to the table specified in section 55.218.

In addition to the above, a technical nonsubstantive amendment is being made to section 55.224 by removing the parenthetical text in footnote 3 at the end of the table and adding in its place ''March 7, 1990.'' This was the date that the provisions of section 55.224 became effective, pursuant to T.D. ATF–293.

## V. How This Document Complies With the Federal Administrative Requirements for Rulemaking

### *A. Executive Order 12866*

We have determined that this proposed rule is not a significant regulatory action as defined in E.O. 12866. Therefore, a Regulatory Assessment is not required.

### *B. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. The proposed amendments clarify the existing regulations and will have a minimal economic impact on the explosives industry. Furthermore, we certify that the revised rule will no longer have a significant economic impact on a substantial number of small entities. We base this certification on the lack of response we received to the RFA analysis set forth in T.D. ATF–293 and comments received on Notice No. 845.

Accordingly, we certify that this proposed rule will not have a significant economic impact on a substantial number of small entities.

### *C. Paperwork Reduction Act*

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the Office of Management and Budget, Attention: Desk Officer for the Bureau of Alcohol, Tobacco and Firearms, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Chief, Document Services Branch, Room 3110, Bureau of Alcohol, Tobacco and Firearms, at the address previously specified. Comments are specifically requested concerning:

- Whether the proposed collections of information are necessary for the proper performance of the functions of the Bureau of Alcohol, Tobacco and Firearms, including whether the information will have practical utility;
- The accuracy of the estimated burden associated with the proposed collections of information (*see* below);
- How the quality, utility, and clarity of the information to be collected may be enhanced; and
- How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology.

The collections of information in this proposed regulation are in 27 CFR 55.22(c), 55.63, and 55.129(b) and (c).

This information is required to ensure that public safety is maintained with respect to explosives storage and accountability. The collections of information are mandatory. The likely respondents are businesses.

With respect to 27 CFR 55.22(c):

- Estimated total annual reporting and/or recordkeeping burden: 12.5 hours.
- Estimated average burden hours per respondent and/or recordkeeper: 0.5 hours (30 minutes).
- Estimated number of respondents and/or recordkeepers: 25.
- Estimated annual frequency of responses: 25.

With respect to 27 CFR 55.63:

- Estimated total annual reporting and/or recordkeeping burden: 128 hours.
- Estimated average burden hours per respondent and/or recordkeeper: 0.1 hours (6 minutes).
- Estimated number of respondents and/or recordkeepers: 1,281.
- Estimated annual frequency of responses: 1,281.

With respect to 27 CFR 55.129(b) and (c):

- Estimated total annual reporting and/or recordkeeping burden: 33.3 hours.
- Estimated average burden hours per respondent and/or recordkeeper: 0.03 hours (2 minutes).
- Estimated number of respondents and/or recordkeepers: 1,000.
- Estimated annual frequency of responses: 1,000.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

## VI. Public Participation

We are requesting comments on the proposed regulations from all interested persons. In addition, we are specifically requesting comments on the clarity of this proposed rule and how it may be made easier to understand.

Comments received on or before the closing date will be carefully considered. Comments received after that date will be given the same consideration if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before the closing date.

ATF will not recognize any material in comments as confidential. Comments may be disclosed to the public. Any material that the commenter considers to be confidential or inappropriate for disclosure to the public should not be included in the comment. The name of the person submitting a comment is not exempt from disclosure.

*A. Submitting Comments by Fax*

You may submit written comments by facsimile transmission to (202) 927–8525. Facsimile comments must:

- Be legible;
- Reference this notice number;
- Be 8½″ x 11″ in size;
- Contain a legible written signature; and
- Be not more than five pages long.

We will not acknowledge receipt of facsimile transmissions. We will treat facsimile transmissions as originals.

*B. Request for Hearing*

Any interested person who desires an opportunity to comment orally at a public hearing should submit his or her request, in writing, to the Director within the 90-day comment period. The Director, however, reserves the right to determine, in light of all circumstances, whether a public hearing is necessary.

*C. Disclosure*

Copies of this notice and the comments received will be available for public inspection by appointment during normal business hours at: ATF Reference Library, Room 6480, 650 Massachusetts Avenue, NW., Washington, DC; telephone (202) 927–7890.

*D. Regulation Identification Number*

A regulation identification 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 the **Federal Register** in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

*E. Drafting Information*

The authors of this document are James P. Ficaretta, Firearms, Explosives, and Arson, and Chad Yoder, Public Safety Branch, Bureau of Alcohol, Tobacco and Firearms.

**List of Subjects in 27 CFR Part 55**

Administrative practice and procedure, Authority delegations, Customs duties and inspection, Explosives, Hazardous materials, Imports, Penalties, Reporting and recordkeeping requirements, Safety, Security measures, Seizures and forfeitures, Transportation, and Warehouses.

*Authority and Issuance*

For the reasons discussed in the preamble, the Bureau of Alcohol, Tobacco and Firearms proposes to amend 27 CFR part 55 as follows:

## PART 55—COMMERCE IN EXPLOSIVES

**Paragraph 1.** The authority citation for 27 CFR part 55 continues to read as follows:

**Authority:** 18 U.S.C. 847.

**Par. 2.** Section 55.11 is amended by removing the second and last sentences in the definition for ''Business premises;'' by removing the words ''is'' and ''finished and'' in the definition for ''Fireworks process building'' and adding in their place the words ''are'' and ''finishing or,'' respectively; by removing the word ''and'' in the definition for ''Fireworks shipping building'' and adding in its place the word ''or;'' by revising the definitions for ''Articles pyrotechnic,'' ''Bulk salutes,'' ''Consumer fireworks,'' ''Display fireworks,'' ''Flash powder,'' ''Hardwood,'' ''Highway,'' ''Inhabited building,'' ''Manufacturer,'' and ''Softwood;'' and by adding a definition for ''Fireworks process area'' to read as follows:

### § 55.11 Meaning of terms.

* * * * *

*Articles pyrotechnic.* Pyrotechnic devices similar to consumer fireworks in chemical composition and construction but intended for professional rather than consumer use. Articles pyrotechnic must meet the weight limits for consumer fireworks and must be classified by the U.S. Department of Transportation as UN0431 or UN0432.

* * * * *

*Bulk salutes.* A collection of salute shells or salute components. The term includes a collection of salute shells packaged with other types of aerial shells in quantities such that the salute shells comprise more than 50 percent of the total number of shells in the package.

* * * * *

*Consumer fireworks.* Small firework devices designed to produce visible or audible effects by combustion and that are intended for use by consumers. The term includes devices designed to produce audible effects, such as whistling devices, ground devices containing 50 mg or less of explosive materials, and aerial devices containing 130 mg or less of explosive materials. In addition, to be considered a ''consumer firework,'' a device must meet all applicable construction, chemical composition, and labeling requirements of the Consumer Product Safety Commission (CPSC), and it must be a device that the CPSC deems permissible for consumer use. Consumer fireworks must also be devices that are classified under the U.S. Department of Transportation hazardous material classification system as UN0336 or UN0337. The term also includes fused setpieces containing components that together do not exceed 50 mg of salute powder.

* * * * *

*Display fireworks.* Large fireworks designed to produce visible or audible effects by combustion, deflagration, or detonation. The term includes, but is not limited to, salutes containing more than 130 mg of explosive materials, aerial shells containing more than 40 grams of pyrotechnic compositions, and other fireworks that do not fall within the definition of ''consumer fireworks.'' In addition, to be considered a ''display firework'' an item must be classified as UN0334 or UN0335 under the U.S. Department of Transportation hazardous material classification system. The term also includes fused setpieces containing components that together exceed 50 mg of salute powder.

* * * * *

*Fireworks process area.* Any area, not in a fireworks process building, where pyrotechnic compositions or explosive materials are mixed, pressed, processed or otherwise prepared for finishing or assembly; or any finishing or assembly area not in a fireworks process building.

* * * * *

*Flash powder.* An explosive composition intended to produce a report or flash of light, typically containing, but not limited to, potassium perchlorate, or antimony sulfide, and aluminum metal or similar metals. (Also commonly known as ''salute powder'' or ''photo flash powder.'')

* * * * *

*Hardwood.* Any close-grained wood such as oak, maple, ash, or hickory that is free from loose knots, spaces, wind shakes, or similar defects.

*Highway.* Any street, alley, or road, including a privately financed, constructed, or maintained road, that is regularly and openly traveled by any member of the general public. For purposes of this definition, the term ''general public'' includes any and all individuals whose travel on a highway is not directly in connection with activities being undertaken at a particular facility at which explosives are manufactured, assembled, or stored. Individuals employed by or otherwise associated with one explosives facility will generally constitute members of the ''general public'' with respect to any other explosives facility.

* * * * *

*Inhabited building.* Any building regularly occupied in whole or in part as a habitation for human beings, or any house of worship, schoolhouse, railroad station, store, or other structure where people are accustomed to assemble or to be present for any purpose, except any building occupied in connection with the manufacture, transportation, storage, or use of explosive materials. For purposes of this definition, a building occupied by a person will be considered to be ''occupied in connection with the manufacture, transportation, storage, or use of explosive materials'' only with respect to the explosives operations conducted by the same person.

* * * * *

*Manufacturer.* (a) Any person engaged in the business of manufacturing explosive materials for purposes of sale or distribution or for his own use; or

(b) Any person engaged in the business of assembling explosive materials from explosive and/or non-explosive materials for purposes of sale or distribution or for his own use.

* * * * *

*Softwood.* Any coarse-grained wood such as fir, hemlock, pine, or spruce that is free from loose knots, spaces, wind shakes, or similar defects.

* * * * *

**Par. 3.** Section 55.22(c) is revised to read as follows:

**§ 55.22 Alternate methods or procedures; emergency variations from requirements.**

* * * * *

(c) *Retention of approved variations.* The licensee or permittee will retain, as part of his records available for examination by ATF officers, any variance approved by the Director under this section. Upon request by the Director, previously approved variance requests must be resubmitted for a new determination.

**Par. 4.** Section 55.46(a) is amended by adding a new sentence after the first sentence to read as follows:

**§ 55.46 Renewal of license or permit.**

(a) * * * The Chief, Firearms and Explosives Licensing Center, by written notification may require the applicant for license or permit renewal to also file completed form ATF F 5400.13/5400.16 or ATF F 5400.21 in the manner required by § 55.45. * * *

* * * * *

**Par. 5.** Section 55.63 is revised to read as follows:

**§ 55.63 Notification of magazine changes.**

(a) *General.* Except as provided in paragraph (f) of this section, the requirements of this section are applicable to all magazines used for storage of explosives. Magazines used for temporary storage of explosives are subject to the table of distances and magazine construction requirements prescribed in §§ 55.206—55.211.

(b) *Changes in magazine construction.* A licensee or permittee who intends to make changes in construction of an existing magazine will notify the regional director (compliance) in accordance with paragraph (e) of this section, describing the proposed changes prior to making any changes. Unless otherwise advised by the regional director (compliance), changes in construction may commence.

(c) *Magazines acquired or constructed after permit or license is issued.* A licensee or permittee who intends to construct or acquire additional magazines will notify the regional director (compliance) in accordance with paragraph (e) of this section describing the additional magazines, the proposed location of the magazines, and the class and quantity of explosives to be stored in the magazine. Unless otherwise advised by the regional director (compliance), additional magazines may be constructed, or acquired magazines may be used for the storage of explosives.

(d) *Relocation of magazines.* A licensee or permittee who intends to change the location of an existing magazine will notify the regional director (compliance) in accordance with paragraph (e) of this section describing the proposed changes in location prior to making any changes. Unless otherwise advised by the regional director (compliance), magazines may be relocated after explosives are removed from the magazine. (See also subpart K of this part for storage requirements.)

(e) *Notification of regional director (compliance).* For the purposes of this section, notification of the regional director (compliance) may be by telephone or in writing. However, if notification of the regional director (compliance) is in writing it must be received at least three business days in advance of making changes in construction to an existing magazine or constructing a new magazine, and at least five business days in advance of using any reconstructed magazine or added magazine for the storage of explosives.

(f) *Exception.* Type 3 magazines and mobile or portable type 5 magazines are exempt from the requirements of paragraphs (b), (c), and (d) of this section.

**§ 55.105(g) [Removed]**

**Par. 6.** Section 55.105(g) is removed.

**§ 55.106(d) [Removed]**

**Par. 7.** Section 55.106(d) is removed.

**§ 55.108 [Amended]**

**Par. 8.** Section 55.108 is amended by removing paragraph (b) and by redesignating paragraphs (c) and (d) as paragraphs (b) and (c).

**Par. 9.** Section 55.121 is amended by revising paragraph (a)(1) and by adding the word ''business'' before ''premises'' in the first sentence of paragraph (b) to read as follows:

**§ 55.121 General.**

(a)(1) Licensees and permittees will keep records pertaining to explosive materials in permanent form (*i.e.*, commercial invoices, record books) and in the manner required in this subpart. Computer recordkeeping systems may be used to keep records pertaining to explosive materials, provided the following conditions are met:

(i) The system contains all the information required in this subpart;

(ii) The system can be queried by date code or date shift code and/or lot number;

(iii) The system has a daily memory backup capability acceptable to ATF, such as disk or tape;

(iv) The system is capable of providing a printout of all records for purposes of inspection by ATF, when the system memory is purged, or if business is discontinued;

(v) The computer printout contains a record of explosives in inventory, as well as all that were sold during the period covered, sequentially, by date of acquisition;

(vi) The system accounts for and records all explosive materials returned;

(vii) The system records both the manufacturer and the importer of foreign-made explosives;

(viii) The system records the names and addresses of the distributee (buyer), and in the case of a corporation or other business entity, its authorized representative or agent. An ATF Form 5400.4 transaction number may be used to reference additional information, such as date of birth, place of birth, identification used, etc.;

(ix) The system cannot rely on invoices or other paper/manual systems to provide any of the required information. It must be self contained; and

(x) If the business is discontinued, all records, including a final printout, must be forwarded to the ATF Out-of-Business Records Center, or any ATF office in the region in which the business was located.

* * * * *

**Par. 10.** Section 55.122 is amended by adding a sentence after the first sentence in the introductory text of paragraph (a); by adding a sentence after the fourth sentence in paragraph (a)(4), before the parenthetical text ''(*See also* § 55.127.)''; by revising the introductory text of paragraph (c); and by revising paragraph (c)(1) to read as follows:

**§ 55.122 Records maintained by licensed importers.**

(a) * * * Such inventory will consist of all the information required in paragraph (b) of this section. * * *

(4) * * * All discrepancies disclosed between the physical inventory of explosive materials and the records required by this part must be reconciled in the records by the close of the next business day. * * *

* * * * *

(c) Each licensed importer must, not later than the close of the next business day following the date of use or date of distribution of any explosive materials to another licensee or a permittee, enter in a separate record the following information:

(1) Date of use or date of disposition.

* * * * *

**Par. 11.** Section 55.123 is amended by adding a sentence after the first sentence in the introductory text of paragraph (a); by adding a sentence after the fourth sentence in paragraph (a)(4), before the parenthetical text ''(*See* also § 55.127.)''; by redesignating paragraphs (b)(2) through (b)(4) as paragraphs (b)(3) through (b)(5); by adding a new paragraph (b)(2); by revising paragraph (c); by removing paragraph (d); and by redesignating paragraphs (e) and (f) as paragraphs (d) and (e) to read as follows:

**§ 55.123 Records maintained by licensed manufacturers.**

(a) * * * Such inventory will consist of all the information required in paragraph (b) of this section. * * *

(4) * * * All discrepancies disclosed between the physical inventory of explosive materials and the records required by this part must be reconciled in the records by the close of the next business day. * * *

(b) * * *

(2) Name or brand name of manufacturer or name of importer, as applicable, if acquired other than by his own manufacture.

* * * * *

(c)(1) Each licensed manufacturer must, not later than the close of the next business day following the date of use or distribution of any explosive materials to another licensee or a permittee, enter in a separate record the following information:

(i) Date of use or date of disposition.

(ii) Name or brand name of manufacturer or name of importer, as applicable, if acquired other than by his own manufacture.

(iii) Manufacturer's marks of identification.

(iv) Quantity (applicable quantity units, such as pounds of explosives, number of detonators, number of display fireworks, etc.).

(v) Description (dynamite (dyn), blasting agents (ba), detonators (det), display fireworks (df), etc.) and size (length and diameter or diameter only of display fireworks).

(vi) License or permit number of licensee or permittee to whom the explosive materials are distributed.

(2) *Exception.* A licensed manufacturer is exempt from the recordkeeping requirements of paragraph (c)(1) of this section if the explosive materials are manufactured for his own use and used within a 24-hour period at the same site.

* * * * *

**Par. 12.** Section 55.124 is amended by adding a sentence after the first sentence in the introductory text of paragraph (a), by adding a sentence after the fourth sentence in paragraph (a)(4), before the parenthetical text ''(*See* also § 55.127.)'', and by revising paragraph (c)(1) to read as follows:

**§ 55.124 Records maintained by licensed dealers.**

(a) * * * Such inventory will consist of all the information required in paragraph (b) of this section. * * *

(4) * * * All discrepancies disclosed between the physical inventory of explosive materials and the records required by this part must be reconciled in the records by the close of the next business day. * * *

* * * * *

(c)(1) Date of use or date of disposition.

* * * * *

**Par. 13.** Section 55.125 is amended by adding a sentence after the first sentence in the introductory text of paragraph (a) and by adding a sentence after the fourth sentence in paragraph (a)(4), before the parenthetical text ''(*See* also § 55.127)'', to read as follows:

**§ 55.125 Records maintained by permittees.**

(a) * * * Such inventory will consist of all the information required in paragraph (b) of this section. * * *

(4) * * * All discrepancies disclosed between the physical inventory of explosive materials and the records required by this part must be reconciled in the records by the close of the next business day. * * *

* * * * *

**Par. 14.** Section 55.126(b) is revised to read as follows:

**§ 55.126 Explosives transaction record.**

* * * * *

(b) Before the distribution of explosive materials to a nonlicensee or nonpermittee who is a resident of the State in which the licensee or permittee maintains his business premises, or to a nonlicensee or nonpermittee who is not a resident of the State in which the licensee or permittee maintains his business premises and is acquiring explosive materials under § 55.105(c), the licensee or permittee distributing the explosive materials will:

(1) Obtain an executed ATF F 5400.4 from the distributee that contains all of the information required on the form and by the regulations in this part; and

(2) Cause the distributee to be identified in any manner customarily used in commercial transactions (*e.g.*, a driver's license) and will note on the Form 5400.4 the type of identification used and the identification number.

* * * * *

**Par. 15.** Section 55.129 is amended by designating the existing paragraph as paragraph (a), by revising the first sentence in newly designated paragraph (a), and by adding new paragraphs (b) and (c) to read as follows:

**§ 55.129 Exportation.**

(a) Exportation of explosive materials is to be in accordance with the applicable provisions of section 38 of the Arms Export Control Act (22 U.S.C. 2778), the Export Administration Act (50 U.S.C. APP. 2401 *et seq.*), and the

Export Administration Regulations, 15 CFR, chapter VII, subchapter C. * * *

(b) The licensee or permittee will retain as part of his records available for examination by ATF officers a copy of the export license and the following information:

(1) A certificate of lading executed by a Customs officer of the foreign country to which the explosive materials are exported; or

(2) A sworn statement of the foreign consignee covering the receipt of the explosive materials; or

(3) The return receipt, or a reproduced copy thereof, signed by the addressee or his agent, where the shipment of explosive materials was made by insured or registered parcel post.

(c) Proof of exportation will be retained by the licensee as part of his permanent records and made available for inspection by any ATF officer.

**Par. 16.** Section 55.141 is amended by revising paragraphs (a)(7), and by removing ''‚49 CFR Parts 100 to 177,'' in paragraph (a)(9) to read as follows:

**§ 55.141 Exemptions.**

(a) * * *

(7) The importation and distribution of—

(i) Consumer fireworks and articles pyrotechnic, as defined under § 55.11;

(ii) Explosive auto alarms, that are tubular devices containing a small amount of explosive composition and igniting compound, which are ignited by an electric spark. These devices must be so designed that they will neither burst, nor cause external flame on functioning;

(iii) Toy propellant devices and toy smoke devices consisting of small paper or composition tubes or containers containing a small charge of slow burning propellant powder or smoke producing powder. These devices must be so designed that they will neither burst, nor cause external flame on functioning and ignition elements, if attached, must be of a design approved by the Department of Transportation Associate Administrator for Hazardous Materials Safety (or other official who is designated under Department of Transportation regulations);

(iv) Cigarette loads, trick matches, and trick noise makers, explosive, of a type approved by the Department of Transportation Associate Administrator for Hazardous Materials Safety (or other official who is designated under Department of Transportation regulations) and described as follows:

(A) Cigarette loads consisting of wooden pegs to which are affixed a small amount of explosive composition;

(B) Trick matches consisting of book matches, strike anywhere matches, or strike-on-box matches that have small amounts of explosive or pyrotechnic composition affixed to the match stem just below the match head;

(C) Trick noise makers, explosive, consisting of spheres containing a small amount of explosive composition; and

(v) Model rocket motors consisting of ammonium perchlorate composite propellant, black powder, or other similar low explosives; containing no more than 62.5 grams of total propellant weight and designed as single use motors or as reload kits capable of reloading no more than 62.5 grams of propellant into a reusable motor casing.

* * * * *

**Par. 17.** Section 55.206 is amended by revising paragraph (a), by removing the word ''public'' in paragraph (b), and by revising paragraph (c)(1) to read as follows:

**§ 55.206 Location of magazines.**

(a) Outdoor magazines in which any high explosives are stored must be located no closer to inhabited buildings, passenger railways, highways, or other magazines in which explosive materials are stored, than the minimum distances specified in the table of distances for storage of explosive materials in § 55.218.

* * * * *

(c)(1) Outdoor magazines in which blasting agents are stored must be located no closer to inhabited buildings, passenger railways, or highways than the minimum distances specified in the table of distances for storage of explosive materials in § 55.218.

* * * * *

**Par. 18.** Section 55.207 is amended by revising paragraph (a)(7)(ii); by adding a new paragraph (a)(7)(iii); by revising the first sentence in paragraph (a)(8); by removing ''3⁄8 inch'' in paragraph (a)(9)(v) and adding in its place ''1⁄2 inch''; and by adding new paragraph (c) to read as follows:

**§ 55.207 Construction of type 1 magazines.**

* * * * *

(a) * * *

(7) * * *

(ii) A fabricated metal roof constructed of 1⁄4-inch steel lined with three inches of hardwood.

(iii) Any of the bullet-resistant construction criteria specified in paragraph (c) of this section.

(8) *Doors.* All doors are to be constructed of not less than 1⁄4-inch steel and, effective [Date 1 year after the date of publication of the final rule in the **Federal Register**], lined with at least three inches of hardwood, or otherwise be constructed in accordance with the bullet-resistant construction criteria specified in paragraph (c) of this section. * * *

* * * * *

(c) *Alternate construction standards for storage facilities with respect to bullet resistance.* Storage facilities (magazines) that are constructed according to any of the following minimum specifications are bullet resistant. (All steel and wood dimensions indicated are actual thicknesses. To meet the concrete block and brick dimensions indicated, the manufacturer's represented thicknesses may be used.)

(1) Exterior of 5⁄8-inch steel, lined with an interior of any type of non-sparking material;

(2) Exterior of 1⁄2-inch steel, lined with an interior of not less than 3⁄8-inch plywood;

(3) Exterior of 3⁄8-inch steel, lined with an interior of two inches of hardwood;

(4) Exterior of 3⁄8-inch steel, lined with an interior of three inches of softwood or 2 1⁄4 inches of plywood;

(5) Exterior of 1⁄4-inch steel, lined with an interior of five inches of softwood or 5 1⁄4 inches of plywood;

(6) Exterior of 1⁄4-inch steel, lined with an intermediate layer of two inches of hardwood and an interior lining of 1 1⁄2 inches of plywood;

(7) Exterior of 3⁄16-inch steel, lined with an interior of four inches of hardwood;

(8) Exterior of 3⁄16-inch steel, lined with an interior of seven inches of softwood or 6-inches plywood;

(9) Exterior of 3⁄16-inch steel, lined with an intermediate layer of three inches of hardwood and an interior lining of 3⁄4-inch plywood;

(10) Exterior of 1⁄8-inch steel, lined with an interior of five inches of hardwood;

(11) Exterior of 1⁄8-inch steel, lined with an interior of nine inches of softwood;

(12) Exterior of 1⁄8-inch steel, lined with an intermediate layer of four inches of hardwood and an interior lining of 3⁄4-inch plywood;

(13) Exterior of any type of fire-resistant material that is structurally sound, lined with an intermediate layer of four inches solid concrete block or four inches solid brick or four inches of solid concrete, and an interior lining of 1⁄2-inch plywood placed securely against the masonry lining;

(14) Standard eight-inch concrete block with voids filled with well-tamped sand/cement mixture;

(15) Standard eight-inch solid brick;

(16) Exterior of any type of fire-resistant material that is structurally

sound, lined with an intermediate six-inch space filled with well-tamped dry sand or well-tamped sand/cement mixture.

(17) Exterior of 1/8-inch steel, lined with a first intermediate layer of 3/4-inch plywood, a second intermediate layer of 3 5/8 inches well-tamped dry sand or sand/cement mixture and an interior lining of 3/4-inch plywood;

(18) Exterior of any type of fire-resistant material, lined with a first intermediate layer of 3/4-inch plywood, a second intermediate layer of 3 5/8 inches well-tamped dry sand or sand/cement mixture, a third intermediate layer of 3/4-inch plywood, and a fourth intermediate layer of two inches of hardwood or 14-gauge steel and an interior lining of 3/4-inch plywood; or

(19) Eight-inch thick solid concrete.

**Par. 19.** Section 55.208 is amended by revising paragraph (a)(2); by removing ''3/8-inch'' in paragraph (a)(4)(v) and adding in its place ''1/2-inch''; by removing the number ''50'' wherever it appears in paragraph (b)(1) and adding in its place the number ''60;'' by removing the word ''Exterior'' in the title heading of paragraph (b)(2); by adding a new paragraph (b)(2)(iii); by removing ''3/8-inch'' wherever it appears in paragraph (b)(4)(v) and adding in its place ''1/2-inch''; by revising paragraph (c); and by adding new paragraph (d) to read as follows:

**§ 55.208 Construction of type 2 magazines.**

* * * * *

(a) * * *

(2) *Construction.* (i) Outdoor magazines, including doors, are to be constructed of not less than 1/4-inch steel and, effective January 29, 2004, lined with at least three inches of hardwood, or otherwise be constructed in accordance with the bullet-resistant construction criteria specified in § 55.207(c). Magazines with top openings will have lids with water-resistant seals or that overlap the sides by at least one inch when in a closed position.

(ii) No sparking material is to be exposed to contact with the stored explosive materials. All ferrous metal nails in the floor and sidewalls that might be exposed to contact with explosive materials must be blind nailed, counter-sunk, or covered with a nonsparking lattice work or other nonsparking material.

* * * * *

(b) * * *

(2) * * *

(iii) No sparking material is to be exposed to contact with the stored explosive materials. All ferrous metal nails in the floor and sidewalls that might be exposed to contact with explosive materials must be blind nailed, counter-sunk, or covered with a nonsparking lattice work or other nonsparking material.

* * * * *

(c) *Detonator boxes.* Magazines for detonators in quantities of 100 or less must be stored indoors and are to have sides, bottoms, and doors constructed of not less than number 12-gauge (.1046 inches) metal and lined with a nonsparking material. No sparking material is to be exposed to contact with the stored explosive materials. All ferrous metal nails in the floor and side walls that might be exposed to contact with explosive materials must be blind nailed, counter-sunk, or covered with a nonsparking lattice work or other nonsparking material. Hinges and hasps must be attached so they cannot be removed from the outside. One steel padlock (which need not be protected by a steel hood) having at least five tumblers and a case-hardened shackle of at least 1/2-inch diameter is sufficient for locking purposes.

(d) *Alternate construction standards for storage facilities with respect to bullet resistance.* Storage facilities (magazines) that are constructed according to any of the following minimum specifications are bullet resistant. (All steel and wood dimensions indicated are actual thicknesses. To meet the concrete block and brick dimensions indicated, the manufacturer's represented thicknesses may be used.)

(1) Exterior of 5/8-inch steel, lined with an interior of any type of non-sparking material;

(2) Exterior of 1/2-inch steel, lined with an interior of not less than 3/8-inch plywood;

(3) Exterior of 3/8-inch steel, lined with an interior of two inches of hardwood;

(4) Exterior of 3/8-inch steel, lined with an interior of three inches of softwood or 2 1/4 inches of plywood;

(5) Exterior of 1/4-inch steel, lined with an interior of five inches of softwood or 5 1/4 inches of plywood;

(6) Exterior of 1/4-inch steel, lined with an intermediate layer of two inches of hardwood and an interior lining of 1 1/2 inches of plywood;

(7) Exterior of 3/16-inch steel, lined with an interior of four inches of hardwood;

(8) Exterior of 3/16-inch steel, lined with an interior of seven inches of softwood or 6 3/4 inches plywood;

(9) Exterior of 3/16-inch steel, lined with an intermediate layer of three inches of hardwood and an interior lining of 3/4-inch plywood;

(10) Exterior of 1/8-inch steel, lined with an interior of five inches of hardwood;

(11) Exterior of 1/8-inch steel, lined with an interior of nine inches of softwood;

(12) Exterior of 1/8-inch steel, lined with an intermediate layer of four inches of hardwood and an interior lining of 3/4-inch plywood;

(13) Exterior of any type of fire-resistant material that is structurally sound, lined with an intermediate layer of four inches solid concrete block or four inches solid brick or four inches of solid concrete, and an interior lining of 1/2-inch plywood placed securely against the masonry lining;

(14) Standard eight-inch concrete block with voids filled with well-tamped sand/cement mixture;

(15) Standard eight-inch solid brick;

(16) Exterior of any type of fire-resistant material that is structurally sound, lined with an intermediate six-inch space filled with well-tamped dry sand or well-tamped sand/cement mixture.

(17) Exterior of 1/8-inch steel, lined with a first intermediate layer of 3/4-inch plywood, a second intermediate layer of 3 5/8 inches well-tamped dry sand or sand/cement mixture and an interior lining of 3/4-inch plywood;

(18) Exterior of any type of fire-resistant material, lined with a first intermediate layer of 3/4-inch plywood, a second intermediate layer of 3 5/8 inches well-tamped dry sand or sand/cement mixture, a third intermediate layer of ''-inch plywood, and a fourth intermediate layer of two inches of hardwood or 14-gauge steel and an interior lining of 3/4-inch plywood; or

(19) Eight-inch thick solid concrete.

**Par. 20.** Section 55.209 is amended by adding two new sentences after the third sentence and by removing ''3/8-inch'' and adding in its place ''1/2-inch'' to read as follows:

**§ 55.209 Construction of type 3 magazines.**

* * * No sparking material is to be exposed to contact with the stored explosive materials. All ferrous metal nails in the floor and sidewalls that might be exposed to contact with explosive materials must be blind nailed, counter-sunk, or covered with a nonsparking lattice work or other nonsparking material. * * *

**Par. 21.** Section 55.210 is amended by revising paragraph (a)(1); by adding two new sentences after the first sentence in paragraph (a)(2); by removing ''3/8 inch'' in paragraph (a)(4)(v) and adding in its

place ''½-inch''; by removing the number ''50'' wherever it appears in paragraph (b)(1) and adding in its place the number ''60;'' by adding two new sentences after the first sentence in paragraph (b)(2); and by removing ''⅜ inch'' wherever it appears in paragraph (b)(4)(v) and adding in its place ''½-inch'' to read as follows:

**§ 55.210 Construction of type 4 magazines.**

* * * * *

(a) * * * (1) *General.* Outdoor magazines are to be fire-resistant, weather-resistant, and theft-resistant. The ground around outdoor magazines must slope away for drainage or other adequate drainage must be provided. Vehicular magazines must be immobilized by one of the following methods:

(i) Have wheels removed;

(ii) Be equipped with a kingpin locking device; or

(iii) Be equipped with a steering wheel locking device. Storage in this manner must be attended at all times.

(2) * * * No sparking material is to be exposed to contact with the stored explosive materials. All ferrous metal nails in the floor and sidewalls that might be exposed to contact with explosive materials must be blind nailed, counter-sunk, or covered with a nonsparking lattice work or other nonsparking material.

* * * * *

(b) * * *

(2) * * * No sparking material is to be exposed to contact with the stored explosive materials. All ferrous metal nails in the floor and sidewalls that might be exposed to contact with explosive materials must be blind nailed, counter-sunk, or covered with a nonsparking lattice work or other nonsparking material. * * *

* * * * *

**Par. 22.** Section 55.211 is amended by revising paragraph (a)(1); by revising the second and fourth sentences in paragraph (a)(4); by revising paragraph (b)(1); and by removing ''⅜ inch'' wherever it appears in paragraph (b)(4)(v) and adding in its place ''½-inch'' to read as follows:

**§ 55.211 Construction of type 5 magazines.**

* * * * *

(a) * * * (1) *General.* Outdoor magazines are to be weather-resistant and theft-resistant. The ground around magazines must slope away for drainage or other adequate drainage must be provided. Vehicular magazines must be immobilized by one of the following methods:

(i) Have wheels removed;

(ii) Be equipped with a kingpin locking device; or

(iii) Be equipped with a steering wheel locking device and, if the magazine is unattended, secured by a fence and locked gate. Any person storing explosives materials in this manner must inspect such magazine at least once every 72 hours.

* * * * *

(4) * * * Padlocks must have at least five tumblers and a case-hardened shackle of at least ½-inch diameter. * * * Bins used to load bulk trucks may be locked with one steel padlock (which need not be protected by a steel hood) having at least five tumblers and a case-hardened shackle of at least ½-inch diameter. * * *

* * * * *

(b) * * * (1) *General.* Indoor magazines are to be theft-resistant. They need not be weather-resistant if the buildings in which they are stored provide protection from the weather. No indoor magazine is to be located in a residence or dwelling. The indoor storage of blasting agents must not exceed a quantity of 60 pounds. More than one indoor magazine may be located in the same building if the total quantity of explosive materials stored does not exceed 60 pounds.

* * * * *

**§55.213 [Amended]**

**Par. 23.** Section 55.213 is amended by adding ''shock tube,'' after ''safety fuse,'' in paragraph (b)(1).

**Par. 24.** Section 55.217 is amended by revising the section heading and paragraph (b) to read as follows:

**§ 55.217 Lighting and electrical switches.**

* * * * *

(b) Electric lighting used in any explosives storage magazine must meet the standards prescribed by the ''National Electrical Code'' and the National Fire Protection Association, NFPA 495, for the conditions present in the magazine at any time. All electrical outlets, switches, and devices containing electrical switches are to be located outside of the magazine and also meet the standards prescribed by the National Electrical Code.

* * * * *

**§55.218 [Amended]**

**Par. 25.** Section 55.218 is amended by removing the word ''public'' wherever it appears in the table headings.

**§ 55.220 [Amended]**

**Par. 26.** Section 55.220 is amended by removing the word ''public'' in footnote 6 at the end of the table.

**Par. 27.** Section 55.222 is amended by revising the section heading and footnotes 3, 4, and 5 at the end of the table, and by adding new footnotes 6 and 7 to read as follows:

**§ 55.222 Table of distances between fireworks process buildings, fireworks process areas, and fireworks nonprocess buildings.[6,7]**

* * * * *

[3] While consumer fireworks or articles pyrotechnic in a finished state are not subject to regulation, explosive materials used to manufacture or assemble such fireworks or articles are subject to regulation. Thus, fireworks process buildings and fireworks process areas where consumer fireworks or articles pyrotechnic are being processed must meet these requirements.

[4] A maximum of 500 pounds of in-process pyrotechnic compositions, either loose or in partially assembled fireworks, is permitted in any fireworks process building or fireworks process area. Finished display fireworks may not be stored in a fireworks process building or fireworks process area.

[5] A maximum of 10 pounds of flash powder, either in loose form or in assembled units, is permitted in any fireworks process building or fireworks process area. Quantities in excess of 10 pounds must be kept in an approved magazine.

[6] The placement of explosive materials in a fireworks process area must comply with the requirements of this table of distances at all times.

[7] This table specifies minimum required separation distances from fireworks process buildings and fireworks process areas to other fireworks process buildings and fireworks process areas; and from fireworks process buildings and fireworks process areas to fireworks nonprocess buildings.

**Par. 28.** Section 55.223 is amended by revising the section heading, by removing the table heading, and by adding a new footnote 6 at the end of the table to read as follows:

**§ 55.223 Table of distances from fireworks process buildings and fireworks process areas to passenger railways, highways, and fireworks plant buildings.[3, 4, 5, 6]**

* * * * *

[6] The placement of explosive materials in a fireworks process area must comply with the requirements of this table of distances at all times.

**Par. 29.** Section 55.224 is amended by revising the table and by removing the parenthetical text in footnote 3 at the end of the table and adding in its place ''March 7, 1990'' to read as follows:

**§ 55.224 Table of distances for the storage of display fireworks (except bulk salutes).**

| Net weight of fireworks [1] (pounds) | Distance between magazine and inhabited building, passenger railway, or highway [2 3 4] (feet) | Distance between magazines [2 3 4] (feet) |
|---|---|---|
| 0–1000 | 150 | 100 |
| 1001–5000 | 230 | 150 |
| 5001–10000 | 300 | 200 |
| 10001–15000 | 360 | 200 |
| 15001–20000 | 420 | 200 |
| 20001–30000 | 480 | 225 |
| 30001–40000 | 625 | 250 |
| 40001–50000 | 675 | 275 |
| 50001–60000 | 910 | 300 |
| 60001–75000 | 1500 | 325 |
| 75001–100000 | 1750 | 375 |
| 100001–200000 | 2000 | 500 |
| Above 200000 | Use table § 55.218 | ..... |

* * * * *

Signed: August 12, 2002.

**Bradley A. Buckles,**

*Director.*

Approved: January 7, 2003.

**Timothy E. Skud,**

*Deputy Assistant Secretary, (Regulatory, Tariff and Trade Enforcement).*

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**BILLING CODE 4810–31–P**

## DEPARTMENT OF THE TREASURY

## Office of Foreign Assets Control

## 31 CFR Parts 501 and 515

## Reporting and Procedures Regulations; Cuban Assets Control Regulations: Publication of Economic Sanctions Enforcement Guidelines

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The Office of Foreign Assets Control (''OFAC'') of the U.S. Department of the Treasury is publishing for public comment an updated version of its internal Economic Sanctions Enforcement Guidelines. These Guidelines are being published as separate appendices to two parts of the Code of Federal Regulations: general provisions are being published as an appendix to the Reporting and Procedures Regulations, 31 CFR part 501, and specific provisions focusing on Cuba are being published as an appendix to the Cuban Assets Control Regulations, 31 CFR part 515.

**DATES:** Written comments must be received on or before March 31, 2003.

**ADDRESSES:** Comments may be submitted by mail, by facsimile, or through OFAC's Web site.

*Mailing address:* Chief of Records, ATTN Request for Comments, Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

*Facsimile number:* 202/622–1657.

*OFAC's Web site: http://www.treas.gov/offices/enforcement/ofac/comment.html.*

**FOR FURTHER INFORMATION CONTACT:** Chief of Records, tel.: 202/622–2500, or Chief Counsel, tel.: 202/622–2410.

**SUPPLEMENTARY INFORMATION:**

### Electronic Availability

This document and additional information concerning OFAC are available from OFAC's Web site *http://www.treas.gov/offices/enforcement/ofac/index.html* or via facsimile through a 24-hour fax-on-demand service, tel: 202/622–0077. Comments on these Guidelines may be submitted electronically through OFAC's Web site *http://www.treas.gov/offices/enforcement/ofac/comment.html.*

### Procedural Requirements; Request for Comment

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, it is hereby certified that this rule would not have a significant economic impact on a substantial number of small entities. OFAC's Guidelines impose no regulatory burdens on the public. The Guidelines simply explain OFAC's enforcement practices based on existing substantive and procedural rules. Accordingly, no regulatory flexibility analysis is required. A regulatory assessment is not required because this rule is not a ''significant regulatory action'' as defined in Executive Order 12866.

Comments must be submitted in writing. The addresses and deadline for submitting comments appear near the beginning of this notice. OFAC will not accept comments accompanied by a request that all or part of the submission be treated confidentially because of its business proprietary nature or for any other reason. All comments received by the deadline will be a matter of public record and will be made available on OFAC's Web site *http://www.treas.gov/offices/enforcement/ofac/index.html.*

### Paperwork Reduction Act

The collections of information related to the Reporting and Procedures Regulations and the Cuban Assets Control Regulations have been previously approved by the Office of Management and Budget (''OMB'') under control number 1505–0164. A small adjustment to that collection has been submitted to OMB in order to take into account the voluntary disclosure rule proposed in this notice. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

The new collection of information is contained in subpart B of part III of the new Appendix to part 501—Economic Sanctions Enforcement Guidelines. This subpart explains that when apparent violations are voluntarily disclosed by the actor to OFAC, the proposed penalty will generally be mitigated by at least 50%. This voluntary disclosure rule provides an incentive for persons who have violated economic sanctions laws to come forward and provide OFAC information that it can use to better enforce its economic sanctions programs.

The likely submitters who will avail themselves of the voluntary disclosure rule are financial institutions, business organizations, other entities, and individuals who find that they have violated a sanctions prohibition and wish to disclose their violation.

*The estimated total annual reporting and/or recordkeeping burden:* 50 hours. *The estimated annual burden per respondent/record keeper:* 1 hour.

*Estimated number of respondents and/or record keepers:* 50. *Estimated annual frequency of responses:* once or less, given that OFAC expects that persons who voluntarily disclose their violations will take better care to avoid future violations.

Comments are invited on: (a) Whether this new collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Comments concerning the above information, the accuracy of estimated average annual burden, and suggestions for reducing this burden should be directed to OMB, Paperwork Reduction Project, control number 1505–0164, Washington, DC, 20503, with a copy to the Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Ave., NW.,—Annex, Washington, DC 20220. Any such comments should be submitted not later than March 31, 2003. Comments on aspects of this proposed rule other than those involving collections of information subject to the PRA should not be sent to OMB.

**Background**

OFAC hereby publishes as appendices to 31 CFR parts 501 and 515 its Guidelines for the enforcement of the various economic sanctions programs it administers. These Guidelines review OFAC's procedures for determining whether an economic sanctions violation has occurred and outline the range of enforcement options available, including the imposition of a civil monetary penalty. A schedule of proposed penalties for certain violations of the Cuban Assets Control Regulations, 31 CFR part 515, is published as a separate appendix to those particular regulations. These Guidelines serve as a general framework for OFAC's enforcement activities, but OFAC may depart from them in particular cases.

The primary mission of OFAC is to administer and enforce economic sanctions against targeted foreign countries, terrorists and terrorist organizations, and narcotic traffickers in furtherance of U.S. foreign policy and national security objectives. OFAC acts under general Presidential wartime and national emergency powers, as well as specific legislation, to prohibit transactions and freeze (or ''block'') assets subject to U.S. jurisdiction. Economic sanctions are designed to deprive the target of the use of its assets and deny the target access to the U.S. financial system and the benefits of trade, transactions, and services involving U.S. markets, businesses, and individuals. These same authorities have also been used to protect assets subject to U.S. jurisdiction of countries subject to foreign occupation and to further important U.S. nonproliferation goals.

OFAC currently administers and enforces 24 economic sanctions programs pursuant to Presidential and Congressional mandates. Active enforcement of these programs is a crucial element in preserving and advancing the foreign policy and national security objectives that underlie these initiatives, usually taken in conjunction with diplomatic and occasionally military action. Penalties, both civil and criminal, serve as a deterrent to conduct that undermines or prevents these sanctions from achieving their foreign policy and national security goals. When violations occur, penalties serve a punitive purpose.

The Economic Sanctions Enforcement Guidelines (the ''Guidelines'') published today are intended to provide OFAC with a procedural framework of general applicability to promote consistency while allowing for the appropriate exercise of agency discretion. They are also intended to promote the transparency of OFAC's procedures and better inform the regulated community. OFAC has always sought to maximize voluntary compliance by the public with U.S. sanction laws and regulations. To further its commitment to maximize voluntary compliance, OFAC is publishing these Guidelines in the **Federal Register** for comment. These Guidelines supersede and replace internal Guidelines previously used by OFAC.

**Historical Overview of Statutory Authorities and Regulatory Framework**

The United States Department of the Treasury has a long history of dealing with economic sanctions. Prior to the War of 1812, Secretary of the Treasury Gallatin administered sanctions against Great Britain, in the form of the Embargo Act and the Non-Intercourse Act, for British harassment of American sailors. In 1861, during the Civil War, Congress passed the ''Trading With the Enemy Act,'' which prohibited transactions with the Confederacy, called for the forfeiture of goods involved in such transactions, and provided a licensing system under rules and regulations administered by the Treasury Department. This Civil War legislation was updated as the Trading With the Enemy Act of 1917, 50 U.S.C. App. 1–44, for purposes of responding to World War I.

*OFAC and The Trading with the Enemy Act of 1917.* OFAC is the successor to the Office of Foreign Funds Control (the ''FFC''), which was established at the advent of World War II following the German invasion of Norway in 1940. The FFC's initial purpose, in exercising authorities under Section 5(b) of the Trading With the Enemy Act of 1917 (''TWEA''), was to prevent Nazi use of the occupied countries' holdings of foreign exchange and securities and to prevent forced repatriation of funds belonging to nationals of those countries. These controls were later extended to protect assets of other invaded countries.

After the United States formally entered World War II, the FFC played a leading role in economic warfare against the Axis powers by blocking enemy assets and prohibiting foreign trade and financial transactions. These assets also would serve as a future source of war reparations. The FFC program was administered by the Secretary of the Treasury throughout the war. After the cessation of hostilities, most foreign property subject to protective blocking was gradually released by licenses under the Foreign Funds Control Regulations (the ''FFCR''). Most enemy property was vested by the U.S. Government during and immediately after the war. Responsibility for administering the FFCR was transferred to the Attorney General (Office of Alien Property), effective October 1, 1948.

OFAC was formally created in December 1950, following the entry of China into the Korean War, when President Truman declared a national emergency under TWEA in response to the threat of international communism and blocked all Chinese and North Korean assets subject to U.S. jurisdiction. Economic sanctions against these countries, later expanded to include Vietnam and Cambodia, were promulgated at 31 CFR part 500. Part 505 was added in 1953 to restrict offshore trade with the Soviet Bloc in items of the kind controlled for export from the United States for national security reasons.

In 1963, pursuant to TWEA, President Kennedy imposed a trade embargo and ordered the blocking of assets of Cuba

and Cuban nationals in response to hostile acts against the United States by the Castro regime. Regulations implementing these sanctions are set forth at 31 CFR part 515. In 1966, the Justice Department returned responsibility for administering the FFCR to the Treasury Department, and these regulations were set forth at 31 CFR part 520.

Section 16 of TWEA provides for corporate criminal penalties of up to $1,000,000, and individual criminal penalties not to exceed $100,000 or ten years' imprisonment, or both, per count. Fines for criminal violations may be increased pursuant to 18 U.S.C. 3571. TWEA also provides for forfeiture of property that is the subject of a violation. TWEA authorizes civil penalties of up to $50,000 per count, adjusted for inflation to $55,000. It also allows the respondent to request an agency hearing, with the right to prehearing discovery, and, if the respondent elects this option, the civil penalty may be imposed only after such a hearing.

*The International Emergency Economic Powers Act.* In 1977, the Congress passed the International Emergency Economic Powers Act (''IEEPA''), 50 U.S.C. 1701–06, replacing TWEA as the statutory authority for a Presidential declaration of a national emergency in peacetime for the purpose of imposing economic sanctions. Pre-existing programs continue to be administered under TWEA, but new programs under TWEA may be established only during wartime. At this time, sanctions remain in place under TWEA solely with respect to (1) comprehensive sanctions against Cuba, (2) a residual blocking of North Korean assets previously blocked and an ongoing prohibition against the importation of certain goods from North Korea without an OFAC license, and (3) certain offshore trade in strategic goods with the former Soviet Bloc.

A significant distinction between the two statutes is that, until recently, IEEPA contained no Presidential vesting authority. With the passage of the USA PATRIOT Act of 2001, Pub. L. No. 107–56, IEEPA was amended to permit the vesting of assets under defined circumstances. While IEEPA does not authorize forfeiture absent an exercise of vesting authority, it does provide civil and criminal penalty authority, but in amounts less than those provided in TWEA. OFAC relies upon the U.S. Customs Service, operating under separate statutory authority, for the forfeiture of seized property.

IEEPA provides for civil penalties not to exceed $10,000, adjusted for inflation to $11,000. Criminal penalties range up to $50,000, or, if a natural person, up to ten years imprisonment, or both. Fines for criminal violations may be increased pursuant to 18 U.S.C. 3571.

*National Emergencies under IEEPA.* The first use of IEEPA occurred in 1979, in response to the Iranian hostage crisis. President Carter blocked over twelve billion dollars in Iranian assets subject to U.S. jurisdiction, enabling those assets to be used as leverage in negotiating the release of the U.S. hostages. Although most of the prohibitions contained in these sanctions were lifted prospectively by general license in 1981 in accordance with the Algiers Accords, transactions involving Iranian property within the United States or in the possession or control of U.S. persons remain regulated pursuant to 31 CFR part 535, that is, permitted only by general license. Import sanctions were imposed against Iran by President Reagan in 1987, under the authority of the International Security and Development Cooperation Act of 1985 (''ISDCA''), 22 U.S.C. 2349aa–9. Since this statute does not provide for criminal or civil penalty authority, OFAC relied upon the U.S. Customs Service, operating under separate statutory authority, for the imposition of criminal and civil penalties (including forfeiture of merchandise). President Clinton invoked IEEPA in 1995 to prohibit all trade with and investment in Iran, imposing the most comprehensive economic sanctions currently in place short of an assets freeze. Regulations implementing these sanctions are set forth at 31 CFR part 560.

President Reagan invoked IEEPA in 1985 to impose a trade embargo against the Sandinista regime in Nicaragua, and then again in 1986 to impose comprehensive economic sanctions, including an assets freeze, against the Government of Libya. The Libyan Sanctions Regulations remain in place at this time and are set forth at 31 CFR part 550. In 1986, Congress passed the Comprehensive Anti-Apartheid Act, prohibiting trade in certain goods and new investment in South Africa by codifying and expanding Executive Branch sanctions against that country imposed under IEEPA in 1985.

President Bush invoked IEEPA in 1988 to impose comprehensive economic sanctions against the Noriega regime in Panama, which sanctions were lifted after the U.S. invasion of that country in 1989. Assets of the Government of Panama remained blocked until the new government settled claims against it by U.S. persons. President Bush invoked IEEPA again in 1990 in response to the Iraqi invasion of Kuwait. Kuwaiti assets subject to U.S. jurisdiction were protected under an assets freeze until the Government of Kuwait was restored. Although OFAC did not conduct a formal census of these assets, the total Kuwaiti assets blocked under this program were estimated to exceed sixty billion dollars. Punitive sanctions against Iraq, including a comprehensive assets freeze, also were imposed in 1990 and remain in effect as set forth at 31 CFR part 575.

Since 1990, other countries have been subject to economic sanctions imposed under IEEPA, calibrated to respond to the given situation and U.S. foreign policy and national security objectives. Many ''country-based'' sanctions programs have a nexus to the U.S. government's response over time to the threat to U.S. national security and foreign policy posed by international terrorism. The Secretary of State has designated seven countries—Cuba, North Korea, Libya, Iran, Iraq, Sudan and Syria—as supporting international terrorism. Most of these countries are subject to comprehensive economic sanctions.

In 1995, President Clinton used IEEPA to deal with the threat to U.S. foreign policy and national security posed by terrorists who threaten to disrupt the Middle East Peace Process. This marked an expansion in the use of economic sanctions as a tool of U.S. foreign policy to target groups and individuals, as well as foreign governments. The Terrorism Sanctions Regulations are set forth at 31 CFR part 595. The trend of targeting groups and individuals continued later in 1995 when President Clinton invoked IEEPA to block assets and prohibit transactions with significant narcotics traffickers centered in Colombia. Regulations implementing these sanctions are set forth at 31 CFR part 536.

IEEPA has also been invoked to promote the national security and foreign policy objectives of the United States with respect to nonproliferation. In 1998, certain foreign entities were designated by the Secretary of State as promoting the proliferation of weapons of mass destruction. As set forth in 31 CFR part 539, OFAC regulations prohibit the importation of goods, technology, or services produced or provided by these entities. In 2000, President Clinton also invoked IEEPA to protect assets of the Russian Federation relating to the implementation of the agreement between the United States and Russia on the disposition of highly enriched uranium. Transfers of these assets in support of the agreements are licensed by OFAC. These protective

blocking regulations are set forth at 31 CFR part 540.

Most recently, in Executive Order 13224 of September 23, 2001, President George W. Bush declared a national emergency under IEEPA in response to the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States posed by the grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks committed in New York and Pennsylvania and at the Pentagon on September 11, 2001. The President also relied on the United Nations Participation Act (discussed below) as authority for the imposition of economic sanctions, citing United Nations Security Council Resolution (''UNSCR'') 1214 of December 8, 1998, UNSCR 1267 of October 15, 1999, UNSCR 1333 of December 19, 2000, and the multilateral sanctions contained therein.

*The Iraq Sanctions Act.* An additional statute containing penalty authority with respect to Iraq is the Iraq Sanctions Act of 1990 (''ISA''), Pub. L. 101–513, 104 Stat. 1079, 2047–55. The ISA dramatically increased the amount of civil and criminal penalties that may be assessed against U.S. persons violating these sanctions. ISA provides for civil penalties of up to $250,000, adjusted for inflation to $275,000, and criminal penalties of up to $1,000,000 and 12 years imprisonment.

*The United Nations Participation Act.* The Iraqi sanctions are also multilateral and administered under the authority not only of IEEPA but also the United Nations Participation Act (the ''UNPA''). The UNPA permits the President to incorporate United Nations-mandated economic sanctions into domestic law. The UNPA provides for criminal penalties of up to $10,000 in fines and up to ten years' imprisonment. Fines for criminal violations may be increased pursuant to 18 U.S.C. 3571. The UNPA also provides for forfeiture authority. United Nations-sponsored multilateral economic sanctions against the Federal Republic of Yugoslavia (Serbia & Montenegro) were imposed in 1992 in response to the disintegration of the former Yugoslavia and the civil strife fomented and genocide committed by the Milosevic regime in Bosnia and Herzegovina.

*The Antiterrorism and Effective Death Penalty Act.* Title III of the Antiterrorism and Effective Death Penalty Act of 1996 (''AEDPA''), Pub. L. 104–132, 110 Stat. 1214, makes it a criminal offense to (1) engage in a financial transaction with the government of a country designated as supporting international terrorism, or (2) provide material support or resources to a designated foreign terrorist organization. Violators may be fined or imprisoned for not more than ten years, or both. AEDPA also provides that any financial institution that knowingly fails to retain possession of or control over blocked funds or to report the existence of such funds shall be subject to a civil penalty in an amount that is the greater of $50,000 per violation, or twice the amount of the funds at issue. Regulations implementing these sanctions are set forth at 31 CFR parts 596 and 597.

*The Foreign Narcotics Kingpin Designation Act.* In 1999, new legislation expanded the scope of the 1995 sanctions against narcotics traffickers centered in Colombia. The Foreign Narcotics Kingpin Designation Act (the ''FNKDA''), 21 U.S.C. 1901–08, provides for criminal penalties of up to ten years imprisonment, fines in the amounts provided in title 18 of the U.S. Code, or both, or, in the case of an entity, fines of not more than $10,000,000 per violation. Criminal penalties for any officer, director, or agent range up to $5,000,000 or 30 years imprisonment, or both. Civil penalties not to exceed $1,000,000 per violation also may be imposed. Regulations implementing these sanctions are set forth at 31 CFR part 598.

**List of Subjects**

*31 CFR Part 501*

Administrative practice and procedure, Reporting and recordkeeping requirements.

*31 CFR Part 515*

Administrative practice and procedure, Banks, Banking, Cuba, Currency, Foreign investments in United States, Foreign trade, Penalties, Reporting and recordkeeping requirements, Securities, Travel restrictions.

For the reasons set forth in the preamble, 31 CFR parts 501 and 515 are amended as follows:

## PART 501—REPORTING AND PROCEDURES REGULATIONS

1. Part 501 is amended by adding the following appendix to read as follows:

### Appendix to Part 501—Economic Sanctions Enforcement Guidelines

**Note:** These guidelines provide a procedural framework for the enforcement of all economic sanctions programs administered by the Office of Foreign Assets Control (''OFAC''). Attention is directed to the appendix to the Cuban Assets Control Regulations, 31 CFR part 515, for additional guidelines specifically dealing with particular violations of those regulations.

**I. Enforcement of Economic Sanctions; Determination of Violation**

*A. OFAC Civil Investigation and Enforcement Action.* Civil investigation and enforcement with respect to economic sanctions violations rest primarily with OFAC, with certain investigations conducted by the U.S. Customs Service. OFAC investigations may lead to one or more of the following: a cautionary letter, a warning letter, a requirement to furnish information, an order to cease and desist, or a civil penalty proceeding. In addition to or instead of such actions, if the party involved is currently acting pursuant to an OFAC license, that license may be suspended or revoked.

*B. OFAC's Evaluation of Violative Conduct.* The type of enforcement action undertaken by OFAC depends on the nature of the apparent violation and the foreign policy goals of the particular sanctions program involved. In evaluating whether to initiate a civil penalty action, OFAC determines whether there is reasonable cause to believe that a violation of the regulations, pertinent statute, or Executive Order has occurred. Parts II and III of these Guidelines set forth the criteria used by OFAC to determine the appropriate response to an apparent violation.

*C. Criminal Investigations and Prosecutions.* If the evidence suggests willful violations of substantive prohibitions or requirements, OFAC may refer those cases to other federal law enforcement agencies for criminal investigation. Cases that are referred to the Department of Justice for criminal prosecution also may be processed by OFAC as civil penalty matters. This is generally done after the Justice Department's declination of criminal prosecution or the termination of criminal proceedings or as part of a global settlement of criminal and civil violations by the Justice Department.

**II. License Suspension and Revocation; Cautionary and Warning Letters**

*A. License Suspension and Revocation.* In addition to or instead of other administrative actions, OFAC authorization to engage in transactions pursuant to a general or specific license may be suspended or revoked for reasons including, but not limited to, the following:

1. The party has willfully made or caused to be made in any license application, or in any report required pursuant to a license, any statement that was, at the time and in light of the

circumstances under which it was made, false or misleading with respect to any material fact or has omitted to state in any application or report any material fact that was required;

2. The party has failed to file timely reports or comply with the recordkeeping requirements of a general or specific license;

3. The party has violated any provision of law enforced by the Office of Foreign Assets Control or the rules or regulations issued under any such provision;

4. The party has counseled, commanded, induced, procured, or knowingly aided or abetted the violation by any other person of any provision of any law or regulations referred to above; or

5. The party has committed any other act or omission that demonstrates unfitness to conduct the transactions authorized by the general or specific license.

*B. Cautionary Letters.* OFAC issues ''cautionary letters'' where an OFAC audit or civil investigation results in insufficient evidence to conclude that a violation appears to have occurred, but which may indicate activity that could lead to a violation in other circumstances or cause problems for future transactions. From time to time, when financial institutions appear not to be exercising due diligence in assuring compliance with OFAC's regulations, but no violation has occurred, a cautionary letter may be sent outlining the requirements of the regulations and urging greater diligence.

*C. Warning Letters.* Warning letters represent OFAC's conclusion that an apparent violation of the regulations occurred. In the exercise of its discretion, OFAC may determine in certain instances that a warning letter, citing the specific facts and relevant law, may achieve the same result as a monetary penalty insofar as future compliance with OFAC regulations is concerned. A warning letter will fully explain the apparent violation and urge future compliance. A warning letter does not constitute a final agency determination that a violation has occurred.

1. *Financial Transfers.* OFAC recognizes the high volume and level of automation of international funds transfers processed within the United States banking system on a daily basis. With respect to financial transfers, OFAC often issues warning letters in lieu of civil penalties in cases that appear to involve violations based on technicalities, where good faith efforts to comply with the law and no aggravating factors are evident. Some examples of cases where a warning letter might be issued in lieu of a proposed civil penalty include the following:

(a) Transactions in which there are significant variations in name and/or location specified in a funds transfer from those on OFAC's list of blocked persons and vessels, specially designated nationals, terrorists, narcotics traffickers and foreign terrorist organizations (the ''SDN list'') or list of sanctioned countries;

(b) Transactions where the name of the blocked party is spelled differently from the entry on OFAC's SDN list, thus bypassing an electronic filter (in these instances, the bank is expected to add the spelling variation to its filter);

(c) Transactions where funds are not intended to be sent to or through a blocked or specially designated bank (an ''SDN bank'') but a bank employee accidentally enters a code for an SDN bank;

(d) Transactions where a clerk accidentally hits a ''release'' key instead of a ''block'' or ''reject'' key and immediately takes action to try to recall the funds;

(e) Transactions that take place shortly after a new designation where the bank has not had time to update its systems and procedures or to review its account base;

(f) Transactions that are of a low value where the cost of pursuing a penalty action would likely exceed the enforcement benefit;

(g) Transactions involving an activity for which a policy determination has been made to authorize the activity by specific license; and

(h) Other transactions where the fact pattern and underlying transaction would appear to warrant a warning letter as opposed to a civil penalty action.

2. *Exports and Imports.* Warning letters may be issued in response to apparent violations solely involving the importation and exportation of goods and/or services valued at $500 or less, unless aggravating factors are present. Unauthorized importations in conjunction with travel involving Cuba are addressed in the appendix to the Cuban Assets Control Regulations, 31 CFR Part 515.

**III. Civil Penalties**

Prohibitions against engaging in various types of transactions in the context of economic sanctions programs are set forth in applicable statutes, Executive Orders, and regulations administered by OFAC. The criteria for initiating civil penalty enforcement action may differ depending upon the substantive nature of the apparent violation at issue and existing foreign policy and national security objectives. For purposes of the discussion below, ''proposed penalty'' is the amount set forth in the prepenalty notice, as distinct from the final amount imposed in the penalty notice.

*A. Most Frequent Categories of Violations Resulting in Civil Penalty Action, and the Penalties Proposed by OFAC*

1. *Prohibited Dealing in Blocked Property or Fund Transfers (including Rejected Transfers).* If the apparent violative transaction at issue is a prohibited dealing in blocked property by a person subject to the jurisdiction of the United States, the proposed penalty generally will be the lesser of either the statutory maximum or the dollar value of the transaction involved. For example, the dollar value may be the value of the property dealt in or the amount of the funds transfer that a financial institution failed to block or reject.

2. *Imports and Exports.* In import cases, the dollar value used in proposing a penalty generally will be the transaction value for imports of goods, technology, or services into the United States, as demonstrated by commercial invoices, bills of lading, signed Customs declarations, or similar documents. In U.S. Customs Service seizures where no transaction value can be demonstrated by credible evidence, the dollar value generally will be the foreign value as determined by U.S. Customs Service. Where neither the transactional nor U.S. Customs Service-determined foreign value is established in the administrative record, a default value of $10 per item imported generally will be assigned. For importations of Cuban-origin goods in conjunction with travel-related transactions involving Cuba, please refer to the appendix to the Cuban Assets Control Regulations, 31 CFR part 515. For exports, the dollar value used in proposing a civil penalty generally will be the U.S. domestic value of the goods, technology, or services.

3. *Performance of a Contract; New Investment.* The proposed penalty for the performance of a contract or new investment generally will be the lesser of the statutory maximum or the value of the contract or investment.

4. *Travel-Related Violations.* Proposed penalties for travel-related transactions involving Cuba are set forth in the appendix to the Cuban Assets Control Regulations, 31 CFR part 515. Please note that other sanctions programs, including the Iraqi Sanctions

Regulations (31 CFR part 575) and the Libyan Sanctions Regulations (31 CFR part 550), may include restrictions on travel-related transactions, violations of which will be dealt with on a case-by-case basis.

5. *Travel, Carrier, and Remittance-forwarding Service Provider Violations (Cuba).* The criteria for imposition of civil penalties for violations relating to the provision of travel, carrier, and remittance-forwarding service providers are contained in (1) the appendix to 31 CFR part 515 with respect to service providers not authorized by OFAC to provide such services and (2) the annual Service Provider Program Circular issued by OFAC with respect to service providers holding OFAC authorization.

6. *Requirement to Furnish Information; Reporting and Recordkeeping.* The following criteria shall apply for purposes of proposing a penalty, except in the instance of authorized service providers under the Cuban Assets Control Regulations, which criteria appear in the annual Service Provider Program Circular issued by OFAC:

(a) Each failure to respond to a requirement to furnish information, issued pursuant to 31 CFR 501.602, generally will result in a proposed penalty in the amount of $10,000, irrespective of whether any other violation is alleged;

(b) Late filing of a required report generally will result in a proposed penalty in the amount of $2,000, if filed within the first month after it is due. Each failure to comply with a reporting requirement, whether set forth in regulations or in a specific license, generally will result in a proposed penalty in the amount of $5,000 if the report is beyond one month late. If the report concerns blocked assets, however, the proposed penalty generally will include an additional $1,000 for every month beyond the second month that the report is not submitted, up to five years or the statutory maximum, whichever is lower.

(c) The first failure to maintain records in conformance with the requirements of OFAC's regulations or of a specific license generally will result in a proposed penalty in the amount of $2,000. Each additional offense in this regard generally will result in a proposed penalty in the amount of $10,000.

*B. Evaluation of Mitigating and Aggravating Factors*

In determining a settlement amount or penalty assessment at the penalty notice stage, OFAC generally will balance the mitigating and aggravating factors present in the administrative record, as well as weigh any administrative considerations that the agency may deem appropriate.

1. *Mitigation and mitigating factors.* The degree to which a proposed penalty is mitigated is determined by the blend of mitigating factors and aggravating factors present. The history of mitigation with respect to cases having substantially identical fact patterns generally will govern the degree of mitigation to be applied in subsequent cases. However, departures from these Guidelines or from prior history will be considered where appropriate. OFAC may attach more importance to a particular factor, and administrative considerations may also be taken into account. The individual circumstances of a violation, including the balance of factors present, will also influence the outcome. OFAC encourages evidentiary submissions indicating the presence or absence of a mitigating or aggravating factor. In the case of funds transfer violations by banks or other financial institutions, depending on the balance of mitigating and aggravating factors present, penalties generally will be mitigated 25–50% from the amount proposed in the prepenalty notice. In all other instances, penalties for violations generally will be mitigated 10% to 75% from the amount proposed in the prepenalty notice depending upon the balance of mitigating and aggravating factors present. Typical mitigating factors include, but are not limited to, the following:

(a) Voluntary disclosure;

(b) First offense (but see the appendix to 31 CFR part 515 for certain Cuba travel-related violations);

(c) Compliance program in place at time of violation;

(d) If no compliance program, implementation of one upon the respondent's discovery of or OFAC notification of the violation;

(e) Other remedial measures taken;

(f) Provision of a written response to a prepenalty notice;

(g) Useful enforcement information provided during an OFAC audit, investigation, or penalty proceeding;

(h) Part of comprehensive settlement with U.S. Customs Service;

(i) Other U.S. government enforcement action already completed;

(j) Lack of relevant commercial experience;

(k) Clerical error, inadvertence, or mistake of fact;

(l) Evidence in the administrative record that a transaction(s) could have been licensed by OFAC under an existing licensing policy had an application been submitted;

(m) Apparent language barrier or other impediment to understanding of regulations (individuals only);

(n) Humanitarian nature of transaction;

(o) Such other matters as justice may require.

2. *Aggravating Factors.* Typical aggravating factors include, but are not limited to, the following:

(a) Willfulness;

(b) Second or subsequent offense (but see the appendix to 31 CFR part 515 for certain Cuba travel-related violations);

(c) Apparent disregard of prior notice from U.S. government concerning transactions at issue;

(d) No remedial measure taken after notice or discovery;

(e) Deliberate effort to hide or conceal the violation;

(f) Extraordinary adverse economic sanctions impact;

(g) Lack of compliance program at the time of the violation;

(h) Familiarity with economic sanctions programs.

3. *Voluntary Disclosure.* When apparent violations are voluntarily disclosed by the actor to OFAC, the proposed penalty generally will be mitigated at least 50% from the amount that would otherwise be proposed under these Guidelines. A disclosure to OFAC is considered to be a voluntary disclosure where OFAC is notified of possible sanctions violations. Notification to OFAC may not be considered to be a voluntary disclosure if OFAC previously received information concerning the transactions from another source, including but not limited to another regulatory or law enforcement agency or another person's blocking or funds-transfer rejection report. Responding to an administrative subpoena or other inquiry from OFAC does not constitute a voluntary disclosure. Similarly, the submission of a license application does not constitute a voluntary disclosure unless it is also accompanied by a separate disclosure.

4. *First Offense.* Proposed penalties for apparent violations that constitute a first offense generally will be mitigated at least 25% in the penalty notice, unless aggravating factors are also present. Significant exceptions to this rule include apparent violations involving willful misconduct or gross negligence and those involving certain travel-related transactions described in the appendix to 31 CFR part 515 (where the proposed penalties already distinguish between first and subsequent offenses). In determining whether an apparent violation constitutes a first or subsequent offense, a distinction generally will be made

between prior OFAC penalty cases ending in an assessed civil monetary penalty and those settled prior to a finding of violation. Another factor considered is whether the OFAC regulations previously violated were similar to those of the new case under review. For example, all apparent reporting violations will be considered to be similar, as will those involving a failure to block financial transfers or failure to respond to a request for information. An apparent violation generally will be considered a first offense if no similar violation has been found within the past five years.

*C. Settlement Generally*

Settlements of penalty cases may be proposed at any stage of a civil penalty proceeding prior to the issuance of a final agency determination of violation. A settlement does not constitute a final agency determination that a violation has occurred.

*D. Settlement Prior to Issuance of Prepenalty Notice*

1. *Initiating settlement.* OFAC may settle a matter without initiating a formal action through the issuance of a prepenalty notice. A party may request an informal settlement with OFAC prior to OFAC's issuance of a prepenalty notice. To do so, the party may request in writing that OFAC withhold issuance of a prepenalty notice for a period of up to 60 days for the exclusive purpose of reaching settlement. If the applicable statute of limitations is close to expiring, OFAC may condition the entry into or continuation of informal settlement negotiations on an agreement to execute a waiver with respect to the statute of limitations. If such a waiver is not executed, OFAC may decide that there should be no informal settlement period and issue a prepenalty notice.

2. *Settlement process.* In informal settlement negotiations prior to the issuance of a prepenalty notice, OFAC will inform the party of the apparent violations OFAC intends to cite in the prepenalty notice, as well as the penalty amount to be proposed therein. Whenever possible, settlements will be negotiated in accordance with the mitigation provisions set forth above; however, each settlement will be viewed on its own merits, as factors present in one case may not appear in another.

3. *Settlements of multiple violations.* A settlement initiated for one apparent violation may also involve a comprehensive or global settlement of multiple apparent violations covered by other prepenalty notices, apparent violations for which a prepenalty has yet to be issued by OFAC, or previously unknown violations reported to OFAC during the penalty proceeding.

*E. Settlement Following Issuance of Prepenalty Notice*

1. *Initiating settlement.* After a prepenalty notice is issued and served, OFAC may settle the matter through informal negotiations at OFAC's initiation, at the request of the respondent or its authorized representative, or through the respondent's payment of the proposed penalty in full.

2. *Settlement process.* Settlements generally will be negotiated in accordance with the mitigation provisions set forth above. If a matter is settled at the prepenalty stage, that is, before a final penalty notice is issued, the claim proposed in the prepenalty notice will be withdrawn, the respondent will not be required to take a written position on the allegations contained in the prepenalty notice, and OFAC will not make a final determination as to whether a violation occurred. In the event no settlement is reached, the period specified for written response remains in effect unless additional time is granted by OFAC.

3. *Settlements of multiple violations.* As in the case of settlements prior to the issuance of a prepenalty notice, settlements following the issuance of a prepenalty notice may be comprehensive (global) settlements of multiple apparent violations covered by other prepenalty notices or for which a prepenalty notice has yet to be issued.

*F. Cancellation of Proceedings*

In the absence of a settlement, OFAC generally will not cancel a penalty proposed in a prepenalty notice absent evidence substantiating that the party named in the prepenalty notice did not commit or is not responsible for the violation charged, or unless such cancellation is otherwise appropriate for policy or legal reasons.

*G. Assessment and Imposition of Final Penalty*

1. *Consideration of response to prepenalty notice.* Prior to OFAC's issuance of a penalty notice, the cited party may respond to the allegations in OFAC's prepenalty notice. If a response is submitted, OFAC will carefully and fully consider all explanations contained in the response and weigh all information presented in making a final determination whether a violation has occurred, whether a penalty notice should be issued and, if so, in what amount the penalty should be assessed. If the response discloses new apparent economic sanctions violations, a revised prepenalty notice may be issued citing the newly-disclosed apparent violations. When possible criminal conduct is revealed in the response, the case may be referred for further investigation.

2. *Issuance of penalty notice.* Absent a settlement of allegations, OFAC generally will issue a penalty notice in accordance with the procedures set forth in the applicable regulations. OFAC will consider all information in the administrative record before assessing the final penalty amount. The penalty generally will be assessed in an amount that reflects the mitigating and aggravating factors present in the record, determined in accordance with the mitigation provisions set forth above.

3. *Penalty assessment in absence of response to prepenalty notice.* Where OFAC receives no response to a prepenalty notice within the time prescribed in the applicable regulations, a penalty notice generally will be issued, taking into account the mitigating and/or aggravating factors present in the record. If there are no mitigating factors present in the record, or the record contains a preponderance of aggravating factors, the proposed prepenalty amount generally will be assessed as the final penalty.

4. *Referral to Financial Management Division.* The imposition of a penalty pursuant to a penalty notice creates a debt due the U.S. Government. OFAC advises Treasury's Financial Management Division (''FMD'') upon the imposition of a penalty. FMD will take follow-up action to collect the penalty assessed if it is not paid within the prescribed time period set forth in the penalty notice.

5. *Final agency action and judicial review.* The imposition of a penalty pursuant to a penalty notice constitutes final agency action, which is subject to judicial review.

*H. Disposition of Funds and Merchandise*

1. *Seizure, forfeiture, and release generally.* Where import or export violations of economic sanctions occur, the U.S. Customs Service may have seized the goods involved pursuant to separate statutory authorities. OFAC usually coordinates with the U.S. Customs Service regarding the disposition of seized goods for purposes of resolving the penalty action. Where OFAC lacks civil forfeiture authority, OFAC may provide a recommendation to the U.S. Customs Service regarding disposition of seized goods. The forfeiture of the goods may be considered in addition to or in lieu of monetary penalties in determining the

most equitable and appropriate penalty. OFAC may authorize or recommend to the U.S. Customs Service the release of any funds or merchandise involved in the violative transaction upon the payment of the penalty assessed or settlement negotiated by OFAC. In settlements involving seized goods, the disposition of the goods generally will be an element of OFAC's agreement. When there has been no payment of an assessed monetary penalty, OFAC generally will recommend the forfeiture of the seized goods or funds to the U.S. Customs Service.

2. *Seizure of blocked property.* Where the funds or merchandise seized by the U.S. Customs Service constitute property blocked pursuant to the controlling Executive Order, statute, or regulations, such property generally remains blocked. Those who might claim an interest in the blocked property should refer to provisions in the Reporting and Procedures Regulations, 31 CFR part 501, and in the regulations or other legal authorities governing the relevant economic sanctions program for additional information.

## PART 515—CUBAN ASSETS CONTROL REGULATIONS

1. Part 515 is amended by adding the following appendix to read as follows:

### Appendix to Part 515—Cuba Travel-Related and Certain Other Violations of 31 CFR Part 515

Note to Appendix to Part 515: This appendix provides a schedule of proposed civil monetary penalties for certain violations of the Cuban Assets Control Regulations, 31 CFR part 515. The civil penalty process is described in detail in subpart G of 31 CFR part 515 and in the appendix to the Reporting and Procedures Regulations, 31 CFR part 501.

*A. Traveler Violations/Amounts for Prepenalty Notices*

1. Tourist travel-related transactions:
First trip: $7,500
Each additional trip: $10,000

2. Business travel-related transactions:
First trip: $15,000
Each additional trip: $25,000

3. Travel-related transactions involving unlicensed visits to close relatives:
First trip: warning letter
Each additional trip—
Prior to agency notice*: $1,000
Subsequent to agency notice*: $4,000

4. Travel-related transactions where no specific license was issued under 31 CFR 515.560(a)(3)–(12) but where there is evidence that the purpose of the travel fits within one of the categories of licensable activities:
Each trip prior to agency notice*: $3,000
Each trip subsequent to agency notice*: $10,000

5. Exports (or attempted exports) of unauthorized funds in which Cuba or a Cuban national has an interest: Value of unauthorized funds

**Note to A.5.:** Additional remittance forwarding penalties may be considered.

6. Unauthorized use of a credit card in Cuba:
First trip: $1,000
Each additional trip: $2,000

7. Importations of Cuban-origin goods in conjunction with travel-related violations:
Where aggregate value of goods is $500 or less: $250
Where aggregate value of goods exceeds $500: $250 plus excess value above $500

**Note to A.7.:** Value generally will be determined by the transactional value, if evidenced by a receipt, signed Customs declaration, or similar document or, if none, the foreign value as determined by the U.S. Customs Service. In the absence of either, a default value of $10 per item generally will be assigned to the goods, except in the case of boxes of cigars, which generally will be valued at $250.

*B. Provision of Travel, Carrier and Remittance Forwarding Services by Persons Not Authorized as Service Providers*

1. Provision of remittance forwarding services:
Prior to agency notice*: $2,000
Subsequent to agency notice*: $15,000

2. Provision of travel services:
Prior to agency notice*: $2,000, plus $500 per person assisted
Subsequent to agency notice*: $15,000, plus $500 per person assisted

3. Provision of carrier services:
Prior to agency notice*: $5,000, plus $500 per person assisted
Subsequent to agency notice*: $25,000, plus $500 per person assisted

**Note to B.:** Other violations that arise in the context of the Cuba program are addressed in the main text of these Guidelines as published in the appendix to 31 CFR part 501. Violations by persons authorized as Service Providers are addressed in the annual Service Provider Program Circular issued by OFAC.

* For purposes of determining prepenalty amounts as set forth in this appendix, the term ''agency notice'' means any evidence in the administrative record of written or oral communication between OFAC and the party alleged to have committed a violation concerning the same or a substantially similar violation. This evidence may include, but is not limited to, a warning letter, a cease and desist order, a prepenalty notice, or a notation of a telephonic conversation or letter from OFAC advising the party that the conduct is in violation of applicable regulations. A party may dispute the adequacy of agency notice in its response to the prepenalty notice.

Dated: January 13, 2003.

**R. Richard Newcomb,**

*Director, Office of Foreign Assets Control.*

Approved: January 13, 2003.

**Kenneth E. Lawson,**

*Assistant Secretary (Enforcement), Department of the Treasury.*

[FR Doc. 03–1809 Filed 1–24–03; 12:16 pm]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 300

**[FRL–7443–6]**

### National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of intent for partial deletion of the Cecil Field Naval Air Station (site) from the National Priorities List (NPL).

**SUMMARY:** The Environmental Protection Agency, Region 4, announces its intent to delete portions of the Cecil Field Naval Air Station Superfund Site (the ''Site'') (EPA ID# FL 5170022474) from the National Priorities List (NPL) and requests public comment on this action. The NPL is codified as appendix B to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300, which EPA promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, 42 U.S.C. 9605. The EPA has determined, with the concurrence of the State of Florida through its Department of Environmental Protection, that the parcels proposed for deletion under this action do not pose a significant threat to public health or the environment, as defined by CERCLA, and therefore, further remedial measures pursuant to CERCLA are not appropriate for these parcels. EPA proposes deletion of these parcels in accordance with 40 CFR 300.425(e) and the Notice of Policy Change: Partial Deletion of Sites on the

National Priorities List published in the **Federal Register** on November 1, 1995.

The remaining parcels comprising the Cecil Field Naval Air Station Superfund Site will remain on the NPL. Response actions are either underway at these parcels or the parcels do not require any further response action other than operation and maintenance activities and enforcement.

**DATES:** EPA will accept comments concerning this proposal to delete specified parcels from the Site until March 31, 2003.

**ADDRESSES:** Comments may be submitted to Deborah A. Vaughn-Wright, Remedial Project Manager, Federal Facilities Branch, Waste Management Division, U.S. Environmental Protection Agency, 61 Forsyth Street, Atlanta, Georgia 30303, (404) 562–8539, fax (404) 562–8518, e-mail *vaughn-wright.debbie@epa.gov.*

Comprehensive information and deletion docket for this site is available through the public docket which is available for viewing at the Site Information repositories at the following locations:

(1) U.S. EPA Region 4, Library, 61 Forsyth Street, Atlanta, GA 30303, (404) 562–8190. Hours: Monday thru Friday, 8 a.m. to 4 p.m.; and

(2) Building 907, 13357 Lake Newman Street, Cecil Commerce Center, Jacksonville, Florida 32252, Phone: (904) 573–0336.

**FOR FURTHER INFORMATION CONTACT:** Deborah A. Vaughn-Wright, Remedial Project Manager, U.S. Environmental Protection Agency, 61 Forsyth Street, Atlanta, Georgia 30303, (404) 562–8539, Fax (404) 562–8518, e-mail *vaughn-wright.debbie@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

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## I. Introduction

The U.S. Environmental Protection Agency (EPA) Region 4 announces its intent to delete approximately 16,496.14 acres of land from the Cecil Field Naval Air Station Superfund Site, Jacksonville, Duval and Clay Counties, Florida from the National Priorities List (NPL). The NPL constitutes appendix B to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300, which EPA promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, 42 U.S.C. 9605.

The NPL is a list of facilities which EPA determined may pose a significant threat to public health, welfare, or the environment. 40 CFR 300.425(e) authorizes deletion of facilities, or portions of facilities, from the NPL provided that facility meets certain criteria. Deletion from the NPL does not necessarily preclude further remedial action. If a significant release occurs at a facility deleted from the NPL, that facility is restored to the NPL without application of the Hazard Ranking System. Non-federal facilities deleted from the NPL are eligible for Fund-financed remedial actions should future conditions warrant such action. While federal facilities are not eligible for Fund-financed remedial action, all federal facilities, whether listed on the NPL or not, have a continuing statutory duty to conduct further remediation, if required, even after the federal property is transferred to non-federal owners. Where a release attributable to federal facility's historical activities is discovered after a property transfer, CERCLA section 120(h)(3)(A)(i) requires the federal entity to conduct further remediation if needed for protection of human health and the environment.

An environmental assessment was conducted at the facility on the parcels proposed for transfer. All media were sampled. Results of this sampling were compiled in Remedial Investigations reports which were used to conduct a Risk Assessments. Feasibility Studies were generated which evaluated potential remedies required to address the contamination. The remedies were summarized in a public notice soliciting comments on the remedies. All public comments received during the public comment period were considered by the Navy and EPA before a final remedy was selected. Several parcels did not require a remedial action to be protective of human health and the environment.

The parcels proposed for deletion are described in more detail later in this document. EPA proposes deleting these parcels from the NPL because no further CERCLA response is appropriate. The remaining portions of property comprising the Cecil Field Naval Air Station Superfund Site will remain on the NPL. This notice will be published in the **Federal Register** to solicit public comment on the proposed partial deletion. The public comment period is thirty (30) days beginning on the date of publication.

Section II of this action explains the criteria for the partial deletion of sites from the NPL. Section III discusses the procedures that EPA is using for this action. Section IV discusses the history of the Cecil Field Naval Air Station Site and explains how the portions of the Site proposed for deletion meet deletion criteria. Section V states EPA's action to delete the portions of the site from the NPL unless dissenting comments are received during the comment period.

## II. NPL Deletion Criteria

Section 300.425(e) of the NCP provides that sites may be deleted from, or recategorized on, the NPL where no further response is appropriate. In making a determination to delete a release from the NPL, EPA shall consider, in consultation with the state, whether any of the following criteria have been met:

(i) Responsible parties or other persons have implemented all appropriate response actions required; or

(ii) All appropriate Fund-financed response under CERCLA has been implemented, and no further response action by responsible parties is appropriate; or

(iii) The Remedial Investigation has shown that the release poses no significant threat to public health or the environment and, therefore, taking of remedial measures is not appropriate.

As explained below, portions of the Site meet the NCP's deletion criteria listed above. Therefore, a partial deletion is being proposed.

## III. Deletion Procedures

The following procedures were used for the intended partial deletion of portions from the Site:

(1) All appropriate responses under CERCLA have been implemented and no further action by EPA is appropriate for the identified areas; (2) The State of Florida concurred with the proposed deletion decision via letter dated July 3, 2002; (3) Simultaneous with this notice, a similar notice of Intent for Partial Deletion was published in a major local newspaper with general circulation in and around the Site and distributed to appropriate federal, state, and local officials and other interested parties announcing a thirty (30) day comment period starting on the date of publication in the **Federal Register** and a major local newspaper; and (4) All relevant documents have been made available for public review in the local Site information repositories.

The public is asked to comment on the proposed partial deletion within thirty (30) days of the date of this document. EPA will evaluate all comments received during this period before issuing a final decision. If

appropriate, EPA will prepare a Responsiveness Summary, responding to each significant comment submitted during the public comment period. The Responsiveness Summary will be available for public viewing at the information repositories listed above. If EPA determines that the proposed partial deletion is appropriate, EPA will publish a Final Notice of Partial Deletion in the **Federal Register**. Actual deletion of the proposed parcels does not occur until the Final Notice of Partial Deletion is published in the **Federal Register**. As stated in 40 CFR 300.425, a site, or portions of a site, deleted from the NPL remain eligible for future response actions if conditions warrant.

**IV. Basis for Intended Partial Site Deletion**

The following site summary provides the Agency's rational for the proposed partial deletion. It also includes information demonstrating satisfaction of the deletion criteria specified under 40 CFR 300.425(e).

*Site Background and History:*

Cecil Field Naval Air Station is located 14-miles west of Jacksonville, Florida in Duval and Clay Counties. The entire Site encompasses approximately 17,200 acres. The Site operated as Naval Air Station Cecil Field from 1941 until 1999 when the base was closed as a result of the Defense Base Realignment and Closure (BRAC) Act of 1990. During that period the base provided facilities, services, and material support for the operation and maintenance of naval weapons, aircraft and other units of the operation forces as designated by the Chief of Naval Operations. Some of the tasks required to accomplish this mission include operation of fuel storage facilities and performance of aircraft maintenance. Maintenance activities at NAS Cecil Field over the years generated a variety of waste materials including municipal solid waste, municipal wastewater treatment plant sludge, industrial wastes including waste oils, solvents, paints and spilled fuels, and waste pesticides. Contaminants of concern include pesticides, chlorinated solvents, waste fuels and metals.

Cecil Field Naval Air Station was listed on the NPL in 1989. At that time the entire base was included in the listing, fence line to fence line. The Department of the Navy, State of Florida and the U.S. Environmental Protection Agency approved a Federal Facilities Agreement in October 1990, which outlined procedures for identifying and addressing contamination at the Site. The entirety of Cecil Field Naval Air Station was included on the NPL listing. Upon listing, the facility began identifying sites where activities involving hazardous substances may have occurred. The sites requiring further investigation were grouped into Operable Units (OU). Twelve operable units (OU) have been identified at Cecil Field many with subunits denoted as ''sites.'' The numbering of sites within an OU is not necessarily consecutive because the sites were identified prior to the OU grouping. Operable Units identified at Cecil Field are: OU 1, Site 1—Old Landfill and Site 2—Recent Landfill; OU 2, Site 5—Oil Disposal Area Northwest and Site 17—Oil and Sludge Disposal Pit Southwest; OU 3, Site 7—Old Firefighter Training Area and Site 8—Boresite Range/Hazardous Waste Storage/Firefighting Area; OU 4, Site 10—Rubble Disposal Area; OU 5, Site 14—Blue 5 Ordnance Disposal Area, Site 15—Blue 10 Ordnance Disposal Area, Site 49—Recent Skeet Range; OU 6, Site 11—Golf Course Pesticide Disposal Area; OU 7, Site 16—AIMD Seepage Pit/NDI Holding Tank; OU 8, Site 3—Oil and Sludge Disposal Pit; OU 9, Site 36—Control Tower TCE Plume, Site 37—Hangars 13 and 14 DCE Plume, Site 57—Building 824A/Day Tank 1 Area, and Site 58—Building 312 Area; OU 10, Site 21—Golf Course Maintenance Area and Site 25—Former Transformer Storage Area; OU 11, Site 45—Former Steam Generating Plant; OU 12, Site 32—Former DRMO Area, Site 42—Former Boiler House/Steam Plant, Site 44—DRMO/Lake Fretwell Drainage Ditch; and the Old Golf Course.

This document proposes deletion of some OUs in their entirety or only certain sites within an OU. Remedial Investigations are complete for operable units (OU) 1 (sites 1 and 2), 2 (sites 5 and 17), 3 (sites 7 and 8), 4 (site 10), 5 (site 14), 6 (site 11), 7 (site 16), 8 (site 3), and 9 (sites 36/37). Records of Decisions (ROD) have been finalized for all of these operable units as well. Remedial Investigations/Feasibility Studies are still under way for OU 5 (site 15 and 49), 9 (sites 56 and 57), 10 (sites 21 and 25), and 11 (site 45). An Engineering Evaluation and Cost Analysis has been completed for OU 5 (site 49) and OU 12 (site 32). Removal actions have been completed for OU 12 (sites 42, 44, and the old golf course) which resulted in no further action decisions.

As a result of the BRAC designation in July 1993, an Environmental Baseline Survey (EBS), which identifies parcels of land for sale, lease or needing further investigation, was completed in November 1994. The 1994 EBS also provided descriptions of the environmental condition of property for buildings and open areas on the base. Environmental conditions of property can be divided into seven types: BRAC 1 or White—areas which do not require further investigation because no release or disposal of hazardous substances or petroleum products have occurred (including migration of these substances from an adjacent area); BRAC 2 or Blue—areas where only a release or disposal of petroleum products have occurred; BRAC 3 or light green—areas where a release, disposal and/or migration of hazardous substances have occurred, but at concentrations that do not require a removal or remedial action; BRAC 4 or dark green—areas where release, disposal, and/or migration of hazardous substances have occurred, and all remedial actions necessary to protect human health and the environment have taken place; BRAC 5 or yellow—areas where release, disposal, and/or migration of hazardous substances have occurred, and removal or remedial actions are underway, but all required actions have not yet been taken; BRAC 6 or red—areas where release, disposal, and/or migration of hazardous substances have occurred, but required actions have not been implemented; or BRAC 7 or gray areas that are not evaluated or require additional evaluation. The EPA concurred on 270 buildings/parcels receiving the uncontaminated designation per CERCLA section 120(h)(4)(A) in a letter dated June 20, 1995. Between 1995 and 2001, EPA has concurred on another 125 buildings/parcels as being uncontaminated following further evaluation. EPA has also evaluated another 250 buildings/parcels for BRAC and has approved their designation as BRAC 2, BRAC 3, or BRAC 4. These areas were evaluated in accordance to section 120(h) of CERCLA as amended by the Community Environmental Response Facilitation Act (CERFA) as well as the NCP. Remedial activity for areas where there has been a release or disposal of petroleum products has been deferred to the State of Florida's Petroleum Program. To date approximately 95% of the property has been transferred to the Jacksonville Port Authority and the City of Jacksonville for redevelopment and includes the property being proposed for partial deletion.

The portions of Cecil Field to be deleted from the NPL include OU 4 (site 10), OU 5 (site 14), OU 12 (sites 44, 42 and the Old Golf Course) and an additional 16,527 acres which are not associated with an operable unit that

have been evaluated as not posing a risk to human health and the environment (BRAC environmental condition of property 1, 2, 3 and 4).

The boundaries of the base are within the following coordinates: 30.3012 North Latitude, 81.9306 West Longitude; 30.3012 North Latitude, 81.9244 West Longitude; 30.3063 North Latitude, 81.8781 West Longitude; 30.2468 North Latitude, 81.8445 West Longitude; 30.1784 North Latitude, 81.8676 West Longitude; 30.1783 North Latitude, 81.8847 West Longitude. Within these coordinates are several areas which are not part of this partial deletion. The areas not included are Building 635, Building 605, Potential Source of Contamination (PSC) 51 (Current Golf Course), Operable Unit (OU) 1 (Sites 1—Old Landfill and Site 2—recent landfill), OU 2 (Site 5—Oil Disposal Area Northwest and Site 17—Oil and Sludge Disposal Pit Southwest), OU 3 (Site 7—Old Firefighter Training Area and Site 8—Boresite Range/Hazardous Waste Storage/Firefighting Area), OU 5 (Site 15—Blue 10 Ordnance Disposal Area, Site 49—Recent Skeet Range), OU 6 (Site 11—Golf Course Pesticide Disposal Area), OU 7, (Site 16—AIMD Seepage Pit/NDI Holding Tank), OU 8 (Site 3—Oil and Sludge Disposal Pit), OU 9 (Site 36—Control Tower TCE Plume, Site 37—Hangars 13 and 14 DCE Plume, Site 57—Building 824A/Day Tank 1 Area, and Site 58—Building 312 Area), OU 10 (Site 21—Golf Course Maintenance Area and Site 25—Former Transformer Storage Area), OU 11 (Site 45—Former Steam Generating Plant), and OU 12 (Site 32—Former DRMO Area). Maps identifying all areas are available for review in the partial deletion docket.

*Operable Unit 4*

Operable Unit 4 (site 10) occupies approximately 6.5 acres and operated as a rubble disposal area in the 1950's and 1960's. The Remedial Investigation was conducted in 1996, and did not identify any contamination which would pose a risk to human health or the environment. At OU 4 the primary source of contamination would be from demolition and rubble debris resulting from infrastructure demolition including runway and taxiway pavement. Historical records and physical debris did not indicate the presence of solvents, petroleum products, or other hazardous materials. In July 1997, a Record of Decision was signed for no further action. In June 1999, an Explanation of Significant Differences was approved which would address surface soil contamination with arsenic levels above the State of Florida's residential cleanup target levels. In October 1999, 335 tons of arsenic contaminated soil were removed from this site and taken to an approved landfill, confirmation samples were collected and the area was backfilled with clean fill. No further action is required at this site.

*Operable Unit 5*

Operable Unit 5 (site 14) was known as the Blue 5 Ordnance Disposal Area and consisted of 19 acres located in the Yellow Water Weapons Area. The site was used for ordnance disposal from 1967 through 1977. Disposal operations at this site consisted of detonation of excess ordnance such as fuses, 100-pound bombs, large munitions and explosive materials that normally do not burn. Typical explosives detonated included trinitrotoluene (TNT), trinitrophenylmethylnitramine and cyclotrimethylenetrinitramine. Ordnance detonation generates residual metals, primarily aluminum and lead oxides with minor amounts of unreacted or partially reacted organics. The Remedial Investigation (RI) was completed in October 1997. As part of the RI 102 soil samples were collected. Results showed that TNT is sporadically distributed at low concentrations that pose no explosive or biological hazards over the area of investigation. It was determined that the site did not pose a threat to human health or the environment. In July 1998, a Record of Decision (ROD) was signed for no further action.

*Operable Unit 12*

Operable Unit 12 consists of four sites, site 32, 42, 44 and the old golf course. Removal actions have been completed at all four sites, however, because contamination remains at site 32 above residential levels it is not part of this partial deletion proposal. Site 42 was known as the former boiler house/steam plant and general storehouse. The steam plant and storehouse were demolished about 40-years ago. Currently, only the foundations remain and the area is heavily vegetated. Surface and subsurface soil samples identified polycyclic aromatic hydrocarbons (PAHs), total recoverable petroleum hydrocarbons and metals (chromium, arsenic, and barium). An Action memorandum was prepared and approved in September 2000. Areas of soil where BaPEqs, TRPH, antimony, arsenic, barium and chromium concentrations were greater than the leachability soil concentration target level or three times that residential soil target cleanup level were excavated in March 2001. A total of 2,420.36 tons of soil was excavated, transported and disposed off-site. The site was backfilled with certified clean fill, graded and seeded.

Site 44 is referred to as the ditch from the Defense Reutilization and Marketing Organization (DRMO) to the active federally owned wastewater treatment building. The ditch received storm water runoff from the western edge of the east-west runways, the DRMO area and from the UNF 6 wash rack. Sampling identified lead, Polychlorinated biphenyls (PCBs), pesticides, PAHs, and inorganics (aluminum, cadmium, chromium, lead, mercury, and zinc) in excess of ecological screening criteria in the ditch as well as PCB's above residential risk levels in and around the ditch. No groundwater issues were identified. An action memorandum was prepared and approved in June 2000. Soil with PCB concentrations in excess of 1,500 μg/kg were excavated and disposed at a permitted solid waste disposal facility in September 2000. This resulted in a UCL concentration of PCBs before the Florida residential soil target level of 500 μg/kg. A total of 292 tons of soil was excavated. The site was then backfilled with certified clean fill, graded and seeded.

The old golf course operated from the early 1940's until 1946 when the current golf course was constructed. The area is now heavily wooded with a portion occupied by the former bachelor officer's quarters (BOQ). Surface and Subsurface soil sampling identified arsenic above Florida soil target cleanup levels. An action memorandum was prepared and approved in June 2000. Areas of soil where arsenic concentrations were greater than the residential cleanup levels established by statistical analyses have been excavated. During August 2000, 483-tons of contaminated soil was removed, transported and disposed off site. The site was backfilled with certified clean fill, graded and seeded.

*Five-Year Review*

The initial Five-Year Review for Naval Air Station Cecil Field was concurred upon by EPA in October 2000. The review focused on interim remedial actions that had been conducted at Operable Unit (OU) 2 (Sites 5 and 17), OU 7 (Site 16), OU 6 (Site 11). Discussions and recommendations were included for the long-term groundwater actions at these three operable units as well as operable units 1, 3, 4, 5, and 8 where the remedies had been in place for less than five years. The next five-year review is scheduled for October 2005.

*Other Areas*

Approximately 17,200 acres of Cecil Field have been evaluated for potential property transfer under the BRAC program. As was stated above, using the BRAC environmental condition of property classifications 16,496.14 acres have been determined to either be uncontaminated or BRAC category 1, areas where only a release or disposal of petroleum products have occurred or BRAC category 2; or areas where a release, disposal and/or migration of hazardous substances have occurred, but at concentrations that do not require a removal or remedial action or BRAC category 3; or areas where release, disposal, and/or migration of hazardous substances have occurred, and all remedial actions necessary to protect human health and the environment have taken place or BRAC category 4. No further action under CERCLA is required in these areas. Documentation for BRAC activities are available for public viewing at Building 907, 13357 Lake Newman Street, Cecil Commerce Center, Jacksonville, Florida 32252, Phone: 904–573–0336., which also houses the NPL Site Administrative Record.

**V. Deletion Action**

EPA, with the State of Florida concurrence, has determined that no responses are necessary at the 16,527 acres which comprised a major portion of the Cecil Field Naval Air Station, and no further CERCLA response is appropriate or necessary in order to provide protection of human health and the environment other than the ongoing inspection, maintenance and monitoring activities. Therefore, EPA is deleting these portions of the Site.

**List of Subjects in 40 CFR Part 300**

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: January 10, 2003.

**James I. Palmer, Jr.,**

*Regional Administrator, Region 4.*

Title 40, Chapter 1 of the Code of Federal Regulations is proposed to be amended as follows:

**PART 300—[AMENDED]**

1. The authority citation for part 300 continues to read as follows:

**Authority:** 42 U.S.C. 9601–9657; 33 U.S.C. 1321(c)(2); E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp.; p.351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp.; p.193.

**Appendix B—[AMENDED]**

2. Table 2 of appendix B to part 300 is amended by revising the entry for Cecil Field Naval Air Station to read as follows:

**Appendix B to Part 300—National Priorities List**

* * * * *

TABLE 2.—FEDERAL FACILITIES SECTION

| St | Site name | City/County | Notes [a] |
|---|---|---|---|
| * | * | * | * |
| FL | Cecil Field Naval Air Station | Jacksonville | P |
| * | * | * | * |

(a) * * *

* * * * *

P = Sites within partial deletion(s).

[FR Doc. 03–1776 Filed 1–28–03; 8:45 am]

BILLING CODE 6560–50–P

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Parts 223 and 224**

**[I.D. 122302B]**

## Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List North American Green Sturgeon as a Threatened or Endangered Species

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

**ACTION:** Notice of petition finding and availability of a status review document.

**SUMMARY:** NMFS has completed an Endangered Species Act (ESA) status review for the North American green sturgeon (*Acipenser medirostris*). After reviewing the available scientific and commercial information, NMFS has determined that the petitioned species is comprised of two distinct population segments (DPSs) that qualify as species under the ESA, but that neither DPS warrants listing as a threatened or endangered species at this time. Because of remaining uncertainties about their population structure and status, NMFS is adding both DPSs to the agency's list of candidate species and will re-evaluate their status in 5 years provided sufficient new information becomes available indicating that a status review update is warranted.

**DATES:** The finding announced on this document was made on January 23, 2003.

**ADDRESSES:** The North American green sturgeon status review and list of references are available by submitting a request to the Assistant Regional Administrator, Protected Resources Division, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213, or the Assistant Regional Administrator, Protected Resources Division, Northwest Region, NMFS, 525 NE Oregon Street, Suite 500, Portland, OR 97232. The status review and other reference materials regarding this determination can also be obtained via the Internet at: *http://www.nmfs.noaa.gov*.

**FOR FURTHER INFORMATION CONTACT:** Craig Wingert, NMFS, Southwest Region (562) 980–4021, Scott Rumsey, NMFS, Northwest Region (503) 872–2791, or David O'Brien, NMFS, Office of Protected Resources (301) 713–1401.

**SUPPLEMENTARY INFORMATION:**

**Petition Background**

On June 12, 2001, NMFS received a petition from the Environmental Protection Information Center, Center for Biological Diversity, and WaterKeepers Northern California requesting that NMFS list the North American green sturgeon (*Acipenser medirostris*) as either an endangered or threatened species under the ESA, and that critical habitat be designated for the species concurrently with any listing determination.

The petition noted that the green sturgeon is a recognized species, but also indicated that until recently, geographic variation in the species had received little attention. Although Russian and Asian forms of the green sturgeon are morphologically similar to the North American form, the petitioners cited genetic evidence that demonstrates differences between the Asian and North American forms and suggesting they are two distinct species. In this petition, therefore, the use of A. medirostris referred to the North American population of the green sturgeon. The petitioners also noted that the stock structure of this species is poorly known as well, and that there may prove to be DPSs within this biological species as new data are gathered and analyzed.

The petitioners indicated that the only remaining spawning populations of the North American green sturgeon are in the Sacramento and Klamath River basins in California and possibly the Rogue River, Oregon. The petitioners also suggest that the spawning population in the Klamath River basin is larger than the population in the Sacramento River basin. Running-ripe adults and young of the year have been observed in the Rogue River, but exact spawning locations have not been confirmed. The petitioners also stated that green sturgeon apparently no longer spawn in the Eel River, the South Fork Trinity River, and the San Joaquin River in California. The petitioners also cited recent declines in green sturgeon in the Umpqua River in Oregon and the Fraser River in Canada. The petitioners cite Musick et al. (2000) as indicating that each of the known or suspected spawning populations of green sturgeon presently contain a few hundred mature females at most.

The petitioners concluded that the North American green sturgeon is at a high risk of extinction because of the reduced number and size of spawning populations, ongoing threats to the species from the loss and/or degradation of habitat particularly in those river systems where they are known or thought to spawn, and continuing impacts to the species from harvest in sport fisheries or as bycatch in other fisheries (e.g. commercial white sturgeon fishery). Specific concerns regarding habitat loss and degradation cited by the petitioners include the construction of dams and operation of large scale water projects in the Sacramento, Klamath River and other coastal systems, and logging, agriculture, mining, road construction and urban development in coastal watersheds. With respect to fisheries impacts on green sturgeon, the petitioners cited fisheries that occur in coastal Washington and the Columbia River which focus on white sturgeon or salmon but take green sturgeon as a bycatch. Of particular concern is the potential bycatch of pre-reproductive individuals in these fisheries, particularly if this harvest is supported by the spawning populations that exist in the Klamath and Sacramento River basins.

NMFS evaluated the information provided or cited in the petition and also reviewed other information readily available to agency scientists on issues related to the distribution, abundance, and threats to the petitioned species. On December 14, 2001, NMFS published a 90-day finding (66 FR 64793) that the petition presented substantial information that listing North American green sturgeon under the ESA may be warranted, and announced the initiation of a review of the biological status of the species.

To ensure that the status review was complete and based on the best available scientific and commercial data, the 90–day finding also requested information and comments from the public concerning the status of North American green sturgeon (66 FR 64793). In addition, NMFS specifically requested information and comments on green sturgeon from State and Tribal co-managers in California, Oregon, and Washington. NMFS requested information on: (1) biological or other relevant data that may help identify DPSs of this species (e.g., age structure, genetics, migratory patterns, morphology, etc.); (2) the range, distribution, and abundance of this species, including information on the spawning populations of the species; (3) current or planned activities and their possible impact on this species (e.g., harvest impacts, habitat changes or alterations, etc.); and (4) efforts being made to protect this species in California, Oregon, Washington and Canada. NMFS also requested quantitative evaluations describing the quality and extent of freshwater, estuarine and marine habitats for this species, as well as information on areas that may qualify as critical habitat in California, Oregon, and Washington. For areas potentially qualifying as critical habitat, NMFS requested information describing (1) the activities that affect the area or could be affected by the designation, and (2) the economic costs and benefits of additional requirements of management measures likely to result from the designation.

NMFS assembled a Biological Review Team (BRT) comprised of staff from the agency's Southwest Fisheries Science Center, Northwest Fisheries Science Center, and the U.S. Geological Survey. The BRT has reviewed the best available scientific and commercial information pertaining to green sturgeon from California through the Pacific Northwest and prepared a status review for the species (NMFS, 2002). This document summarizes the principal results of the green sturgeon status review. Copies of the BRT status review report and other documents relevant to this review are available online. Paper copies are available upon request (see **ADDRESSES**).

**Biology and Life History of Green Sturgeon**

The green sturgeon (*A. medirostris*) is the most widely distributed member of the sturgeon family Acipenseridae. Like all sturgeon species it is anadromous, but it is also the most marine oriented of the sturgeon species. The only recently-documented green sturgeon spawning locations are in the Klamath, Sacramento, and Rogue rivers along the west coast of North America. However, green sturgeon are known to range in nearshore marine waters from Mexico to the Bering Sea and are commonly observed in bays and estuaries along the coast with particularly large concentrations entering the Columbia River estuary, Willapa Bay, and Grays Harbor during the late summer (Moyle *et al.*, 1992). The reasons for these concentrations are unclear, but do not appear to be related to spawning or feeding.

Sturgeons in general have a life history that is susceptible to overharvesting and a number of species have some kind of protection or special status. The green sturgeon has a status designation of Special Concern in Canada (Houston 1988) because it has characteristics that make it particularly sensitive to human activities or natural events. Sakhalin sturgeon (*A. mikadoi*), a species that was at one time synonymized with green sturgeon, is extirpated throughout Japan, Korea, and China. In Russia the species is reduced in range to the Tumnin River where there is a hatchery. In the United States, there are five sturgeon species listed as threatened or endangered under the ESA: Shortnose sturgeon (*A. brevirostrum*); pallid sturgeon (*Scaphirhynchus albus*); Gulf sturgeon (*A. oxyrinchus*); white sturgeon, Kootenai River population (*A. transmontanus*); and Alabama sturgeon (*S. suttkusi*). More detailed information on the geographic distribution, spawning, early life history, ocean residence, age and growth, and feeding

habits of green sturgeon are presented below.

*Distribution.* San Francisco Bay and its associated river systems contain the southern-most spawning population of green sturgeon. White sturgeon supports a large fishery in this area, particularly in San Pablo Bay, which has been extensively studied by California Department of Fish and Game (CDFG) since the 1940's. While green sturgeon are not common, they are collected incidentally in a white sturgeon trammel net monitoring program during most years in numbers ranging from 5 to 110 fish. Green sturgeon juveniles are found throughout the Delta and San Francisco Bay.

Green sturgeon adults and juveniles occur throughout the upper Sacramento River. Green sturgeon are reported to spawn in the Feather River, but this has not been substantiated. Green sturgeon spawning occurs predominately in the upper Sacramento River. Juvenile sturgeon have been taken annually in trapping operations at the RBDD (1995–2001) and at the Glenn-Colusa Irrigation District pumping facility as part of a monitoring program (1986–2001). All larval and juvenile sturgeon caught at these locations are assumed to be green sturgeon because juveniles collected at these sites and grown to identifiable size were green sturgeon. There is no documentation of green sturgeon spawning in the San Joaquin River at present, but there may have been spawning there before construction of large-scale hydropower and irrigation development. Young green sturgeon have been taken occasionally in the Santa Clara Shoal area in the San Joaquin delta but these fish likely originated from elsewhere, most likely the Sacramento River (CDFG 2002).

Green sturgeon also occur in the coastal waters of the Pacific Ocean off California and in coastal rivers. Small numbers have been taken in both Tomales Bay and Bodega Bay and a single fish has been taken from the Noyo River. They are regularly taken in small numbers in Humboldt Bay, and have been caught in coastal waters and in estuaries from Arcata Bay to the Oregon border. Small numbers of both adult and juvenile green sturgeon have been observed in the Eel River.

The largest spawning population of green sturgeon is thought to occur in the Klamath River on the north coast of California, but there are no direct estimates of green sturgeon abundance. Adults are captured in the salmon gill net fisheries conducted by the Yurok and Hoopa Indian tribes and adults occur upstream in the Klamath to a natural migration barrier at Ishi Pishi Falls (rkm 107). Juvenile green sturgeon are captured each year on the Klamath River and have also been found in the lower portion of the Salmon River which is a tributary to the Klamath River. Adults occur in the Trinity River, a major tributary to the Klamath River, to Gray's Falls (rkm 69), but spawning can only be confirmed up to the Willow Creek trap (rkm 40). Moyle et al. (1992) reported no evidence of spawning in the South Fork of the Trinity River.

The Rogue River in Oregon was recently confirmed as a third spawning area for green sturgeon (Erickson *et al.*, 2001, Rien *et al.*, 2001). Based on tracking of radio-tagged adults captured in the estuary, extended holding sites were identified that have been associated with spawning in other species of sturgeon. Juvenile fish are taken in beach seining efforts in the estuary (Rien *et al.*, 2001). Green sturgeon adults are taken in almost all of the Oregon coastal estuaries from the Chetco River to Nehalem Bay (EPIC *et al.*, 2001). During white sturgeon tagging projects in Coos Bay (Coos River), Winchester Bay (Umpqua River), Yaquina Bay (Yaquina River), and Tillamook Bay (Tillamook River) green sturgeon have been captured and tagged; however, no recoveries have been reported (ODFW 2002).

The Columbia River has supported a large white sturgeon fishery for many years in which green sturgeon are taken as bycatch. In the mid 1930's before Bonneville dam, green sturgeon were found up to the Cascade Rapids. Green sturgeon are presently found up river to the Bonneville Dam (rkm 235), but are predominately found in the lower 60 rkm. Tagging studies indicate a substantial exchange of fish between the Columbia River and Willapa Bay (WDFW 2002a). Willapa Bay, along with the Columbia River and Grays Harbor, is one of the estuaries where green sturgeon concentrate in summer. Generally, green sturgeon are more abundant than white sturgeon in Willapa Bay (Emmett *et al.*, 1991).

Grays Harbor in Washington is the northernmost estuary with green sturgeon summer concentrations and there are both tribal and commercial fisheries that take green sturgeon. There are no records of juveniles from Grays Harbor. Green sturgeon occur sporadically in small numbers throughout coastal Washington (WDFW 2002a) and are routinely encountered in the coastal Washington trawl fishery as minor incidental catch (WDFW 2002b). Occasionally, green sturgeon are caught in small coastal bays and estuaries during tribal salmon fisheries. A few green sturgeon are recovered in Puget Sound as incidental harvest (mostly trawl fisheries).

Green sturgeon occur in small numbers along the western coast of Vancouver Island (Houston 1988) and the Skeena River. Historically, green sturgeon were not uncommon in the Fraser River (EPIC et al., 2001). Since the collapse of the Fraser River white sturgeon fishery, however, green sturgeon are only taken there occasionally.

*Spawning.* Green sturgeon are thought to spawn every 3 to 5 years (Tracy 1990). Their spawning period is March to July, with a peak in mid-April to mid-June (Moyle *et al.*, 1992). Mature males range from 139–199 cm in fork length (FL) and 15 to 30 years of age (VanEenennaam 2002). Mature females range from 157–223 cm FL and 17 to 40 years of age. Most of the spawning males are 160–170 cm FL and 17–18 years old, while most of the spawning females are 182–192 cm FL and 27–28 years old.

Green sturgeon spawning occurs in deep pools or ''holes'' in large, turbulent river mainstems (Moyle *et al.*, 1992). Specific spawning habitat preferences are likely large cobble substrates, but may range from clean sand to bedrock substrates as well. Eggs are likely broadcast over the large cobble substrates where they settle into the space between the cobble. Green sturgeon females produce 60,000–140,000 eggs (Moyle *et al.*, 1992) and they are the largest eggs (diameter 4.34 mm) of any sturgeon species (Cech *et al.*, 2000). Temperatures above 20 C are lethal to green sturgeon embryos (Cech *et al.*, 2000).

Green sturgeon spawning has only been documented in the Klamath, Sacramento (Moyle *et al.*, 1992, CDFG 2002) and Rogue (Erickson *et al.*, 2001, Rien *et al.*, 2001) rivers in recent times. The Klamath Basin is thought to support the largest green sturgeon spawning population (Moyle *et al.*, 1992). In the Klamath River, breaching and other suspected sturgeon courtship behaviors have been observed in ''The Sturgeon Hole'' upstream of Orleans (rkm 96). Larvae and juveniles are caught in the Big Bar trap (rkm 80) on the Klamath and in the Willow Creek trap (rkm 40) on the Trinity. Numbers at both traps have a peak in July (Healey 1973).

In the Sacramento River, green sturgeon spawn in late spring and early summer above Hamilton City and perhaps as far upstream as Keswick Dam (CDFG 2002). The opening of the Red Bluff Diversion Dam (RBDD) gates to improve winter-run chinook upstream and downstream passage is believed to have provided a substantial

increase in spawning habitat for green sturgeon in the upper Sacramento River. The gates were first opened in 1986 and the current pattern of operation began in 1992–93. Juvenile green sturgeon are taken in traps at the RBDD and the Glenn Colusa Irrigation District's (GCID) facility in Hamilton City, primarily in the months of May through August. Peak counts occur in the months of June and July.

Green sturgeon spawning has been recently documented in the Rogue River (Erickson *et al.*, 2001, Rien *et al.,* 2001). Adult fish were radio-tagged in the estuary during May–June 2000. After release, tagged ripe fish moved up the Rogue River to spawn, while non-reproductive fish remained close to the tagging site. Spawning fish spent more than 6 months in freshwater and traveled as far as rkm 39. All tagged individuals emigrated from freshwater during fall and winter when water temperatures fell below 10 C. Juvenile green sturgeon have been taken in beach seines in the Rogue River estuary from April until the end of November (Rien *et al.*, 2001).

Apparently, green sturgeon no longer spawn in some river systems where they once did (CDFG 2002). Juvenile green sturgeon were captured in the Eel River in traps at Rio Dell (rkm 20) and Dos Rios (rkm 191) during the period from 1967 to 1970 (Puckett 1976). Single or small numbers of adult green sturgeon are also observed periodically in the Eel River. Similarly, green sturgeon are reported to have spawned in the South Fork Trinity River, but apparently no longer do so due to extensive sedimentation from the 1964 flood (Moyle *et al.*, 1992). The validity of reports of green sturgeon spawning in the Umpqua River is unclear (Lauman *et al.*, 1972) and the possibility of current spawning activity is being investigated (ODFW 2002).

*Early Life History.* Green sturgeon larvae first feed at 10 days post hatch, and metamorphosis to the juvenile stage is complete at 45 days. Larvae grow fast, reaching a length of 66 mm and a weight of 1.8 g in 3 weeks of exogenous feeding. Juveniles averaged 29 mm at the peak of occurrence in June-July at the RBDD fish trap and 36 mm at their peak abundance in July at the GCID trap. These growth rates are consistent with rapid juvenile growth to 300 mm in 1 year and to over 600 mm within 2–3 years for the Klamath River (Nakamoto *et al.*, 1995). Juveniles appear to spend 1 to 3 years in freshwater before they enter the ocean (Nakamoto *et al.*, 1995).

*Ocean Residence.* Green sturgeon disperse widely in the ocean after their out-migration from freshwater (Moyle *et al.,* 1992). Tagged green sturgeon from the Sacramento and Columbia Rivers are primarily captured to the north in coastal and estuarine waters, with some fish tagged in the Columbia being recaptured as far north as British Columbia (WDFW 2002a). While there is some bias associated with recovery of tagged fish through commercial fishing, the pattern of a northern migration is supported by the large concentration of green sturgeon in the Columbia River estuary, Willapa Bay, and Grays Harbor which peaks in August. These fish tend to be immature; however, mature fish and at least one ripe fish have been found in the lower Columbia River (WDFW 2002a). Genetic evidence suggests that Columbia River green sturgeon are a mixture of fish from at least the Sacramento, Klamath, and Rogue Rivers (Israel *et al.*, 2002). The reasons for the concentration of green sturgeon in Oregon and Washington estuaries during the summer are unknown as there is no known spawning in these rivers and all stomachs examined to date have been empty (Beamesderfer 2000).

*Age and Growth.* Green sturgeon is a long-lived, slow-growing species as are all sturgeon species (Nakamoto *et al.*, 1995, Farr *et al.*, 2002). Size-at-age is consistently smaller for fish from the Klamath River (Nakamoto *et al.*, 1995) in comparison to fish from Oregon until around age 25, but thereafter the pattern is reversed. This could be the result of actual differences in growth or in ageing techniques. The asymptotic length for Klamath fish of 218 cm is close to the maximum observed size of 230 cm reported by Moyle *et al.* (1992), but substantially larger than for fish in Oregon (females 182 cm, males 168 cm).

*Feeding.* Little is known about green sturgeon feeding. Adults in the Sacramento-San Joaquin delta feed on benthic invertebrates including shrimp, mollusks, amphipods, and even small fish (Moyle *et al.*, 1992). Juveniles in the Sacramento-San Joaquin Delta feed on opossum shrimp and amphipods (Radtke 1966). One hundred and twenty-one green sturgeon stomach samples from the Columbia River gill-net fishery were empty with the exception of one fish, while all white sturgeon stomachs contained digested material (ODFW 2002).

**Consideration as a ''Species'' Under the ESA**

To qualify for listing as a threatened or endangered species the petitioned North American green sturgeon must be considered a species under the ESA. Section 3(16) of the ESA (16 U.S.C. 1532(16)) expands the definition of a ''species'' under the ESA to include any subspecies or any ''distinct population segment (DPS) of any species of vertebrate fish or wildlife which interbreeds when mature.'' On February 7, 1996, the U.S. Fish and Wildlife Service and NMFS adopted a policy to clarify their interpretation of the phrase ''distinct population segment of any species of vertebrate fish or wildlife'' for purposes of listing, delisting, and reclassifying species under the ESA (61 FR 4722). This joint policy identifies two elements that must be considered when making DPS determinations: (1) The discreteness of the population segment in relation to the remainder of the species (or subspecies) to which it belongs; and (2) the significance of the population segment to the species or subspecies to which it belongs.

According to the joint policy, a population segment may be considered discrete if it satisfies either one of the following conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors; or (2) it is delimited by international governmental boundaries across which there is a significant difference in exploitation control, habitat management, or conservation status. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation.

The joint policy states that the following are some of the considerations that may be used when determining the significance of a population segment to the taxon to which it belongs: (1) persistence of the discrete population in an unusual or unique ecological setting for the taxon; (2) evidence that the loss of the discrete population segment would cause a significant gap in the taxon's range; (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere; or (4) evidence that the discrete population segment has marked genetic differences from other populations of the species.

**Species Status and DPS Structure**

*Species Status.* Green sturgeon that occur within U.S. and Canadian waters are a geographically isolated and genetically distinct species. The North American form was initially considered conspecific with the previously described Asian species, Sakhalin sturgeon (*A. mikadoi*), and the two forms were synonymized (Berg, 1948). More recent molecular data on three mitochondrial genes, however, show great differences between the North

American and Asian forms of green sturgeon (Birstein and DeSalle, 1998), and consequently, these two forms are now considered separate species.

The petitioned action requested that North American green sturgeon be listed as a threatened or endangered species, but the petitioners also recognized that this species could be comprised of multiple DPSs. For this reason and because other sturgeon species have been divided into multiple DPSs, NMFS' BRT assessed the best available scientific information concerning the population structure of green sturgeon in North America in an effort to determine whether or not the biological species was comprised of one or more DPSs. Based on a review of the best available scientific information, NMFS has determined that North American green sturgeon are comprised of two populations that are both discrete and significant as defined in the DPS policy and are therefore DPSs. One is a northern DPS consisting of coastal populations ranging from the Eel River northward. The second is a southern DPS that includes any coastal or central valley populations south of the Eel River, with the only known population being in the Sacramento River. These DPSs and the information used to characterize them are summarized below, and discussed in greater detail in the green sturgeon status review (NMFS 2002).

*Discreteness:* Genetic data were analyzed from 66 green sturgeon sampled from the Klamath River in 1998, 46 fish sampled from San Pablo Bay in 2001, 15 sampled from the Rogue River in 2000, and 29 sampled from the Columbia River estuary in 1995. The analysis on this genetic data, while preliminary, suggest that green sturgeon from the Klamath River are genetically distinct from fish in San Pablo Bay, and that green sturgeon from the Klamath and Rogue River are similar to each other (Israel *et al.*, 2002). Green sturgeon from the Columbia River appear to be a mixture of fish from the San Pablo Bay, Klamath, and Rogue populations. Israel *et al.* (2002) suggest that the genetic data indicate that spawning could be occurring in some other unknown locations; however, this preliminary conclusion could change if larger samples were analyzed or if samples were collected from multiple years. While preliminary, the best available genetic data indicates that there are substantial genetic differences at least between the geographically separated Klamath River and San Pablo Bay populations of green sturgeon.

Sturgeon species exhibit fidelity to their spawning sites so they have a general pattern of multiple DPSs. Sturgeon are known to have strong homing capabilities which leads to high spawning site fidelity (Bemis and Kynard, 1997). Because preliminary genetic data indicate that the Sacramento River population is different from the Klamath and Rogue River populations, and because sturgeon tend to exhibit high spawning site fidelity, NMFS has determined that the two green sturgeon populations are ''discrete'' as defined in the DPS policy.

*Significance:* The genetic information described above indicates that the northen and southern populations are ''significant'' as defined in the DPS policy. In addition to the genetic information, there is other information indicating that these DPSs are significant. First, each DPS occupies unusual or unique ecological settings for the species as a whole. This is evidenced by the fact that spawning populations of each DPS are found in separate and distinct Environmental Protection Agency ecoregions that have been identified based on soil content, topography, climate, potential vegetation, and land use (Omernik 1987). The geographic range of the northern DPS occurs largely within the Coastal Range ecoregion which extends from the Olympic Peninsula southward through the Coast Range and Klamath Mountains to the San Francisco Bay area. In contrast, the southern DPS occurs largely within the Central California Valley ecoregion which includes the Sacramento and San Joaquin Rivers. Second, the loss of either of these DPSs would result in a significant gap in the range of the species given the known distribution of spawning populations.

The identification of two DPSs and the geographic separation of the two DPSs at the Eel River should be considered provisional and subject to revision as more genetic and life history information is gathered on green sturgeon. Although NMFS believes that the green sturgeon is comprised of at least these two DPSs, additional DPSs may be delineated when more genetic and life history information is collected and analyzed. Similarly, the Eel River boundary between these two DPSs is based largely on geography and may be modified based on new information.

**Status of Green Sturgeon DPSs**

In assessing the status of the northern and southern DPSs, NMFS evaluated the available literature, information obtained in response to the 90-day finding request for information, and both qualitative and quantitative information provided by state and Tribal co-managers from California, Oregon, and Washington. The quantitative information was primarily time series of harvest (catch and catch-per-unit-effort (CPUE)) data from fishery agencies in Oregon and Washington, and from Tribal fishery managers in the Klamath River basin.

*Northern Green Sturgeon DPS*

Information relevant to assessing the abundance and/or population trends of green sturgeon in this DPS is limited. The status review for green sturgeon examined fisheries harvest data from the Yurok tribal fishery in the Klamath River and the commercial sturgeon fishery in the Columbia River in an effort to assess trends in abundance over time and population status (NMFS 2002). The time series of catch and CPUE data for the Yurok tribal fishery was considered the most representative available population measure for green sturgeon in general and this DPS in particular because the data are based on a spawning population in the DPS rather than a summer concentration of non-spawning fish from a mixture of spawning populations such as is the case in the Columbia River. Both data series are fishery-dependent and suffer from problems associated with changing regulations and effort levels.

Catch and CPUE data are available for the Yurok tribal fishery for the period 1984–2001, and it is the data set least impacted by regulatory changes. A qualitative examination of the data suggests that catch has increased slightly over time and that CPUE is stable or has slightly decreased over time. However, these trends are not statistically significant. The length-frequency data of harvested green sturgeon was also examined to determine if there was any evidence that harvest was affecting the size structure of the population. Although the sample sizes were small, there was no evidence of any trend in the available data suggesting that larger fish were being removed from the population or that the size structure of the population has been altered by this or other fisheries.

The Columbia River commercial harvest data represents the longest available green sturgeon time series, but it is difficult to interpret since the harvest occurs on a summer concentration of non-spawning fish that are thought to originate from multiple spawning populations. Regulations were significantly modified in 1993, so the analysis of trends was only conducted on catch data from 1960–1992. Catch over this time period may have been affected not only by changes in regulations and effort but also by

unknown factors controlling the summer concentration of green sturgeon in the Columbia River. The catch data were analyzed to determine if there were any trends in data and if they were significant. Length frequency of the catch data was also examined over the period of 1985–2001 to see if the fishery was affecting the size structure of fish that concentrate in the Columbia River. Analysis of the data suggests that catch in the Columbia River has increased slightly over time; however, the trend was not statistically significant. In contrast, Rein (2002b) analyzed CPUE data for green sturgeon in the lower Columbia River commercial fishery over the same period of time (1981–1993) and found there was a statistically significant increasing trend. There was little evidence of a trend in the length-frequency distributions of catch over time. However, there does appear to have been an increase in the average length of green sturgeon taken in the fishery over the past few years, possibly suggesting that a strong year class is moving through the fishery.

The status review identified potential risk factors for the northern green sturgeon DPS including harvest bycatch in several fisheries, the concentration of spawning in the Klamath River, the loss of historical spawning habitat, and the lack of adequate abundance and population trend data (NMFS, 2002). While there is some information relevant to harvest bycatch, limited information is available about the distribution of historical and current spawning activity, and the loss of spawning habitat. The lack of adequate abundance and population trend data is of concern because it is difficult to assess the status of the population without such data. As a result, there is considerable uncertainty regarding the extent to which these factors affect the overall level of risk faced by this DPS.

The Klamath River is thought to support most of the total spawning population in this DPS and there is concern that this could increase the vulnerability of the DPS to catastrophic events. However, the extent to which spawning is concentrated in the Klamath River is not well documented and there is limited information on the extent and magnitude of spawning elsewhere in the DPS. Recent information, for example, has documented spawning in the Rogue River (Rein *et al.*, 2001) and the possibility of spawning in the Umpqua River is also being investigated (ODFW 2002). Further research and monitoring in these and other coastal watersheds may provide new information about the magnitude and geographical extent of current spawning within this DPS and the importance of the spawning population in the Klamath River. Historical accounts, and what little data are available, suggest there has been a loss of spawning habitat in the Eel River and South Fork Trinity Rivers due to anthropogenic changes and natural events that increased sedimentation (CDFG, 2002). At the same time, it is uncertain to what extent the loss or reduction of spawning in the Eel and South Fork Trinity Rivers has affected this DPS or the extent to which it places the DPS at greater risk since there is virtually no information documenting the magnitude and extent of spawning that historically occurred in either system. Although spawning apparently no longer occurs in the South Fork Trinity, there is recent evidence of limited green sturgeon spawning in the Eel River based on the collection of both adult and juvenile fish in the mid 1990s (CDFG, 2002).

The status review examined the available harvest bycatch data in an effort to assess the effects of harvest on green sturgeon in this DPS and in general, but concluded it was not possible to directly assess harvest impacts because of two factors. First, most of the harvest occurs on summer concentrations of fish in the Columbia River and coastal Washington estuaries that are comprised of fish from a mixture of spawning populations and both DPSs. Second, there is no estimate of the size for any of the known spawning populations that occur in either DPS. Although direct assessment of harvest impacts on this DPS may not be possible with the available data, a qualitative assessment of green sturgeon bycatch data for various fisheries since the mid 1980s suggests that the impacts to green sturgeon from harvest bycatch have been greatly reduced in recent years.

Harvest of green sturgeon occurs almost entirely as bycatch in commercial fisheries for white sturgeon in Oregon and Washington, as well as a variety of smaller tribal fisheries (*e.g.* Klamath River tribal fisheries). Green sturgeon harvest data for these fisheries were summarized in the status review for the years 1985–2001, and over this period the vast majority of the total harvest was taken in the Columbia River sport and commercial fisheries (51 percent) and the various Washington coastal fisheries (28 percent). The remainder of the total harvest occurred in the coastal Oregon fisheries and the Klamath River tribal fisheries. Since the mid 1980s, the total annual harvest of green sturgeon in all of these fisheries has declined nearly six fold from approximately 6,870 fish/year in 1985–1989 to approximately 1,190 fish/year in 1991–2001 (Table 1 in NMFS 2002). In 2001, the total harvest in all fisheries declined to less than 800 fish, with approximately equal numbers of fish taken in the Columbia River, coastal Washington, and Klamath River fisheries. This overall decline in green sturgeon harvest has been driven principally by a major reduction in the harvest from the Columbia River and Washington coastal fisheries since the mid 1990s.

The average length of green sturgeon caught in the Columbia River commercial fishery has been increasing since 1990, with the largest average size of fish occurring in the last five years. This trend may indicate a larger average size of fish due to reduced exploitation, a strong year-class moving through the fishery, or a reduction of small fish due to reduced or failed recruitment.

Much of the harvest reduction in recent years is due to increasingly restrictive regulations in the Columbia River fisheries (Appendix 1, Tables 1 and 2 in NMFS 2002). The Columbia River fishery is currently managed through a joint Washington and Oregon accord to manage white sturgeon. Probably the most important regulation for protecting sturgeon was the introduction of slot limits starting in 1950 for both the sport and commercial fisheries. Beginning in 1950 and continuing through 1997–98 when the slot limits were last changed, they have become increasingly restrictive and protective of both green and white sturgeon. The Columbia River sturgeon fishery is currently operating under a March 2000 agreement covering a three-year period through 2002. The green sturgeon regulations under this agreement include: a recreational size limit of 42–60 inches (107–152 cm) with one fish per day and 10 fish per year bag limits, with barbless hooks required; a commercial size limit of 48–66 inches (122–168 cm); and no green sturgeon-only commercial seasons (green sturgeon are only taken as bycatch during white sturgeon seasons, provided the green sturgeon catch does not exceed recent harvest levels). Commercial bycatch of green sturgeon occurs predominantly during the early fall (August) salmon and white sturgeon fisheries, when the green sturgeon have migrated into the estuary and lower mainstem of the Columbia River.

In 2001, sturgeon retention was prohibited during the early-fall target chinook commercial season after the preseason catch expectation for white sturgeon was exceeded in early August. Sturgeon retention was prohibited in

mainstem commercial fisheries through the remainder of the fall fishing period. White sturgeon population estimates for 2002 did not increase as expected, and in December of 2001 the Compact adopted reduced catch guidelines for 2002 as a management buffer and to compensate for catch overages that occurred in 2001. In 2002, the Compact prohibited retention of green sturgeon during August fisheries and allowed retention during September and October fisheries. This management action provided flexibility for shaping September and October salmon fisheries and allowed the commercial fishery access to their allocation of white sturgeon without any target sturgeon seasons, further minimizing green sturgeon bycatch. The Compact will meet in January 2003 to review its sturgeon fishery management agreement and it is expected that continued efforts will be taken to minimize green sturgeon bycatch.

Ocean and coastal estuarine fisheries in Washington and Oregon accounted for approximately 28 percent and 8 percent, respectively, of the total green sturgeon harvest bycatch in the period between 1985–2001. Since the mid to late 1990's, however, the overall catch of green sturgeon in these fisheries has also declined substantially, most likely due to changes in fishing regulations. White and green sturgeon fisheries in Oregon coastal areas are managed under size and bag limit regulations consistent with the lower Columbia River regulations.

Non-tribal harvest impacts on green sturgeon in coastal rivers of California are considered to be minimal (CDFG, 2002). Commercial fishing for green sturgeon (and white sturgeon) has been prohibited throughout the state since the early 1900s. Recreational fishing for green sturgeon has been prohibited since the early 1990s in virtually all coastal watersheds where green sturgeon are known to occur from the Eel River northward to the Oregon border, including the Klamath-Trinity basin. The Klamath River tribal (Yurok and Hoopa Tribes) fisheries accounted for about 8 percent of the total green sturgeon harvest that occurred between 1985–2001, with an average catch of approximately 260 fish per year. These Tribal fisheries do impact a spawning population in the Klamath River, but the available data for the Yurok Tribal fishery show that both catch and CPUE have been very stable since 1985, with no evidence of a decline. There is no evidence from the available length-frequency data for harvested green sturgeon that larger fish have been removed from the population or that the size structure of the population has been altered by this or other fisheries.

*Conclusion:* The available population information for green sturgeon in the northern DPS does not provide any evidence that the abundance of green sturgeon in this DPS is declining. In particular, the fishery-dependent harvest data from the Yurok tribal fishery show no evidence that catch or CPUE are declining, or that large fish are being removed from that spawning population. Despite this information, NMFS' BRT was uncertain about the status of green sturgeon in this DPS because no direct fisheries-independent population estimates were available. For this reason, the BRT believes it is essential that immediate efforts be undertaken to implement direct monitoring of green sturgeon in this DPS. There are some risk factors of potential concern for this DPS, most notably bycatch harvest in various fisheries; however, there is uncertainty about the overall level of risk facing this DPS. In the case of harvest bycatch for which there is the most information, it is not possible to directly assess the impact of harvest on green sturgeon in this DPS. Nevertheless, the available data shows that overall green sturgeon harvest has declined substantially since the mid 1980s due to increasingly restrictive harvest management measures, suggesting that risk from harvest has been also reduced. Although the risk to green sturgeon from harvest bycatch may be declining, NMFS believes it may be prudent for fisheries managers to continue recent conservative management measures as well as consider additional harvest protections until population monitoring information can be obtained to assess the status of this DPS with greater certainty. Based on a review of the best available information, NMFS concludes that the northern green sturgeon DPS is not presently in danger of extinction nor is it likely to become so in the foreseeable future.

*Southern Green Sturgeon DPS*

The only data relevant to assessing the abundance and/or population trends of green sturgeon in this DPS are estimates of green sturgeon abundance made by the California Department of Fish and Game in San Pablo Bay incidental to monitoring of white sturgeon (CDFG, 2002). Tagging experiments have been conducted irregularly since 1954, but since 1990 tagging has been conducted for two years consecutively and then the next two are skipped. Over this period, a total of 536 green sturgeon were captured and 233 fish were tagged. The green sturgeon estimate is obtained by multiplying the ratio of legal-size (earlier minimum slot limits of 102 cm) green sturgeon to legal-size white sturgeon caught in the tagging program by the legal-size white sturgeon population estimate. Although this is a fishery-independent estimate of green sturgeon abundance, there are a number of problems associated with these estimates; the most important being the assumption that both species are equally vulnerable to the sampling gear. Since green sturgeon concentrate in estuaries only during the summer and white sturgeon remain in estuaries year round, the temporal and spatial vulnerabilities of the two species are likely different. In addition, the estimate is based on a summer concentration of fish rather than a spawning population, and varying levels of tag recovery effort.

The status review examined the available time series of these population estimates qualitatively and also looked for statistically significant trends in the data. A qualitative examination of the time series suggests abundance has been stable, except for a substantial increase in the 2001 abundance estimate. The 2001 abundance estimate was 8,421 fish which is approximately four times higher than any previous estimate. Estimates for the years prior to 2001 range from several hundred to approximately 2,000 fish (*see* Figure 11 and Table 2 in NMFS 2002). The data suggest an increasing trend in green sturgeon abundance, but the increase was not statistically significant even with the large increase in the 2001 estimate. Although the sample sizes are small, the average size of green sturgeon tagged as part of this population estimation program in San Pablo was generally stable and showed no apparent trend over time.

NMFS' BRT identified several potential threats or risk factors for the southern green sturgeon DPS (NMFS, 2002). These include: harvest bycatch concerns; the concentration of spawning in the Sacramento River and the apparent small population size; loss of spawning habitat, lack of adequate population abundance data; potentially lethal water temperatures for larval green sturgeon; entrainment by water projects in the central valley; and the adverse effects of toxic materials and exotic species. Although the BRT expressed concerns about these potential risk factors, there is considerable uncertainty regarding their significance or effects on the southern green sturgeon DPS.

Spawning in this DPS does appear to be concentrated in the upper Sacramento River at present. Since the

early 1990s it appears that green sturgeon have expanded into additional spawning habitat in the upper Sacramento above Hamilton City due to the re-operation of the RBDD (CDFG, 2002). There is uncertainty about the abundance of green sturgeon and the size of the spawning population in the Sacramento River. The CDFG population estimates for San Pablo Bay, which presumably include Sacramento River spawners, are in the range of hundreds to thousands of fish, but there are several problems with the estimates that make them difficult to interpret or rely upon. Similarly, there are no historical estimates of spawning population abundance available to make an assessment of the extent to which spawning populations have declined. The lack of population monitoring data is clearly problematic, but it is not a risk factor directly affecting the status of the DPS.

According to the CDFG, there is no evidence that green sturgeon historically spawned in the San Joaquin River and juveniles that have been found in the lower San Joaquin River are most likely from the spawning population in the Sacramento River (CDFG, 2002). It is uncertain whether green sturgeon ever spawned in the upper Sacramento River above Shasta Dam, but CDFG has speculated that they may have based on the apparent expansion of spawning above Hamilton City in the early 1990s when RBDD was re-operated (CDFG, 2002). The most likely loss of historical spawning habitat for green sturgeon in the central valley may be in the Feather River as a result dam construction and warm water releases (CDFG, 2002), but anecdotal evidence suggests that adult green sturgeon still occur there in high flow years, presumably for spawning. Based on this information, it is uncertain how much green sturgeon spawning habitat historically occurred in the central valley or how much has been lost, and whether or not lost spawning habitat is a significant risk factor for this DPS.

The state and Federal pumping facilities in the Sacramento-San Joaquin Delta export water from the Delta and in the process entrain many fish species including juvenile green sturgeon which are salvaged and returned to the Delta. Expanded estimates of salvage are made annually by CDFG and these data have been collected and compiled since 1968 at the state facility and since 1981 at the Federal facility. The status review qualitatively reviewed the expanded salvage data for the available time series to determine whether there were any trends. The data series indicates that salvage (an indicator of entrainment) has varied substantially over time, but was much higher prior to the mid-1980s. From the mid-1980s to present, salvage declined substantially at both facilities and has remained very low thereafter. Limited length-frequency data indicates that only juvenile green sturgeon were salvaged at the two facilities. Interpretation of these data is difficult since there have been problems with species identification (distinguishing white and green sturgeon) and the expanded salvage estimates are based on actual counts from brief sampling periods (CDFG 2002). Given the low level of entrainment and salvage that has occurred since the mid-1980s and the problems with interpreting the available data, it is uncertain to what extent water exports and the associated entrainment of green sturgeon is a risk factor for this DPS. In the case of white sturgeon, however, year class strength is related to freshwater flows in late winter and spring rather than Delta exports (CDFG 2002). If this is the case for green sturgeon, which is more marine oriented than white sturgeon, then Delta exports are not likely to be an important risk factor.

The introduction of exotic species in the San Francisco Bay estuary is an ongoing problem, but the most likely effect on green sturgeon is through changes in trophic interactions (CDFG, 2002). For example, the overbite clam, which first was observed in the Bay in 1988, is now the most common food item of white sturgeon and has been found in the diet of green sturgeon (CDFG, 2002). This species may be replacing other clam species in the diet of white and possibly green sturgeon, but it is not possible to assess the impacts of such changes at present. Assessing the impacts of such trophic changes and the extent to which they increase risks to green sturgeon in this DPS will require additional information on the comparative trophic benefits of these new prey and information on the extent to which they bioaccumulate contaminants.

There is no specific information available regarding contaminant loads or impacts on green sturgeon, although there is information on contaminant loads for white sturgeon (CDFG 2002). For example, there is evidence that white sturgeon may have contained high Polychlorinated Biphenyl (PCB) levels in the past (Kohlhorst, 1980), though more recent data show lower levels of contamination suggesting that earlier data may have been incorrect (CDFG, 2002). There is also evidence that white sturgeon in the estuary accumulate selenium, but tissue concentrations have varied over time without a trend and do not seem to be size related (White et al., 1989). Given the available information, it is uncertain to what extent green sturgeon are impacted by contaminants in this DPS. Based on the fact that white sturgeon spend more time in the estuary and green sturgeon are more marine oriented, CDFG suggests that green sturgeon are probably less vulnerable than white sturgeon to the effects of contaminant bioaccumulation in the San Francisco Bay estuary (CDFG, 2002).

Concerns were raised in the status review that summer temperatures in the Sacramento River were near the lethal limits for larval green sturgeon; however, there is no direct evidence that elevated temperatures are adversely affecting spawning and larval development. In the Sacramento River, green sturgeon are thought to spawn in the spring and summer primarily from Hamilton City to as far upstream as perhaps Keswick Dam (NMFS, 2002; CDFG, 2002). Re-operation of RBDD in the early 1990s to improve upstream passage for winter-run chinook is also thought to have provided a substantial increase in green sturgeon spawning habitat above the facility (CDFG, 2002). Spawning of green sturgeon in the upper Sacramento River above the RBDD is supported by the annual collection of juvenile green sturgeon in fish trapping operations at the RBDD (1995–2001) and the Glenn-Colusa Irrigation District (1986–2001) between the months of May and August (see Figures 13 and 14 in NMFS 2002). Since the early 1990s, significant efforts and measures have been implemented by the Bureau of Reclamation and NMFS to control water temperatures in the upper Sacramento River between the RBDD and Keswick dam in the late spring and early summer so that winter-run chinook salmon can successfully reproduce there. Under the current protocols, water temperatures upstream from RBDD are generally controlled by releases from Shasta and Keswick Dams so that they do not exceed 56 degrees Farenheit (or 13.3 degrees Centigrade) from mid April through the end of September. This period of temperature control appears to coincide with green sturgeon spawning, egg incubation, and larval development in the upper river, and therefore, the temperature control efforts for winter-run chinook are likely to benefit and protect green sturgeon as well. Temperatures cannot be controlled downstream of RBDD or in the Sacramento-San Joaquin Delta, so elevated temperatures could potentially

affect green sturgeon larval development in those areas.

Harvest impacts on green sturgeon in this DPS, at least from fisheries in California, are thought to be minimal. Commercial fishing for green sturgeon (and white sturgeon) has been prohibited in California since the early 1900s. Direct recreational harvest does occur, primarily in San Pablo Bay, but the total harvest is thought to be very small (CDFG 2002). In addition, green sturgeon are protected by slot limits, very restrictive take limits, and a seasonal closure in central San Francisco Bay during the herring spawning season (January through March). Based on tagging studies conducted by CDFG, green sturgeon tagged in San Pablo Bay undertake extensive ocean migrations and are recaptured in commercial and recreational fisheries in both Oregon and Washington (CDFG, 2002; NMFS, 2002). Although there are harvest bycatch data for green sturgeon in these fisheries, it is not possible with the available information to directly assess the impact on green sturgeon in the southern DPS. In order to assess direct harvest impacts on this DPS, information is needed on the actual number of fish taken in these fisheries that originate from the Sacramento River spawning population as well as good estimates of the size of the Sacramento River population. These data are not currently available. Although direct harvest impacts on this DPS from the fisheries in Oregon and Washington cannot be determined at this time, the available harvest information for these fisheries suggests that overall harvest and, therefore, harvest impacts to green sturgeon have declined steadily since the mid 1980s.

*Conclusion:* There is no evidence from the available San Pablo Bay population information that green sturgeon abundance in the southern DPS is declining. Nevertheless, NMFS' BRT was uncertain about the status of green sturgeon in this DPS because the method of deriving population estimates involves numerous assumptions and there are no direct measures of population abundance. For these reasons, the BRT believes it is essential that immediate efforts be undertaken to implement population monitoring for this DPS using methods that directly assess population status. There is a great deal of uncertainty regarding the effects of potential risk factors on green sturgeon in this DPS. While there is some information on harvest bycatch impacts, it appears most of the identified risk factors are not well documented or are only suspected to be risk factors. Examples of the latter include entrainment at the Delta water export facilities, impacts from exotic species introductions, impacts from contaminants, and lethal water temperatures. In the case of harvest bycatch for which there is the most information and perhaps the greatest concern, it is not possible to directly assess the impact of harvest on green sturgeon in this DPS. Nevertheless, direct harvest appears to be limited in California and harvest from fisheries in Oregon and Washington has declined substantially since the mid 1980s and even more so since the mid 1990s due to increasingly restrictive harvest management measures. These harvest reductions and associated restrictive management measures suggest that risk to green sturgeon from harvest bycatch has been reduced. Although the risk to green sturgeon from bycatch harvest may be declining, NMFS believes it may be prudent to consider additional harvest protections until population monitoring information can be obtained to assess the status of this DPS with greater certainty. Based on a review of the best available information, NMFS concludes that the southern green sturgeon DPS is not presently in danger of extinction nor is it likely to become so in the foreseeable future.

**Determination**

The ESA defines an endangered species as any species in danger of extinction throughout all or a significant portion of its range, and a threatened species as any species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. Section 4(b)(1) of the ESA requires that the listing determination be based solely on the best scientific and commercial data available, after conducting a review of the status of the species and after taking into account those efforts, if any, that are being made to protect such species.

After reviewing the best available scientific and commercial information for green sturgeon, NMFS concludes that the species is comprised of two DPSs that qualify as species under the ESA: (1) a northern coastal DPS consisting of populations in coastal watersheds northward of, and including, the Eel River, and (2) a southern DPS consisting of coastal or central valley populations south of the Eel River, with the only known population in the Sacramento River. Additional green sturgeon DPSs may be identified with further genetic analysis and the boundaries of these two DPS may also be modified. After assessing the risk of extinction faced by each DPS, NMFS further determines that neither the northern or southern green sturgeon DPSs warrant listing as threatened or endangered species at this time.

Because of uncertainties in the structure and status of the DPSs, NMFS will add both DPSs to the agency's list of candidate species. Additional information is expected to be collected over the next several years and NMFS intends to reevaluate the status of green sturgeon in five years provided sufficient new information becomes available indicating that a status review update is warranted.

**References**

A list of references is available upon request (see **ADDRESSES**).

**Authority**

The authority for this section is the ESA, as amended (16 U.S.C. *et seq.*).

Dated: January 23, 2003.

**Rebecca Lent,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

[FR Doc. 03–2034 Filed 1–28–03; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 660

**[I.D. 011303A]**

## Western Pacific Fishery Management Council; Public Meetings

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

**ACTION:** Notice of public meetings/ public hearings.

**SUMMARY:** The Western Pacific Fishery Management Council will meet in February (see **SUPPLEMENTARY INFORMATION** for specific times, dates, and agenda items).

**ADDRESSES:** The Council meeting will be held at the Governor Pedro P. Tenorio Multipurpose Center, Office of the Governor, Susupe, P.O. Box 10007, Saipan, MP 96950; telephone: 670–664–1014.

**FOR FURTHER INFORMATION CONTACT:** Kitty M. Simonds, Executive Director; telephone: 808–522–8220.

**SUPPLEMENTARY INFORMATION:**

**Dates and Times**

*Committee Meetings*

The following Standing Committees of the Council will meet on February 11, 2003. Enforcement/Vessel Monitoring System (VMS) from 7:30 a.m. to 9 a.m.; Fishery Rights of Indigenous People from 9 a.m. to 10 a.m.; International Fisheries/Pelagics from 9 a.m. to 12 noon; Bottomfish from 1:30 p.m. to 2:30 p.m.; Ecosystem and Habitat from 2:30 p.m. to 4:30 p.m.; and Executive/Budget and Program from 4:30 p.m. to 5:30 p.m.

In addition, the Council will hear recommendations from its Scientific and Statistical committee (SSC), and other ad hoc groups. Public comment periods will be provided throughout the agenda. The order in which agenda items are addressed may change. The Council will meet as late as necessary to complete scheduled business.

*Public Hearings*

Public hearings will be held at 4:30 p.m on Wednesday, February 12, 2003, on the issuance of Community Development Program (CDP) Mau Zone bottomfish permits; at 11 a.m. on Thursday, February 13, 2003, on line clippers/bolt cutters, turtle mitigation, southern area closure, seabird mitigation, and longline setting chute; and at 2 p.m. on Thursday, February 13, 2002, on managing Guam's offshore bottomfish fishery. The order in which agenda items are addressed may change. The Council will meet as late as necessary to complete scheduled business.

The agenda during the full Council meeting will include the items listed here:

*Wednesday, February 12, 2003*

1. Introductions
2. Approval of Agenda
3. Approval of 115th and 116th meeting minutes
4. Island reports
   A. American Samoa
   B. Guam
   C. Hawaii
   D. Commonwealth of the Northern Mariana Islands (CNMI)
5. Federal fishery agency and organization reports
   A. Department of Commerce
   (1) NMFS
   (a) Southwest Region, Pacific Island Area Office (PIAO)
   (b) Southwest Fisheries Science Center, La Jolla and Honolulu Laboratories
   (2) NOAA General Counsel, Southwest Region
   (3) National Ocean Service (NOS), National Marine Sanctuaries
   (4) NOS, Pacific Services Center
   B. Department of the Interior, U.S. Fish and Wildlife Service (USFWS)
   C. U.S. State Department
6. Enforcement and VMS
   A. U.S. Coast Guard activities
   B. NMFS activities
   C. Enforcement activities of local agencies
   D. Status of violations
   E. Report on safety workshop
7. Observer and monitoring programs
   A. NMFS, PIAO
   (1) American Samoa longline fishery
   (2) Northwestern Hawaiian Islands (NWHI) bottomfish fishery
   (3) Hawaii longline fishery
   B. Native Observer Program
8. Crustaceans fisheries
   A. Report on CNMI crustacean fisheries
9. Ecosystems and Habitats
   A. CNMI reef fish commercial catch data
   B. Report on U.S. Coral Reef Task Force
   C. Marianas coral reef survey
   D. Report on marine protected areas working group
10. Fishery rights of indigenous people
   A. Review Hawaii marine conservation plan
   B. Report on Community demonstration projects program
   (1) Report on first solicitation
   (2) Report on second solicitation
   C. CDP, Mau Zone bottomfish permits
   D. Public hearing on issuance process for Mau Zone bottomfish permits

The Council will consider alternatives to take initial action on a process for issuing NWHI Mau Zone bottomfish CDP permits. Three alternatives to be considered for selecting participants for the program include a random selection process (lottery), a weighted point system, and evaluation criteria. Each alternative will be used in concert with the Western Pacific Community eligibility criteria as published in the **Federal Register** on April 16, 2002 (67 FR 18512). The Council's preferred alternative adopted by the Council will be incorporated into the existing draft framework amendment ''Measure to Establish Eligibility Criteria for New Entry into the Northwestern Hawaiian Islands Mau Zone Limited Access System''. A revised framework regulatory amendment, incorporating a CDP permit issuance process, will be presented to the Council for final action at a subsequent Council meeting in 2003.

*Thursday, February 13, 2002*

11. Pelagic Fisheries
   A. Quarterly 2002 Hawaii and American Samoa longline reports
   B. American Samoa limited entry program
   C. Recreational fisheries
   (1) CNMI recreational fisheries
   (2) RECFISH 2003
   D. Bycatch conservation and management
   (1) Honolulu lab mitigation turtle research
   (2) Southern longline closure

On June 12, 2002, a final rule was published that implemented the reasonable and prudent alternative (RPA) of a Biological Opinion issued by NMFS on March 29, 2001. The Biological Opinion concluded that the actions of the Hawaii-based longline fleet were likely to jeopardize the continued existence of Pacific populations of green, loggerhead and leatherback turtles. One of the measures included in the reasonable and prudent alternatives for the fishery to operate without jeopardy was a closure of southern fishing grounds below 15° N. lat. during the months of April and May. The April and May closure denied access to the Hawaii-based longline fleet to grounds at a time when tuna were seasonally abundant. While some form of seasonal area closure may need to remain in effect, there may be options for a more limited closure that would have the same turtle conservation effects as the current large-scale closure, but be less onerous for the Hawaii-based longline fleet. The Council will consider alternatives for modifying the seasonal area closure and may take preliminary action at this meeting. Public comment will be solicited from the public prior to the Council's decision.

(3) Line clippers/bolt cutters

On November 15, 2002, NMFS issued a new Biological Opinion for the operation of pelagic fisheries in the Western Pacific Region and interactions with turtle and marine mammal species protected under the Endangered Species Act. The 2002 Biological Opinion does not contain any new requirements for pelagic fishing vessels, however it does appear to remove requirements for non-longline vessels to carry line clippers and bolt cutters, as well as adjusting handling requirements for longline vessel operators that encounter sea turtles. A range of options are available to the Council in response to the change in requirements that has resulted from the issuance of this new Biological Opinion. These include maintaining the current non-longline vessel requirements for line clippers, bolt cutters, and sea turtle handling procedures for longline vessels; or adjusting the non-longline requirements for line clippers and bolt cutters, and the sea turtle handling procedures for longline boats. At the 116th Council meeting, the Council took preliminary

action on a preferred alternative to remove requirements for line clippers and bolt cutters, and to clarify the sea turtle handling procedures for longline boats. The Council may take final action on this preferred alternative, and comments from the public will be solicited prior to the Council's decision.

(4) Report on CNMI turtles

(5) Longline setting chute

On June 12, 2001, a final rule was published implementing the terms and conditions of a Biological Opinion issued by the USFWS on November 28, 2000. These measures apply to all Hawaii-based longline vessels and consist of the following requirements: When fishing above 23° N. lat., vessel operators must: completely thaw and dye all bait blue before using it; discharge spent bait and fish parts to distract seabirds while setting or hauling the gear (strategic offal discard); use a line shooter or line setting machine with weighted branch lines to set the gear; follow handling guidelines for seabirds hooked or entangled in fishing gear. On November 18, 2002, the USFWS issued a new Biological Opinion. This new Biological Opinion does not add or delete any measures. However, it does include a conservation recommendation stating that the FWS will consider the use of underwater setting chute as a seabird mitigation measure after the device is used voluntarily and successfully on Hawaii-based longline vessels. The new Biological Opinion also states that the blue dyed bait requirement will be reconsidered if it is shown that it does not provide additional protection to seabirds. Results of recent trials with an underwater setting chute on an Hawaiian longline vessel in 2002 showed that the device is virtually 100 percent effective in eliminating interactions between seabirds and the Hawaii-based longline fishery when used with a line shooter and weighted branch lines. Given the success of this new technology, a range of options is available to the Council to re-address the issue of seabird interactions with this fishery. These include: maintaining all current requirements; adding an option to use underwater setting chutes when fishing north of 23° N. lat. (keeping requirements for blue dyed bait, strategic offal discards and handling guidelines); or adding an option to use underwater setting chutes when fishing north of 23° N. lat. instead of blue dyed bait, and strategic offal discards when setting (keeping handling guidelines and requirements to use strategic offal discards when hauling). The Council may take preliminary action and select a preferred alternative at this Council meeting. Comments will be solicited from the public prior to the Council's decision.

(6) Litigation

E. International Fishers Forum

F. Public hearing on regulatory changes for line clippers and bolt cutters

12. Bottomfish

A. Report on CNMI fisheries

B. Guam offshore bottomfish management

C. Public hearing on Guam offshore bottomfish management

The Council will consider alternatives and intends to take initial action to manage Guam's offshore bottomfish fishery. The Council considered preliminary considered management options at its 115th Council meeting in October 2002, and will be presented revised options including an alternative to prohibit harvest of bottomfish management unit species (BMUS) on vessels longer than 42 ft (12.8 m) that fish in Federal waters within 50 miles from shore. The Council also intends to consider requiring Federal permits and reports for vessels over 42 ft (12.8 m) in length that harvest bottomfish management unit species (BMUS).

Recent entry of larger vessels into the Guam bottomfish fishery has raised concerns regarding data collection gaps and resource status. These vessels harvest deep-slope species on offshore seamounts (or ''banks'') in Federal waters, land the bottomfish at Guam's commercial port, and export the bottomfish to Japan. Neither the level of fishing effort nor the amount of bottomfish harvested, which is believed to have started in 2001, is known. Guam's creel survey does not cover fish landed at the commercial port and the exported fish are not sold through any establishments that participate in the voluntary sales ticket monitoring program. Onaga (*Etelis coruscans*) appears to be the primary species that is targeted.

The southern banks have been fished for many years by Guam-based bottomfish fishermen using smaller vessels that engage in a mix of subsistence, recreational, and small-scale commercial fishing, particularly in the summer months, when weather conditions tend to be calmer. Most of the vessels fishing on the southern banks target the shallow-water bottomfish complex, but some target the deep-water complex.

It is unknown at this time whether the new component of the fishery is having significant impacts on marine resources. Initial discussions with fishery managers and Guam's fishing community (through a public scoping meeting held in Guam August 8, 2002) indicate that the catch of fish by this new component may lead to localized overfishing of the bank area.

The Council will also consider additional options to expand the action to include targeting pelagic management unit species (PMUS). Larger vessels targeting PMUS in the EEZ surrounding Guam must also land fish in the commercial port due to the smaller harbors' inability to accommodate such large vessels. The same issues regarding harbors' collecting data from large bottomfish vessels apply to large vessels targeting and landing other species, such as pelagics.

12. Program planning

A. Legislation

B. NOAA Pacific Island Region

C. Cooperative research

D. Council program

E. Social science research planning

F. Indigenous working group

13. Administrative matters

A. Financial reports

B. Administrative reports

C. Upcoming meetings and workshops

D. Advisory Panel, SSC, Plan Team, NWHI Reserve and Sea Turtle Working Group Appointments

14. Other Business

Although non-emergency issues not contained in this agenda may come before the Council for discussion, those issues may not be the subject of formal Council action during this meeting. Council action will be restricted to those issues specifically listed in this document and any issue arising after publication of this document that requires emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

**Special Accommodations**

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, 808–522–8220 (voice) or 808–522–8226 (fax), at least 5 days prior to the meeting date.

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

Dated: January 23, 2003.

**Richard W. Surdi,**

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

[FR Doc. 03–1976 Filed 1–28–03; 8:45 am]

BILLING CODE 3510–22–S

# Notices

Federal Register
Vol. 68, No. 19
Wednesday, January 29, 2003

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 AGRICULTURE

### Foreign Agricultural Service

### Advisory Committee on Emerging Markets: Nominations

**AGENCY:** Foreign Agricultural Service, USDA.

**ACTION:** Advisory Committee on Emerging Markets: Nominations.

**SUMMARY:** Notice is hereby given that nominations are being sought for five (5) qualified persons to serve on the Advisory Committee on Emerging Markets (the Committee). The role of the Committee is to provide information and advice, based upon knowledge and expertise of the members, useful to the Department of Agriculture (USDA) in implementing the Emerging Markets Program. The Committee also advises USDA on ways to increase the involvement of the U.S. private sector in cooperative work with emerging markets in food and rural business systems and reviews proposals submitted to the Program for funding technical assistance activities.

**DATES:** Written nominations must be received by the Foreign Agricultural Service (FAS) by 5 p.m. on February 28, 2003.

**ADDRESSES:** All nominating materials should be sent to Mr. Douglas Freeman, Foreign Agricultural Service, Room 4932—Stop 1042, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250–1042. Forms may also be submitted by fax to (202) 720–9361.

**FOR FURTHER INFORMATION CONTACT:** Persons interested in serving on the Advisory Committee, or in nominating individuals to serve, should contact Mr. Douglas Freeman, Foreign Agricultural Service, by telephone (202) 720–4327, by fax (202) 720–9361, or by electronic mail to *emo@fas.usda.gov* and request Form AD–755 and Form SF–181. Form AD–755 is required and is available at the FAS home page: *http://www.fas.usda.gov/admin/ad755.pdf.* Form SF–181 is requested, but optional, and is available at *http://www.fas.usda/admin/sf181.pdf.* Persons with disabilities who require an alternative means for communication of information (Braille, large print, audiotape, etc.) should contact USDA's Target Center at (202) 720–2600 (voice and TDD).

**SUPPLEMENTARY INFORMATION:** The Committee is authorized by section 1542 of the Food, Agriculture, Conservation and Trade Act of 1990, as amended. The overall purpose of the Committee is to provide USDA with information that may be useful in carrying out the provisions of the Emerging Markets Program. The Committee is composed of representatives of the various sectors of the food and rural business systems of the United States. More information about the purpose and function of the Committee and about the Emerging Markets Program may be found at the FAS/Emerging Markets Program Web site: *http://www.fas.usda.gov/mos/em-markets/acem.html.* The members of the Committee are appointed by the Secretary of Agriculture and serve at the discretion of the Secretary. Committee members serve without compensation, but can receive reimbursement for travel expenses to attend committee meetings, if requested, in accordance with USDA Travel regulations.

The Committee has a balanced membership of up to 20 members, representing a broad cross-section of the U.S. agricultural and agribusiness industry. All appointments will expire two years from the date of appointment. The Secretary may renew an appointment for one or more additional terms.

Most meetings will be held in Washington, DC, though other locations may be selected on an occasional basis. Committee meetings will be open to the public, unless the Secretary of Agriculture determines that the Committee will be discussing issues, the disclosure of which justify closing all or a portion of a meeting, in accordance with 5 U.S.C. 552b(c).

Nominations are open to all individuals without regard to race, color, religion, sex, national origin, age, physical handicap, marital status, or sexual orientation. To ensure that the work of the Committee takes into account the needs of the diverse groups served by USDA, membership shall include, to the extent practicable, individuals with demonstrated ability to represent the interest of minorities, women and persons with disabilities.

Members are selected primarily for their experience, expertise and knowledge of international agriculture and of trade and development issues as they affect emerging markets. No person, company, producer, farm organization, trade association or other entity has a right to representation on the Committee. In making selections, every effort will be made to maintain balanced representation of the various broad industries within the United States as well as geographic diversity.

Signed at Washington, DC, on January 23, 2003.

**A. Ellen Terpstra,**

*Administrator, Foreign Agricultural Service.*

[FR Doc. 03–2013 Filed 1–28–03; 8:45 am]

**BILLING CODE 3410–10–M**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Wrangell-Petersburg Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Wrangell-Petersburg Resource Advisory Committee (RAC) will meet from 12:30 p.m. until 5 p.m. on Friday, February 21, and from 8 a.m. until 2 p.m., Saturday, February 22, 2003, in Petersburg, Alaska. The purpose of this meeting is to review, discuss and potentially recommend for funding proposals received pursuant to Title II, Public Law 106–393, H.R. 2389, the Secure Rural schools and community Self-Determination Act of 2000, also called the ''Payments to States'' Act. Public testimony regarding the proposals will also be taken.

**DATES:** The meeting will be held commencing at 1 p.m., Friday, February 21 through 2 p.m., Saturday, February 22, 2003.

**ADDRESSES:** The meeting will be held at the Holy Cross House, Petersburg Lutheran Church, 401 Fram Street, Petersburg, Alaska.

**FOR FURTHER INFORMATION CONTACT:** Chip Weber, Wrangell District Ranger, PO Box 51, Wrangell, AK 99929, phone (907) 874–2323, e-mail *cweber@fs.fed.us,* or Patty Grantham, Petersburg, District Ranger, PO Box 1328, Petersburg, AK 99833, phone (907) 772–3871, e-mail *pagrantham@fs.fed.us.* For further information on RAC history, operations, and the application process, a website is available at *http://www.fs.fed.us/r10/payments.*

**SUPPLEMENTARY INFORMATION:** This will be the third meeting of the committee, and will focus on the review and discussion of proposals received by the RAC for funding under Title II of the Payments to States legislation (Pub. L. 106–393). Deadline for proposals during this round of funding consideration is February 10, 2003. No proposals will be recommended for funding at their initial reading, however, proposals that were submitted and reviewed at the January meeting may be recommended for funding at this meeting. The meeting is open to the public. Public input opportunity will be provided and individuals will have the opportunity to address the committee at that time.

Dated: January 22, 2003.

**Thomas Puchlerz,**

*Forest Supervisor.*

[FR Doc. 03–2002 Filed 1–28–03; 8:45 am]

**BILLING CODE 3410–11–M**

## DEPARTMENT OF AGRICULTURE

### Grain Inspection, Packers and Stockyards Administration

**[03–a–a]**

### Cancellation of Mississippi's Designation, and the Opportunity for Designation in the Mississippi Area

**AGENCY:** Grain Inspection, Packers and Stockyards Administration, USDA.

**ACTION:** Notice.

**SUMMARY:** The United States Grain Standards Act, as amended (Act), provides that official agency designations will end not later than triennially and may be renewed. The Mississippi Department of Agriculture and Commerce (Mississippi) is designated to provide official inspection services until September 30, 2003, according to the Act. Mississippi advised Grain Inspection, Packers and Stockyards Administration (GIPSA) that they will cease providing official inspection effective June 30, 2003. Accordingly, GIPSA is announcing that Mississippi's designation will be canceled effective June 30, 2003. GIPSA is asking for applicants for service in the Mississippi area.

**DATES:** Applications and comments must be postmarked or electronically dated on or before February 28, 2003.

**ADDRESSES:** Submit applications to USDA, GIPSA, Janet M. Hart, Chief, Review Branch, Compliance Division, STOP 3604, room 1647–S, 1400 Independence Ave. SW., Washington, DC 20250–3604; Fax (202) 690–2755; e-mail *Janet.M.Hart@usda.gov.*

**FOR FURTHER INFORMATION CONTACT:** Janet M. Hart at (202) 720–8525, e-mail *Janet.M.Hart@usda.gov.*

**SUPPLEMENTARY INFORMATION:** This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12866 and Departmental Regulation 1512–1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

Section 7(f)(1) of the Act authorizes GIPSA's Administrator to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services. GIPSA designated Mississippi, main office in Jackson, Mississippi, to provide official inspection services under the Act on October 1, 2000.

Section 7(g)(1) of the Act provides that designations of official agencies will end not later than triennially and may be renewed according to the criteria and procedures prescribed in section 7(f) of the Act. The designation of Mississippi ends on September 30, 2003, according to the Act. However, Mississippi asked GIPSA for a voluntary cancellation of their designation coinciding with end of their fiscal year, June 30, 2003. Accordingly, Mississippi's designation will cease effective June 30, 2003, and GIPSA is asking for applicants to provide official service.

Pursuant to section 7(f)(2) of the Act, the following geographic area, the entire State of Mississippi, except those export port locations within the State, is assigned to this official agency. Interested persons are hereby given the opportunity to apply for designation to provide official services in the geographic areas specified above under provisions of section 7(f) of the Act and section 800.196(d) of the regulations issued thereunder. Persons wishing to apply for designation should contact the Compliance Division at the address listed above for forms and information, or obtain applications at the GIPSA Web site, *http://www.usda.gov/gipsa/oversight/parovreg.htm.*

**Authority:** Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*).

Dated: January 22, 2003.

**Donna Reifschneider,**

*Administrator, Grain Inspection, Packers and Stockyards Administration.*

[FR Doc. 03–1862 Filed 1–28–03; 8:45 am]

**BILLING CODE 3410–EN–P**

## DEPARTMENT OF AGRICULTURE

### Grain Inspection, Packers and Stockyards Administration

**[02–b–c]**

### Opportunity To Comment on the Applicant for the Oregon Area

**AGENCY:** Grain Inspection, Packers and Stockyards Administration, USDA.

**ACTION:** Notice.

**SUMMARY:** GIPSA requests comments on the applicant for designation to provide official services in the Oregon geographic area.

**DATES:** Comments must be postmarked or electronically dated on or before February 28, 2003.

**ADDRESSES:** Comments must be submitted in writing to USDA, GIPSA, Janet M. Hart, Chief, Review Branch, Compliance Division, STOP 3604, room 1647–S, 1400 Independence Ave. SW., Washington, DC 20250–3604; FAX 202–690–2755; e-mail *Janet.M.Hart@usda.gov.* All comments received will be made available for public inspection at the above address located at 1400 Independence Avenue, SW., during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** Janet M. Hart at (202) 720–8525, e-mail *Janet.M.Hart@usda.gov.*

**SUPPLEMENTARY INFORMATION:** This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12866 and Departmental Regulation 1512–1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

In the November 22, 2002, **Federal Register**, (67 FR 70397), GIPSA announced that Oregon was ceasing their official inspection operations effective November 27, 2002, and asked persons interested in providing official services in the Oregon area to submit an application for designation by December 23, 2002. There was one applicant. Lewiston Grain Inspection Service, Inc. (Lewiston), main office located in Lewiston, Idaho, applied for the entire

area specified in the November 22, 2002, **Federal Register**.

GIPSA is publishing this notice to provide interested persons the opportunity to present comments concerning the applicant. Commenters are encouraged to submit reasons and pertinent data for support or objection to the designation of the applicant. All comments must be submitted to the Compliance Division at the above addresses. Comments and other available information will be considered in making a final decision. GIPSA will publish notice of the final decision in the **Federal Register**, and GIPSA will send the applicant written notification of the decision.

**Authority:** Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*).

Dated: January 16, 2003.

**Donna Reifschneider,**

*Administrator, Grain Inspection, Packers and Stockyards Administration.*

[FR Doc. 03–1863 Filed 1–28–03; 8:45 am]

**BILLING CODE 3410–EN–P**

## CIVIL RIGHTS COMMISSION

### Sunshine Act Meeting

**AGENCY:** U.S. Commission on Civil Rights.

**DATE AND TIME:** Friday, February 7, 2003, 9 a.m.

**PLACE:** Omni Charlotte Hotel, 132 E. Trade Street, Charlotte, NC 28202.

**STATUS:**

*Agenda*

I. Approval of Agenda

II. Approval of Minutes of January 10, 2003 Meeting

III. Announcements

IV. Staff Director's Report

V. Program Planning

VI. Presentations from Southern Regional State Advisory Committee members

VII. Future Agenda Items

8:30 a.m.—Briefing on Education Accountability and High-Stakes Testing in the Carolinas (Thursday, February 6, 2003)

**FOR FURTHER INFORMATION CONTACT:** Les Jin, Press and Communications, (202) 376–7700.

**Debra A. Carr,**

*Deputy General Counsel.*

[FR Doc. 03–2230 Filed 1–27–03; 4:01 pm]

**BILLING CODE 6335–01–M**

## DEPARTMENT OF COMMERCE

**[I.D. 012403A]**

### Submission for OMB Review; Comment Request

**SUPPLEMENTARY INFORMATION:** The Department of Commerce 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*: National Oceanic and Atmospheric Administration.

*Title:* NOAA Community-based Restoration Program Progress Reports.

*Form Number(s):* None.

*OMB Approval Number:* None.

*Type of Request:* Regular submission.

*Burden Hours:* 1,125.

*Number of Respondents:* 150.

*Average Hours Per Response:* 15 hours.

*Needs and Uses:* The NOAA Community-based Restoration Program (CRP) involves communities in local marine and estuarine habitat restoration. Each fiscal year, NOAA publishes in the Federal Register two notices of availability of financial assistance inviting applications from persons who are interested in obtaining grants to carry out community-based habitat restoration activities through individual projects or restoration partnerships. It is critical to track the status and success of funded projects to provide accountability for the CRP and NOAA on the expenditure of federal restoration funds as well as to respond quickly to inquiries from NOAA management, congressional members, and constituents. Successful applicants are now required to submit periodic performance reports and a final report for each award. NOAA proposes to require that specific information be provided in these reports.

*Affected Public:* Not-for-profit institutions; business or other for-profit organizations; and State, Local, or Tribal Government.

*Frequency:* On occasion, semi-annually.

*Respondent's Obligation:* Required to obtain or retain a benefit.

*OMB Desk Officer:* David Rostker, (202) 395-3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482-0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: January 23, 2003.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 03–2032 Filed 1–28–03; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

**[I.D. 012403B]**

### Submission for OMB Review; Comment Request

**SUPPLEMENTARY INFORMATION:** The Department of Commerce 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:* National Oceanic and Atmospheric Administration (NOAA).

*Title:* Coastal and Estuarine Land Conservation, Planning, Protection, and Restoration.

*Form Number(s):* None.

*OMB Approval Number:* 0648–0459.

*Type of Request:* Regular submission.

*Burden Hours:* 1,520.

*Number of Respondents:* 50.

*Average Hours Per Response:* 30 hours for development of a plan; and 10 hours for a project application and checklist.

*Needs and Uses:* The FY 2002 Commerce, Justice, State Appropriations Act directed the Secretary of Commerce to establish a Coastal and Estuarine Land Conservation Program (CELCP) to protect important areas that have significant conservation, recreation, ecological, historical, or aesthetic values, or that are threatened by conversion, and to issue guidelines for this program delineating the criteria for grant awards (16 U.S.C. 1456d.). The guidelines establish procedures for eligible applicants, who choose to participate in the program, to use when developing state conservation plans, proposing or soliciting projects under this program, applying for funds, and carrying out projects under this program in a manner that is consistent with the purposes of the program. NOAA also has, or is given, authority under the Coastal Zone Management Act, annual appropriations or other authorities, to issue funds to coastal states and localities for planning, conservation,

acquisition, protection, restoration, or construction projects. This information collection will enable NOAA to implement the CELCP, under its current or future authorization, and facilitate the review of similar projects under different, but related, authorities.

*Affected Public:* State, Local, or Tribal Government; and not-for-profit institutions.

*Frequency:* One-time.

*Respondent's Obligation:* Required to obtain or retain a benefit.

*OMB Desk Officer:* David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: January 23, 2003.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 03–2033 Filed 1–28–03; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 011403A]**

### Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Fisheries for Dolphin and Wahoo

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

**ACTION:** Notice of agency action.

**SUMMARY:** NMFS, under authority granted to the Secretary of Commerce (Secretary) under section 304(f) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), has re-designated the South Atlantic Fishery Management Council (SAFMC) as the lead council to develop a dolphin (*Coryphaena hippurus* and *C. equiselis*), and wahoo (*Acanthocybium solanderi*), fishery management plan (FMP) in the exclusive economic zone (EEZ) for the U.S. Atlantic coast.

**FOR FURTHER INFORMATION CONTACT:** Dr. Steve Branstetter, NMFS, 727–570–5305.

**SUPPLEMENTARY INFORMATION:** Currently, dolphin in the EEZ of the South Atlantic and Gulf of Mexico is managed under the FMP for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (Coastal Pelagics FMP). Wahoo in the EEZ is currently not managed under any Federal FMP. The Gulf of Mexico Fishery Management Council (GMFMC) and SAFMC have joint responsibility for developing and amending the Coastal Pelagics FMP (managed species include king mackerel, Spanish mackerel, cero, cobia, dolphin, little tunny, and bluefish in the Gulf of Mexico). The Coastal Pelagics FMP is implemented under authority of the Magnuson-Stevens Act by regulations at 50 CFR part 622. Presently, those regulations specify authorized fishing gears for dolphin.

Given the increasing fishing pressure on dolphin and wahoo, and the sparse information available on stock structure and status, the SAFMC perceived a need to provide management for dolphin and wahoo resources throughout their ranges. The SAFMC believed that present fishery conditions required timely action to prevent localized reductions in fish abundance due to heavy fishing pressure and serious user group conflicts before they occurred off the southern Atlantic states or elsewhere in the Atlantic EEZ. Consequently, on September 15, 1997, the SAFMC requested authorization under the Magnuson-Stevens Act to develop an FMP that would provide comprehensive management and protection of dolphin and wahoo in the EEZ of the Atlantic, Gulf of Mexico, and Caribbean Sea.

On March 9, 1998 (63 FR 11422), and May 5, 1998 (63 FR 24774), NMFS published documents in the **Federal Register** requesting public comment on the SAFMC proposal. After considering the SAFMC request, and the public comment received, NMFS, acting on behalf of the Secretary under the procedures of the Magnuson-Stevens Act, designated the SAFMC, GMFMC, and Caribbean Fishery Management Council (CFMC) as joint preparers of a new FMP for the fisheries for dolphin and wahoo throughout their range in the EEZ of the Atlantic, Gulf of Mexico, and Caribbean Sea, with the Mid-Atlantic Fishery Management Council (MAFMC) and New England Fishery Management Council (NEFMC) serving in an advisory capacity to the other Councils. Authority to designate a Council or Councils to prepare an FMP for fisheries that extend beyond one Council's geographical area of authority is granted to the Secretary under section 304(f) of the Magnuson-Stevens Act.

Subsequently, on July 16, 2002, the SAFMC requested that the Secretary allow the SAFMC to withdraw from further action to prepare a joint FMP. The SAFMC further requested that the Secretary re-designate the SAFMC as true lead for an FMP encompassing only the U.S. Atlantic coast, and excluding the Gulf of Mexico and U.S. Caribbean regions. The SAFMC submitted this request because of continued logistic delays in finalizing and implementing the jointly developed FMP. The SAFMC was concerned that these delays could exacerbate identified user conflicts specific to the fishery along the Atlantic coast.

NMFS, on behalf of the Secretary, responded to the Council in a letter dated October 9, 2002, indicating that the agency found merit with the SAFMC's proposal. NMFS still believes that a jointly developed FMP would best meet Magnuson-Stevens Act requirements to manage stocks throughout their ranges. Nevertheless, NMFS also recognizes that the National Standard Guidelines (NSG), at 50 CFR 600.320, suggest that more restrictive alternative management units may be justified if complementary management is planned for other geographic areas or if the unmanaged portions of the stocks are immaterial to proper management within the area under consideration for the alternate management unit, especially if designated alternate management units are specifically relevant to the FMP's objectives.

In the case of the dolphin and wahoo FMP, social and economic issues are identified as the SAFMC's primary objectives in the FMP. The SAFMC is not attempting to rectify a biological problem with the stocks; neither stock is overfished nor approaching an overfished condition because of overfishing. The SAFMC has specific objectives to: (1) minimize the potential for localized reductions in fish abundance, which can have economic and social impacts; (2) minimize market disruptions from intense landings by all sectors; (3) minimize conflicts and competition between recreational and commercial user groups; and (4) optimize social and economic benefits by recognizing and maintaining the historical importance of the recreational fishery.

No similar economic and social issues requiring management have been identified by the GMFMC or CFMC for their respective areas of jurisdiction. In the Gulf of Mexico, about 90 percent of

the combined dolphin and wahoo commercial and recreational landings are from the west coast of Florida. Of the two species, dolphin dominate the landings, and Florida has regulations in place that restrict the commercial harvest of dolphin to hook-and-line fishing in state waters (where most of the harvest occurs), thus limiting the potential for user group conflicts. Similarly, catches and landings for both dolphin and wahoo in the Caribbean are minimal compared to the catches in the other areas, and in many instances, the catches are incidental to the catch of targeted species such as billfishes.

Therefore, NMFS sought comment on the SAFMC proposal from the affected Councils and the general public. In letters to the GMFMC, CFMC, MAFMC, and NEFMC, dated October 22, 2002, NMFS presented the SAFMC proposal and NMFS' reasons, outlined above, for supporting the proposal. Three of the four Councils responded in support the SAFMC proposal; the fourth Council did not respond. Additionally, NMFS published a **Federal Register** notice (67 FR 70214, November 21, 2002) seeking public comment on the SAFMC proposal. Eleven letters of comment were received from the public (see Comments and Responses below).

Based on responses from the other affected Councils and public comment, NMFS, on behalf of the Secretary, under the procedures of the Magnuson-Stevens Act, has designated the SAFMC as the lead Council to develop an FMP for the fisheries for dolphin and wahoo in the U.S. Atlantic EEZ. Under this designation the MAFMC and NEFMC would continue to serve in an advisory capacity to the SAFMC. Once completed, the dolphin/wahoo FMP or subsequent amendments would be submitted for Secretarial review, approval, and implementation.

Additionally, it will be necessary to remove the U.S. Atlantic Ocean component of the dolphin stock from management in the Coastal Migratory Pelagics (CMP) FMP. The CMP FMP is implemented under authority of the Magnuson-Stevens Act by regulations at 50 CFR part 622. The CMP FMP is a joint plan involving both the GMFMC and SAFMC, and species in the fishery include king mackerel, Spanish mackerel, cero, cobia, dolphin, little tunny, and bluefish in the Gulf of Mexico. Presently, the only regulations in the CMP FMP that pertain to dolphin are those that specify authorized fishing gears in the Atlantic and Gulf of Mexico EEZ. Removal of the U.S. Atlantic component of the dolphin stock from the CMP FMP would require a plan amendment and would have to be approved by a majority of the voting members, present and voting, of both the SAFMC and GMFMC.

**Comments and Responses**

In addition to three letters in support of the SAFMC proposal from Councils, eleven letters of comment were received from the public. Four letters commented only on specific management actions that have been proposed by SAFMC and three letters based their comments on the proposed re-designation by questioning the appropriateness of the SAFMC's proposed management actions. NMFS appreciates the input of these informed fishery participants regarding proposed management actions for the dolphin and wahoo fisheries. Nevertheless, comments on the proposed management measures are beyond the scope of this request for comments, and are not addressed here. When the SAFMC submits the FMP for the dolphin and wahoo fisheries for review by the Secretary, NMFS will provide the public with the opportunity to comment on the proposed management actions.

*Comment 1:* One comment supported the designation of the U.S. Atlantic coast as a justified alternate management unit. Given that the proposed FMP for the dolphin and wahoo fisheries is not designed to control fishing mortality but to maintain status quo in a healthy fishery, fishing on the unmanaged portion of the stock in the Gulf of Mexico and Caribbean regions will not materially effect the SAFMC goals.

*Response:* NMFS still believes that a jointly developed FMP would best meet Magnuson-Stevens Act requirements to manage stocks throughout their ranges. Nevertheless, NMFS recognizes that the NSGs allow for alternative management units, encompassing a portion of the range of the stocks, if complementary management is planned for other geographic areas or if the unmanaged portions of the stocks are immaterial to proper management within the area under consideration for the alternate management unit, especially if designated alternate management units are specifically relevant to the FMP's objectives. In the case of the dolphin and wahoo FMP, social and economic issues are identified as the SAFMC's primary objectives in the FMP. No similar economic and social issues requiring management have been identified by the GMFMC or CFMC for their respective areas of jurisdiction. Therefore, NMFS, on behalf of the Secretary, is approving the SAFMC request.

*Comment 2:* One commenter opposed the SAFMC request to manage beyond their specific area of jurisdiction (North Carolina to the Florida Keys) to include the entire U.S. Atlantic coast.

*Response:* Under the existing designation by the Secretary (64 FR 33468, June 23, 1999) to develop a joint FMP, the SAFMC already has the authority to manage these stocks in the U.S. Atlantic region. The MAFMC and NEFMC agreed not to manage the stocks directly, but to serve in an advisory capacity to the SAFMC. Thus, designating the SAFMC to develop an FMP for dolphin and wahoo fisheries along the U.S. Atlantic coast does not alter the existing range of the SAFMC jurisdiction for these fisheries, nor the ability to establish management measures for that specific region.

*Comment 3:* Six comments were received suggesting that the SAFMC's membership gives preference to the recreational sector, and without representation of the commercial pelagic longline fishery, the SAFMC would not manage the dolphin and wahoo stocks fairly and equitably among all fishing sectors. To best address management of these species that have distributions extending beyond any one Council's geographical area of authority, dolphin and wahoo should be managed as highly migratory species (HMS) by NMFS in conjunction with the International Commission for the Conservation of Atlantic Tunas and all the affected Councils. If NMFS does not assume authority to manage these species as HMS, the current five-council process should be maintained to ensure fair and equitable management throughout the range of the stocks.

*Response:* NMFS disagrees with the comments alleging bias in the composition and position of the South Atlantic Council membership. In approving candidates for Council membership, the Secretary and his designees endeavor to balance equitably the representation of diverse user groups and resource managers.

As for ensuring fair and equitable management, it is NMFS' responsibility to ensure that any management measures developed under an FMP and its amendments comply fully with the national standards, other provisions of the Magnuson-Stevens Act, and other applicable law before these measures would be approved and implemented.

Additionally, some of these commenters appeared to misunderstand the existing June 23, 1999, designation by the Secretary (64 FR 33468) to develop a joint FMP. It is true that the FMP would have needed approval by a majority of the voting members, present

and voting, of the SAFMC, GMFMC, and CFMC. However, each Council would thereafter have the authority to establish independently the regulations pertaining to the fisheries in its respective area of jurisdiction. Therefore, except for initially approving the FMP as a whole, the Councils would not be at liberty to oppose a management action that did not affect their respective region. For example, in the most recent draft of the joint FMP, the SAFMC proposed a size limit for dolphin along the U.S. Atlantic coast, but the GMFMC and CFMC did not establish a size limit in their respective areas, nor could the GMFMC or CFMC oppose that proposed SAFMC action. The decision to approve or disapprove a management action lies solely with the Secretary. As with the 1999 designation, under the new designation, the MAFMC and NEFMC would remain as advisors to the SAFMC for management actions that affected their respective areas of jurisdiction.

In regards to the establishment of a broader, international-based management strategy, NMFS outlined its position regarding the designation of a restricted alternative management unit that includes only the U.S. Atlantic waters in the response to Comment 1. The dolphin and wahoo stocks are not overfished, nor are they undergoing overfishing, and management as proposed by the SAFMC for its area of authority for these stocks (the U.S. Atlantic coast) is intended to address issues of concern within this area. NMFS and the SAFMC will continue to monitor the status of these stocks, and should the need arise to manage these stocks on a broader scale, an alternative management strategy can be devised.

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

Dated: January 23, 2003.

**Rebecca Lent,**

*Deputy Assistant Administrator for Regulatory Programs,National Marine Fisheries Service.*

[FR Doc. 03–2030 Filed 1–28–03; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 011303E]**

### Taking and Importing of Marine Mammals

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

**ACTION:** Notice.

**SUMMARY:** This notice announces that on January 21, 2003, the United States District Court for the Northern District of California issued an order that stayed the implementation of the final finding made on December 31, 2002, by the Assistant Administrator for Fisheries, NMFS, (Assistant Administrator). The stay of the labeling standard for ''dolphin-safe'' tuna became effective on January 23, 2003, and shall remain in effect for 90 days from the effective date or until a ruling is issued on a motion for a preliminary injunction, to be published in the **Federal Register**.

**DATES:** Effective on January 23, 2003.

**FOR FURTHER INFORMATION CONTACT:** Nicole R. Le Boeuf, Office of Protected Resources, NMFS, 301–713–2322.

**SUPPLEMENTARY INFORMATION:** The Dolphin Protection Consumer Information Act (DPCIA) (16 U.S.C. 1385), as amended by the International Dolphin Conservation Program Act, requires the Secretary of Commerce (Secretary) to make a finding, based on the results of specified scientific research, information obtained under the International Dolphin Conservation Program, and any other relevant information, as to whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a ''significant adverse impact'' on any depleted dolphin stock in the eastern tropical Pacific Ocean (ETP). On December 31, 2002, the Assistant Administrator, on behalf of the Secretary, issued a final finding required under subsection (g)(2) of the DPCIA published a notification in the **Federal Register** on January 15, 2003 (68 FR 2010).

In the final finding, the Assistant Administrator determined that the chase and intentional deployment on or encirclement of dolphins with purse seine nets is not having a significant adverse impact on depleted dolphin stocks in the ETP. The final finding changed the definition of dolphin-safe for tuna products containing tuna harvested in the ETP by purse seine vessels with carrying capacity greater than 400 short tons and exported from, sold in, the United States. Based upon the final finding, the definition of dolphin-safe for such tuna will be governed by the provisions of subsection (h)(1) of the DPCIA (16 U.S.C. 1385). Under this definition, dolphin-safe means that dolphins can be encircled or chased during the trip in which the tuna was harvested, but that no dolphins can be killed or seriously injured in the set in which the tuna was harvested.

On December 31, 2002, Earth Island Institute, eight organizations, and one individual person filed a complaint in the United States District Court for the Northern District of California. This complaint challenges the final finding of the Assistant Administrator and seeks to enjoin any change to the dolphin-safe labeling standard for tuna harvested with purse seine nets.

On January 21, 2003, the Court, at the request of all parties, issued an order that stayed the implementation the final finding. Under the terms of this order, the labeling standard for dolphin-safe tuna shall be governed by the provisions of subsection (h)(2) of the DPCIA. Under that provision, tuna harvested by purse seine vessels with 400 short tons or greater carrying capacity in the ETP is deemed dolphin-safe if, ''no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and no dolphins were killed or seriously injured during the sets in which the tuna were caught.'' The terms of the order further provide that this labeling standard shall remain in effect for 90 days from the date of the order or until a ruling is issued on a motion for a preliminary injunction, which will be published in the **Federal Register**.

Dated: January 23, 2003.

**Rebecca J. Lent,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

[FR Doc. 03–1973 Filed 1–24–03; 12:28 pm]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Meeting of the Chairs of the National Marine Sanctuary Program's Sanctuary Advisory Councils

**AGENCY:** National Marine Sanctuary Program (NMSP), National Ocean Service (NOS), National Oceanic and Atmospheric Administration, Department of Commerce (DOC).

**ACTION:** Notice.

**SUMMARY:** The National Marine Sanctuary Program (NMSP) is holding a meeting of the Chairs of its eleven site-specific Sanctuary Advisory Councils (Councils). The purpose of the meeting is to obtain recommendations from the Chairs on the prioritization of a list of policy topics that should be addressed on a programmatic basis and, if time

permits, to obtain advice on what actions could be taken to address the most important policy topics. The meeting will be open to the public. Opportunities for public comment will be provided at 9 and 4 on a first-come, first-serve basis. Members of the public wishing to provide comments will be asked to sign up upon arrival and will likely be limited in how much time they will be allotted for comments (depending upon how many people have signed up). A maximum of fifteen minutes will be allotted at 9 and again at 4 for public comments.

**DATES:** The meeting will be held on Thursday, February 20, 2003, from 8:30 to 4:15. Opportunities for public comment will be provided at 9 and 4.

**ADDRESSES:** The meeting will be held at Chase Palm Park Center, 236 East Cabrillo Boulevard, Santa Barbara, California.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Moore at (301) 713–3125 ext. 170 (*elizabeth.moore@noaa.gov*) or Karen Brubeck at (206) 842–9074 (*karen.brubeck@noaa.gov*).

**SUPPLEMENTARY INFORMATION:** The National Marine Sanctuaries Act (NMSA) authorizes the Secretary of Commerce to establish one or more Advisory Councils to provide advice to the Secretary regarding the designation and management of National Marine Sanctuaries. Eleven Councils exist, for the Channel Islands, Cordell Bank, Florida Keys, Gray's Reef, Gulf of the Farallones, Hawaiian Islands Humpback Whale, Monterey Bay, Olympic Coast, Stellwagen Bank, and Thunder Bay Sanctuaries and the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve and proposed Sanctuary. Councils represent a wide variety of community interests and are active in various projects and issues affecting the management of their local Sanctuaries; Councils generally meet on a monthly or bimonthly basis.

Each year, the NMSP hosts a meeting for all the Council Chairs and Coordinators to discuss projects and topics of mutual interest (2003's meeting will be the third such meeting). This year, for the first time, the Chairs are being asked to provide advice to the national program leadership on policy topics important on a programmatic rather than a site-specific level. The Chairs will provide this advice only during the meeting announced by this notice, and will not become a permanent national advisory body.

**Authority:** 16 U.S.C. section 1431 *et seq.* (Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: January 21, 2003.

**Jamison S. Hawkins,**

*Acting Assistant Administrator for Ocean Services and Coastal Zone Management.*

[FR Doc. 03–2022 Filed 1–28–03; 8:45 am]

**BILLING CODE 3510–08–M**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 011403F]**

### Marine Mammals; File No. 9981678

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

**ACTION:** Issuance of permit.

**SUMMARY:** Notice is hereby given that Gregory D. Bossart, V.M.D., Ph.D., Harbor Branch Oceanographic Institution, Inc., 5600 US 1 North, Ft. Pierce, Florida 34946 (Principal Investigator: Dr. Gregory D. Bossart) has been issued a permit (Permit No. 998–1678–00) to take Atlantic bottlenose dolphins (*Tursiops truncatus*) for purposes of scientific research.

**ADDRESSES:** The permit and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 713–2289; fax (301) 713–0376; and

Southeast Region, NMFS, Protected Resources Division, 9721 Executive Center Drive North, St. Petersburg, FL 33702-2432; phone (813) 570–5312; fax (813) 570–5517.

**FOR FURTHER INFORMATION CONTACT:** Trevor Spradlin or Lynne Barre, (301) 713–2289.

**SUPPLEMENTARY INFORMATION:** On July 25, 2002, notice was published in the **Federal Register** (67 FR 48614) that a request for a scientific research permit to take bottlenose dolphins had been submitted by the above-named individual. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216).

The permit authorizes a maximum of 400 individual dolphins to be captured, examined, sampled, marked, and released for health assessment studies in the Indian River Lagoon, Florida and the waters near Charleston, South Carolina (200 at each field site) over the 5–year period of the permit. Dolphins of all age and sex classes may be captured except female-calf pairs containing calves presumed to be less than one year of age. Some individual dolphins may be harassed more than once per day but not more than three times per day. In addition, some individual dolphins may be captured more than once during the 5–year period, but not more than three times in any given year.

Dated: January 17, 2003.

**Eugene T. Nitta,**

*Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 03–2029 Filed 1–28–03; 8:45 am]

**BILLING CODE 3510–22–S**

## COMMODITY FUTURES TRADING COMMISSION

### Sunshine Act Meetings

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of public meeting.

**SUMMARY:** Notice is hereby given that the Commodity Futures Trading Commission (''Commission'') will hold a joint technical conference with the Federal Energy Regulatory Commission at which all interested parties are invited to hear panel discussions on the feasibility of utilizing clearing to address the credit issues that exist in today's energy markets. The conference is open to the public and there is no registration fee.

**DATES:** Wednesday, February 5, 2003, from 9 a.m. to 4:30 p.m.

**PLACE:** Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC, Commission Meeting Room.

**STATUS:** Open.

**FOR FURTHER INFORMATION CONTACT:** Jean A. Webb, 202–418–5100.

Issued in Washington, DC this 24th day of January, 2003.

By the Commodity Futures Trading Commission.

**Jean A. Webb,**

*Secretary of the Commission.*

[FR Doc. 03–2161 Filed 1–27–03; 8:45 am]

**BILLING CODE 6351–01–M**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Proposed Collection; Comment Request

**AGENCY:** Office of the Assistant Secretary of Defense Health Affairs, DoD.

**ACTION:** Notice.

In accordance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Assistant Secretary of Defense for Health Affairs announces the proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Consideration will be given to all comments received by March 31, 2003.

**ADDRESSES:** Written comments and recommendations on the information collection should be sent to TRICARE Management Activity, Medical Benefits and Reimbursement Systems, 16401 East Centretch Parkway, ATTN: David Bennett, Aurora, CO 80011–9043.

**FOR FURTHER INFORMATION CONTACT:** To request more information on this proposed information collection, please write to the above address or call TRICARE Management Activity, Medical Benefits and Reimbursement Systems, at (303) 676–3494.

*Title; Associated Form; and OMB Number:* Application for TRICARE-Provider Status: Corporate Services Provider.

*Needs and Uses:* The information collection will allow eligible providers to apply for Corporate Services Provider status under the TRICARE program.

*Affected Public:* Businesses or other for-profit; not-for-profit institutions.

*Annual Burden Hours:* 333.

*Number of Respondents:* 1,000.

*Responses for Respondent:* 1.

*Average Burden Per Response:* 20 minutes.

*Frequency:* On occasion.

**SUPPLEMENTARY INFORMATION:**

**Summary of Information Collection**

On March 10, 1999, TRICARE Management Activity (TMA), formerly known as OCHAMPUS, published a finale rule in the **Federal Register** (64 FR 11765), creating a fourth class of TRICARE providers consisting of freestanding corporations and foundations that render principally professional ambulatory or in-home care and technical diagnostic procedures. The intent of the rule was not to create additional benefits that ordinarily would not be covered under TRICARE if provided by a more traditional health care delivery system, but rather to allow those services which would otherwise be allowed except for an individual provider's affiliation with a freestanding corporate facility. The addition of the corporate class will recognize the current range of providers within today's health care delivery structure, and give beneficiaries access to another segment of the health care delivery industry. Corporate services providers must be approved for Medicare payment, or when Medicare approval status is not required, be accredited by a qualified accreditation organization to gain provider authorization status under TRICARE. Corporate services providers must also enter into a participation agreement which will be sent out as part of the initial authorization process. The participation agreement will ensure that TRICARE determined allowable payments, combined with the cost-share/copayment, deductible, and other health insurance amounts, will be accepted by the provider as payment in full.

The Application for TRICARE-Provider Status: Corporate Services Provider, will collect the necessary information to ensure that the conditions are met for authorization as a TRICARE corporate services provider: *i.e.*, the provider (1) is a corporation or a foundation, but not a professional corporation or professional association; (2) provides services and related supplies of a type rendered by TRICARE individual professional providers or diagnostic technical services; (3) is approved for Medicare payment or when Medicare approval status is not required, is accredited by a qualified accreditation organization; and (4) has entered into a participation agreement approved by the Executive Director, TMA or a designee.

The collected information will be used by TRICARE contractors to process claims and verify authorized provider status. Verification involves collecting and reviewing copies of the provider's licenses, certificates, accreditation documents, etc. If the criteria are met, the provider is granted TRICARE-authorization status. The documentation and information are collected when: (1) A provider requests permission to become a TRICARE-authorized provider; (2) a claim is filed for care received from a provider who is not listed on the contractors' computer listing of authorized providers; or (3) when a former TRICARE-authorized provider requests reinstatement.

The contractors develop the forms used to gather information based on TRICARE conditions for participation listed above. Without the collection of this information, contractors cannot determine if the provider meets TRICARE authorization requirements for corporate services providers. If the contractor is unable to verify that a provider meets these authorization requirements, the contractor may not reimburse either the provider or the beneficiary for the provider's health care services.

To reduce the reporting burden to a minimum, TRICARE has carefully selected the information requested from respondents. Only that information which has been deemed absolutely essential is being requested. If necessary, contractors may verify credentials with Medicare, JCAHO and other national organizations by telephone. TRICARE is also participating with Medicare in the development of a National Provider System which will eliminate duplication of provider certification data collection among Federal government agencies.

TRICARE contractors are required to maintain a computer listing of all providers that have submitted the appropriate authorization information and documentation. To avoid duplicate inquiries, the contractors must search the computer provider listing before requesting documentation from providers.. Since the providers affected by this information collection generally have not previously been eligible to be authorized providers, TRICARE contractors will have no information on file. The providers will have to submit the information requested on the data collection form (Application for TRICARE-Providers Status: Corporate Services Provider) in order to obtain provider authorization status under TRICARE.

The information will usually be collected from each respondent only once. It is estimated that there will be approximately 3,000 applicants over an initial 3 year collection period or 1,000 respondents per year. After the initial three years of collection, it is estimated

that annual number of respondents will decline to less than 100. TRICARE will request the provider authorization documentation and information when the provider asks to become TRICARE-authorized or when a claim is filed for a new provider's services. If after a provider has been authorized by a contractor, no claims are filed during a two-year period of time, the provider's information will be placed in the inactive file. To reactivate a file, the provider must verify that the information is still correct, or supply new or changed information. The total first year reporting burden is estimated to be 333⅓ hours.

Dated: January 21, 2003.

**Patricia L. Toppings,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 03–1947 Filed 1–28–03; 8:45 am]

**BILLING CODE 5001–08–M**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Meeting of the Defense Policy Board Advisory Committee.

**AGENCY:** Department of Defense, Defense Policy Board Advisory Committee.

**ACTION:** Notice.

**SUMMARY:** The Defense Policy Board Advisory Committee will meet in closed session at the Pentagon on February 27–28, 2003 from 0900 to 1800.

The purpose of the meeting is to provide the Secretary of Defense, Deputy Secretary of Defense and Under Secretary of Defense for Policy with independent, informed advice on major matters of defense policy. The Board will hold classifed discussions on national security matters.

In accordance with section 10(d) of the Federal Advisory Committee Act, Public Law 92–463, as amended [5 U.S.C. App II (1982)], it has been determined that this meeting concerns matters listed in 5 U.S.C. § 552B(c)(1)(1982), and that accordingly this metting will be closed to the public.

Dated: January 21, 2003.

**Patricia L. Toppings,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 03–1948 Filed 1–28–03; 8:45 am]

**BILLING CODE 5001–08–M**

## DEPARTMENT OF EDUCATION

**[CFDA No. 84.120A]**

### Office of Postsecondary Education; Minority Science and Engineering Improvement Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2003

*Purpose of Program:* The Minority Science and Engineering Improvement Program (MSEIP) is designed to effect long-range improvement in science and engineering education at predominantly minority institutions and to increase the flow of underrepresented ethnic minorities, particularly minority women, into scientific and technological careers.

*Eligibility for Grants:* Under section 361 of Title III of the Higher Education Act of 1965, as amended (HEA), the following entities are eligible to receive a grant under MSEIP:

(1) Public and private nonprofit institutions of higher education that:

(A) Award baccalaureate degrees; and

(B) Are minority institutions;

(2) Public or private nonprofit institutions of higher education that:

(A) Award associate degrees; and

(B) Are minority institutions that:

(i) Have a curriculum that includes science or engineering subjects; and

(ii) Enter into a partnership with public or private nonprofit institutions of higher education that award baccalaureate degrees in science and engineering;

(3) Nonprofit science-oriented organizations, professional scientific societies, and institutions of higher education that award baccalaureate degrees, that:

(A) Provide a needed service to a group of minority institutions; or

(B) Provide in-service training for project directors, scientists, and engineers from minority institutions; or

(4) Consortia of organizations that provide needed services to one or more minority institutions, the membership of which may include:

(A) Institutions of higher education that have a curriculum in science or engineering;

(B) Institutions of higher education that have a graduate or professional program in science or engineering;

(C) Research laboratories of, or under contract with, the Department of Energy;

(D) Private organizations that have science or engineering facilities; or

(E) Quasi-governmental entities that have a significant scientific or engineering mission.

*Eligible Applicants:* (a) For institutional, design, and special projects described in 34 CFR 637.12, 637.13 and 637.14, public and private nonprofit minority institutions of higher education as defined in sections 361(1) and (2) of the HEA.

(b) For special projects described in 34 CFR 637.14(b) and (c), nonprofit science-oriented organizations, professional scientific societies, institutions of higher education, and consortia of organizations as defined in sections 361(3) and (4) of the HEA.

(c) For cooperative projects described in 34 CFR 637.15, groups of nonprofit accredited colleges and universities whose primary fiscal agent is an eligible minority institution as defined in 34 CFR 637.4(b).

**Note:** A minority institution is defined in 34 CFR 637.4(b) as an accredited college or university whose enrollment of a single minority group or combination of minority groups exceeds 50 percent of the total enrollment.

*Applications Available:* January 31, 2003.

*Deadline for Transmittal of Applications:* March 17, 2003.

*Deadline for Intergovernmental Review:* May 19, 2003.

*Estimated Available Funds:* The Administration has requested $8,500,000 for this program for FY 2003. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

*Estimated Range of Awards:* $19,000–$500,000.

**Estimated Average Size of Awards**

*Institutional Projects*

*Estimated Range of Awards:* $100,000–$300,000.

*Estimated Average Size of Awards:* $125,851.

*Estimated Number of Awards:* 24.

*Design Projects*

*Estimated Range of Awards:* $19,000–$20,000.

*Estimated Average Size of Awards:* $19,500.

*Estimated Number of Awards:* 2.

*Special Projects*

*Estimated Range of Awards:* $20,000–$150,000.

*Estimated Average Size of Awards:* $34,622.

*Estimated Number of Awards:* 12.

*Cooperative Projects*

*Estimated Range of Awards:* $100,00–$500,000.

*Estimated Average Size of Awards:* $251,000.

*Estimated Number of Awards:* 3.

*Estimated Total Number of Awards:* 41.

**Note:** The Department is not bound by any estimates in this notice. Applicants should periodically check MSEIP's Web site for further information on this program. The address is: *http://www.ed.gov/offices/OPE/HEP/idues/msi.html*

*Project Period:* Up to 36 months.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 82, 85, 86, 97, 98, and 99; and

(b) the regulations for this program in 34 CFR part 637.

**Note 1:** The regulations in 34 CFR part 86 apply to institutions of higher education only.

**Note 2:** The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

*Applicability of Executive Order 13202:* Applicants that apply for construction funds under these programs must comply with Executive Order 13202, signed by President Bush on February 17, 2001 and amended on April 6, 2001. This Executive Order provides that recipients of Federal construction funds may not ''require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other construction project(s)'' or ''otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise adhere to agreements with one or more labor organizations, on the same or other construction project(s).'' However, the Executive Order does not prohibit contractors or subcontractors from voluntarily entering into these agreements.

Projects funded under this program that include construction activity will be provided a copy of this Executive Order and will be asked to certify that they will adhere to it.

*Application Procedures*

**Note:** Some of the procedures in these instructions for transmitting applications differ from those in the Education Department General Administrative Regulations (EDGAR) (34 CFR 75.102). Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed regulations. However, these amendments make procedural changes only and do not establish new substantive policy. Therefore, under 5 U.S.C. 553(b)(A), the Secretary has determined that proposed rulemaking is not required.

*Pilot Project for Electronic Submission of Applications*

In FY 2003, the U.S. Department of Education is continuing to expand its pilot project for electronic submission of applications to include additional formula grant programs and additional discretionary grant competitions. The MSEIP, CFDA 84.120A is one of the programs included in the pilot project. If you are an applicant under the MSEIP, you may submit your application to us in either electronic or paper format.

The pilot project involves the use of the Electronic Grant Application System (e-Application) portion of the Grant Administration and Payment System (GAPS). Users of e-Application will be entering data on-line while completing their applications. You may not e-mail a copy of a grant application to us. If you participate in this voluntary pilot project by submitting an application electronically, the data you enter on-line will be saved into a database. We request your participation in e-Application. We shall continue to evaluate its success and solicit suggestions for improvement.

If you participate in e-Application, please note the following:

- Your participation is voluntary.
- You will not receive any additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format. When you enter the e-Application system, you will find information about its hours of operation.
- You may submit all documents electronically, including the Application for Federal Assistance under MSEIP (OMB No. 1840–0109), Project Summary page, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- After you electronically submit your application, you will receive an automatic acknowledgement, which will include a PR/Award number (an identifying number unique to your application).
- Within three working days of submitting your electronic application, fax a signed copy of the Application for Federal Assistance under MSEIP (OMB No. 1840–0109) to the Application Control Center after following these steps:

(1) Print the Application for Federal Assistance under MSEIP (OMB No. 1840–0109) from the e-Application system.

(2) The institution's Authorizing Representative must sign this form.

(3) Place the PR/Award number in the upper right hand corner of the hard copy signature page of the Application for Federal Assistance under MSEIP (OMB No. 1840–0109).

(4) Fax the Application for Federal Assistance under MSEIP (OMB No. 1840–0109) to the Application Control Center at (202) 260–1349.

- We may request that you give us original signatures on all other forms at a later date.
- Closing Date Extension in Case of System Unavailability: If you elect to participate in the e-Application pilot for the MSEIP and you are prevented from submitting your application on the closing date because the e-Application system is unavailable, we will grant you an extension of one business day in order to transmit your application electronically, by mail, or by hand delivery. For us to grant this extension—

(1) You must be a registered user of e-Application, and have initiated an e-Application for this competition; and

(2)(a) The e-Application system must be unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the deadline date; or

(b) The e-Application system must be unavailable for any period of time during the last hour of operation (that is, for any period of time between 3:30 and 4:30 p.m., Washington, DC time) on the deadline date. The Department must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension you must contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** or (2) the e-GRANTS help desk at 1–888–336–8930.

You may access the electronic grant application for MSEIP at *http://e-grants.ed.gov.*

*For Applications and Further Information Contact:* Kenneth Waters, Deborah Newkirk or Sophia McArdle, Institutional Development and Undergraduate Education Service, U.S. Department of Education, 1990 K Street, NW., 6th Floor, Washington, DC 20006–8517. *Telephone:* Mr. Waters (202) 502–7586, Ms. Newkirk (202) 502–7591, Dr. McArdle (202) 219–7078. *FAX:* (202) 502–7861, or via Internet: *ken.waters@ed.gov, deborah.newkirk@ed.gov, sophia.mcArdle@ed.gov.*

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

Individuals with disabilities may obtain this document in an alternative

format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the program contact persons listed under *For Applications and Further Information Contact.*

Individuals with disabilities may obtain a copy of the application package in an alternative format by contacting those persons. However, the Department is not able to reproduce in an alternative format the standard forms included in the application package.

*Electronic Access to This Document*

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/legislation/FedRegister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the Federal Register and the Code of Federal Regulations is available on GPO Access at: *http://www.access.gpo.gov/nara/index.html*

**Program Authority:** 20 U.S.C. 1067–1067k.

Dated: January 23, 2003.

**Sally L. Stroup,**

*Assistant Secretary, Office of Postsecondary Education.*

[FR Doc. 03–2003 Filed 1–28–03; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

**[CFDA No. 84.031S]**

## Office of Postsecondary Education; Developing Hispanic-Serving Institutions (HSI) Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2003

*Purpose of Program:* Assists eligible Hispanic-Serving Institutions (HSIs) of higher education to expand their capacity to serve Hispanic and low-income students by enabling them to improve their academic quality, institutional management, and fiscal stability and to increase their self-sufficiency. Five-year individual development grants and cooperative arrangement grants will be awarded in FY 2003. Planning grants will not be awarded in FY 2003. For FY 2003, the competition for new awards focuses on projects designed to meet the priorities we describe in the *Priorities* section of this application notice.

*Eligible Applicants:* Institutions of higher education (IHEs) that have been designated as eligible under Part A or B of Title III or under Title V of the Higher Education Act of 1965, as amended (HEA), are eligible to apply for individual development grants and cooperative arrangement grants. In addition, at the time of application, the IHE must provide assurances if applying for a grant in Title V that it has an enrollment of undergraduate full-time equivalent (FTE) students that is at least 25 percent Hispanic students, and that not less than 50 percent of the enrolled Hispanic students are low-income individuals.

**Notes:** 1. A grantee under the HSI Program, authorized under Title V of the HEA, may not receive a grant under any Title III, Part A Program. Further, an HSI Program grantee may not give up that grant in order to receive a grant under any Title III, Part A Program. Therefore, a current HSI Program grantee may not apply for a grant under any Title III, Part A Program in FY 2003.

2. An IHE that does not fall within the limitation described in Note 1 may apply for a FY 2003 grant under all Title III, Part A Programs for which it is eligible, as well as under the HSI Program. An applicant may receive only one grant.

*Applications Available:* January 29, 2003.

*Deadline for Transmittal of Applications:* March 3, 2003.

*Deadline for Intergovernmental Review:* April 30, 2003.

*Estimated Available Funds:* The Administration has requested $89.1 million for this program for FY 2003. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

*Estimated Range of Awards:* $400,000–$600,000.

*Estimated Average Size of Awards:* Individual Development Grant: $425,000 per year. Cooperative Arrangement Development Grant: $600,000 per year.

*Estimated Number of Awards:* Individual Development Awards: 18. Cooperative Arrangement Development Awards: 6.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* Up to 60 months.

*Page Limit:* We have established mandatory page limits for both the individual development grant and the cooperative arrangement development grant applications. You must limit the application to the equivalent of no more than 100 pages for the individual development grant and 140 pages for the cooperative arrangement development grant, using the following standards:

- A ''page'' is 8.5″ × 11″, on one side only, with 1″ margins top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles and headings. You may single space footnotes, quotations, references, captions, charts, tables, figures, and graphs.
- Use a font that is either 12-point or larger or no smaller than 10 pitch (characters per inch).

The page limit does not apply to the application cover sheet (ED 424), the one-page abstract, the Certification Regarding Collaborative Arrangement (ED 851S–8), the Hispanic-Serving Institutions Assurance Form (ED 851S–7), and the Cooperative Arrangement Form (ED 851S–1). The page limit does, however, apply to all remaining parts of the application.

We will reject your application if—

- You apply these standards and exceed the page limit; or
- You apply other standards and exceed the equivalent of the page limit.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 81, 82, 85, 86, 97, 98, and 99; and (b) The regulations for this program in 34 CFR part 606.

*Applicability of Executive Order 13202:* Applicants that apply for construction funds under these programs must comply with the Executive Order 13202 signed by President Bush on February 17, 2001 and amended on April 6, 2001. This Executive order provides that recipients of Federal construction funds may not ''require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other construction project(s)'' or ''otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise adhere to agreements with one or more labor organizations, on the same or other construction project(s).'' However, the Executive order does not prohibit contractors or subcontractors from voluntarily entering into these agreements.

Projects funded under this program that include construction activity will be provided a copy of this Executive Order and will be asked to certify that they will adhere to it.

*Priorities:* This competition focuses on projects designed to meet the priority in section 511(d) of the HEA (29 U.S.C. 1103) (see 34 CFR 75.105(b)(2)(iv)).

The Secretary gives priority to a development grant application that contains satisfactory evidence that the HSI has entered into, or will enter into, a collaborative arrangement with at least one local educational agency or community-based organization to provide that agency or organization with assistance (from funds other than funds provided under Title V of the HEA) in reducing dropout rates for Hispanic students, improving rates of academic achievement for Hispanic students, and increasing the rates at which Hispanic secondary school graduates enroll in higher education.

Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This competition also focuses on projects designed to meet the priority in section 514(b) of the HEA (20 U.S.C. 1103c) (see 34 CFR 75.105(b)(2)(iv)).

The Secretary gives priority to grant applications for cooperative arrangements that are geographically and economically sound or will benefit the applicant HSI.

*Invitational Priorities:* Within the absolute priorities specified in this competition, we are particularly interested in applications that meet one or more of the following invitational priorities.

**Invitational Priority 1**

Cooperative arrangements between two-year and four-year IHEs aiming to increase transfer and retention of Hispanic students.

**Invitational Priority 2**

Cooperative arrangements between IHEs that develop and share technological resources in order to enhance each institution's ability to serve the needs of low-income communities or minority populations.

**Invitational Priority 3**

Cooperative arrangements between IHEs, where at least one does not currently have funding under the HSI Program.

**Invitational Priority 4**

Cooperative arrangements that involve institutional partners from more than one university or college system.

Under 34 CFR 75.105(c)(1), we do not give an application that meets one or more of the invitational priorities a competitive or absolute preference over other applications.

*Special Funding Consideration:* In tie-breaking situations described in 34 CFR 606.23, the HSI Program regulations require that we award one additional point to an application from an IHE that has an endowment fund for which the 1999–2000 market value per full-time equivalent (FTE) student was less than the comparable average per FTE student at a similar type IHE. We also award one additional point to an application from an IHE that had expenditures for library materials in 1999–2000 per FTE student that were less than the comparable average per FTE student at a similar type IHE.

For the purpose of these funding considerations, an applicant must be able to demonstrate that the market value of its endowment fund per FTE student and library expenditures per FTE student were less than the average expenditure per FTE student when calculated using the data submitted by applicants for the year 1999–2000.

If a tie still remains after applying the additional point(s), we will determine the ranking of applicants based on the lowest combined library expenditures per FTE student and endowment values per FTE student.

**Application Procedures**

**Note:** Some of the procedures in these instructions for transmitting applications differ from those in the Education Department General Administrative Regulations (EDGAR) (34 CFR 75.102). Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed regulations. However, these amendments make procedural changes only and do not establish new substantive policy. Therefore, under 5 U.S.C. 553(b)(A), the Secretary has determined that proposed rulemaking is not required.

**Pilot Project for Electronic Submission of Applications**

In FY 2003, the U.S. Department of Education is continuing to expand its pilot project for electronic submission of applications to include additional formula grant programs and additional discretionary grant competitions. The HSI Program—84.031S is one of the programs included in the pilot project. If you are an applicant under the HSI Program, you may submit your application to us in electronic or paper format.

The pilot project involves the use of the Electronic Grant Application System (e-Application) portion of the Grant Administration and Payment System (GAPS). Users of e-Application will be entering data on-line while completing their applications. You may not e-mail a soft copy of a grant application to us. If you participate in this voluntary pilot project by submitting an application electronically, the data you enter on-line will be saved into a database. We request your participation in e-Application. We shall continue to evaluate its success and solicit suggestions for improvement.

If you participate in e-Application, please note the following:

- Your participation is strictly voluntary.
- You will not receive any additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format. When you enter the e-Application system, you will find information about its hours of operation.
- You may submit all documents electronically including the Application for Federal Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- After you electronically submit your application, you will receive an automatic acknowledgement, which will include a PR/Award number (an identifying number unique to your application).
- Within three working days after submitting your electronic application, fax a signed copy of the Application for Federal Assistance (ED 424) to the Application Control Center after following these steps:

(1) Print ED 424 form from the e-Application system.

(2) The institution's Authorizing Representative must sign this form.

(3) Place the PR/Award number in the upper right hand corner of the hard copy signature page of the ED 424.

(4) Fax the signed ED 424 to the Application Control Center at (202) 260–1349.

- We may request that you give us original signatures on all other forms at a later date.
- *Closing Date Extension in Case of System Unavailability:* If you elect to participate in the e-Application pilot for the HSI Program and you are prevented from submitting your application on the closing date because the e-Application system is unavailable, we will grant you an extension of one business day in order to transmit your application electronically, by mail, or by hand delivery. For us to grant this extension—

(1) You must be a registered user of e-Application, and have initiated an e-Application for this competition; and

(2)(a) The e-Application system must be unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30

p.m., Washington, DC time, on the deadline date; or

(b) The e-Application system must be unavailable for any period of time during the last hour of operation (that is, for any period of time between 3:30 and 4:30 p.m., Washington, DC time) on the deadline date.

The Department must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension you must contact either (1) the person listed elsewhere in this notice under *For Applications and Further Information Contact* or (2) the e-GRANTS help desk at 1–888–336–8930.

You may access the electronic grant application for the Title V, HSI Program at: *http://e-grants.ed.gov.*

We have included additional information about the e-Application pilot project (see Parity Guidelines between Paper and Electronic Applications) in the application package.

*For Applications and Further Information Contact:* Louis Venuto, U.S. Department of Education, Title V, Developing Hispanic-Serving Institutions Program, 1990 K Street NW., 6th floor, Washington, DC 20006–8513. Telephone: (202) 502–7763 or via Internet: *title.five@ed.gov.*

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

Individuals with disabilities may obtain this document in an alternative format (*e.g.,* Braille, large print, audiotape, or computer diskette) on request to the program contact person listed under *For Applications and Further Information Contact.*

Individuals with disabilities may obtain a copy of the application package in an alternative format by contacting that person. However, the Department is not able to reproduce in an alternative format the standard forms included in the application package.

**Electronic Access to This Document**

You may view this document, as well as all other Department of Education documents published in the **Federal Register,** in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/legislation/FedRegister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

**Note:** The official version of a document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.access.gpo.gov/nara/index.html.*

**Program Authority:** 20 U.S.C. 1101–1101d, 1103–1103g.

Dated: Janaury 23, 2003.

**Sally L. Stroup,**

*Assistant Secretary, Office of Postsecondary Education.*

[FR Doc. 03–2004 Filed 1–28–03; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. RP03–236–000]**

## ANR Storage Company; Notice of Tariff Filing

January 23, 2003.

Take notice that on January 17, 2003, ANR Storage Company (ANR Storage), tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, Second Revised First Revised Sheet No. 155, with an effective date of February 17, 2003.

ANR Storage states that this filing is being made to add flexibility to transfers of gas in storage.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.314 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's Regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For Assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

*Comment Date:* January 29, 2003.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. 03–2139 Filed 1–28–03; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. RP91–161–029]**

## Columbia Gas Transmission Corporation; Notice of Refund

January 23, 2003.

Take notice that on January 21, 2003, Columbia Gas Transmission Corporation (Columbia Gas) filed to report on the flow-back to customers of funds received from insurance carriers for environmental costs attributable to Columbia Gas' Docket No. RP91–161 settlement period.

Columbia Gas states that it allocated such recoveries among customers based on their fixed cost responsibility for services on the Columbia Gas system during the period December 1, 1991 through January 31, 1996, the period of the Docket No. RP91–161 settlement.

Columbia Gas states further that it provided a copy of the report to all customers who received a share of the environmental insurance recoveries and all state commissions whose jurisdiction includes the location of any such recipient.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's Rules and Regulations. All such protests must 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 proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. For Assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact

(202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

*Comment Date:* January 30, 2003.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. 03–2143 Filed 1–28–03; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. RP95–408–050]**

## Columbia Gas Transmission Corporation; Notice of Refund

January 23, 2003.

Take notice that on January 21, 2003, Columbia Gas Transmission Corporation (Columbia Gas) filed to report on the flow-back to customers of funds received from insurance carriers for environmental costs attributable to Columbia Gas' Docket No. RP95–408 settlement period.

Columbia Gas states that it allocated such recoveries among customers based on terms of the Docket No. RP95–408 Phase II Settlement which states that customer allocations shall be based on customers' actual contributions to Remediation Program collections for the most recent February 1–January 31 period.

Columbia Gas states further that it provided a copy of the report to all customers who received a share of the environmental insurance recoveries and all state commissions whose jurisdiction includes the location of any such recipient.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's Rules and Regulations. All such protests must 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 proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. For Assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

*Comment Date:* January 30, 2003.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. 03–2144 Filed 1–28–03; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. RP91–160–029]**

## Columbia Gulf Transmission Company; Notice of Refund

January 23, 2003.

Take notice that on January 21, 2003, Columbia Gulf Transmission Company (Columbia Gulf) filed to report on the flow-back to customers of funds received from insurance carriers for environmental costs pursuant to Article I(A)(2)(d) of its Docket No. RP91–160 settlement.

Columbia Gulf states that it allocated such recoveries among customers based on their fixed cost responsibility for services rendered on the Columbia Gulf system during the period December 1, 1991 through October 31, 1994, the period of the Docket No. RP91–160 settlement.

Columbia Gulf states further that it provided a copy of the report to all customers who received a share of the environmental insurance recoveries and all state commissions whose jurisdiction includes the location of any such recipient.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's Rules and Regulations. All such protests must 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 proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. For Assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

*Comment Date:* January 30, 2003.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. 03–2142 Filed 1–28–03; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. EG03–36–000]**

## Conectiv Mid-Merit, Inc; Notice of Filing

January 21, 2003.

Take notice that on January 15, 2003, Conectiv Mid-Merit, Inc. (CMM) filed with the Federal Energy Regulatory Commission (Commission) an Application for Determination of Exempt Wholesale Generator Status (Application) pursuant to Section 32(a)(1) of the Public Utility Holding Company Act of 1935 (PUHCA), all as more fully explained in the Application.

CMM states that it is in the process of permitting and developing several sites in the Commonwealth of Pennsylvania, one or more of which it intends to use for the location and construction of one or more 500 MW combined cycle generating modules (each 500 MW module is an Eligible Facility for the purposes of PUHCA and the Commission's EWG regulations). CMM anticipates that each Eligible Facility will be interconnected to the transmission system operated by the PJM Interconnection, LLC via transmission voltage facilities. CMM states that it has served this filing on the Maryland Public Service Commission, Delaware Public Service Commission, New Jersey Board of Public Utilities, Virginia State Corporation Commission, District of Columbia Public Service Commission and the Securities and Exchange Commission (SEC).

Any person desiring to intervene or to protest this filing should file 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). 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. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659. Protests and interventions 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 under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

*Comment Date:* February 11, 2003.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. 03–2131 Filed 1–28–03; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. RP03–238–000]**

## Dominion Transmission, Inc.; Notice of Proposed Changes in FERC Gas Tariff

January 23, 2003.

Take notice that on January 21, 2003, Dominion Transmission, Inc. (DTI) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, the following revised tariff sheets, with a March 1, 2003 effective date:

Third Revised Sheet No. 210
Third Revised Sheet No. 211
Fourth Revised Sheet No. 1006
Third Revised Sheet No. 1007
Second Revised Sheet No. 1031
Third Revised Sheet No. 1052
Fifth Revised Sheet No. 1143
Third Revised Sheet No. 1143A
Fourth Revised Sheet No. 1155
Sheet No. 1160
Fourth Revised Sheet No. 1185

DTI states that it is filing the above-referenced tariff sheets to make various formatting changes, to correct typographical errors and to eliminate the reference to Eastern Clock Time.

DTI states that copies of its letter of transmittal and enclosures have been served upon DTI's customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.314 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For Assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

*Comment Date:* February 3, 2003.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. 03–2141 Filed 1–28–03; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. ER02–2475–001]**

## Pacific Gas and Electric Company; Notice of Filing

January 23, 2003.

Take notice that on December 6, 2002, Pacific Gas and Electric Company (PG&E) tendered for filing with the Federal Energy Regulatory Commission (Commission) a correction to the designation of a transmission rate adjustment in Second Revised PG&E Rate Schedule FERC No. 136, the PG&E-Sacramento Municipal Utility District (SMUD) Interconnection Agreement, accepted by the Commission in FERC Docket No. ER02–2475–000 on October 16, 2002.

PG&E has requested a waiver of the Commission's notice requirements to allow the effective date previously requested and accepted by the Commission for the corrected rate schedule sheet.

PG&E states that copies of this filing were served upon SMUD, the California Independent System Operator Corporation, the California Public Utilities Commission, and the official service list for FERC Docket No. ER02–2475–000.

Any person desiring to intervene or to protest this filing should file 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). 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. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov* , using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659. Protests and interventions 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 under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

*Comment Date:* January 30, 2003.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. 03–2132 Filed 1–28–03; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. RP03–237–000]**

## Transwestern Pipeline Company; Notice of Tariff Filing

January 23, 2003.

Take notice that on January 21, 2003, Transwestern Pipeline Company (Transwestern) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheet to become effective February 21, 2003:

Twentieth Revised Sheet No. 5B.05
First Revised Sheet No. 5B.13
Fourth Revised Sheet No. 5C
Fourth Revised Sheet Nos. 5D—5E(viii)

Transwestern states that the purpose of this filing, is to submit for Commission review and acceptance two non-conforming service agreements and a negotiated rate agreement, and the tariff revisions required by these agreements.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.314 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's Regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For Assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

*Comment Date:* February 3, 2003.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. 03–2140 Filed 1–28–03; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Project No. 12311–000]**

## Notice of Application Accepted for Filing and Soliciting Motions To Intervene, Protests, and Comments

January 23, 2003.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 12311–000.

c. *Date filed*: July 23, 2002.

d. *Applicant:* Universal Electric Power Corp.

e. *Name of Project:* John T. Myers L&D Project.

f. *Location:* On the Ohio River, in Union County, Kentucky, utilizing the U.S. Army Corps of Engineers' John T. Myers Lock and Dam.

g. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Raymond Helter, Universal Electric Power Corp., 1145 Highbrook Street, Akron, OH 44301, (330) 535–7115.

i. *FERC Contact:* Robert Bell, (202) 502–6062.

j. *Deadline for filing comments, protests, and motions to intervene*: 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions 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 under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the project number (P–12311–000) on any comments or motions filed.

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 in 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.

k. *Description of Project*: The proposed project would utilize the Corps' existing John T. Myers Lock and Dam and consist of: (1) 11 proposed 50-foot-long, 120-inch diameter steel penstocks, (2) a proposed powerhouse containing 11 generating units having a total installed capacity of 22.5 MW, (3) a proposed 500-foot-long, 14.7 kV transmission line, and (4) appurtenant facilities.

Applicant estimates that the average annual generation would be 138 GWh and would be sold to a local utility.

l. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *ferconlinesupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

m. Competing Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (*see* 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

n. Competing Development Application—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

o. Notice of Intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development

application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

p. Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

q. 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 comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

r. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

s. 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.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. 03–2133 Filed 1–28–03; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

## Notice of Applications Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

January 23, 2003.

Take notice that the following hydroelectric applications have been filed with the Commission and are available for public inspection:

a. *Type of Applications*: Preliminary Permit (Competing).

b. *Project Nos.*: 12371–000 and 12397–000.

c. *Dates filed*: September 20, 2002, and October 16, 2002.

d. *Applicants*: Nelson Hydroelectric LLC and Universal Electric Power Corporation.

e. *Name and Location of Projects*: Both Red River L&D#3 Hydroelectric Projects are proposed to be located on the Red River in Bossier County, Louisiana, and to utilize the U.S. Army Corps of Engineers' existing Red River Lock and Dam #3.

f. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791(a)–825(r).

g. *Applicant Contacts*: For Nelson Hydroelectric LLC: Mr. Robert Larson, Gray, Plant, Mooty, Mooty & Bennett, 33 South Sixth Street, Minneapolis, MN 55402, (612) 343–2913. For Universal: Mr. Raymond Helter, Universal Electric Power Corporation, 1145 Highbrook Street, Akron, OH 44301, (330) 535–7115.

h. *FERC Contact:* Robert Bell, (202) 502–6062.

i. *Deadline for filing motions to intervene, protests and comments*: 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions 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 under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the project number (12371–000 and 12397–000) on any comments or motions filed.

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 in 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.

j. *Description of Projects*: Each project proposes to use the existing U.S. Army Corps of Engineers' Red River Lock and Dam #3 and would consist of: (1) Six proposed 126-inch-diameter, 100-foot-long steel penstocks, (2) a proposed powerhouse containing six generating units with a total installed capacity of 49 megawatts, (3) a 500-foot-long, 47 kV transmission line, and (4) appurtenant facilities. Each project would have an average annual generation of 300 gigawatthours.

k. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *ferconlinesupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item g above.

l. Competing Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (*see* 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

m. Competing Development application—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely

notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

n. Notice of intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

o. Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

p. 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 comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

q. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

r. 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.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. 03–2134 Filed 1–28–03; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

## Notice of Applications Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

January 23, 2003.

Take notice that the following hydroelectric applications have been filed with the Commission and are available for public inspection:

a. *Type of Applications*: Preliminary Permit (Competing).

b. *Project Nos.*: 12372–000 and 12398–000.

c. *Dates filed*: September 20, 2002, and October 16, 2002.

d. *Applicants*: Nelson Hydroelectric LLC and Universal Electric Power Corporation.

e. *Name and Location of Projects*: Both Red River L&D#4 Hydroelectric Projects are proposed to be located on the Red River in Bossier County, Louisiana, and to utilize the U.S. Army Corps of Engineers' existing Red River Lock and Dam #4.

f. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791(a)–825(r).

g. *Applicant Contacts*: For Nelson Hydroelectric LLC: Mr. Robert Larson,Gray, Plant, Mooty, Mooty & Bennett, 33 South Sixth Street, Minneapolis, MN 55402, (612) 343–2913. For Universal: Mr. Raymond Helter, Universal Electric Power Corporation, 1145 Highbrook Street, Akron, OH 44301, (330) 535–7115.

h. *FERC Contact:* Robert Bell, (202) 502–6062.

i. *Deadline for filing motions to intervene, protests and comments*: 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions 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 under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the project number (12372–000 and 12398–000) on any comments or motions filed.

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 in 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.

j. *Description of Projects*: Each project proposes to use the existing U.S. Army Corps of Engineers' River Lock and Dam #4 and would consist of: (1) Five proposed 126-inch-diameter, 100-foot-long steel penstocks, (2) a proposed powerhouse containing five generating units with a total installed capacity of 27 megawatts, (3) a 500-foot-long, kV transmission line, and (4) appurtenant facilities. Each project would have an average annual generation of 166 gigawatthours.

k. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *ferconlinesupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item g above.

l. Competing Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (*see* 18 CFR 4.36). Submission of a timely notice of intent

allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

m. Competing Development application—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

n. Notice of intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

o. Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

p. 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 comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

q. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

r. 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.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. 03–2135 Filed 1–28–03; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

## Notice of Applications Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

January 23, 2003.

Take notice that the following hydroelectric applications have been filed with the Commission and are available for public inspection:

a. *Type of Applications*: Preliminary Permit (Competing).

b. *Project Nos.*: 12378–000 and 12396–000.

c. *Dates filed*: September 23, 2002, and October 16, 2002.

d. *Applicants*: Nelson Hydroelectric LLC and Universal Electric Power Corporation.

e. *Name and Location of Projects*: Both Red River L&D#5 Hydroelectric Projects are proposed to be located on the Red River in Bossier County, Louisiana, and to utilize the U.S. Army Corps of Engineers' existing Red River Lock and Dam #5.

f. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791(a)—825(r).

g. *Applicant Contacts*: For Nelson Hydroelectric LLC: Mr. Robert Larson, Gray, Plant, Mooty, Mooty & Bennett, 33 South Sixth Street, Minneapolis, MN 55402, (612) 343–2913. For Universal: Mr. Raymond Helter, Universal Electric Power Corporation, 1145 Highbrook Street, Akron, OH 44301, (330) 535–7115.

h. *FERC Contact:* Robert Bell, (202) 502–6062.

i. *Deadline for filing motions to intervene, protests and comments:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions 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 under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the project number (12378–000 and 12396–000) on any comments or motions filed.

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 in 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.

j. *Description of Projects*: Each project proposes to use the existing U.S. Army Corps of Engineers' River Lock and Dam # 5 and would consist of: (1) Five proposed 114-inch-diameter, 90-foot-long steel penstocks, (2) a proposed powerhouse containing five generating units with a total installed capacity of 19.8 megawatts, (3) a 300-foot-long, 14.7-kilovolt transmission line, and (4) appurtenant facilities. Each project would have an average annual generation of 121 gigawatthours.

k. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For

assistance, call toll-free 1–866–208–3676 or e-mail *ferconlinesupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item g above.

l. Competing Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (*see* 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

m. Competing Development application—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

n. Notice of intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

o. Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

p. 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 comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

q. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

r. 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.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. 03–2136 Filed 1–28–03; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Project No. 12395–000]**

## Notice of Application Accepted for Filing and Soliciting Motions To Intervene, Protests, and Comments

January 23, 2003.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 12395–000.

c. *Date filed*: October 16, 2002.

d. *Applicant:* Universal Electric Power Corp.

e. *Name of Project:* Arkansas Lock and Dam #5 Project.

f. *Location:* On the Arkansas River, in Jefferson County, Arkansas, utilizing the U.S. Army Corps of Engineers' Kentucky Lock and Dam #5.

g. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Raymond Helter, Universal Electric Power Corp., 1145 Highbrook Street, Akron, OH 44301, (330) 535–7115.

i. *FERC Contact:* Robert Bell, (202) 502–6062.

j. *Deadline for filing comments, protests, and motions to intervene*: 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions 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 under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the project number (P–12395–000) on any comments or motions filed.

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 in 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.

k. *Description of Project*: The proposed project would utilize the Corps' existing Kentucky Lock and Dam

#5 and consist of: (1) 16 proposed 40-foot-long, 114-inch-diameter steel penstocks, (2) a proposed powerhouse containing 16 generating units having an installed capacity of 30.6 MW, (3) a proposed 600-foot-long, 14.7 kV transmission line, and (4) appurtenant facilities.

Applicant estimates that the average annual generation would be 187 GWh and would be sold to a local utility.

l. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *ferconlinesupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

m. Competing Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (*see* 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

n. Competing Development Application—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

o. Notice of Intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

p. Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

q. 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 comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

r. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

s. 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.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. 03–2137 Filed 1–28–03; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Project No. 12408–000]**

## Notice of Application Accepted for Filing and Soliciting Motions To Intervene, Protests, and Comments

January 23, 2003.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 12408–000.

c. *Date filed*: October 31, 2002.

d. *Applicant:* Universal Electric Power Corp.

e. *Name of Project:* Kentucky lock and Dam #12 Project.

f. *Location:* On the Kentucky River, in Estill County, Kentucky, utilizing the U.S. Army Corps of Engineers' Kentucky lock and Dam #12.

g. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791(a)—825(r).

h. *Applicant Contact:* Mr. Raymond Helter, Universal Electric Power Corp., 1145 Highbrook Street, Akron, OH 44301, (330) 535–7115.

i. *FERC Contact:* Robert Bell, (202) 502–6062.

j. *Deadline for filing comments, protests, and motions to intervene*: 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions 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 under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the project number (P–12408–000) on any comments or motions filed.

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 in 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.

k. *Description of Project*: The proposed project would Utilize the Corps' existing Kentucky Lock and Dam #12 and consist of: (1) four proposed 50-foot-long, 96-inch-diameter steel penstocks, (2) a proposed powerhouse containing four generating units having an installed capacity of 5.5 MW, (3) a proposed 400-foot-long, 14.7 kV transmission line, and (4) appurtenant facilities.

Applicant estimates that the average annual generation would be 33 GWh and would be sold to a local utility.

l. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *ferconlinesupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

m. Competing Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (*see* 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

n. Competing Development Application—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

o. Notice of Intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

p. Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

q. 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 comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

r. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

s. 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.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. 03–2138 Filed 1–28–03; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. AD03–4–000]**

## Credit Issues in Energy Markets-Clearing and Other Solutions; Notice of Technical Conference

January 23, 2003.

The Federal Energy Regulatory Commission (FERC) and the Commodity Futures Trading Commission (CFTC) are holding a joint technical conference on credit issues & potential solutions in energy markets. The conference is scheduled for Wednesday, February 5, 2003, at FERC headquarters, 888 First Street, NE., Washington, DC, in the Commission Meeting Room (Room 2C).

The vision of FERC is dependable, affordable energy through competitive markets. Current conditions in energy markets are causing concern due to the credit-worthiness of market participants and market uncertainty. In holding this conference, FERC and CFTC are looking forward to an informed discussion on credit issues, potential solutions to problems and their implementation.

This conference plans to provide education on potential credit solutions, particularly clearing. It will cover clearing fundamentals, clearing regulation, clearing alternatives, industry initiatives and implementation. Speakers will include representatives of clearing providers, energy industry participants, and other experts who are expected to discuss the issues in depth, as well as FERC and CFTC staff.

This one-day conference will begin at 9:00 a.m. and will conclude at about 4:30 p.m. All interested parties are invited to attend. There is no registration fee.

Capitol Connection will cover this meeting live over the Internet, as well as

via telephone and satellite. For a fee, you can receive these meetings in your office, at home, or anywhere in the world. To find out more about Capitol Connection's live Internet, phone bridge, or satellite coverage, contact David Reininger or Julia Morelli at (703) 993–3100, or visit *http://www.capitolconnection.gmu.edu*.

The conference will be transcribed. Those interested in obtaining transcripts of the conference need to contact Ace Federal Reporters at (202) 347–3700 or (800) 336–6646. Transcripts will be available to view electronically under this docket number seven days after the conference. Anyone interested in purchasing videotapes of the meeting should call VISCOM at (703) 715–7999.

The Agenda and the list of participants will be announced in the near future. For additional information, please contact Saida Shaalan of FERC's Office of Market Oversight & Investigations at 202–502–8278 or by e-mail, *Saida.Shaalan@ferc.gov*.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. 03–2130 Filed 1–28–03; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[OW–2002–0058, FRL–7445–1]**

## Agency Information Collection Activities; Submission of EPA ICR No. 2092.01 to OMB for Review and Approval; 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 the following Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval: Tribal Operator Certification Program Information Collection Request (EPA ICR No. 2092.01). The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

**DATES:** Additional comments may be submitted on or before February 28, 2003.

**ADDRESSES:** Follow the detailed instructions in **SUPPLEMENTARY INFORMATION**.

**FOR FURTHER INFORMATION CONTACT:** Lisa Christ, Drinking Water Protection Division, Office of Ground Water and Drinking Water, 4606M, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–564–8354; fax number: 202–564–3755; e-mail address: *christ.lisa@epa.gov.*

**SUPPLEMENTARY INFORMATION:** EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On September 17, 2002 (67 FR58603), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID No. OW–2002–0058, which is available for public viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1742, and the telephone number for the Water Docket is (202) 566–2426. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.* Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice, and according to the following detailed instructions: (1) Submit your comments to EPA online using EDOCKET (our preferred method), by e-mail to *OW–DOCKET@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460; and (2) Mail your comments to OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket.*

*Title:* Information Collection Request for the Tribal Operator Certification Program (EPA ICR Number 2092.01). This is a request for a new collection. Under the OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB.

*Abstract:* The Tribal Operator Certification Program was developed to increase public health protection by increasing training and certification of personnel operating community and nontransient noncommunity drinking water systems in Indian Country. This voluntary program is intended to provide tribes with further training and certification opportunities in addition to existing training or certification programs offered by States, various federal agencies, and private organizations. The Information Collection Request will estimate the burden and cost to tribal drinking water system operators who seek certifications from EPA approved providers. In addition, the burden and cost to Tribal Certification Providers will be estimated. The information collected will be used to measure EPA's goal for 80% of tribal community and nontransient noncommunity water systems to have a certified operator by 2005. Establishing a tribal operator certification program will help achieve this goal while bringing greater public health protection to tribal communities. The information collected will include: number and level of new certifications, number and level of renewal certifications, information regarding revoked and suspended certifications, and training status for tribal drinking water system operators. Responses to the collection of information are voluntary.

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,

and are identified on the form and/or instrument, if applicable.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average about 18 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Respondents/Affected Entities:* Tribal water systems and tribal certification providers.

*Estimated Number of Respondents:* 271.

*Frequency of Response:* Annually.

*Estimated Total Annual Hour Burden:* 2,597.

*Estimated Total Annual Cost:* $71,526, includes $82 annualized capital or O&M costs.

Dated: January 16, 2003.

**Oscar Morales,**

*Director, Collection Strategies Division.*

[FR Doc. 03–2036 Filed 1–28–03; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[OECA–2002–0013; FRL–7445–2]**

## Agency Information Collection Activities; Submission of EPA ICR No. 1901.02 (OMB No. 2060–0424) to OMB for Review and Approval; 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 the following Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval: Title: Emission Guidelines Reporting and Recordkeeping Requirements for Existing Small Municipal Waste Combustion Units, (40 CFR Part 60, Subpart BBBB), OMB Control No. 2060–0424 and EPA ICR No. 1901.02, expiration date February 28, 2003. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

**DATES:** Additional comments may be submitted on or before February 28, 2003.

**ADDRESSES:** Follow the detailed instructions in the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:** Joyce Chandler, Compliance Assistance and Sector Program, Office of Enforcement & Compliance Assurance, Mailcode 2224A, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–564–707; fax number: 202–564–0009; e-mail address: *chandler.joyce@epa.gov*.

**SUPPLEMENTARY INFORMATION:** EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On June 20, 2002 (67 FR 41981), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID No. OECA–2002–0013, which is available for public viewing at the Enforcement & Compliance Docket Information Center (ECDIC) in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the ECDIC is (202) 566–1514. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket*. Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice, and according to the following detailed instructions: (1) Submit your comments to EPA online using EDOCKET (our preferred method), by e-mail to *docket.oeca@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Mailcode: 2201T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) Mail your comments to OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Attention:* Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket*.

*Title:* Emission Guidelines Reporting and Recordkeeping Requirements for Existing Small Municipal Waste Combustion Units (MWC), (40 CFR Part 60, Subpart BBBB) (OMB Control No. 2060–0424, EPA ICR Number 1901.02). This is a request to renew an existing approved collection that is scheduled to expire on February 28, 2003. Under the OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB.

*Abstract:* This addresses information collection activities that would be imposed by the ''Emission Guidelines Reporting and Recordkeeping Requirements for Existing Small Municipal Waste Combustion Units MWC,'' 40 CFR part 60, subpart BBBB. This information collection is required as a result of the implementation of the emission guidelines that are being developed under the authority of sections 111 and 129 of the Clean Air Act (CAA). Reporting and recordkeeping requirements would apply to existing MWC units that have the capacity to combust greater than 35 tons per day (tpd) but less than 250 tpd of municipal solid waste.

This ICR will enable EPA to monitor compliance with emission standards for regulated pollutants. Owners and

operators of small MWCs are required to measure, record, and report emission rates and operating parameters, follow good combustion practices. The responses to this Emission Guideline is mandatory.

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, and are identified on the form and/or instrument, if applicable.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 404 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Respondents/Affected Entities:* Small Municipal Waste Combustors.

*Estimated Number of Respondents:* 39.

*Frequency of Response:* Initial, Quarterly, Semi-annual, Annual.

*Estimated Total Annual Hour Burden:* 186,374 hours.

*Estimated Total Annual Cost:* $17,351,247, includes $3,337,600 annualized capital and O&M costs.

*Changes in the Estimates:* There is an increase of 185,077 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This increase is due to the conducting of initial performance tests, annual performance tests, and the installation of continuous emission monitoring systems and their operation and maintenance.

Dated: January 15, 2003.

**Oscar Morales,**

*Director, Collection Strategies Division.*

[FR Doc. 03–2037 Filed 1–28–03; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[OPP–2002–0049; FRL–7280–6**

## Rodenticides; Availability of Preliminary Comparative Ecological Assessment

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces the availability of the preliminary comparative ecological assessment for nine rodenticides, which included those addressed in the Reregistration Eligibility Decisions (REDs) for the the rodenticide cluster (brodifacoum, bromadiolone, bromethalin, chlorophacinone, diphacinone,) and zinc phosphide, as well as three other rodenticides, warfarin, difethialone, and cholecalciferol. This notice also starts a 60–day public comment period for the preliminary comparative ecological risk assessment. Comments are to be limited to issues directly associated with the nine rodenticides that are included in the risk assessment which has been placed in the docket and should be limited to issues raised in the document. By allowing access and opportunity for comment on the preliminary ecological assessment, EPA is seeking to strengthen stakeholder involvement and help ensure our decisions are transparent and based on the best available information. The Agency cautions that this assessment is a preliminary assessment only and that further refinements of the assessment may be appropriate for the nine rodenticides. This document reflects only the work and analysis conducted as of the time it was produced and it is appropriate that, as new information becomes available and/or additional analyses are performed, the conclusions it contains may change.

**DATES:** Comments, identified by the docket ID number OPP–2002–0049, must be received on or before March 31, 2003.

**ADDRESSES:** Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.**

**FOR FURTHER INFORMATION CONTACT:** John W. Pates, Jr., Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8195; e-mail address: *pates.john@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 who are or may be required to conduct testing of chemical substances under 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 Copies of this Document and Other Related Information?*

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP–2002–0049. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*. In addition, copies of the preliminary comparative ecological assessment for the nine rodenticides may also be accessed at *http://www.epa.gov/pesticides/rodenticidecluster*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically.

Once in the system, select ''search,'' then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA' s electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

*C. How and To Whom Do I Submit Comments?*

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket*, and follow the online instructions for submitting comments. Once in the system, select ''search,'' and then key in docket ID number OPP–2002–0049. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *e-mail.* Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2002–0049. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency (7502C), 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2002–0049.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA., Attention: Docket ID Number OPP–2002–0049. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.D.

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is 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 docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket 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.**

*D. 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 ID 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**

*A. What Action is the Agency Taking?*

EPA is making available the preliminary comparative ecological assessment for nine rodenticides, which included those addressed in the Reregistration Eligibility Decisions (REDs) for the the rodenticide cluster (brodifacoum, bromadiolone, bromethalin, chlorophacinone, diphacinone,) and zinc phosphide, as well as three other rodenticides, warfarin, difethialone, and cholecalciferol. This notice starts a 60–day public comment period for the preliminary comparative ecological assessment. The Agency's preliminary assessment titled: ''Potential Risks of Nine Rodenticides to Birds and Nontarget Mammals: A Comparative Approach,'' is available in the docket.

As additional comments, reviews, and risk assessment modifications become available, these will also be docketed for the nine rodenticides listed in this notice. The Agency cautions that these assessments are preliminary assessments only and that further refinements will be appropriate for some, if not all, of these nine rodenticides. This document reflects only the work and analysis conducted as of the time it was produced and it is appropriate that, as new information becomes available and/or additional analyses are performed, the conclusions contained, therein, may change.

The Agency is providing an opportunity, through this notice, for interested parties to provide written comments and input to the Agency on the preliminary ecological assessment for the chemicals specified in this notice. Such comments and input could address, for example, the availability of additional data to further refine the assessment or address the Agency's risk assessment methodologies and assumptions as applied to these specific chemicals. Comments should be limited to issues raised within the preliminary assessment. Failure to comment on any such issues as part of this opportunity will in no way prejudice or limit a commenter's opportunity to participate fully in later notice and comment processes. All comments should be submitted by February 28, 2003 using the methods in Unit I. Comments will become part of the Agency record for each rodenticide to which it pertains.

**List of Subjects**

Environmental protection, Chemicals, Pesticides and pests.

Dated: January 18, 2003.

**Lois A. Rossi,**

*Director, Special Review and Reregistration Division, Office of Pesticide Programs.*

[FR Doc. 03–2021 Filed 1–28–03; 8:45 am]

**BILLING CODE 6560–50–S**

## ENVIRONMENTAL PROTECTION AGENCY

**[OPP–2002–0318; FRL–7281–3]**

## S-metolachlor; Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical in or on Food

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

**DATES:** Comments, identified by docket ID number OPP–2002–0318, must be received on or before February 28, 2003.

**ADDRESSES:** Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.**

**FOR FURTHER INFORMATION CONTACT:** Joanne I. Miller, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: 703–305–6224; e-mail address: *miller.joanne@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

*A. Does this Action Apply to Me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- (NAICS 111), e.g., Crop Production
- (NAICS 112), e.g., Animal Production
- (NAICS 311), e.g., Food Manufacturing
- (NAICS 32532), e.g., Pesticide Manufacturing
- (NAICS 32561),e.g., Antimicrobial Pesticide

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The NAICS codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in this Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical in or on Food regarding the applicability of this action to a particular entity , consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

*B. How Can I Get Copies of this Document and Other Related Information?*

1. *Docket*. EPA has established an official public docket for this action under docket identification (ID) number OPP–2002–0138. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m.,

Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select ''search,'' then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

*C. How and To Whom Do I Submit Comments?*

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically*. If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets*. Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket*, and follow the online instructions for submitting comments. Once in the system, select ''search,'' and then key in docket ID number OPP–2002–0318. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail*. Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2002–0318. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM*. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail*. Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2002–0318.

3. *By hand delivery or courier*. Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP–2002–0318. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

*D. How Should I Submit CBI To the Agency?*

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is

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 docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket 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. Make sure to submit your comments by the deadline in this notice.

7. To ensure proper receipt by EPA, be sure to identify the docket ID 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. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

**List of Subjects**

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: January 16, 2003.

**Debra Edwards,**

*Acting Director, Registration Division, Office of Pesticide Programs.*

**Summaries of Petitions**

The petitioner summaries of the pesticide petitions are printed below as required by FFDCA section 408(d)(3). The summaries of the petitions was prepared by the petitioners and represent the views of the petitioners. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

*6E4638, 8E5011, 6F6751, and 7F4897*

EPA has received pesticide petitions (PP 6E4638, 8E5011, 6F6751, and 7F4897) from the Interregional Research Project No. 4 (IR-4), and Syngenta Crop Protection, New Jersey Agricultural Experiment Station, P.O. Box 231, Rutgers University, New Brunswick, NJ 08903 and 410 Swing Road, Greensboro, NC 27419, proposing pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR part 180 to establish tolerances for residues of S-metolachlor on grasses grown for seed (6E4638), spinach (8E5011), sugar beets and sunflowers (7F4897), and tomato (6F6751). Grasses grown for seed and tomato petitions have been the subject of previous **Federal Register** notices on March 4, 1998, and April 14, 1997, these petitions have been amended to request the establishment of tolerances for S-metolachlor, by establishing a tolerance for residues of S-metolachlor [acetamide, 2-chloro-*N*-(2-ethyl-6-methylphenyl)-*N*-(2-methoxy-1-methylethyl)-, (S)] (CAS Number 873921–9) and its metabolites, determined as the derivatives, 2-[(2-ethyl-6-methylphenyl)amino]-1-propanol and 4-(2-ethyl-6-methylphenyl)-2-hydroxy-5-methyl-3-morpholinone, each expressed as the parent compound in or on the raw agricultural commodity (RAC) grass forage, grass hay, spinach, sugar beet, sugar beet dried pulp, sugar beet molasses, sugar beet tops, sunflower, sunflower meal, and tomato at 12, 0.2, 0.5, 0.5, 1.0, 3.0, 15.0, 0.5, 1.0, and 0.1 (respectively) parts per million (ppm). EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

*A. Residue Chemistry*

1. *Plant metabolism*. The qualitative nature of S-metolachlor residues in plants is adequately understood based upon available EPA approved corn, potato, and soybean metabolism studies. The metabolism of S-metolachlor involves conjugation with glutathione, breakage of this bond to form the mercaptan, conjugation of the mercaptan with glucuronic acid, hydrolysis of the methyl ether, and conjugation of the resultant alcohol with a neutral sugar. EPA has determined that residues of concern in plants include parent and metabolites, determined as the derivatives CGA–37913 and CGA–49751.

2. *Analytical method*. The Pesticide Analytical Manual (PAM) Vol. II, Pesticide Regulation (§ 180.368) lists a gas chromatography nitrogen phosphorous detector (GC/NPD) method (Method 1) for determining residues in or on plants and a gas chromatography mass spectrometry detector (GC/MSD) method for determining residues in livestock commodities. These methods determine residues of S-metolachlor and its metabolites as either CGA–37913 or CGA–49751 following acid hydrolysis. The limit of quantitation (LOQ) for the method is 0.03 ppm for CGA–37913 and 0.05 ppm for CGA–49751.

3. *Magnitude of residues–Grasses grown for seed*. This petition is supported by six field residue tests conducted on grasses grown for seed. Quantitative measurements of the metolachlor hydrolysates, CGA–37913 and CGA–49751, were made for all samples and reported as parent equivalents. In all residue tests, the active ingredient (a.i.) was applied post-emergence at a maximum of 2.0 lbs. a.i./acre at the early regrowth stage prior to weed emergence. The maximum residue in forage was 27 ppm (60–day PHI). Residues in forage declined with increasing PHI. Maximum residues in straw, screenings, and seed were 0.11 ppm, 0.04 ppm, and < 0.08 ppm, respectively.

i. *Spinach*. Magnitude of residue data on the spinach were collected from 12 field trials. In 1994, four field trials were conducted to collect magnitude of residue data in or on spinach. The treated plots each received one post-seeding, pre-emergence, broadcast

application of a.i., targeting a rate of 1.0 lb a.i./acre. The spinach was harvested 45 to 56 days after the application. No residues of CGA–49751 were detected above the LOQ, 0.05 ppm, in spinach samples from two of the three remaining sites. CGA–49751 was detected at 0.1 ppm in one treated sample from Arkansas. Residues of CGA–37913 were detected above the LOQ in samples from all three field sites. The CGA–37913 residues ranged from < 0.10 ppm to 0.33 ppm. The resulting maximum total combined residues of CGA–49751 + CGA–37913 in samples treated at the 1.0 lb a.i./acre rate is < 0.38 ppm.

In 1995, eight field trials were conducted in Maryland, Michigan, New Jersey, Texas, and California. Each of the eight trials consisted of at least an untreated control and one treated plot, where the treated plot received one post-seeding, pre-emergence, broadcast application of a.i., targeting a rate of 1.0 lb a.i./acre. The California and Texas trials also included a second treated plot, which received post-seeding, pre-emergence, broadcast application of a.i., targeting a rate of 2.0 lbs a.i./acre. The spinach was harvested 34 to 69 days after the application. The residues found in 1995 spinach samples, treated targeting the 1.0 lb a.i./acre rate, ranged from less than the LOQ, 0.05 ppm, to 0.85 ppm of CGA–49751, and ranged from less than the LOQ, 0.03 ppm, to 0.107 ppm for CGA–37913 for a maximum combined residue of 0.174 ppm. In the spinach samples treated targeting the 2.0 lbs a.i./acre rate, CGA–49751 residues ranged from < 0.05 ppm to 0.188 ppm and CGA–37913 residues ranged from 0.032 ppm to 0.075 ppm. The maximum combined residues for a.i. at the 2.0 lbs a.i./acre application rate is 0.263. The maximum residues found in or on spinach treated with the proposed labeled rate of 1.0 lbs a.i./acre, was < 0.38 ppm for the combined residues of CGA–37913 and CGA–49741. Residues in spinach treated at the 2.0 lbs a.i./acre application rate did not exceed this combined residues, with a maximum combined residue of 0.263 ppm. IR–4 is conducting additional research to support the 2.0 lbs a.i./acre application rate.

ii. *Sugarbeets*. Eleven sugar beet trials were conducted using six different treatment scenarios. The maximum 1X use rate was 4.0 lbs. a.i./acre applied preplant surface or preplant incorporated (1.33 lbs. a.i./acre) plus a post foliar spray (2.66 lbs. a.i./acre). 3X and 5X treatments were also conducted. Maximum residues at the 1X rate were 14 ppm in sugar beet tops and 0.32 ppm in sugar beet roots. In the processing study, it was determined that tolerances would be required in dried pulp and molasses, but not in refined sugar.

iii. *Sunflower*. A total of 15 residue trials were conducted in major sunflower growing areas of the United States. Applications were made at 1X and 2X the maximum labeled rate of 3.0 lbs. a.i./acre. Processing was also conducted with seeds processed into meal, hulls, crude oil, refined oil and soapstock. Based on these studies, tolerances are proposed in sunflower seed at 0.5 ppm and in sunflower meal at 1.0 ppm.

iv. *Tomato*. Thirteen field trials were conducted in major tomato production areas across the United States. Both tomato and its processed fractions were analyzed for residues of parent, measured as CGA–37913 and CGA–49751. One application at 3.0 lbs. a.i./acre (1X) was made post-foliar to tomato transplants. Exaggerated rate applications (2X, 3X and 5X) were also made. Two of the 13 trials were used for processing into tomato commodity products. No residues LOQ of 0.08 ppm) were found at the 1X rate in the RAC tomatoes. In processed commodities at the 1X rate of 3.0 lbs a.i./acre, residues of parent were found below the method LOQ in tomato puree (0.4 ppm) and above the method LOQ in dry pomace and tomato paste (0.16 and 0.13 ppm, respectively). Because residues in tomato puree and paste (commodities listed in Table 1 of OPPTS 860.1000 as processed commodities of tomatoes) are less than 2X the LOQ of 0.08 ppm, tolerances are not required according to OPPTS 860.1520 (f)(3).

*B. Toxicological Profile*

1. *Acute toxicity*. The database for acute toxicity for S-metolachlor is complete. S-metolachlor is moderately acutely toxic (Toxicity Category III) by the oral and dermal route and relatively non-toxic (Toxicity category IV) by the inhalation route. It causes slight eye irritation (Toxicity Category III) and is non-irritating dermally (Toxicity Category IV); the a.i. was found to be positive in a dermal sensitization test but this effect is mitigated in end-use product formulations.

2. *Genotoxicty*. The database for S-metolachlor has been deemed to be adequate by EPA. Gene mutation studies (Guideline 870.5100), micronucleus (Guideline 870.5395), and unscheduled DNA synthesis (Guideline 870.5550) studies have recently been reviewed and approved by EPA. There is no evidence of a mutagenic or cytogentic effect *in vivo* or *in vitro* with S-metolachlor.

3. *Reproductive and developmental toxicity*. The database for developmental and reproductive toxicity for S-metolachlor are considered complete according to EPA reviews. The prenatal developmental studies in the rat and rabbit with S-metolachlor revealed no evidence of a qualitative or quantitative susceptibility in fetal animals. No significant developmental toxicity was observed in most studies even at the highest does tested (HDT). In a 2–generation reproduction study, there was no evidence of parental or reproductive toxicity at the HDT (80 millograms/kilogram/day (mg/kg/day)). The results indicate that S-metolachlor is not embryotoxic or teratogenic in either species at maternally toxic doses.

4. *Subchronic toxicity*. In a 90–day dietary study in rats with S-metolachlor, no effects were observed in male or females at 208 and 236 mg/kg/day, respectively. In another 90–day dietary study in rats, decreased body weight, reduced food consumption and food efficiency in both sexes and increased kidney weight in males at 150 mg/kg/day; the no observe adversed effect level (NOAEL) was 15 mg/kg/day. A 90–day dog study with S-metolachlor in dogs has been accepted by EPA; no effects were observed in males and females at 62 mg/kg/day and 74 mg/kg/day, respectively, the HDT.

5. *Chronic toxicity*. The database that supports S-metolachlor is considered adequate by EPA. A combined chronic toxicity/ carcinogenic study in the rat satisfies the requirements for both the chronic toxicity and carcinogenicity studies. No significant chronic toxicity was found in either rats or dogs. In the rat, a decrease in body weight was observed at the HDT. In the chronic dog study that supports S-metolachlor, the only adverse effect was decreased body weight gain in females at 33 mg/kg/day; the NOAEL was 10 mg/kg/day.

6. *Animal metabolism*. The database for S-metolachlor is considered to be complete. In animals, S-metolachlor is extensively absorbed, rapidly metabolized and almost totally eliminated in the excreta of rats, goats, and poultry. Metabolism in animals proceeds through common Phase 1 intermediates and glutathione conjugation.

7. *Metabolite toxicology*. The metabolism of S-metolachlor has been well characterized in standard FIFRA metabolism studies. The metabolites found are considered to be toxicologically similar to parent. S-metolachlor does not readily undergo dealkylation to form an aniline or quinone imine as has been reported for other members of the chloroacetanilide class of chemicals. Therefore, as EPA has agreed, it is not appropriate to include S-metolachlor with the group of

chloroacetanilides that readily undergo dealkylation, producing a common toxic metabolite (quinone imine).

8. *Endocrine disruption.* S-Metolachlor does not belong to a class of chemicals known or suspected of having adverse effects on the endocrine system. There is no evidence that S-metolachlor has any effect on endocrine function in developmental or reproduction studies. Furthermore, histological investigation of endocrine organs in the chronic dog, rat and mouse studies did not indicate that the endocrine system is targeted by S-metolachlor, even at maximally tolerated doses administered for a lifetime. There is no evidence that S-metolachlor bioaccumulates in the environment.

*C. Aggregate Exposure*

1. *Dietary exposure.* A Tier III/IV chronic dietary exposure analysis was conducted on S-metolachlor using field trial and market basket (MB) residues. Field trial residues were adjusted for PCT whereas MB residues were not, since this information is inherent in the data. The PCT was assumed to be 100% for all commodities for which no PCT information was available. The chronic assessment was conducted for S-metolachlor using the Dietary Exposure Evaluation Model (DEEM™), version 7.76) by exponent and food consumption information from Department of Agriculture (USDA's) 1994–96 Continuing Survey of Food Intake by Individuals (CSFII) and the Supplemental CSFII children's survey (1998). For this chronic assessment, the field trial values were averaged and entered into the DEEM™ software.

Syngenta Market Basket Survey (SMBS) S-metolachlor data were available for the following commodities: Milk, potatoes, and tomatoes. The SMBS was conducted from September 1999 through September 2000. Following the Agency tier ranking system, these chronic dietary assessments are considered as Tier III (utilizing field trial data) and Tier IV (utilizing SMBS and PDP data) assessments.

The chronic reference dose (RfD) for S-metolachlor is 0.10 mg/kg body weight/day and is based on a 1–year dog study with a NOAEL of 9.7 mg/kg body weight/day and a safety factor of 100X. No additional FQPA safety factor is required, nor was applied in this assessment. S-metolachlor is not considered acutely toxic and therefore, acute dietary exposure was not determined. For the purpose of aggregate assessment, the exposure values were expressed in terms of margin of exposure (MOE) which was calculated by dividing the NOAEL by the exposure for each population subgroup. The benchmark MOE for this assessment is 100.

i. *Food.* The risk from chronic dietary exposure to S-metolachlor is considered to be very low. Based on worst-case assumptions, the chronic exposure assessment did not result in any MOE less than 55,428 for even the most impacted population subgroup (children 1-6 years). Syngenta believes that the MOE for chronic exposure would be well above 100 for any population group. A MOE of 100 or more is considered satisfactory. The percent of the chronic RfD ranged from 0.05% for seniors to 0.2% for children 1–6 and Non-nursing infants, theoretically the most exposure population subgroups.

ii. *Drinking water.* Other potential sources of exposure of the general population to residues of S-metolachlor are residues in drinking water and exposure from non-occupational sources. The degradation of S-metolachlor is microbially mediated with an aerobic soil metabolism primary half-life of less than 30 days and subsequently soil binding predominates. S-metolachlor Koc's vary from 110–369. S-metolachlor is stable to hydrolysis and while aqueous and soil photolysis occur, they are not expected to be prominent pathways in the environment.

The predominant crop for S-metolachlor is corn and accordingly an Index Reservoir PRZM/EXAMS was run using EPA's standard corn scenario. The model simulated two applications to the same plot: Pre-emergence (2.67 kg a.i./hectare (ha) post-emergence (1.50 kg a.i./ha). The mean annual average EEC was 11.77 part per billion (ppb). It should be noted that extensive monitoring data suggests that this estimated environmental concentration (EEC) is a conservative estimate. For the vast majority of locations sampled, the peak measured concentration does not approach 12 ppb, and the annual average would be expected to be much lower.

The Chronic drinking water levels of concern (DWLOC) was calculated based on a chronic reference dose (cRfD) of 0.097 mg/kg/day. Non-nursing infants are the most sensitive subpopulation and their DWLOC is estimated to be 544 ppb which corresponds to a %cRfD value of 2.2% with an MOE value of 4,621. Thus, the DWLOC is considerably higher than the EEC of 11.77 ppb and the MOE is well above the benchmark value of 100.

2. *Non-dietary exposure.* S-metolachlor is labeled for use on warm-season turf and landscape ornamentals. Although it is primarily used on sod farms and commercial landscape ornamentals, it can be used by licensed pest control operators or lawn care operators on residential turf. Since S-metolachlor can only be applied to warm-season turf varieties (bermudagrass, Zoysiagrass, St. Augustinegrass, and Centipedegrass), its use on turf is limited to the southern states.

Non-dietary residential exposure may occur to homeowners or children as a result of exposure during re-entry activities. Using surrogate dislodgeable foliar residue data, and conservative standard EPA exposure scenarios, exposure through the dermal route was calculated. Based on the use pattern, which restricts to number of application to one per year, only short-term risks need to be considered. The relevant toxicological endpoint for short-term dermal risks is the NOAEL of 100 mg/kg/day from a 21–day dermal toxicity study in rabbits. No acute oral hazard has been identified following an acute exposure to S-metolachlor and, therefore, no nondietary assessment is needed.

The short-term dermal post-application risks for adults and children are acceptable, ranging from 520 to 870. These risk estimates exceed the EPA's level of concern for S-metolachlor (all MOEs are greater than 100).

3. *Aggregate exposure (drinking water and dietary exposure).* Using the total MOE equation for the determination of aggregate chronic exposure (food and drinking water only) resulted in an aggregate $MOE_T$ of 4,630 for the most sensitive subpopulation, non-nursing infants. For this particular subpopulation, there are no non-dietary exposure contributions to the $MOE_T$ aggregate value.

*D. Cumulative Effects*

EPA has examined the common mechanism potential for S-metolachlor and has concluded that S-metolachlor should not be included with some pesticides that comprise the class of chloroacetanilides included in a ''Common Mechanism Group''. Therefore, a cumulative assessment is not necessary for S-metolachlor.

*E. Safety Determination*

1. *U.S. population.* Based on the aggregate assessment described above and the completeness and reliability of the toxicity data, it is concluded that aggregate exposure to S-metolachlor (including the proposed uses) in food will utilize less than 0.1% of the cRfD for the U.S. population. EPA generally has no concern for exposures below

100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to S-metolachlor in drinking water and from non-dietary, non-occupational exposures, the assessment presented above demonstrates that the high levels of safety exist for current and proposed uses of S-metolachlor; it is not expected that aggregate exposure from all sources will exceed 100% of the RfD. Therefore, one can conclude there is a reasonable certainty that no harm will result from aggregate exposure to S-metolachlor.

2. *Infants and children*. FFDCA section 408 provides that EPA may apply an additional safety factor for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database. Based on the current toxicological data requirements, the database relative to prenatal and postnatal effects for children is complete. A full consideration of the available reproductive toxicity data supporting S-metolachlor demonstrates no increased sensitivity to infants and children. Therefore, it is concluded that an additional uncertainty factor is not warranted to protect the health of infants and children and that the cRfD at 0.1 mg/kg/day is appropriate for assessing aggregate risk to infants and children from use of S-metolachlor.

Based on the aggregate assessment described above, the percent of the cRfD that will be utilized by aggregate exposure to residues of S-metolachlor is less than 0.2% for non-nursing infants and children 1 to 6 years old, and 0.1% for children 7 to 12 years old. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to S-metolachlor in drinking water and from non-dietary, non-occuptional exposure, the assessment described above demonstrates that it is not expected that aggregate exposure from all sources provides for a large margin of safety and will exceed 100% of the RfD. Therefore, based on the completeness and reliability of the toxicity data and the exposure assessment, it is concluded there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to S-metolachlor residues.

*F. International Tolerances*

There are no Codex Alimentarius Commission maximum residue levels (MRL's) established for residues of S-metolachlor in or on raw agricultural commodities.

[FR Doc. 03–2019 Filed 1–28–03; 8:45 am]

BILLING CODE 6560–50–S

## ENVIRONMENTAL PROTECTION AGENCY

**[OPP–2003–0001; FRL–7287–6]**

## Lactofen; Notice of Filing Pesticide Petitions to Establish Tolerances for Certain Pesticide Chemicals in or on Food

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces the initial filing of pesticide petitions proposing the establishment of regulations for residues of certain pesticide chemicals in or on various food commodities.

**DATES:** Comments, identified by docket ID number OPP–2003–0001, must be received on or before February 28, 2003.

**ADDRESSES:** Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

**FOR FURTHER INFORMATION CONTACT:** Joanne I. Miller, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6224; e-mail address: *miller.joanne@epamail.epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this Action Apply to Me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected categories and entities may include, but are not limited to:

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in the table could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether or not this action might apply to certain entities. If you have 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 Copies of this Document and Other Related Information?*

1. *Docket*. EPA has established an official public docket for this action under docket identification (ID) number OPP–2003–0001. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select ''search,'' then key in the appropriate docket ID number.

Certain types of information will not be placed in EPA's Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper

form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

*C. How and To Whom Do I Submit Comments?*

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically*. If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets*. Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket*, and follow the online instructions for submitting comments. Once in the system, select ''search,'' and then key in docket ID number OPP–2003–0001. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail*. Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2003–0001. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM*. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail*. Send your comments to: Public Information and Records Integrity Branch (PIRIB) 7502C, Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2003–0001.

3. *By hand delivery or courier*. Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP–2003–0001. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

*D. How Should I Submit CBI to the Agency?*

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is 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 docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket 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. Make sure to submit your comments by the deadline in this notice.

7. To ensure proper receipt by EPA, be sure to identify the docket ID 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. What Action is the Agency Taking?**

EPA has received pesticide petitions as follows proposing the establishment and/or amendment of regulations for residues of certain pesticide chemicals in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that these petitions contain data or information regarding the elements set forth in FFDCA section 408d)2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petitions. Additional data may be needed before EPA rules on the petitions.

**List of Subjects**

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: January 17, 2003.

**Debra Edwards,**

*Acting Director, Registration Division, Office of Pesticide Programs.*

*Summaries of Petitions*

The petitioner's summaries of the pesticide petitions are printed below as required by FFDCA section 408(d)(3). The summaries of the petitions were prepared by the petitioner and represent the views of the petitioner. The petitions summaries announce the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemicals residues or an explanation of why no such method is needed.

**Valent U.S.A. Corporation**

*PP 8F3591 and PP 9F3798*

EPA has received pesticide petitions (8F3591 and 9F3798) from Valent U.S.A. Corporation, 1333 North California Boulevard, Suite 600, Walnut Creek, California 94596–8025 proposing, pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR 180.432 by establishing tolerances for residues of the herbicide lactofen, 1-(carboethoxy)ethyl 5-[2-chloro-4-(trifluoromethyl)phenoxy]-2-nitrobenzoate, in or on the raw agricultural commodities (RACs) cottonseed at 0.01 part per million (ppm), cotton gin byproducts at 0.02 ppm, and peanut nutmeats at 0.01 ppm. EPA has determined that the petitions contain data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petitions. Additional data may be needed before EPA rules on the petitions.

*A. Residue Chemistry*

1. *Plant metabolism*. The nature of the residue in plants is adequately understood based on plant metabolism studies on cotton, peanut, soybean, and tomato. The Health Effects Division (HED) Metabolism Assessment Review Committee (MARC) met on April 4, 2000, considered all of the metabolism studies submitted to date and concluded that only the parent compound needs to be regulated for plant commodities, provided that pre-harvest intervals exceed 45 days.

2. *Analytical method*. Adequate analytical methodology is available for detecting and measuring levels of lactofen in or on RACs with a limit of detection (LOD) that allows monitoring of food with residues at or above the level of the proposed tolerances. The method, RM–28D, has been successfully radio validated in conjunction with a tomato metabolism study and has undergone a successful independent laboratory validation trial. This method was also successfully validated by EPA's Analytical Chemistry Laboratory using peanut nutmeats and cottonseed. In general, the analytical method has a LOD of 0.005 ppm and limit of quantitation (LOQ) of 0.01 ppm in crops.

3. *Magnitude of residues*. Adequate lactofen residue data are available for cotton and peanuts. An adequate number of field trials distributed throughout cotton and peanut growing areas of the United States have been conducted on these crops to determine lactofen residues resulting from the application of lactofen at the maximum labeled or proposed use rate.

i. *Cotton*. Residues of lactofen were each <0.01 ppm, in/on cottonseed (n=14) harvested 59–127 days following a single postemergence soil-directed application of lactofen at 0.4 lb active ingredient per acre (lb active ingredient/acre) (2x the single application rate) and in/on cottonseed (n=10) harvested 23–108 days following the last of two postemergence directed applications at 0.4 lb active ingredient/acre application (2x the maximum seasonal rate). With one exception, residues of lactofen were also each <0.01 ppm, in/on cotton gin byproducts (gin trash) (n=11) derived from cotton harvested 69–108 days following two applications at 0.2 lb active ingredient/acre. One gin trash sample bore residues of lactofen at 0.03 ppm, but confirmatory analyses of this sample detected lactofen at <0.01–0.02 ppm, and residues of lactofen were <0.01 ppm, in the duplicate treated sample from the same trial.

In a single processing study, residues of lactofen were <0.01 ppm, in/on cottonseed harvested 76 days following the last of two directed applications of lactofen at 0.6 lb active ingredient/acre application (1.2 lb active ingredient/acre/season, 3x rate). Residues of lactofen were <0.01 ppm in samples of meal, hulls, oil, (crude and refined) and soapstock.

All these data support proposed tolerance for lactofen in/on cottonseed at 0.01 ppm, and in/on cotton, gin byproducts at 0.02 ppm. No separate tolerances are needed for cotton processed commodities.

ii. *Peanuts*. In 8 field trials, residues of lactofen were each <0.01 ppm, in/on 16 samples of peanut nutmeats and hulls harvested 65–71 days following the last of 2 broadcast applications of lactofen totaling 0.45 lb active ingredient/acre (1x the maximum proposed rate). Residues of lactofen were also <0.01 ppm, in/on peanut nutmeats and hulls from 2 trials conducted at 2x and 5x the maximum seasonal rate.

In a processing study, residues of lactofen were <0.01 ppm in meal, oil, crude and refined, and soapstock processed from nutmeats treated at 3x and 5x the maximum proposed use rates.

All these data support proposed tolerance for lactofen in/on peanut nutmeats at 0.01 ppm. No separate tolerances are needed for peanut processed commodities.

*B. Toxicological Profile*

1. *Acute toxicity*. Lactofen has very low acute toxicity. The acute oral $LD_{50}$ is 5.96 gram/kilogram/body weight (g/kg/bwt) toxicity category IV, the acute dermal $LD_{50}$ is >2.0 g/kg/bwt toxicity category III and the acute inhalation $LD_{50}$ is >6.3 milligrams/liter (mg/L) toxicity category IV. Lactofen is not a

skin sensitizer but is a very slight dermal irritant.

2. *Genotoxicity*. Lactofen has very little mutagenic or genotoxic activity. While a positive mutagenic response was reported in one trial of a *Salmonella typhimurium*/mammalian microsome mutagenicity assay, this response was not repeated in the second assay conducted. In addition, lactofen did not appear to induce chromosomal aberrations, unscheduled deoxyribonucleic acid (DNA) synthesis or inhibit DNA repair.

3. *Reproductive and developmental toxicity*. Reproduction and teratology studies indicate that adverse effects, including embryotoxicity, occur only at doses that are also maternally toxic. Since lactofen causes effects only at levels which also produce systemic toxicity, the compound is not a reproductive hazard.

In a 2–generation reproduction study in rats, decreased pup weight and decreased absolute and relative weights of the spleen were first reported at approximately 26.2 milligrams/kilogram/day (mg/kg/day) (based on dose administered to the parental group). The same dose level elicited mortality and decreased male fertility in the parental groups. The no observed adversed effect level (NOAEL) for both systemic and reproductive toxicity in this study was 2.6 mg/kg/day.

In the developmental toxicity study in rats, effects were observed at the 150 mg/kg/day dose level consisting of decreases in fetal weight as well as skeletal abnormalities. This dose level also elicited signs of toxicity in the parental group. The NOAEL for this study was 50 mg/kg/day. Based on this NOAEL and an uncertainty factor (UF) of 100, the acute reference dose (RfD) for lactofen has been set at 0.50 mg/kg/day.

Two developmental toxicity studies were conducted in rabbits. In the first study, pregnant rabbits were administered oral doses of 0, 5, 15, or 50 mg/kg bwt/day lactofen technical on days 6–18 of gestation. Maternal toxicity (clinical signs and reduced weight gain) and developmental effects (increased embryonic death, decreased litter size and increased post-implantation loss) were reported at 15 and 50 mg/kg. The Agency concluded that the data were insufficient to establish a clear NOAEL. In the second rabbit developmental toxicity study, pregnant rabbits were exposed to 0, 1, 4, or 20 mg/kg bwt/day oral doses on days 6–18 of gestation. Maternal toxicity (reduced food consumption) was observed at 20 mg/kg bwt/day, but no developmental effects were observed at any dose. Therefore, the maternal NOAEL was 4 mg/kg bwt/day and the developmental NOAEL was greater than 20 mg/kg bwt/day.

4. *Subchronic toxicity*—i. *Rats 4–week*. Male and female rats were fed diets containing lactofen technical at concentrations of 0, 200, 1,000, 5,000, and 10,000 ppm, for 4 weeks. A slight increase in spleen weight was the basis for a lowest observed adversed effect level (LOAEL) of 200 ppm, lowest dose tested (LDT). At doses of 1,000 ppm, or higher, the following findings were reported: clinical signs of toxicity; decreased red blood cell (RBC), hemoglobin, hematocrit, and increased white blood cell (WBC); increased relative liver and spleen weights; and necrosis and pigmentation of hepatocytes. At 10,000 ppm, severe toxic signs were observed by day 7 and all animals were dead or killed *in extremis* by day 11. Hypocellularity of the spleen, thymus, and bone marrow was also observed in animals exposed to 10,000 ppm.

ii. *Rats 3–month*. Lactofen technical was fed to male and female rats at dietary concentrations of 0, 40, 200, and 1,000 ppm, for 13 weeks. Histopathological changes in the liver and significant changes in clinical chemistry associated with the liver were observed in rats exposed to 1,000 ppm, dosage. Decreased RBC, hemoglobin and hematocrit values were also observed at 1,000 ppm. The NOAEL in this study was 200 ppm, 14.1 mg/kg/day.

iii. *Dogs 4–week*. In a range finding study lactofen technical was fed in the diet of dogs at 0, 1,000, 3,000, and 10,000 ppm, for 4 weeks. Toxic effects noted in dogs fed 10,000 ppm, included decreased RBC count and hemocrit, and increased blood urea nitrogen (BUN) and serum glutamic-pyruvic transaminase (SGPT). Food palatability problems led to greatly decreased feed consumption at higher dosages. The NOAEL appeared to be 1,000 ppm.

iv. *Mice 3–month*. Groups of male and female mice were fed diets containing lactofen technical at concentrations of 0, 40, 200, 1,000, 5,000, and 10,000 for 13 weeks. At week 5, the dosage of the 40 ppm, groups was increased to 2,000 ppm. Treatment related mortality occurred at dosages above 1,000 ppm. The LOAEL was 200 ppm, 28.6 mg/kg/day based on:

- Increased WBC; decreased hematocrit, hemoglobin and RBC.
- Increased alkaline phosphatase, serum glutamic-oxloacetic transaminase (SGOT), SGPT, cholesterol and total serum protein levels.
- Increased weights or enlargement of the spleen, liver, adrenals, heart, and kidney; histopathological changes of the liver, kidney, thymus, spleen, ovaries, and testes.

In general, effects were slight in the 200 ppm groups, and moderate to severe in the 1,000 ppm groups.

v. *Peroxisome proliferation*. Butler *et al* (1988) studied the effects of lactofen on peroxisome proliferation in mice exposed for 7 weeks to dietary concentrations of 2, 10, 50, and 250 ppm. Liver-weight to body-weight ratio, liver catalase, liver acyl-CoA oxidase, liver cell cytoplasmic eosinophilia, nuclear, and cellular size, and peroxisomal staining were increased by the tumorigenic dose of lactofen, i.e. 250 ppm. Lower doses of lactofen had little to no effect on these parameters. This study indicates that lactofen induces peroxisome proliferation and further, that 50 ppm, 7 mg/kg/day, a dose which is not tumorigenic, would be considered a threshold dose in mice for peroxisome proliferation produced by lactofen. A subchronic study conducted in chimpanzees (Couch and Erickson 1986), indicated no effect on clinical chemistry or histological endpoints that would suggest liver toxicity or peroxisome proliferation at doses up to 75 mg/kg bwt/day administered for 93 days. Therefore, Valent believes that 75 mg/kg bwt/day is a clear NOAEL for peroxisome proliferation observed in a species closely related to man. On January 17, 2001, the Mechanism of Toxicity Assessment Review Committee (MTARC) reviewed the merits of the toxicological data supporting peroxisome proliferation as the proposed mode of action for lactofen. Based on the weight-of-evidence from guideline, as well as mechanistic studies, the MTARC concluded that there are sufficient data to classify lactofen as a non-genotoxic hepatocarcinogen in rodents with peroxisome proliferation being a plausible mode of action.

5. *Chronic toxicity*. Lactofen causes adverse health effects when administered to animals for extended periods of time. These effects include proliferative changes in the liver, spleen, and kidney; hematological changes; and blood biochemistry changes.

i. *Mouse 18–month*. In a dietary 18–month oncogenicity study in mice at dosages of 10, 50, and 250 ppm, lactofen technical, an increase in liver adenomas and carcinomas, cataracts, and liver pigmentation was observed at 250 ppm, a dose that clearly exceeded the maximum tolerance dose (MTD). The lowest dose, 10 ppm, 1.4 mg/kg/day, was the LOAEL based on increased liver weight and hepatocytomegaly.

ii. *Rat 24–month*. In a 2–year chronic feeding/oncogenicity study of lactofen technical in rats at dosages of 0, 500, 1,000 ppm; and 2,000 ppm, in the diet, an increase in liver neoplastic nodules and foci of cellular alteration was observed in both sexes at 2,000 ppm. The NOAEL for systemic toxicity is 500 ppm, 2 mg/kg/day based on kidney and liver pigmentation.

iii. *Dog 12–month*. In a 1–year study in dogs exposed to 40, 200, and 1,000 ppm; week 1–17 or 3,000 ppm; week 18–52 lactofen technical in their diet, the NOAEL was determined to be 200 ppm, (0.79 mg/kg/day) based on renal dysfunction and decreased RBC, hemoglobin hematocrit and cholesterol observed at 1,000/3,000 ppm. Based on this NOAEL and an uncertainty factor (UF) of 100, the chronic RfD for lactofen has been set at 0.008 mg/kg/day.

iv. *Carcinogenicity*. As a member of the diphenyl ether chemical family, lactofen is structurally related to four other chemicals that are oncogenic in rodents:

- Sodium acifluorfen (acifluorfen is a lactofen metabolite), nitrofen, oxyfluorfen, and fomesafen.
- Sodium acifluorfen produces hepatocellular adenomas and carcinomas in mice but is negative in rats.
- Nitrofen produces hepatocellular carcinomas in mice and pancreatic carcinomas in rats.
- Oxyfluorfen produces marginally positive liver tumors in mice but is negative in rats.
- Fomesafen produces hepatocellular adenomas and carcinomas in mice.

The Cancer Peer Review Committee (CPRC) evaluated the relevant data on the carcinogenic potential of lactofen in 1987 and classified lactofen as a B2 carcinogen Probable Human Carcinogen and assigned a Cancer Potency Factor ($Q_1$*) of 1.7 x $10^{-1}$ mg/kg/day$^{-1}$, based on a interspecies scaling factor of 0.67. This $Q_1$* has since been reduced to 1.19 x $10^{-1}$ mg/kg/day$^{-1}$ based on recent EPA guidance indicating that 0.75 is a more appropriate interspecies scaling factor. The B2 classification is based on an increase in the combined incidence of liver adenomas and carcinomas in mice and increases in liver neoplastic nodules and foci of cellular alteration (possible precursor of tumors) in rats. In 1996, and 1999, EPA proposed new cancer risk assessment guidelines which state that nonmutagenic carcinogens known to cause cancer via a threshold mechanism, such as peroxisome proliferation, could be assessed using a nonlinear margin of exposure (MOE) approach rather than the $Q_1$ * method. EPA has recently determined that lactofen acts via a peroxisome proliferation mechanism and is currently reevaluating its approach to the quantification of the cancer risk for lactofen.

6. *Animal metabolism*. In a rat metabolism study, lactofen was shown to metabolize to acifluorfen, 5-[2-chloro-4-(trifluoromethyl)phenoxy]-2-nitrobenzoate, which was eliminated via both urine and feces. While lactofen was the primary compound found in the feces, acifluorfen accounted for >90% of the radioactivity in the urine. Negligible amounts of the administered radioactivity were found in any tissue with less than 0.8% of the administered radioactivity being found in the liver one of the main target organs.

7. *Metabolite toxicology*. Acifluorfen is also a hydrolytic metabolite of lactofen. The sodium salt of this benzoic acid is the registered herbicide, sodium acifluorfen. This product has a complete data base supporting registration with a RfD of 0.013 mg/kg/day and a $Q_1$* of 5.30 x $10^{-2}$ mg/kg/day$^{-1}$. Because lactofen and its metabolites are not retained in the body, the potential for acute toxicity from *in situ* formed metabolites is low. The potential for chronic toxicity of lactofen metabolites has been adequately addressed by an extensive battery of lactofen chronic toxicity testing.

8. *Endocrine disruption*. No special studies to investigate the potential for estrogenic or other endocrine effects of lactofen have been performed. However, a large and detailed toxicology data base exists for the compound including studies acceptable to the Agency in all required categories. These studies include evaluations of reproduction and reproductive toxicity and detailed pathology and histology of endocrine organs following repeated or long-term exposure. These studies are considered capable of revealing endocrine effects and no such effects were observed.

*C. Aggregate Exposure*

1. *Dietary exposure*. A full battery of toxicology testing, including studies of acute, chronic, oncogenicity, developmental, mutagenicity, and reproductive effects is available for lactofen. For the following risk assessments, the NOAEL from the chronic oral toxicity study in dogs, 0.79 mg/kg/day, was selected as the chronic oral toxicity endpoint. Based on this NOAEL, and an UF of 100, the chronic RfD and the chronic population adjusted dose (cPAD) for lactofen has been set at 0.008 mg/kg/day. The NOAEL from the rat developmental study, 50 mg/kg/day, was selected as the acute oral toxicity endpoint. Based on this NOAEL and an UF of 100, the acute RfD for lactofen has been set at 0.50 mg/kg/day. An acute adjusted dose (aPAD) of 0.17 mg/kg/day was calculated using this endpoint and an additional Food Quality Protection Act (FQPA) safety factor of 3. This aPAD will only be used to assess acute exposures to the females 13 to 50 year old population subgroup since it is derived from a developmental toxicity endpoint. No other acute endpoints were identified to assess acute exposures to other populations.

i. *Food*. Dietary risk was considered for the currently registered uses of lactofen on soybeans, snap beans, and cotton and for the pending use on peanuts. Dietary risk assessments were done using the Dietary Exposure Evaluation Model (DEEM™), which incorporates consumption data generated in U. S. Department of Agriculture (USDA) Continuing Surveys of Food Intakes by Individuals (CSFII), 1989–1992. For chronic dietary risk assessments, the 3–day average of consumption for each subpopulation is combined with residues in commodities to determine average exposure in mg/kg/day. For refined acute dietary risk assessments, the entire distribution of consumption events for individuals is multiplied by a distribution of residues to obtain a distribution of exposures in mg/kg/day. This is a probabilistic analysis, referred to as ''Monte Carlo,'' and the risk is reported at the 99.$^{9th}$ percentile of exposure. Food monitoring data are not available from Food and Drug Administration (FDA) or USDA for residues of lactofen. Therefore, only field trial data were used. A value of one-half the LOQ, 0.005 ppm, was used to represent the residues in all treated commodities. Percent crop treated (PCT) were incorporated for soybeans and snap beans, as reliable usage information was available for these commodities. The estimated risk from food is presented in the following table:

TABLE 1.—DIETARY EXPOSURE AND RISK TO LACTOFEN FROM FOOD SOURCES

| Population | Acute Endpoint | | Chronic Endpoint | | Cancer Endpoint[2] | |
|---|---|---|---|---|---|---|
| | Exposure mg/kg/day | %aPAD | Exposure mg/kg/day | %aPAD | Exposure mg/kg/day | Risk |
| U.S. population | NA[1] | NA | $1 \times 10^{-6}$ | <0.1 | $1 \times 10^{-6}$ | $8 \times 10^{-8}$ |
| Females 13 to 50 | $2 \times 10^{-6}$ | <0.1 | $<1 \times 10^{-6}$ | <0.1 | NA | NA |
| Children 1 to 6 | NA[1] | NA | $2 \times 10^{-6}$ | <0.1 | NA | NA |

[1]Acute endpoint applies only to females of childbearing age.
[2]Cancer risk is generally reported for the U.S. population.

ii. *Drinking water*. Environmental fate properties indicate that lactofen is not very persistent or mobile. Hydrolysis half-lives are 10.7, 4.6, and <1.0 days at pH 5, 7, and 9 at 40° C, respectively. This temperature most likely exceeds temperatures that lactofen would be expected to be exposed to under normal conditions, thus the hydrolysis rates are probably slower. Aerobic soil metabolism half-lives range from 1 to 3 days. Lactofen has a low probability to contaminate drinking water because it has a short half-life (3 days or less) and high binding potential( $K_{oc}$>1,000). Limited data suggest that lactofen conversion to acifluorfen in water is approximately 52%. The HED MARC has concluded that the residues of concern in drinking water are acifluorfen and amino acifluorfen. Insufficient information is available to estimate the amino acifluorfen concentration in water, but it is likely to be less than that of acifluorfen. Laboratory studies have shown that acifluorfen reaches its maximum concentration of 53.3% of applied lactofen at 7 days following application and it is most likely to form under the soil surface. Thus, the formed acifluorfen is not subject to drift, erosion, or runoff forces that contribute to surface water contamination. Surface water, however, could be contaminated with acifluorfen from lactofen applications via spray drift. The registrant also has conducted two prospective ground water studies which showed that neither lactofen nor acifluorfen from lactofen applications contaminate ground water. Therefore, in the following discussion, the potential exposure to lactofen from drinking water will address only potential surface water contamination with lactofen and acifluorfen.

The Tier II estimated environmental concentration (EEC) assessment in surface water uses a single site, or multiple single sites, which represents a high-end exposure scenario from pesticide use on a particular crop or non-crop use site. The EEC's for lactofen were generated for the standard Mississippi cotton scenario. The Agency has implemented the concept of index reservoirs (IR) and the PCT area to better estimate potential residue level in drinking water sources. The scenarios used with EPA pesticide root zone model (PRZM) and exposure analysis modeling systems (EXAMS) to estimate lactofen in the ''standard pond'' were rerun with the IR for the cotton and soybean scenarios. The Agency has estimated that the PCT area for the Mississippi cotton scenario is 0.20 (20%).

The Office of Pesticide Programs (OPP) has calculated drinking water levels of comparison (DWLOCs) for acute and chronic exposure to lactofen and acifluorfen from applications of lactofen in surface water. To calculate the DWLOC for acute exposure, the acute dietary food exposure from the DEEM™ analysis was subtracted from the aPAD. To calculate the DWLOC for chronic (non-cancer) exposure, the chronic dietary food exposure from the DEEM™ analysis was subtracted from the cPAD to obtain the acceptable chronic non-cancer exposure to lactofen and acifluorfen in drinking water. A DWLOC cancer was calculated in a similar manner, assuming a negligible risk of $1 \times 10^{-6}$. Assumptions used in calculating the DWLOCs include 70 kg bwt for the U.S. population, 60 kg bwt for adult females, 10 kg bwt for children, 2 liters of water consumption per day for adults, and 1 liter consumption for children.

TABLE 2.—DIETARY EXPOSURE AND RISK TO LACTOFEN FROM DRINKING WATER

| Population | Acute Endpoint | | Chronic Endpoint | | Cancer Endpoint[2] | |
|---|---|---|---|---|---|---|
| | Exposure µg/L | DWLOC µg/L | Exposure µg/L | DWLOC µg/L | Exposure µg/L | DWLOC µg/L |
| U.S. population | NA[1] | NA | 0.022 | 280 | 0.012 | 0.3 |
| Females 13 to 50 | 0.62 | 5,100 | 0.022 | 240 | - | - |
| Children 1 to 6 | NA[1] | NA | 0.022 | 80 | - | - |

[1] Acute endpoint applies only to females of childbearing age.
[2] Cancer risk is generally reported for the U.S. population.

TABLE 3.—DIETARY EXPOSURE AND RISK TO ACIFLUORFEN[1] FROM DRINKING WATER

| Population | Acute Endpoint | | Chronic Endpoint | | Cancer Endpoint[3] | |
|---|---|---|---|---|---|---|
| | Exposure µg/L | DWLOC µg/L | Exposure µg/L | DWLOC µg/L | Exposure µg/L | DWLOC µg/L |
| U.S. population | NA[2] | NA | 0.99 | 140 | 0.34 | 0.7 |
| Females 13 to 50 | 4.9 | 600 | 0.99 | 120 | - | - |

TABLE 3.—DIETARY EXPOSURE AND RISK TO ACIFLUORFEN[1] FROM DRINKING WATER—Continued

| Population | Acute Endpoint | | Chronic Endpoint | | Cancer Endpoint[3] | |
|---|---|---|---|---|---|---|
| | Exposure µg/L | DWLOC µg/L | Exposure µg/L | DWLOC µg/L | Exposure µg/L | DWLOC µg/L |
| Children 1 to 6 | NA[2] | NA | 0.99 | 40 | - | - |

[1] Acifluorfen derived from applications of lactofen.
[2] Acute endpoint applies only to females of childbearing age.
[3] Cancer risk is generally reported for the U.S. population.

HED has a concern if the DWLOC for any scenario is below the estimated environmental concentration from the models. All of the DWLOCs shown in the tables above exceed the estimated EECs.

2. *Non-dietary exposure.* Lactofen is proposed only for agricultural uses and no home owner or turf uses. Thus, no non-dietary risk assessment is needed.

*D. Cumulative Effects*

Section 408(b)(2)(D)(v) requires that the Agency must consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.'' Available information in this context include not only toxicity, chemistry, and exposure data, but also scientific policies and methodologies for understanding common mechanisms of toxicity and conducting cumulative risk assessments. For most pesticides, although the Agency has some information in its files that may turn out to be helpful in eventually determining whether a pesticide shares a common mechanism of toxicity with any other substances, EPA does not at this time have the methodologies to resolve the complex scientific issues concerning common mechanism of toxicity in a meaningful way.

There are other pesticidal compounds that are structurally related to lactofen and have similar effects on animals. In consideration of potential cumulative effects of lactofen and other substances that may have a common mechanism of toxicity, there are currently no available data or other reliable information indicating that any toxic effects produced by lactofen would be cumulative with those of other chemical compounds. Thus, only the potential risks of lactofen have been considered in this assessment of aggregate exposure and effects.

Valent will submit information for EPA to consider concerning potential cumulative effects of lactofen consistent with the schedule established by EPA in the **Federal Register** of August 4, 1997 (62 FR 42020) (FRL-5734–6), and other subsequent EPA publications pursuant to FQPA.

*E. Safety Determination*

1. *U.S. population.* Water is not expected to be a significant source of exposure for lactofen, as it degrades quickly in the environment to numerous degradates, including acifluorfen. EECs for lactofen and acifluorfen are well below the DWLOC for chronic, acute, and cancer risk. Therefore, the only significant source of human exposure to lactofen is in food. Residues of lactofen are generally non-detectable at a LOQ of 0.005 ppm, in all food forms. The exposure is <0.1% of the acute and chronic PAD for all population subgroups. Exposure is generally not of concern if it is less than 100% of the PAD. The estimated cancer risk for the U.S. population is $8 \times 10^{-8}$, which is more than an order of magnitude less than the risk that is generally considered negligible $1 \times 10^{-6}$.

2. *Infants and children.* As stated above, dietary exposure assessments, including drinking water, utilize less than 0.1% of the acute and chronic PADs for all population subgroups, including infants and children. Reproduction and developmental effects have been found in toxicology studies for lactofen but only at levels that were also maternally toxic. This indicates that developing animals are not more sensitive than adults. FQPA requires an additional safety factor of up to 10 for chemicals which present special risks to infants or children. Lactofen does not meet the criterion for application of an additional safety factor for infants and children. The FQPA Safety Factor Committee met on March 13, 2000 to evaluate the hazard and exposure data for lactofen and recommended that FQPA, safety factor for protection of infants and children should be reduced to 3x for lactofen. This safety factor was reduced to 3x by The FQPA, Safety Factor Committee because available data provide no indication of quantitative or qualitative increased susceptibility from *in utero* and/or postnatal exposure to lactofen in rats. Information on the reproduction and developmental effects caused by the other diphenyl ether herbicides is not available to Valent. Additional time is needed for the Agency to evaluate the need for an additional safety factor related to these other chemicals. However, even if an additional safety factor were deemed necessary, the dietary exposures are still expected to be well below the established reference doses.

*F. International tolerances.*

There are no Codex maximum residue limits established for lactofen on cotton or peanut commodities, so there is no conflict between this proposed action and international residue limits.

[FR Doc. 03–2020 Filed 1–28–03; 8:45 a m]
BILLING CODE 6560–50–S

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7445–4; RCRA–2002–0029]**

## Land Disposal Restrictions: Treatment Standards for Mercury-Bearing Hazardous Waste; Notice of Data Availability

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of data availability.

**SUMMARY:** This notice of data availability (NODA) makes available to the public two studies conducted on the treatment of mercury wastes. The studies were initiated to help evaluate whether EPA could propose treatment and disposal alternatives to the current land disposal restriction (LDR) treatment standard of mercury retorting. The studies were performed to assess conditions that affect the stability of waste residues resulting from the treatment of high mercury (greater than 260 mg/kg total mercury) wastes. This NODA also makes available the results of the peer review of these studies. As a result of our investigation, we have concluded that changes to our national regulations are impractical at this time. Additionally, this notice also provides information on how to use the existing treatability variance procedures to make site-specific choices on alternatives to mercury recovery. The treatability studies and the results of the peer review are presented here only to provide information—we are not

requesting comments on the mercury-related issues in this NODA.

**ADDRESSES:** You may view the supporting materials for this NODA in the EPA Docket Center (EPA/DC), B102, EPA West, 1301 Constitution Ave. NW., Washington, DC 20460–0002. The docket number is RCRA–202–0029. To review file materials, we recommend that you make an appointment by calling (202) 566–0270. The EPA/DC is open from 9 am to 4 pm, Monday through Friday, excluding Federal holidays. You may copy up to 100 pages from any regulatory document at no charge. Additional copies cost $ 0.15 per page. For information on accessing an electronic copy of the treatability study and peer review documents, see the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:** For general information, call the RCRA Call Center at 1–800–424–9346 or TDD 1–800–553–7672 (hearing impaired). Callers within the Washington Metropolitan Area must dial 703–412–9810 or TDD 703–412–3323 (hearing impaired). The RCRA Call Center is open Monday–Friday, 9 a.m. to 4 p.m., Eastern Standard Time. For more information on specific aspects of this NODA, contact Mary Cunningham at 703–308–8453, *cunningham.mary@epa.gov*, or write her at the Office of Solid Waste, 5302W, U.S. EPA, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

**SUPPLEMENTARY INFORMATION:**

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## I. How Can I Get Copies of This Document and Other Related Information?

### *A. Docket*

EPA has established an official public docket for this action under Docket Number: RCRA–2002–0029. The official public docket consists of the documents specifically referenced in this action and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the EPA Docket Center (EPA/DC), B102, EPA West, 1301 Constitution Ave. NW., Washington, DC 20460–0002. To review file materials, we recommend that you make an appointment by calling (202) 566–0270. The EPA/DC is open from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays.

### *B. Electronic Access*

You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA/DC facility identified above. Once in the system, select ''search,'' then key in the appropriate docket identification number.

## II. What Are the Treatability Studies and Peer Review Results?

### *A. Why Is Mercury a Concern?*

Mercury is an elemental metal, occurs in certain minerals and is a naturally-occurring contaminant of some other natural resources, such as certain types of coal. Once released into the environment, inorganic forms of mercury may be converted to methylmercury, which is the main form of organic mercury found in the environment. Methylmercury may accumulate in fish tissue to levels that are unhealthful to humans and which harm wildlife. Methylmercury has also been shown to be a developmental toxicant, causing subtle to severe neurological effects at very low levels of exposure, especially to fetuses and young children.[1] The developing fetus is exposed to mercury if the mother eats mercury-contaminated fish during pregnancy. Recent data,[2] [3] indicate that 8% of women of childbearing age in the U.S. currently have blood mercury levels higher than EPA considers to be a ''safe'' level of exposure.[4] Children and adults can be exposed to mercury if they routinely eat large quantities of contaminated fish.

The problem of mercury-contaminated fish is wide-spread in the U.S. As of December 2001, 44 states have issued fish advisories for mercury. Twenty-four states have issued statewide advisories.[5] These advisories inform the public that concentrations of mercury have been found in local fish at levels of public health concern. State advisories recommend either limiting or avoiding consumption of certain fish from specific water bodies or, in some cases, from specific water body types (*e.g.*, all freshwater lakes or rivers).

### *B. What Is The Purpose of This NODA?*

Today's notice presents the results of two recent treatability studies conducted to assess the feasibility of the treatment of high mercury wastes (*i.e.*, wastes containing greater than 260 mg/kg total mercury) and elemental mercury destined for disposal. This notice also presents the results of the independent peer review of these two treatability studies.

The existing land disposal restrictions (LDR) treatment standards require recovery by retorting of high mercury wastes. Based on the results of the treatability studies published in today's NODA, we have decided not to propose revisions to the existing treatment standards. We are concerned that treatment (such as the treatment technologies evaluated in our treatability studies) may not result in a waste that is stable under some landfill conditions that are within the range of normal operations.

Having said this, we believe there may be site-specific situations where treatment and disposal of high mercury wastes or excess elemental mercury may be warranted. In these instances, we could grant a petition for a site-specific

[1] *http://www.epa.gov/waterscience/fish/.*

[2] *http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5008a2.htm.*

[3] *http://www.cdc.gov/nceh/dls/report/results/Mercury.htm.*

[4] *http://www.epa.gov/triinter/tridata/tri00/qa.pdf.*

[5] *http://www.epa.gov/waterscience/fish/.*

variance from the applicable treatment standards under current regulations. For a site-specific petition to be granted, it should demonstrate that treatment of the waste significantly limits mobility of mercury from the treated waste and that the treatment residues are stable in the intended disposal environment.

*C. What Prompted The Treatability Studies?*

On May 28, 1999, EPA published an advance notice of proposed rulemaking (ANPRM) requesting comment to help gain a better understanding of the environmental impact of our waste treatment standards for mercury-bearing hazardous wastes. In the ANPRM, we requested data to support potential alternatives to current LDR requirements to reclaim elemental mercury from high mercury subcategory wastes (*i.e.*, those wastes that contain greater than or equal to 260 mg/kg total mercury). However, we did not receive enough information to propose changes to any of the mercury treatment standards. Therefore, we initiated two research studies to identify the ''currently available'' treatment processes and to gather information that could be used to potentially change the current mercury treatment standards to assure more effective treatment.

*D. What Are the Current Treatment Practices for Mercury Wastes?*

In this section, we describe the current regulatory categorization for mercury wastes as low mercury subcategory wastes, high mercury subcategory wastes, or elemental mercury wastes.

1. What Are the Current Treatment Practices for Low Mercury Subcategory Wastes?

Low mercury wastes are those hazardous wastes containing less than 260 mg/kg of total mercury. Current regulations require that these wastes be treated to achieve a certain numerical level, 0.20 mg/L, measured using the Toxicity Characteristic Leaching Procedure (TCLP) for mercury residues from retorting, and 0.025 mg/L TCLP for all other low mercury wastes. These concentrations are generally met by stabilization/solidification treatment. This subcategory of mercury wastes was not included in any of the treatability studies described in this notice.

2. What Are the Current Treatment Practices for High Mercury Subcategory Wastes?

High mercury wastes are those hazardous wastes that contain greater than 260 mg/kg total mercury. Because of this high concentration of mercury, they are generally required to undergo roasting or retorting (see ''RMERC,'' at 40 CFR 268.42, Table 1). RMERC is defined, in part, as: ''Retorting or roasting in a thermal processing unit capable of volatilizing mercury and subsequently condensing the volatilized mercury for recovery.'' The residuals from the roasting or retorting process are then subject to a numerical treatment standard as discussed above (if the residues meet the definition of ''low mercury subcategory'').

There may be cases where it is not desirable or practical to retort high mercury subcategory wastes. One example of this would be mixed radioactive high mercury wastes. See the discussion in Section II.K for information on this category of mercury waste.

3. What Are the Current Treatment Practices for Elemental Mercury?

There are three elemental mercury waste streams that contain most of the waste regulated under the LDR program:

(1) Discarded commercial elemental mercury, off-specification elemental mercury, and container and spill residues (RCRA hazardous waste code U151) that contain greater than or equal to 260 mg/kg total mercury. These waste streams must be treated by roasting or retorting (see ''RMERC'' at 40 CFR 268.42, Table 1).

Additionally, because the uses for elemental mercury in products is declining, stockpiles of excess commodity (bulk) mercury currently exist; if these stockpiles are deemed to be wastes, then they would become subject to the ''RMERC'' standard.

(2) Elemental mercury contaminated with radioactive materials. These waste streams are required to be treated by amalgamation (see ''AMLGM'' at 40 CFR 268.42 Table 1). AMLGM is defined as: ''Amalgamation of liquid, elemental mercury contaminated with radioactive materials utilizing inorganic agents such as copper, zinc, nickel, gold, and sulfur that results in a nonliquid, semi-solid amalgam and thereby reducing potential emissions of elemental mercury vapors to the air.''

(3) Characteristically hazardous elemental mercury wastes (RCRA hazardous waste code D009) that also are required to be roasted or retorted, if they contain greater than or equal to 260 mg/kg total mercury.

*E. What Earlier Studies Have Been Performed on Radioactive Mercury Waste?*

The Department of Energy's (DOE) Transuranic and Mixed Waste Focus Area-Mercury Working Group, in conjunction with EPA, has initiated studies of the treatability and disposal of mercury wastes resulting from nuclear weapons production. These treatability studies have evaluated current commercialized state-of-the-art technologies and several emerging technologies. To date, DOE and EPA have conducted several studies of the treatability of contaminated soils, surrogate wastes, and bulk elemental mercury by commercial vendors. The goal of the studies has been to identify the range of conditions suitable for the disposal of these waste residuals, should direct treatment rather than separation be performed. Sepradyne Corporation's vacuum retort extraction, Nuclear Fuel Services, Inc. (NFS) DeHg® stabilization process, Brookhaven National Laboratory's sulfur polymer solidification/stabilization, and ADA Technologies, Inc. (ADA) and Allied Technology Group (ATG) sulfur-based solidification/stabilization processes have been evaluated.

A 1999 DOE study [6] examined the release of mercury from mercury amalgams prepared by processes operated by ADA Technologies, Inc. (ADA) and Nuclear Fuel Services, Inc. (NFS) as a function of temperature and pH. Leachate exposure experiments indicate that amalgams prepared with zinc released mercury at high rates into the leachate at acidic (low pH) conditions and at lesser rates at neutral pH. These metal-based amalgams tended to perform better in alkaline (high pH) solutions. Sulfur-based treatment samples showed increased release of mercury after two and three months at pH 12.5.[7] Other studies of mercuric sulfide solubility have detected increased solubility of mercury sulfide complexes above pH 6 with excess sulfide present.[8] Mercuric sulfide is the product formed from treating elemental mercury with sulfur or sulfide salts. The reports for these prior studies are available on the internet.[9]

[6] C.H. Mattus, ''Measurements of Mercury Released from Amalgams and Sulfide Compounds'', Oak Ridge National Laboratory, ORNL/TM–13728, April 1999.

[7] Ibid. Table 6, page 17.

[8] Jenny Ayla Jay, Francois M. M. Morel, and Harold F. Hemond, Mercury Speciation in the Presence of Polysulfides, Environmental Science and Technology, 2000, Vol. 34, No. 11, pages 2196–2200.

[9] See C.H. Mattus, ''Measurements of Mercury Released from Solidified/Stabilized Waste Forms'', Oak Ridge National Laboratory, ORNL/TM–2001/17, April 2001, available at *http://osti.gov/bridge*; and F. Sanchez, D.S. Kosson, C.H. Mattus, and M.I Morris, ''Use of a New Leaching Test Framework for Evaluating Alternative Treatment Processes For Mercury Contaminated Mixed Waste (Hazardous

Continued

*F. What Treatability Studies Are the Subject of Today's NODA?*

The studies we just described did not focus on two types of mercury waste that we thought were important to address: (1) High mercury (containing greater than 260 mg/kg total mercury) waste sludges that contain multiple forms of mercury; and (2) bulk elemental mercury.

We collaborated with DOE to evaluate the ability of commercially available treatment processes to reduce the solubility of mercury in these two types of waste and to identify stable disposal conditions as a potential alternative to current regulations which require the reclamation of mercury via roasting or retorting before treatment and disposal of the residuals. Because this potential alternative (of treatment/disposal as opposed to roasting/retorting) would result in much higher concentrations of mercury potentially being land disposed, and because of the toxic nature of mercury (see section II.A of this notice) and the difficulty of treatment, we decided to evaluate treated waste forms using the Toxicity Characteristic Leaching Procedure (TCLP),[10] as well as a constant pH leaching procedure that addresses the range of pH conditions that could be expected in hazardous waste landfill disposal environments. Because the TCLP only evaluates one pH condition that results from the interaction of the waste and the fixed acid content of the TCLP leaching solution, we thought it was important to supplement the TCLP with the constant pH leaching procedure to access the performance of the treatment residuals over the range of normal landfill operating conditions. Using this procedure, we examined waste solubility over a pH range from 2 to 12. Even though more extreme conditions have been observed in landfills,[11] a recent compilation of landfill data finds that approximately 95 percent of all hazardous waste landfills are in the 2 to 12 pH range, and more than 90 percent are less than pH 10.[12] By maintaining the pH constant at each level, the test simulates the potential for metals to be extracted or mobilized from the treated waste form by a large volume of landfill leachate passing through and around the waste at the set pH level. This also allows treatment performance to be compared at the set conditions. An exposure period of 14 days, rather than the 18 hours of the TCLP, was chosen to allow all samples time to reach near-equilibrium before measurement of the release potential of mercury from the treatment residuals. Other factors, such as leachate to solids ratio, oxidation/reduction potential (eH), particle size, exposure period, and the major ions present all affect metal solubility. However, the studies presented here primarily focused on the effects of varying pH conditions because the solubilities of metals and metal complexes are highly pH dependent and the pH conditions of hazardous waste landfills are known to vary widely.

The results of these two studies are provided in two reports: ''Technical Background Document: Mercury Wastes—Evaluation of Treatment of Mercury Surrogate Waste'' and ''Technical Background Document: Mercury Wastes—Evaluation of Treatment of Bulk Elemental Mercury,'' available in the docket for today's notice. In this section, we provide an overview of these studies.

The first study evaluated the effectiveness of four technologies to stabilize a ''difficult-to-treat'' mercury waste, representing the wide range of high mercury wastes that could require treatment. A surrogate waste was designed for the study, which included an organic form of mercury, elemental mercury, and several mercury salts in an inorganic matrix. The surrogate waste was treated by each technology vendor. The treated waste was then evaluated for mercury leachability, using both the TCLP and an automated, constant-pH leaching protocol. Prior to leach testing, waste form particles were reduced in size to 9.5 mm or less. The waste forms were exposed to the leaching medium at a 20:1 liquid to solids ratio, and the pH was monitored and adjusted as necessary by computer-controlled addition of acid or base. Constant pH leaching was conducted at pH 2, 4, 6, 8, 10, and 12 for 14 days at each pH. This leaching procedure and the waste surrogate are described in detail in the Technical Background Documents, available in the docket for today's notice.

The second study evaluated the ability of three technologies to convert elemental mercury into a stable waste form. The study was designed to assist in evaluation of options for disposition of the inventory of mercury in the Defense Logistics Agency (DLA) stockpile. Bulk elemental mercury was treated by each technology vendor, and the treated waste residuals were evaluated for mercury leachability, using the same protocols and conditions as those used in the first study.

In both studies, the total concentration of mercury was measured in samples of the untreated starting material (either surrogate waste or bulk elemental mercury), in the treated waste form, and in leachates (both TCLP and constant pH leaching). In addition, samples of the untreated and treated material were characterized, including measurements of bulk density, moisture content, percent organic matter, cation exchange capacity and particle size distribution.

Each of the technologies evaluated in these studies relies on chemical reactions to minimize volatilization and solubility, rather than on recovery or separation technologies which generate a near mercury-free residual in addition to concentrated or purified mercury. These treatment processes are summarized below.

*G. What Were the Treatment Technologies Included in Our Treatability Studies?*

Four commercial treatment vendors participated in studies of the treatability of the surrogate waste. Because the actual commercial amalgamation processes are proprietary, we refer to the aforementioned treatment technologies as ''vendors'' to mask their identity. Each of the four vendors' processes utilized reagents to bind the mercury forms present as various sulfides. The following table presents a comparison of these technologies.

and Radioactive)'' *http://www.cee.vanderbilt/cee/research_projects.html.*

[10] See 55 FR 11798, March 29, 1990 for more information on the TCLP. The TCLP was originally developed to assess the plausible, worst case mismanagement scenario for evaluating industrial waste codisposed in a municipal solid waste landfill.

[11] 65 FR 37945, June 19, 2000.

[12] Characterization and Evaluation of Landfill Leachate (Draft), SAIC, September 2000, page 3–33.

TABLE 1.—TECHNOLOGIES USED FOR SURROGATE SLUDGE TREATMENT

| Comparison factor | Vendor | | | |
|---|---|---|---|---|
| | A | B | C | D |
| Process Overview | Sulfur amalgamation followed by thermoplastic encapsulation. | Formation of mercuric sulfide followed by micro- and macroencapsulation with proprietary binders and coating agents. | Sulfur amalgamation followed by addition of proprietary precipitation reagent. | Formation of mercuric sulfide followed by solidification with a proprietary cement-containing stabilization agent. |
| Reagents | Sulfur polymer, organic modifier, and proprietary additives. | Sulfide and proprietary binders and coating agents. | Sulfur and proprietary precipitation reagent. | Sulfide and proprietary cement-containing stabilization agent. |
| Waste Loading** (on dry basis). | 30 wt% | 72 wt% | 44.9–47 wt% | 25.4 wt%. |
| Final Form | Uniform solid mass | Uniform solid mass | Granular | Uniform solid mass. |

** Waste loading is the percentage of waste in the treated residue.

Three of the vendors also participated in the treatment of elemental mercury. Vendor D did not participate in this study. Vendors A and B used the same general process for elemental mercury. However, Vendor C used a process that differed from what was used in the surrogate sludge treatment. The following table presents a comparison of the technologies used in the treatment of elemental mercury.

TABLE 2.—TECHNOLOGIES USED FOR ELEMENTAL MERCURY TREATMENT

| Comparison factor | Vendor | | |
|---|---|---|---|
| | A | B | C |
| Process Overview | Sulfur amalgamation followed by thermoplastic encapsulation. | Formation of mercuric sulfide followed by micro- and macroencapsulation with proprietary binders and coating agents. | Amalgamation followed by addition of proprietary precipitation reagent. |
| Reagents | Sulfur polymer, organic modifier, and proprietary additives. | Sulfide and proprietary binders and coating agents. | Amalgamation agent and proprietary stabilization reagent. |
| Waste Loading** (on dry basis) | 33 wt% | 44 wt% | 20.1 wt%. |
| Final Form | Uniform solid mass | Uniform solid mass | Uniform solid mass. |

** Waste loading is the percentage of waste in the treated residue.

*H. What Were the Study Results?*

1. What Were the Study Results for the Surrogate Mercury Waste?

Presented in Table 3 and discussed below are the constant pH leaching results for the surrogate mercury waste. Additional testing results (raw data, tables, and graphs) are presented in the report ''Technical Background Document: Mercury Wastes—Evaluation of Treatment of Surrogate Mercury Wastes,'' available in the docket for today's notice.

TABLE 3.—SURROGATE MERCURY WASTE TREATMENT STUDY—CONSTANT LEACHING RESULTS (MG/L MERCURY)

| pH | Vendor A** | | Vendor B | Vendor C | | Vendor D | |
|---|---|---|---|---|---|---|---|
| | Pellets | Crushed | | Batch 1 | Batch 2 | Batch 1 | Batch 2 |
| 2* | 0.00251/ 0.00856 | 0.00682/ 0.00294 | 1.92/ 0.617 | 0.356/ 13.9 | 4.39/ 1.11 | 0.127/ 0.0775 | 0.257/ 0.130 |
| 4 | 0.00483 | 0.00555 | 0.137 | 0.0816 | 0.0340 | 2.63 | 4.35 |
| 6 | 0.00425 | 0.0140 | 0.102 | 0.0441 | 0.118 | 0.240 | 0.289 |
| 8* | 0.0127/ 0.00424 | 0.00180/ 0.00139 | 0.0873/ 0.0753 | 0.0391/ 0.0206 | 0.0106/ 0.00797 | 0.0603/ 0.0594 | 0.0724/ 0.0658 |
| 10 | 0.00734 | 0.00378 | 0.0577 | 0.0108 | 0.00337 | 2.17 | 0.0204 |
| 12* | 0.111/ 0.157 | 0.781/ 0.136 | 0.00885/ 0.00609 | 0.0353/ 0.0336 | 0.00239/ 0.00264 | 0.0156/ 0.0109 | 0.0250/ 0.0193 |

*Duplicate analyses were performed at pH levels 2, 8 and 12.
**Vendor A provided cast <9mm pellets and a larger material that was crushed to yield a <9 mm form for analysis.

Each vendor's treatment of surrogate waste achieved a significant reduction in mercury release in comparison to the untreated waste form. However, there are significant differences in the effectiveness of the various technologies. Vendor A's stabilized waste leached less than 0.025 mg/L [13]

[13] The current treatment standard for low-level mercury wastes that have not undergone roasting or

Continued

the range of pH 2 to 10. However, when exposed to very alkaline conditions of pH 12, the waste leached 0.111 to 0.157 mg/L in the pellet form and 0.136 to 0.781 mg/L in the crushed form. Vendor B's and Vendor C's stabilized wastes leached increasingly higher levels of mercury at the acidic conditions of pH 4 and lower. Vendor B's stabilized waste achieved 0.025 mg/L only at pH greater than 10. Vendor C's stabilized waste achieved 0.025 mg/L only at pH greater than 6 in one of the two batches. Vendor D's stabilized waste achieved 0.025 mg/L only at pH greater than 10.

2. What Were the Study Results for Elemental Mercury?

Presented in Table 4 and discussed below are the constant pH leaching results for the bulk elemental mercury study. Additional testing results (raw data, tables and graphs) are presented in the report ''Technical Background Document: Mercury Wastes—Evaluation of Treatment of Bulk Elemental Mercury,'' available in the docket for today's notice.

TABLE 4.—BULK ELEMENTAL MERCURY TREATMENT STUDY—CONSTANT LEACHING RESULTS (mg/L MERCURY)

| pH | Vendor A | | Vendor B | Vendor C |
|---|---|---|---|---|
| | Pellets | Crushed | | |
| 2* | 0.00542/ 0.0137 | 0.00658/ 0.0132 | 0.00105/ 0.00156 | 29.7/ 27.9 |
| 4 | 0.984 | 0.0621 | 0.00186 | 0.315 |
| 6 | 0.0835 | 16.7 | 0.00484 | 0.0323 |
| 8* | 44.9/ 24.3 | 30.8/ 53.5 | 0.011/ 0.00832 | 0.0494/ 0.368 |
| 9 | 13.7 | NA | NA | NA |
| 10 | 0.0742 | 0.0839 | 0.0118 | 0.139 |
| 11 | 0.00951/ 0.0177 | NA | NA | NA |
| 12* | 127/ 155 | 74.6/ 23.5 | 0.143/ 0.0672 | 0.0251/ 0.0249 |

*Duplicate analyses were performed at pH levels 2, 8 and 12.
NA—Not Analyzed.

Significant differences were observed between vendors in the treatment of elemental mercury. Vendor A's stabilized elemental mercury exhibited highly variable leaching as a function of pH. The variability observed prompted additional testing at pH 9 and pH 11 to verify and better characterize the significant swings in leachate mercury concentration. Leaching increased from less than 0.01 mg/L at pH 2 to over 24 mg/L at pH 8, reached a minimum of 0.009 mg/L at pH 11, then increased significantly as it approached pH 12 (to greater than 127 mg/L). Vendor B's stabilized elemental mercury shows a gradual increase in mercury leaching (from levels of 0.001mg/L to 0.15 mg/L) with the increasing pH of the leachate fluid. Vendor C's stabilized elemental mercury showed a pattern of decreased leaching with increasing pH, approaching the level of 0.025 mg/L only at a pH of 12. These results clearly show that there are significant differences in the effectiveness of the various treatment technologies. More importantly, the results show that leaching of mercury from the stabilized elemental mercury is pH dependent.

One treatment vendor in Europe, Bjästa Återvinning, has developed a mercury treatment process that results in the formation of mercuric selenide. This vendor was one of the treatment vendors that submitted proposals to the Department of Defense's Defense Logistic Agency (DLA), expressing interest in treating their stockpile of elemental mercury. Mercuric selenide is indicated by solubility calculations to be one of the more insoluble mercury salts. Even though our study was underway, when we learned of Bjästa Återvinning's proposal to treat the DLA stockpile, we were very interested in including their treated waste form in our study. Due to logistical difficulties, we were unable to obtain a treated waste form from this vendor. We were, however, able to obtain laboratory-grade mercuric selenide and conduct limited leachate studies at pH 7 and 10 which bracket the conditions found at many landfills.[14] We also assessed the effects of the addition of 500 ppm of chloride at pH 7 and 10. Unlike the other treated waste forms formed from treatment using a variety of reagents, the final waste form in this case was a known compound: Mercury selenide. Thus, there was readily available information on mercuric selenide solubility and the potential significant effects of chloride on that solubility. Geochemical solubility calculations for the mercuric selenide compound indicated that chloride ions would promote the solubility of mercury. Chloride ions tend to form strong soluble complexes with mercury, greatly increasing mercury's mobility. While mean groundwater chloride concentrations are approximately 160 mg/L, landfill leachates range from 59 to 6,560 mg/L in industrial landfills and 96 to 31,100 mg/L in hazardous waste landfills.[15] In our study, more than a three-fold increase in solubility was observed at both pH conditions with the addition of 500 ppm of chloride. At pH 7, the leachate concentration of mercury increased with the addition of chloride from 0.006 mg/L to 0.021 mg/L; at a pH of 10, the concentration of mercury increased from 0.028 mg/L to 0.11 mg/L. This indicates that major ions present in a given disposal environment may significantly impact the release of mercury from the treated waste form.

*I. What Were the Peer Review Results?*

The complete results of the Peer Review are provided in the docket to today's notice (Docket Number: RCRA–2002–0029), along with EPA's responses to the Peer Review comments.

retorting is 0.025 mg/L mercury, as measured by the TCLP. Treatment results are presented relative to this numerical benchmark for comparison purposes.

[14] Characterization and Evaluation of Landfill Leachate (Draft), SAIC, September 2000.

[15] Ibid.

1. What Questions Were Asked of the Peer Reviewers?

In order to provide a more complete analysis, and in accordance with EPA policy, we presented the two new studies for formal, independent peer review. The three peer reviewers selected for this process are national experts with significant technical expertise in hazardous waste leaching, have no prior association with these studies, and have no perceived or actual conflict with any impact of the study results. The members of the peer review panel were tasked with evaluating the adequacy of the experimental design, conduct, and conclusions of the two studies. The peer review panel also provided information on how the studies can be used to provide a framework to determine whether additional protective measures are required to prevent loss of mercury to the environment from the treatment and co-disposal of mercury-bearing wastes in landfills.

Additionally, the members of the peer review panel were asked if additional studies were warranted for other factors that impact solubility (*e.g.*, liquid/solid ratio, redox conditions, leachate composition) or affect ability to leach (such as use of macroencapsulation).

2. What Did the Peer Reviewers Say About the Study of the Treatment of Mercury Surrogate Wastes?

Two of the peer reviewers stated that the experimental design was appropriate for the study. One reviewer, however, said the design did not follow the Data Quality Objectives (DQOs) process, and argued that there is little relationship between the objectives and the design. We disagree with this reviewer, however. EPA has developed the DQOs process as the Agency's recommended planning process when environmental data are used to select between two opposing conditions, such as achieving or not achieving a numerical standard.[16] The DQOs process is used to develop qualitative and quantitative statements of the overall level of uncertainty that a decision-maker is willing to accept in results or decisions derived from environmental data, *i.e.*, Data Quality Objectives. The DQOs process entails a seven step systematic procedure for defining the criteria that a data collection design should satisfy, including when to collect samples, where to collect samples, the tolerable level of decision error for the study, and how many samples to collect, balancing risk and cost in an acceptable manner. When this process is not directly applicable (*i.e.*, the experimental objective is estimation, research, or any other objective that does not select between two distinct conditions), the Agency recommends the use of a systematic planning method for defining performance criteria.[17] For this research project, a systematic planning method was used. The project planning process used and the planning documents development were guided and overseen by EPA/ORD staff, and the Quality Assurance Project Plan (QAPP) was reviewed and approved by an EPA/ORD quality assurance expert. EPA believes that the project objectives and criteria were logical, given the intended end-use of the data, well-defined, and achievable.

The three reviewers all stated that the study was conducted properly. The three reviewers also stated that the studies met the objectives of: (1) Evaluating the ability of alternative treatment technologies to achieve a goal of 0.025 mg/L or less for the stabilization of mercury over a range of pH levels from 2 to 12; and, (2) to compare constant pH leaching protocol results to standard TCLP results. Two of the reviewers evaluated the ability of each treatment technology to meet the treatment goal, and concluded that the ability of each technology to meet the treatment goal in the constant pH leaching was pH-dependent.

The reviewers suggested additional studies to fill in specific data gaps. One reviewer noted that additional extractions up to at least pH 12.5 are needed to supplement the report. While we agree evaluation of a broader range could be helpful, we do not believe that additional studies are cost effective, because only a small fraction of hazardous waste landfills have been observed to have leachates above pH 12. In cases where disposal is proposed at or above pH 12.5, additional data for such conditions may be necessary to establish that treatment is effective for the expected disposal conditions. (See section II.F of today's notice for a discussion of pH levels in hazardous waste landfills.)

Another reviewer suggested that two or more actual wastes (rather than surrogates) containing over 260 mg/kg of mercury be subjected to stabilization and leaching by the TCLP as well as by the constant pH protocols. EPA agrees that using actual wastes, rather than surrogates, for treatability tests can be desirable. However, in many cases during the history of establishing treatment standards in the BDAT program, EPA has used surrogates in lieu of actual wastes, whenever representative ''hard-to treat'' wastes were not readily obtainable. Specifically, in the case of characteristic wastes, which can be extremely variable, using a surrogate allows us to evaluate a ''hard-to-treat'' waste. Using a ''hard-to-treat'' waste is useful if the ultimate treatment results will be used for other forms of that waste, which in the case of a characteristic waste like D009, is likely the case. In the studies discussed in this notice, where we were trying to determine how these forms of mercury would respond to treatment and determine how the treated waste forms would react to various pH environments, we are comfortable that using surrogate wastes did not diminish the value of the studies.

3. What Did the Peer Reviewers Say About the Elemental Mercury Study?

One of the peer reviewers agreed that the experimental design was appropriate for the study. Another reviewer said that a statement of acceptable errors should have been included (*e.g.*, a treatment technology must be effective on 90% of wastes with a 90% confidence). Without such a statement, he said, it is difficult to decide when a technology provides adequate treatment. EPA believes that a statement of acceptable errors as constructed by the reviewer was not appropriate. The objective of the study was to determine how these forms of mercury would respond to treatment and to determine how the treated waste forms would behave in various pH environments.

Another reviewer also said the experimental design was generally appropriate; however, it failed to confirm that concentrations of elemental mercury in the treated wastes were at the values reported by the vendors. He added that the recoveries (*i.e.*, measure of total mercury present) for treated elemental mercury wastes submitted by Vendors A and C are so low that they cast doubt on the results of the leach tests. We disagree. The analysis of mercury content of the treatment residuals and that of the leachates are two distinct analyses. The low recoveries for the treated elemental mercury wastes were a result of the difficulty in digesting the solid waste form to dissolve the mercury and make it available for analysis; as a result, waste loadings reported by the vendors could not be verified. Regarding the leach tests, all spike recovery measurements of the leachates achieved

[16] See EPA/600/R–96/055; Guidance for the Data Quality Objectives Process. *http://www.epa.gov/quality/qs-docs/g4-final.pdf*

[17] Ibid.

quantitative recoveries between 84% and 109%. Thus, there is no evidence of a problem with the analysis of mercury in the leachates. We believe this is because the mercury was in solution, and therefore, available for analysis.

All reviewers said that the study was conducted properly. Reviewers were then asked whether the stated objectives were adequately met. All reviewers agreed that the studies met the objectives of: (1) Evaluating the ability of alternative treatment technologies to achieve a goal of 0.025 mg/L or less for the stabilization of mercury over a range of pH levels from 2 to 12; and, (2) to compare constant pH leaching protocol results to standard TCLP results.

The reviewers all agreed that the results of the bulk elemental mercury study supported the conclusion that the presence of chloride ions in a given disposal environment may significantly impact the release from a treated waste form (mercury selenide).

4. What Additional Studies Are Recommended?

When asked if further studies were recommended for other factors that impact solubility, one reviewer recommended additional extractions up to at least pH 12.5. Again, as described above, we do not agree that additional studies are warranted for this pH range, as few landfills have been shown to maintain pH conditions in excess of pH 12. This reviewer also recommended that mercuric selenide waste should be evaluated over the range of pH 2 to 12.5, with varied chloride content in the leachate. We agree that if additional studies were planned, it would be useful to further investigate mercuric selenide or elemental mercury treated to a mercuric selenide composition across a wider range of pH values than the 2 pH conditions in our study. We also believe that varying chloride content and other potentially significant variables across the pH range for all waste forms would be a useful study, and would provide additional information on the potential effects of chloride content in landfill leachate.

5. Must Site-Specific Disposal Conditions Be Considered Along With Appropriate Treatment Technology as Decisions Are Made About Disposal of Mercury Wastes?

Peer reviewer opinions were mixed as to whether the studies supported the assertion that site-specific disposal conditions must be considered along with appropriate treatment technology as decisions are made about disposal of mercury wastes. One reviewer stated that the studies provide useful data on pH and chlorides, but do not provide adequate support for an absolute requirement. The reviewer also stated that, ''For any disposal of hazardous wastes, treated or untreated, it is scientifically preferable to use site-specific information.'' This reviewer maintained, however, that requiring the factoring of site-specific conditions into decision making is not always feasible. Another reviewer's comments countered that these research results do support the assertion, because they demonstrate that leaching fluids, which vary greatly in pH under different disposal conditions, can have an important impact on the amount of mercury leached from the treated wastes. The third reviewer suggested that if several actual wastes have been tested and are shown to be stable at all pH values, then selection of stabilization technology would not require any site-specific considerations. We do not agree with this reviewer's comment, because we believe that there are other factors (redox conditions, presence of chlorides, *etc.*) besides pH, which would likely impact the solubility of the treated waste form.

The complete results of the peer review are provided in Docket Number: RCRA–2002–0029, along with EPA's responses to the peer review comments.

*J. What Conclusions Do We Reach From the Treatability Studies?*

For wastes containing a wide range of mercury compounds, treatment can result in a residual of reduced solubility under certain pH conditions. Our treatability studies showed that the leaching of mercury out of the stabilized waste form varied with pH. We saw that some of the vendor's treatment of surrogate waste performed better in certain pH ranges. For example, Vendor A performed best (*i.e.*, achieved levels less than 0.025 mg/L) except in very alkaline conditions (*i.e.*, when the pH was greater than 10), whereas Vendor B's treatment performed best only under very alkaline conditions. Because the pH in a hazardous waste landfill can vary anywhere from near pH 2 to over pH 12, it appears that none of the treatment processes tested in the studies presented here are effective for the entire range of pH levels that could exist.

We find that the evaluated processes are effective to a degree for the treatment of elemental mercury wastes. Several have been demonstrated to achieve 0.025 mg/L or better under certain pH conditions. However, vapor pressure measurements [18] and observation of small droplets of mercury in some samples of the treated wastes lead us to believe that some treatment processes did not result in complete treatment of all the elemental mercury in every test sample. We also believe that the testing conditions cannot be considered to be worst-case, because the additional presence of sulfide and chloride ions in leachates can promote formation of soluble mercury complexes.

The physical properties of elemental mercury present significant challenges to its long-term management. Mercury cannot be destroyed. Elemental mercury is easily vaporized due to its vapor pressure at ambient temperatures. Also, elemental mercury is not significantly soluble [19] and therefore not readily detected by short term leachate tests, such as the TCLP. Disposal of large amounts of elemental mercury require control of both volatilization losses and any subsequent solubilization in leachates. Thus, for protective long-term management in a disposal environment, elemental mercury first has to be treated to convert it to a form with reduced volatility and solubility, and then measures must be put into place to prevent these treatments from being degraded once the properties of the treatment residual have been determined.

The physical properties of mercury also present treatment challenges. At ambient conditions, mercury is an extremely dense liquid with high surface tension. It does not appreciably dissolve into, or adhere to, wastes or environmental media, and because of its density and surface tension, it is extremely difficult to distribute homogeneously through the treatment reagents. Consequently, large volumes of treatment reagents are needed to contact and react with the elemental mercury, resulting in low waste loadings and large volume increases.

The current treatment standard for high mercury and elemental mercury wastes is recovery of mercury followed by land disposal of any treatment residuals that pass a leaching standard.[20] The results of the treatability studies outlined in this notice lead us to conclude that, at this time, we cannot

[18] C.H. Mattus, ''Measurements of Mercury Released from Solidified/Stabilized Waste Forms,'' Oak Ridge National Laboratory, ORNL/TM–2001/17, April 2001. Available at *http://osti.gov/bridge*.

[19] The solubility of elemental mercury is 0.056 mg/L at 25°C (MERCK Index).

[20] Residuals that do not pass the leaching standard would require additional treatment to meet the standard for the applicable subcategory of mercury waste.

establish a new national treatment standard allowing for disposal of high mercury and elemental mercury wastes. We continue to believe that the current recovery standard is the most appropriate standard for most high mercury waste. No technology demonstrated adequate stability across the plausible range of pH conditions found in landfills. We recognize that other factors, including leachate salinity, can have a significant effect on the solubility of treated mercury wastes. These other factors may be the reason that we have not been able to find a single technology that is effective in all or many situations.

*K. Why Are Treatability Variances an Option for High Mercury Wastes?*

While these circumstances do not allow us to modify or provide an alternative national treatment standard for high-mercury hazardous wastes to allow for disposal, we are deferring to our variance process for stakeholders who believe it would be appropriate to use an alternative treatment technology for their wastes and expected disposal conditions. Under 40 CFR 268.44(h), we allow facilities to apply for a site-specific variance for wastes generated under conditions specific to only one site. In such cases, the generator or treatment facility may apply to the Administrator, or EPA's delegated representative, for a site-specific variance from a treatment standard.

In cases where roasting and retorting for a certain waste is inappropriate, a generator can consider petitioning for a site-specific variance from that treatment standard. At a minimum, the generator would want to look for the treatment technology that would be most effective in the expected pH range for the chosen disposal site. In general, for a site-specific petition to be granted, it should demonstrate that treatment has occurred and that the treatment residues are stable in the intended disposal environment.

For example, a variance may be appropriate for a high mercury subcategory waste that also is radioactive (*i.e.*, a mixed waste). The current regulations require high mercury-organic subcategory mixed wastes be treated by retorting (RMERC) or incineration (IMERC) and high mercury-inorganic subcategory mixed wastes be treated by RMERC. At the time of promulgation, the assumed approach for compliance with these regulations was separation of the mercury from the wastes and recycling of the pure elemental mercury back into commerce. However, this assumed compliance scenario is invalid for mixed wastes containing mercury because there is no use for recovered mercury that is radioactively contaminated.

To manage this type of waste, it would appear reasonable to use, on a site-specific basis, the ''inappropriate'' variance approach (§ 268.44(h)(2)(i)). A petitioner using this approach would necessarily have to describe the specifics and likely effectiveness of the stabilization treatment that will be used. As demonstrated by the studies described in today's notice, the stability of treated waste forms can be highly dependent on pH conditions. In determining whether the proposed technology is protective, EPA would expect the petitioner to demonstrate the technology's effectiveness under the planned disposal conditions.

LDR variance petitions should be submitted in accordance with the procedures in 40 CFR 260.20. Petitions should include, among other things, a description of the process that generates the waste, the rationale for the variance request, and data on the proposed waste treatment process.[21] Site-specific circumstances often dictate the types and amount of information that we will need to evaluate a petition, so stakeholders who are considering petitioning for a treatment variance should engage EPA early in the process to ensure all of the necessary information is, or will be, available.

*L. What Other Implications Arise From the Treatability Studies?*

Because these treated waste forms may be chemically altered by environmental conditions, macroencapsulation prior to land disposal could be used to provide a barrier against leachate intrusion and attack on the treated mercury waste. Macroencapsulation would also provide a barrier to reduce emissions of elemental mercury vapors. In order to meet the performance requirements of 40 CFR 268.45, Table 1, the macroencapsulation treatment must completely encapsulate the waste and be resistant to degradation by the waste, its contaminants, and materials into which it may come into contact after placement. We promulgated such a requirement for wastewater treatment sludge from the production of vinyl chloride monomer using mercuric chloride catalyst in an acetylene-based process; hazardous waste K175 (65 FR 67068, November 8, 2000). For K175 wastes, we estimated that macroencapsulation and placement in a hazardous waste landfill utilizing high density polypropylene vaults adds an additional $150 to $200 per ton of waste disposed to the treatment costs.[22] For a review of the current state of encapsulation technologies and materials being used to immobilize elemental mercury, mercury-contaminated wastes, soils, or sludges, see the technical report ''Advances in Encapsulation Technologies for the Management of Mercury-Contaminated Hazardous Wastes,'' Battelle, August 30, 2002, available in the docket for this notice.

Having concluded that treatment residues of elemental mercury are potentially subject to attack by leachates and that the technologies may not have fully reacted with the mercury, we are evaluating whether to propose modifying the treatment standards for the radioactive elemental mercury waste subcategories of U151 and D009. The current treatment standard for these wastes is amalgamation (AMLGM). We could propose, for example, to replace this standard with the more restrictive requirement of amalgamation followed by macroencapsulation. We could also require post-treatment testing to ensure effective treatment. If we decide to amend the treatment standards, we would publish a proposed rule for public comment.

Dated: January 22, 2003.

**Robert Springer,**

*Director, Office of Solid Waste.*

[FR Doc. 03–2035 Filed 1–28–03; 8:45 am]

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[21] Note that when submitting data, petitioners should also include evidence that appropriate quality assurance/quality control procedures were followed in generating the data. For guidance, see Final Best Demonstrated Available Technology (BDAT) Background Document for Quality Assurance/Quality Control Procedures and Methodology; USEPA, October 23, 1991.

[22] Economics Background Document—USEPA Final Rule Listing Wastewater Sludges Generated By Chlorinated Aliphatic Chemical Manufacturing Facilities, as RCRA Hazardous Waste Codes K174 and K175: Industry Profile and Estimation of Regulator Costs; page 74. *http://www.epa.gov/epaoswer/hazwaste/id/chlorali/ca_ebd.pdf*

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7444–6]**

## Connecticut Marine Sanitation Device Standard; Receipt of Petition

Notice is hereby given that a petition has been received from the State of Connecticut requesting a determination of the Regional Administrator, U.S. Environmental Protection Agency, pursuant to section 312(f)(3) of Pub. L. 92–500 as amended by Pub. L. 95–217

and Pub. L. 100–4, that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the area encompassing the Connecticut portions of the Pawcatuck River, Little Narragansett Bay, portions of Fisher Island Sound and all of Stonington Harbor in the town of Stonington, State of Connecticut, to qualify as a ''No Discharge Area'' (NDA). The areas covered under this petition extends from Wamphassuc Point (41° 19′ 40.63″ N by 71° 55′ 15.75″ W) due south past Noyes Shoal to the boundary between Connecticut and New York (41° 18′ 28.99″ N by 71° 55′ 15.75″ W), easterly following the boundary between Connecticut and New York to the intersection of the Connecticut, New York and Rhode Island State lines (41° 18′ 16.69″ N by 71° 54′ 27.23″ W) and following the boundary between Connecticut and Rhode Island to U.S. Route 1 over the Pawcatuck River and including all Connecticut waters seaward of U.S. Route 1.

The State of Connecticut has certified that there will be three pumpout facilities located within the proposed area to service vessels in the Stonington Harbor and Little Narragansett Bay area. The first is a shoreside facility located at the Dodson Boatyard. This pumpout facility is connected directly to the Stonington Borough Sewer system as permitted by the Stonington Water Pollution Control Authority. It has a depth of 6 feet at mean low water. The Dodson Boatyard facility is open daily from April, May and October, 8 a.m. to 5 p.m., and June through September 8 a.m. to 10 p.m. The facility staff monitors VHF CH 78 and may also be contacted at (860) 535–1507. The second shoreside facility is located at Norwest Marina. The pumpout unit is located 25 feet landward of the water and has a hose that extends to the adjacent floating service dock. The depth at the service dock is 6 feet at mean low water. This pumpout facility discharges directly into the Pawcatuck Sewer system. This facility is opened daily from April to November, 8 a.m. to 4:30 p.m. The facility staff monitors VHF Channel 68 and may also be contacted at (860) 535–1507. The third is a pumpout boat berthed at the Westerly Yacht Club that serves the Pawcatuck River, Watch Hill Harbor, Fishers Island Sound, Stonington Harbor and Little Narragansett Bay in Connecticut and Rhode Island. The boat has a holding capacity of 300 gallons. The pumpout boat is available during the boating season (April—October), Thursday and Friday from 10 a.m. to 4 p.m., and Saturday from 8 a.m. to 6 p.m. The schedule is expanded during July and August to provide service 7 days a week. The pumpout boat staff monitors VHF Channel 9 and may also be contacted by calling (401) 348–2538. For all three facilities it has been suggested to call ahead for service.

There are 13 marinas within the proposed No Discharge Area and the majority of marinas provide public restrooms for boaters and their clientele. During races the Wadawanuck Club also operates a floating public restroom at the month of the Stonington Harbor, which consists of a floating dock with portable toilets that are serviced and emptied onshore by the portable toilet vendor. In addition there are seven additional pumpout facilities in the surrounding area of the proposed No Discharge Area.

The State of Connecticut states that the total vessel population is 1600 vessels, 1548 are identified as recreational, and 52 are identified as commercial. The transient vessel population is estimated to be 300, which is included in the total figure. It is estimated that over 70% of the total vessel population is under 26 feet, and therefore do not have any type of Marine Sanitation Device (MSD).

The resources of the Stonington Harbor, Little Narragansett Bay, Pawcatuck River, and Fishers Island Sound are recreational and commercial. There are four public beaches, two boat ramps, the Barn Island Wildlife Management Area, and Sandy Point (owned by Avalonia Land Trust) are located within the proposed No Discharge Area. The area is used by both recreational and commercial shell fishermen for the harvest of hard clams, small populations of bay scallops, soft shell clams and blue mussels. In addition fishing is commonplace and the species found in the area are smelt, small cod, flounder, scup, menhaden, and white perch. The proposed area has a variety of rich natural habitats, and supports a wide diversity of species.

Comments and reviews regarding this request for action may be filed on or before March 17, 2003. Such communications, or requests for information or a copy of the applicant's petition, should be addressed to Ann Rodney, U.S. Environmental Protection Agency—New England Region, 1 Congress Street, Suite 1100, CWQ, Boston, MA 02114–2023. Telephone: (617) 918–1538.

Dated: January 21, 2003.

**Robert Varney,**

*Regional Administrator, Region 1.*

[FR Doc. 03–1867 Filed 1–28–03; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7445–3]**

## Clean Water Act Section 303(d): Notice Final Agency Action Withdrawing of 1 Total Maximum Daily Load (TMDL)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of withdrawal of 1 TMDL.

*Subject:* This notice announces EPA final action withdrawing of the TMDL for atrazine in the water column that EPA established pursuant to the Clean Water Act (''CWA'') section 303(d), for Louisiana subsegment 080903, Big Creek from the confluence with the Boeuf River to the headwaters (including Big Colewa Bayou). EPA is withdrawing this TMDL because the draft criteria value for atrazine used in screening the waterbody to determine whether it meets Louisiana water quality standards and for calculation of allowable load allocations was draft only and had not been through the complete public notice process and had not been finalized. In place of the draft atrazine criteria number of 12 µg/l, EPA is establishing a screening value of 36 µg/l as calculated by one possible procedure found in Louisiana water quality standards (LAC 33:IX,1113.C.6). Based on this new screening value of 36 µg/l, Big Creek is not, and was not at the time EPA established this TMDL, impaired by atrazine and should not be listed on Louisiana's current CWA section 303(d) list for atrazine. Thus, EPA is withdrawing this TMDL.

*Background:* EPA established this atrazine TMDL under CWA section 303(d) on February 28, 2001, to satisfy a consent decree obligation in the lawsuit styled *Sierra Club* v. *Clifford,* Civ. No. 96–0527 (E.D. La.). The Waterbody subsegment 080903, Big Creek from the confluence with the Boeuf River to the headwaters (including Big Colewa Bayou) was listed on the Louisiana section 303(d) list of impaired waters as impaired due to pesticides, under the ''no toxics in toxic amounts'' narrative Louisiana water quality standard (LAC 33:IX,1113.B.5).

Since the State of Louisiana does not have a numeric water quality criterion for the protection of aquatic life for atrazine, EPA derived a numeric

interpretation of the State of Louisiana's narrative water quality criterion for toxic substances using EPA's Draft Criteria Document for atrazine (Ambient Aquatic Life Water Quality Criteria for Atrazine—Draft, EPA 822-D–010002, August 2001) and used that interpretation as the basis for establishing the Big Creek TMDL for atrazine.

During the comment period for this TMDL, commenters submitted information stating that under Louisiana water quality standard provisions (LAC 33:IX,1113.C.6) it was not appropriate to use a draft criterion document value and that the Louisiana procedures should be used. EPA has evaluated these comments and has concluded that using the calculation procedure found in the Louisiana water quality standards provisions is more appropriate for establishing a screening value for atrazine in this particular case. Based on its modification of the screening value used for interpretation of Louisiana's narrative water quality criterion of ''no toxics in toxic amounts,'' EPA concluded that the applicable water quality standard for the Big Creek is not, and was not at the time EPA established this TMDL, exceeded for atrazine in the water column.

Therefore, in the exercise of its discretion, EPA is withdrawing the Big Creek TMDL established in February 2001 for atrazine. Because Big Creek is not listed for atrazine on the Louisiana 303(d) list, LDEQ has no present obligation under the CWA to submit to EPA a TMDL for atrazine for Big Creek, nor does the CWA require EPA to maintain this TMDL. Three other TMDLs for Big Creek, DDT, carbofuran, and methyl parathion are not affected by this determination.

**FOR FURTHER INFORMATION CONTACT:** Ellen Caldwell at (214) 665–7513.

Dated: December 20, 2002.

**Jayne Fontenot,**

*Acting Director, Water Quality Protection Division, Region 6.*

[FR Doc. 03–2038 Filed 1–28–03; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Privacy Act; System of Records

**AGENCY:** Federal Communications Commission (FCC or Commission).

**ACTION:** Notice; correction.

**SUMMARY:** The Federal Communications Commission published a document in the **Federal Register** of January 15, 2003, concerning a Privacy Act System of Records Notice; altered Privacy Act system of records; revision of one routine use; addition of one new routine use; and cancellation of one system of records. The document contained an incorrect System Manager(s) and Address.

**FOR FURTHER INFORMATION CONTACT:** Les Smith, Federal Communications Commission, at (202) 418–0217 or via the Internet at *lesmith@fcc.gov.*

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** issue of January 15, 2003 in FR Doc. 03–884, a notice was published which provided an incorrect System Manager(s) and Address. This correction changes that System Manager(s) and Address.

### Correction

On page 2052, in the second column, lines 19–24, should be corrected to read:

**SYSTEM MANAGER(S) AND ADDRESS:**

Security Office, Associate Managing Director—Administrative Operations (AMD–AO), Security Operations Center, Federal Communications Commission (FCC), 445 12th Street, S.W., Room 1–B458, Washington, DC 20554.

Dated: January 16, 2003.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 03–2023 Filed 1–28–03; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL MARITIME COMMISSION

### Notice of Agreement(s) Filed

The Commission hereby gives notice of the filing of the following agreement(s) under the Shipping Act of 1984. Interested parties can review or obtain copies of agreements at the Washington, DC offices of the Commission, 800 North Capitol Street, NW., Room 940. Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days of the date this notice appears in the **Federal Register**.

*Agreement No.:* 011075–062.

*Title:* Central America Discussion Agreement.

*Parties:* King Ocean Services Limited, Crowley Liner Services, Inc., Seaboard Marine, Ltd., A. P. Moller-Maersk Sealand, APL Co. PTE Ltd., Dole Ocean Cargo Express.

*Synopsis:* The modification adds Dole Ocean Cargo Express as a party to the agreement.

*Agreement No.:* 011823–001.

*Title:* Contship/P&O Nedlloyd Vessel Sharing Agreement.

*Parties:* Contship Containerlines, P&O Nedlloyd Limited, P&O Nedlloyd BV.

*Synopsis:* The proposed modification clarifies that the agreement will remain effective until at least December 31, 2009.

By Order of the Federal Maritime Commission.

Dated: January 24, 2003.

**Bryant L. VanBrakle,**

*Secretary.*

[FR Doc. 03–2051 Filed 1–28–03; 8:45 am]

**BILLING CODE 6730–01–P**

## FEDERAL MARITIME COMMISSION

### Ocean Transportation Intermediary License; Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. app. 1718 and 46 CFR part 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

**Non-Vessel Operating Common Carrier Ocean Transportation Intermediary Applicants**

Sun Ocean Logistics Corp., 520 S. Mateo Street, Los Angeles, CA 90013, Officers: Simon P. Um, Chief Executive Officer, (Qualifying Individual), Wan Kyu Choi, Secretary.

Air-City (China) Co., Ltd., Floor C7, Wanshun Bldg., No. 89 Huangpu South Rd., Hexi Dist., Tianuin 300201, P.R. of China, Officer: Ronnie Chum, President (Qualifying Individual).

R.B.I. Shipping and Trading, Inc., 25 Milwood Street, Dorchester, MA 02124, Officer: Ralph Beckles, President (Qualifying Individual).

**Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants**

NISCO Pacific, Inc., 500 West Victoria Street, Compton, CA 90220, Officers: Koichi Nakanishi, President (Qualifying Individual), Misako Nakanishi, Director.

AAA Intercontinental Cargo, 6100 Richmond Street, Suite A113,

Houston, TX 77057, Meheddin Meirkhan, Sole Proprietor.

Global Fritz Logistics Service Co. Ltd., 970 West 190th Street, Suite 200, Torrance, CA 90502, Officer: Tayung Soong, President (Qualifying Individual).

Decheng Shipping Group, Ltd., 2248 East 49th Street, Vernon, CA 90058, Officers: Gordon Lee, Vice President (Qualifying Individual), Raymond C. Camero, Director.

EZ Forwarding LLC, 3901 North 29th Avenue, Hollywood, FL 33020, Officers: Sandra Villa, Vice President (Qualifying Individual), Yves Surprenant, President.

Dated: January 24, 2003.

**Bryant L. VanBrakle,**

*Secretary.*

[FR Doc. 03–2052 Filed 1–28–03; 8:45 am]

**BILLING CODE 6730–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60 Day–03–38]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer on (404) 498–1210.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Send comments to Anne O'Connor, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D24, Atlanta, GA 30333. Written comments should be received within 60 days of this notice.

*Proposed Project:* Reporting Requirements for Assessment of the Well-Integrated Screening and Evaluation for Women Across the Nation (WISEWOMAN)—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

**Background**

The WISEWOMAN program, which focuses on reducing cardiovascular disease risk factors among at-risk women, was in response to the Secretary of Health and Human Services' Continuous Improvement Initiative, asking for the development of programs that examine ways in which service delivery can be improved for select populations. Title XV of the Public Health Service Act, Section 1509 originally authorized the secretary of the Department of Health and Human Services to establish up to three demonstration projects. Through appropriations language, the CDC WISEWOMAN program is now allowed to fund up to 15 projects. Currently, WISEWOMAN funds 12 demonstration projects, which at full implementation are expected to screen approximately 30,000 women annually for cardiovascular disease risk factors. The program targets women already participating in the National Breast and Cervical Cancer Early Detection Program (NBCCEDP) and provides screening for select cardiovascular disease risk factors (including elevated cholesterol, hypertension, and abnormal blood glucose levels), lifestyle interventions, and medical referrals as required in an effort to improve cardiovascular health among participants.

The CDC proposes to collect and analyze baseline and follow-up data (12 months post enrollment) for all participants. These data, called the minimum data elements (MDE's), includes demographic and risk factor information about women served in each program and information concerning the number and type of intervention sessions attended. The MDE data allows for an assessment of how effective WISEWOMAN is at reducing the burden of cardiovascular disease risk factors among participants. The CDC also proposes to collect programmatic data for all WISEWOMAN programs. Programmatic data includes information related to grantee management, public education and outreach, professional education, service delivery, cost, and an assessment of how well each program is meeting their stated objectives.

All required data will be submitted electronically to RTI International, the contractor hired by CDC to conduct the WISEWOMAN evaluation. MDE and cost data will be submitted to RTI twice a year, October 15 and April 15. October 15 reporting will cover all MDE's and costs for activities that took place between January 1 and June 30, and the April 15 submission will cover MDE's and costs for activities occurring between July 1 and December 31. Quarterly reports containing programmatic data will be due to RTI on January 31 (reflecting October 1–December 31 program activities), April 30 (reflecting January 1–March 31), July 31 (reflecting April 1–June 30), and October 31 (reflecting July 1–September 30). All reports will be due in a pre-determined format provided by CDC and the contractor. The contractor will provide training as requested to WISEWOMAN personnel at each location concerning data collection and submission.

All information collected as part of the WISEWOMAN evaluation will be used to assess the costs, effectiveness, and cost-effectiveness of WISEWOMAN in reducing cardiovascular disease risk factors, for obtaining more complete health data among vulnerable populations, promoting public education of disease incidence and risk-factors, improving the availability of screening and diagnostic services for under-served women, ensuring the quality of services provided to women, and developing strategies for improved interventions. Because certain demographic data are already collected as part of NBCCEDP, the additional burden on grantees will be modest. Once the infrastructure is established to capture the additional WISEWOMAN data, the response burden is expected to be reduced even further. There are no costs to respondents.

| Form | Number of respondents | Number of responses per respondent | Average burden per response (in hours) | Total burden (in hours) |
|---|---|---|---|---|
| Screening MDE Report | 12 | 2 | 16 | 384 |
| Intervention MDE Report | 12 | 2 | 8 | 192 |
| Cost Report | 12 | 2 | 16 | 384 |
| Quarterly Report | 12 | 4 | 16 | 768 |
| Total | ..... | ..... | ..... | 1728 |

Dated: January 21, 2003.

**Thomas Bartenfeld,**

*Acting Associate Director for Policy, Planning and Evaluation Centers for Disease Control and Prevention.*

[FR Doc. 03–1974 Filed 1–28–03; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60 Day–03–39]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer on (404) 498–1210.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Send comments to Anne O'Connor, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D24, Atlanta, GA 30333. Written comments should be received within 60 days of this notice.

*Proposed Project:* The National Tobacco Control Program (NTCP) Chronicle Progress Reporting System—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

**Background**

Implementation of National Tobacco Control Program (NTCP) Chronicle: Progress Reporting System National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC). Tobacco use is the single most preventable cause of death and disease in the United States. Most people begin using tobacco in early adolescence. Tobacco use causes more than 430,000 deaths annually in the nation and costs approximately $50–70 billion in medical expenses alone. The Centers for Disease Control and Prevention's (CDC) Office on Smoking and Health (OSH) provides funding to health departments of states and territories to develop, implement and evaluate comprehensive Tobacco Control Programs (TCPs) based on CDC guidelines provided in Best Practices for Comprehensive Tobacco Control Programs-August 1999 (Atlanta, GA, HHS). TCPs are population-based, public health programs that design, implement and evaluate public health prevention and control strategies to reduce disease, disability and death related to tobacco use and to reach those communities most impacted by the burden of tobacco use (e.g., racial/ethnic populations, rural dwellers, and the economically disadvantaged). Support for these programs is a cornerstone of the OSH's strategy for reducing the burden of tobacco use throughout the nation. CDC, Office on Smoking and Health is authorized under sections 301 and 317(k) of the Public Health Service Act [42 U.S.C. section 241 and 247b(k)].

As outlined in 45 CFR Subtitle A, section 92.40, funding recipients are required to submit twice yearly progress reports to CDC. These reports are used by both the Procurement and Grants Office (PGO) to monitor program compliance, and by OSH managers and Project Officers (POs) to identify training and technical assistance needs; monitor compliance with cooperative agreement requirements; evaluate the progress made in achieving national and program-specific goals; and respond to inquiries regarding program activities and effectiveness. Funding recipients currently have a wide latitude in the content of the information they report with some recipients providing extensive and detailed programmatic information and others providing minimal detail regarding TCP operations. Historically, information has been collected and transmitted via hard-copy paper document. The manual reporting system significantly impacts the OSH's staff ability to accomplish its responsibilities resulting from providing TCP funds, particularly with respect to compiling, summarizing and reporting aggregate TCP program information.

In responding to the federal government's E-Government initiative, the proposed change in progress report collection methodology is driven by OSH's development of an electronic progress reporting system to collect state TCP information. The proposed reporting system will utilize a more formal, systematic method of collecting information that has historically been requested from individual TCPs and will standardize the content of this information. This will facilitate OSH staff's ability to fulfill its obligations under the cooperative agreements; to monitor, evaluate and compare individual programs; and to assess and report aggregate information regarding the overall effectiveness of OSH's National Tobacco Control Program (NTCP). It will also support OSH's broader mission of reducing the burden of tobacco use by enabling OSH staff to more effectively identify the strengths and weaknesses of individual TCPs; to identify the strength of national movement toward reaching the goals specified in Healthy People 2010; and to disseminate information related to successful public health interventions implemented by these organizations to prevent and control the burden of tobacco use. The OSH anticipates that the state burden of providing hard-copy reports will be reduced with the

introduction of the web-based progress reporting system. It is assumed that states will experience a learning curve in using this application, and the reported burden will be reduced once they have familiarized themselves with this system. The only cost to respondents is the time required to complete the web-based progress reports.

| Respondents | Number of respondents | Number of responses per respondent | Average burden per respondent (in hours) | Total burden (in hours) |
|---|---|---|---|---|
| States and DC | 51 | 2 | 6 | 612 |
| Totals | | | | 612 |

Dated: January 21, 2003.

**Thomas Bartenfeld,**

*Acting Associate Director for Policy, Planning and Evaluation, Centers for Disease Control and Prevention.*

[FR Doc. 03–1975 Filed 1–28–03; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Healthcare Infection Control Practices Advisory Committee (HICPAC): Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting.

*Name:* Healthcare Infection Control Practices Advisory Committee.

*Time and Date:* 10 a.m.–6 p.m., February 3, 2003.

*Place:* Crowne Plaza Atlanta Airport, 1325 Virginia Avenue, Atlanta, GA 30344.

*Status:* Open to the public, limited only by the space available.

*Purpose:* The Committee is charged with providing advice and guidance to the Secretary, the Assistant Secretary for Health, the Director, CDC, and the Director, National Center for Infectious Diseases (NCID), regarding (1) the practice of hospital infection control; (2) strategies for surveillance, prevention, and control of infections (*e.g.*, nosocomial infections), antimicrobial resistance, and related events in settings where healthcare is provided; and (3) periodic updating of guidelines and other policy statements regarding prevention of healthcare associated infections and healthcare-related conditions.

*Matters To Be Discussed:* Agenda items will include infection control precautions for patients with vaccinia-related adverse events and respiratory protection options for healthcare workers potentially exposed to patients with pneumonic plague and smallpox.

Agenda items are subject to change as priorities dictate.

*Contact Person for More Information:* Michele L. Pearson, M.D., Executive Secretary, HICPAC, Division of Healthcare Quality Promotion, NCID, CDC, 1600 Clifton Road, NE, M/S A–07, Atlanta, Georgia 30333, telephone 404–498–1182.

Due to programmatic issues that had to be resolved, the Federal notice is being published less than fifteen days before the date of meeting.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: January 23, 2003.

**Joseph E. Salter,**

*Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 03–1999 Filed 1–28–03; 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:* 45 CFR 1303—Appeal Procedures for Head Start Grantees and Current or Prospective Delegate Agencies.

*OMB No.:* 0980–00242.

*Description:* Section 646 of the Head Start Act requires the Secretary to prescribe a timeline for conducting administrative hearings when adverse actions are taken or proposed against Head Start or Early Head Start grantees or delegate agencies. The Head Start Bureau is proposing to renew this rule, which implements these requirements that prescribe when a grantee must submit information and what that information should include to support a contention that adverse action should not be taken.

*Respondents:* Head Start and Early Head Start grantees and delegate agencies against which the Head Start Bureau has taken or proposes to take adverse actions.

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| Report | 10 | 1 | 26 | 260 |
| Estimated Total Annual Burden Hours: | | | | 260 |

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 21, 2003.

**Bob Sargis,**

*Reports Clearance Officer.*

[FR Doc. 03–1967 Filed 1–28–03; 8:45 am]

**BILLING CODE 4184–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Proposed Information Collection Activity; Comment Request

### Proposed Projects

*Title:* Head Start Program Grant Application and Budget Instrument.

*OMB No.:* 0970–0207.

*Description:* The Head Start program is proposing to renew the Head Start Program Grant Application and Budget Instrument, which standardizes the grant application information that is requested from all Head Start grantees applying for continuation grants. The application and budget forms are available on a data diskette and can be transmitted electronically to Regional and Central Offices. The Administration for Children, Youth and Families believes that, in promulgating this application document, the process of applying for Head Start program grants is made more efficient for applicants.

*Respondents:* Head Start Program grants recipients.

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | total burden hours |
|---|---|---|---|---|
| Head Start Grant Application and Budget Instrument | 1600 | 1 | 33 | 52,800 |
| Estimated Total Annual Burden Hours: | | | | 52,800 |

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 21, 2003.

**Bob Sargis,**

*Reports Clearance Officer.*

[FR Doc. 03–1968 Filed 1–28–03; 8:45 am]

**BILLING CODE 4184–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Proposed Information Collection Activity; Comment Request

### Proposed Projects

*Title:* Examining Services and Best Practices of Intermediary Organizations.

*OMB No.:* New Collection.

*Description:* Currently, DHHS/ACF is conducting the project ''Examining Services and Best Practices of Intermediary Organizations and the Faith- and Community-Based Organizations They Serve.'' The purpose of the project will be to examine (1) The role of intermediary organizations in assisting faith- and community-based organizations in building their capacity to serve needy individuals and families; (2) innovative and best practices among intermediary organizations; (3) promising practices among faith- and community-based organizations; (4) methods to evaluate the services of both types of organizations; and (5) methods to assess and benchmark performance among faith- and community-based groups. Priority will be given to programs that focus on the following areas: homelessness, hunger, at-risk children, transition from welfare to work, and intensive rehabilitation.

*Respondents:*

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| Intermediary Staff Interview Guide | 40 | 2 | 1 | 80 |
| Frontline Staff Interview Guide | 50 | 2 | 1 | 100 |
| Estimated Total Annual Burden Hours: | | | | 180 |

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 Administration, 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 21, 2003.

**Robert Sargis,**

*Reports Clearance Officer.*

[FR Doc. 03–1970 Filed 1–28–03; 8:45 am]

**BILLING CODE 4184–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Submission for OMB Review; Comment Request

*Title:* Child Care Case-Level Report.

*OMB No.:* 0970–0167.

*Description:* Section 658K of the Child Care and Development Block Grant Act of 1990 (Pub. L. 101–508, 42 U.S.C. 9858) requires that States and Territories submit monthly case-level data on the children and families receiving direct services under the Child Care and Development Fund. The implementing regulations for the statutorily required reporting are at 45 CFR 98.70. Case-level reports, submitted quarterly or monthly (at grantee option) include monthly sample or full population case-level data. The data elements to be included in these reports are represented in the ACF–801. Disaggregate data is used to determine program and participant characteristics, as well as costs and levels of child care services provided. This provides ACF with the information necessary to make reports to Congress, address national child care needs, offer technical assistance to grantees, meet performance measures, and conduct research. Consistent with the statute and regulations, ACF requests extension of the ACF–801.

*Respondents:* States, the District of Columbia, and Territories including Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Northern Marianna Islands.

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| ACF–801 | 56 | 4 | 20 | 4,480 |
| Estimated Total Annual Burden Hours: | | | | 4,480 |

*Additional Information:* Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer.

*OMB Comment:* OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, 725 17th Street, NW., Washington, DC 20503, Attn: Desk Officer for ACF.

Dated: January 21, 2003.

**Robert Sargis,**

*Reports Clearance Officer.*

[FR Doc. 03–1969 Filed 1–28–03; 8:45 am]

**BILLING CODE 4184–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Submission for OMB Review; Comment Request

*Title:* Access and Visitation Grants to States' Program Survey.

*OMB No.:* 0970–0204.

*Description:* States are required, on an annual basis, to provide OCSE with program data on projects that have been funded through the Grants to States for Access and Visitation Program. These program reporting requirements

include, but are not limited to, the collection of data on the number of participants served, referral sources, kinds of services delivered, project goals, and other relevant data.

*Respondents:* State Access and Visitation Program Coordinators and administrators of state and/or local service providers.

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| Grants to States: Access and Visitation Program Survey (1 additional year.—to collect FY 2001 program data in FY 2003). | 324 | 1 | 15 | 4,860 |
| State Child Access Program Survey (FY 2003, 2004, 2005). | 324 | 1 | 15 | 4,860 |
| Estimated Total Annual Burden Hours:. | | | | Average 6,480 over 3 yrs. (9,720 in FY 2003; 4,860 in FY 2004; 4,860 in FY 2005. |

*Additional Information:* Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer.

*OMB Comment:* OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, 725 17th Street, NW., Washington, DC 20503, Attn: Desk Officer for ACF.

Dated: January 21, 2003.

**Robert Sargis,**

*Reports Clearance Officer.*

[FR Doc. 03–1971 Filed 1–28–03; 8:45 am]

**BILLING CODE 4184–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Government-Owned Inventions; Availability for Licensing

**AGENCY:** National Institutes of Health, Public Health Service, HHS.

**ACTION:** Notice.

**SUMMARY:** The inventions listed below are owned by agencies of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

**ADDRESSES:** Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7057; fax: 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

**Minimally Immunogenic Variant of Humanized COL–1 Antibody Against Carcinoembryonic Antigen (CEA)**

Syed V.S. Kashmiri (NCI), Jeffrey Schlom (NCI), Eduardo A. Padlan (NIDDK)

DHHS Reference No. E–239–2002/0–US–01 filed 05 Sep 2002

Licensing Contact: Jonathan Dixon; 301/435–5559; *dixonj@od.nih.gov*

Monoclonal antibodies (mAbs) show promise for the diagnosis and treatment of human cancers. COL–1 has a high affinity for carcinoembryonic antigen (CEA), and it reacts specifically to CEA. The present invention discloses humanized COL–1 (HuCOL–1) mAbs that are potentially minimally immunogenic and retain CEA binding affinity. Humanization of the antibody by ''abbreviated'' CDR grafting has reduced the risk of human anti-murine antibody response associated with the clinical use of murine mAbs for diagnosis and treatment of CEA expressing tumors. This invention also provides further methods of detecting and treating CEA expressing tumors.

**Novel Broadly Cross-Reactive HIV Neutralizing Human Monoclonal Antibodies Selected From Fab Phage Display Libraries Using a Novel Strategy Based on Alternative Antigen Panning**

Dimiter S. Dimitrov (NCI) and Mei-Yun Zhang (SAIC)

DHHS Reference No. E–144–2002/0–US–01 filed 05 May 2002 and

**Novel Broadly Cross-Reactive HIV–1 Neutralizing Human Single-Chain Antibodies Derived From X5 by DNA Shuffling and Alternating Antigen Panning**

Dimiter S. Dimitrov (NCI) and Mei-Yun Zhang (SAIC)

DHHS Reference No. E–144–2002/1–US–01 filed 05 May 2002

Licensing Contact: Sally Hu; 301/435–5606; *hus@od.nih.gov*

This invention (E–144–2002/0–US–01) identifies four antibodies, designed m12, m14, m16, and m18. These four antibodies were isolated from a human Fab phage display library using alternating antigen panning (AAP). All four antibodies bind to recombinant HIV envelope glycoproteins (Env) $gp12089.6$, $gp120JR–FL$ and $gp120IIIB$ with high affinity. Moreover, m12 binding to gp 120 or gp 140 is significantly enhanced in the presence of the receptor CD4. The second invention (E–144–2002/1–US–01) describes two scFv clones, designated M6 and M9 that were selected form phage-displayed X5 scFv mutants library by panning the library against $gp12089.6/IIIB$–CD4 complex using

the same strategy, alternating antigen panning strategy (AAP). M6 and M9 are more stable than previously reported HIV–1 antibody named X5 and have significant improved binding activities to $gp_{120IIIB}$. Both scFvs inhibit more efficiently membrane fusion mediated by envelope glycoproteins of primary HIV isolates with a broader spectrum compared to X5, indicating that scFv format may be a more proper format compared to Fab for HIV–1 neutralizing antibodies to inhibit virus infection and transmission. Furthermore, scFv is a single molecule with almost half size of Fab, which makes scFv more suitable for constructing bivalent and multivalent antibodies and antibody fusion proteins. Thus, since all six antibodies from the above two inventions cross-react with different HIV–1 isolates, these antibodies could be directly used for therapy of HIV–1 infected individuals. In addition, these antibodies can be also used for screening of peptide phage display libraries, libraries of Envs, and in general as tools for development of HIV vaccines.

**A Mouse Model for Human Osteoarthritis**

Laurent G. Ameye (NIDCR), Marian F. Young (NIDCR), Ake Oldberg (EM), Tianshun Xu (NIDCR)

DHHS Reference No. E–081–2002/0

Licensing Contact: Susan Carson; 301/435–5020; *carsons@od.nih.gov*

Osteoarthritis (OA) is the most common form of arthritis and affects more than 20 million Americans, costing billions of dollars in health care annually. Osteoarthritis is caused by the breakdown of joint cartilage, leading to a loss of the cartilage ''cushion'' between the bones of the joints. Risk factors associated with OA include age, obesity, traumatic injury and overuse due to sports or occupational stresses. There is no cure for OA and current treatments are directed at the symptomatic relief of pain, and at improving and maintaining joint function. There remains, however, a critical need both to develop OA treatments that focus on slowing down the degenerative process of the disease and for validated animal models to test these new treatments. NIH scientists at the NIDCR have generated a mouse model for osteoarthritis (FASEB J. (2002) 16, 673–680) that fills one part of this important gap.

The mouse model is a double knockout mouse that lacks biglycan and fibromodulin, two members of the small leucine-rich proteoglycan family, and that spontaneously develops OA. All the hallmarks of human osteoarthritis are present, including: progressive degeneration of the articular cartilage from early fibrillation to complete erosion, subchondral sclerosis, an absence of inflammation and development of osteophytes and cysts. Advantages over the existing models for osteoarthritis include: high phenotypic penetrance, early onset (at 1–2 months) and a rapid disease progression (between 3–6 months) which can be accelerated by moderate levels of exercise, such as treadmill running. These properties, combined with a normal life span, make the biglycan/fibromodulin-deficient mouse an ideal animal model for evaluating new drugs and treatments for osteoarthritis.

**Ligands for FPR Class Receptors That Induce a Host Immune Response to a Pathogen or Inhibit HIV Infection**

Ji Ming Wang *et al.* (NCI)

DHHS Reference Nos. E–267–1999/0–PCT–04 filed 04 Feb 2000 (PCT/US00/02842) and E–267–1999/0–US–05 filed 17 Jul 2002

Licensing Contact: Marlene Shinn-Astor; 301/435–4426; *shinnm@od.nih.gov*

The NIH announces a technology that relates a synthetic amino acid peptide that has been discovered to have chemotactic activity and the ability to activate both the FPR and FPRL1 receptors. This peptide has been found by NIH investigators to be a potent inhibitor of cellular response to chemokines including those chemokines that use the CCR5 receptor. It has been found that the activation of the FPRL1 by the peptide will in fact inhibit HIV–1 fusion to a cell and its infection through the CCR5 receptor. The peptide can potentially be used as a topical drug in the anal-vaginal tract to prevent or reduce the mucosal transmission of HIV–1. It also has the potential to be used as a vaccine adjuvant to prime a host response from a patient to a microbial infection. In addition, because of its interaction with the FPR and FPRL1 receptor it could be used to design drugs which interfere with responses due to the presence of excess quantities of chemokines. The peptide is short and contains a D-amino acid so that it is economical and easy to synthesize. Also, it may be more resistant to proteolytic degradation in vivo, which will prolong its half-life and therefore make it more effective as a treatment. It is available for immediate licensing and research collaborations via a Cooperative Research and Development Agreement (CRADA).

Dated: January 10, 2003.

**Jack Spiegel,**

*Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.*

[FR Doc. 03–1988 Filed 1–28–03; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Heart, Lung, and Blood Institute Special Emphasis Panel.

*Date:* February 20–21, 2003.

*Time:* 7 p.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.

*Contact:* Robert B. Moore, PhD, Review Branch, Room 7178, Division of Extramural Affairs, National Heart, Lung, and Blood Institute, National Institutes of Health, Bethesda, MD 20892, 301–435–0725.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular diseases Research, 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: January 16, 2003.

**LaVerne Y. Stringfield,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 03–1983 Filed 1–28–03; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Mental Health Special Emphasis Panel; A National Resource for Postmortem Brain Research.

*Date:* February 10, 2003.

*Time:* 2 pm to 3:30 pm.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

*Contact Person:* Peter J. Sheridan, PHD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6142, MSC 9606, Bethesda, MD 20892–9606, 301–443–1513, *psherida@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* National Institute of Mental Health Special Emphasis Panel IP–RISPS.

*Date:* February 11, 2003.

*Time:* 4 pm to 8 pm.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

*Contact Person:* Martha Ann Carey, PHD, RN, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6151, MSC 9608, Bethesda, MD 20892–9608, 301–443–1606, *mcarey@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* National Institute of Mental Health Special Emphasis Panel; Late-Life Intervention

*Date:* February 21, 2003.

*Time:* 2 pm to 4 pm.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

*Contact Person:* David I. Sommers, PHD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6144, MSC 9606, Bethesda, MD 20892–9606, 301–443–7861, *dsommers@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: January 17, 2003.

**LaVerne Y. Stringfield,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 03–1980 Filed 1–28–03; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; ZAA1 BB (12) R21 Application Review Meeting.

*Date:* February 18, 2003.

*Time:* 2 pm. to 3 pm.

*Agenda:* To review and evaluate grant applications.

*Place:* Willco Building, 6000 Executive Blvd., 409, Bethesda, MD 20892–7003, (Telephone Conference Call).

*Contact Person:* Elsie D. Taylor, Scientific Review Administrator, Extramural Project Review Branch, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, Suite 409, 6000 Executive Blvd., Bethesda, MD 20892–7003, 301–443–9787, *etaylor@niaaa.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants, National Institutes of Health, HHS)

Dated: January 17, 2003.

**LaVerne Y. Stringfield,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 03–1981 Filed 1–28–03; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Deafness and Other Communication Disorders; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Deafness and Other Communications Disorders Special Emphasis Panel; Auditory Perception Review.

*Date:* March 6, 2003.

*Time:* 1 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852.

*Contact Person:* Stanley C. Oaks, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, Executive Plaza South, Room 400C, 6120 Executive Blvd., Bethesda, MD 20892–7180, 301–496–8683.

*Name of Committee:* National Institute on Deafness and Other Communications Disorders Special Emphasis Panel, Review of NIDCD Small Grants (R03) Applications.

*Date:* March 12, 2003.

*Time:* 8 a.m. to 5:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

*Contact Person:* Stanley C. Oaks, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, Executive Plaza South, Room 400C, 6120 Executive Blvd., Bethesda, MD 20892–7180, 301–496–8683.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: January 17, 2003.

**LaVerne Y. Stringfield,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 03–1982 Filed 1–28–03; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel Centers Review.

*Date:* February 10, 2003.

*Time:* 8 am to 6 pm.

*Agenda:* To review and evaluate grant applications.

*Place:* Ritz-Carlton Hotel at Pentagon City, 1250 South Hayes Street, Arlington, VA 22202.

*Contact Person:* Rita Liu, PHD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1388, *rliu@nida.nih.gov.*

*Name of Committee:* National Institute on Drug Abuse Initial Review Group. National Medication Development Research Subcommittee.

*Date:* February 24, 2003.

*Time:* 8 am to 6 pm.

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Khursheed Asghar, PHD, Chief, Basic Sciences Review Branch, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 443–2755.

*Name of Committee:* National Institute on Drug Abuse and Initial Review Group. Health Services Research Subcommittee.

*Date:* February 25–26, 2003.

*Time:* 9 am to 5 pm.

*Agenda:* To review and evaluate grant applications.

*Place:* Holiday Inn Georgetown, 2101 Wisconsin Avenue, NW., Washington, DC 20007.

*Contact Person:* Marina L. Volkov, PHD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1433.

*Name of Committee:* National Institute on Drug Abuse Initial Review Group. Treatment Research Subcommittee.

*Date:* February 25–26, 2003.

*Time:* 9 am to 5 pm.

*Agenda:* To review and evaluate grant applications.

*Place:* Holiday Inn Georgetown, 2101 Wisconsin Avenue, NW., Washington, DC 20007.

*Contact Person:* Kesinee Nimit, MD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Neuroscience Center, Rm. 3158, MSC 9547, 6001 Executive Boulevard, Bethesda, MD 20892–9547, (301) 435–1432.

*Name of Committee:* National Institute on Drug Abuse Initial Review Group. Training and Career Development Subcommittee.

*Date:* March 11–13, 2003.

*Time:* 9 am to 6 pm.

*Agenda:* To review and evaluate grant applications.

*Place:* Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Mark Swieter, PHD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1389.

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse Research Programs, National Institutes of Health, HHS).

Dated: January 16, 2003.

**LaVerne Y. Stringfield,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 03–1984 Filed 1–28–03; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel. ''Worksite Based Health Promotion for Youth'' (Topic 046).

*Date:* January 29, 2003.

*Time:* 9:30 AM to 11:30 PM.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

*Contact Person:* Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1439.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel. ''Design, Synthesis, Preclinical, Testing and Scale-Up of Novel Treatment Agents for Stimulant Abuse'' (Topic 041).

*Date:* February 12, 2003.

*Time:* 9:30 AM to 11:30 AM.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

*Contract Person:* Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1439.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel. ''Develop New Technologies for Drug Abuse Prevention Delivery'' (Topic 034).

*Date:* February 26, 2003.

*Time:* 9 AM to 4 PM.

*Agenda:* To review and evaluate contract proposals.

*Place:* Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.

*Contact Person:* Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1439.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel. ''Measurement Modules for Psychiatric Comorbidity Evaluation'' (Topic 045).

*Date:* March 6, 2003.

*Time:* 9 AM to 4 PM.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

*Contact Person:* Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1439.

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse Research Programs, National Institutes of Health, HHS)

Dated: January 16, 2003.

**LaVerne Y. Stringfield,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 03–1985 Filed 1–28–03; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets of commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal property.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel, ''Worksite Based Health Promotion for Youth'' (Topic 046).

*Date:* January 29, 2003.

*Time:* 9:30 a.m. to 11:30 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1439.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel, ''Design, Synthesis, Preclinical, Testing and Scale-Up of Novel Treatment Agents for Stimulant Abuse'' (Topic 041).

*Date:* February 12, 2003.

*Time:* 9:30 a.m. to 11:30 a.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852. (Telephone Conference Call).

*Contact Person:* Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1439.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel, ''Develop New Technologies for Drug Abuse Prevention Delivery'' (Topic 034).

*Date:* February 26, 2003.

*Time:* 9 a.m. to 4 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1439.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel, ''Measurement Modules for Psychiatric Comorbidity Evaluation'' (Topic 045).

*Date:* March 6, 2003.

*Time:* 9 a.m. to 4 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1439.

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse Research Programs, National Institutes of Health, HHS)

Dated: January 22, 2003.

**LaVerne Y. Stringfield.**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 03–1986 Filed 1–28–03; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Oncological Sciences Integrated Review Group; Cancer Molecular Pathobiology Study Section.

*Date:* February 2–4, 2003.

*Time:* 6 pm to 5 pm.

*Agenda:* To review and evaluate grant applications.

*Place:* Latham Hotel, 3000 M Street, NW., Washington, DC 20007.

*Contact Person:* Elaine Sierra-Rivera, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6184, MSC 7804, Bethesda, MD 20892, (301) 435–1779, *riverase@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, ZRG1 SSS–X 41P: Program Project Site Visit.

*Date:* February 2–4, 2003.

*Time:* 7 pm to 4 pm.

*Agenda:* To review and evaluate grant applications.

*Place:* Best Western Boston, The Inn at Longwood Medical, 342 Longwood Avenue, Boston, MA 02115.

*Contact Person:* Lee Rosen, PHD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5116, MSC 7854, Bethesda, MD 20892, (301) 435–1171.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Brain Disorders and Clinical Neuroscience Integrated Review Group, Brain Disorders and Clinical Neuroscience 1.

*Date:* February 3–4, 2003.

*Time:* 8 am to 5 pm.

*Agenda:* To review and evaluate grant applications.

*Place:* Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

*Contact Person:* David M. Armstrong, PHD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5188, MSC 7846, Bethesda, MD 20892, 301–435–1253.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Cardiovascular Sciences Integrated Review Group, Pathology A Study Section.

*Date:* February 3–4, 2003.

*Time:* 8:30 am to 4 pm.

*Agenda:* To review and evaluate grant applications.

*Place:* El Encanto Hotel and Garden Villas, 1900 Lausen Rd., Santa Barbara, CA 93103.

*Contact Person:* Larry Pinkus, PHD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4132, MSC 7802, Bethesda, MD 20892, 301–435–1214.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Cell Development and Function Integrated Review Group, Cell Development and Function 4.

*Date:* February 6–7, 2003.

*Time:* 8:30 am to 5 pm.

*Agenda:* To review and evaluate grant applications.

*Place:* Holiday Inn Georgetown, 2101 Wisconsin Avenue, NW., Washington, DC 20007.

*Contact Person:* Alexandra Ainsztein, PHD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5144, MSC 7840, Bethesda, MD 20892, 301–451–3848, *ainsztea@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Cell Development and Function Integrated Review Group, Cell Development and Function 2.

*Date:* February 6–7, 2003.

*Time:* 8:30 am to 4 pm.

*Agenda:* To review and evaluate grant applications.

*Place:* Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.

*Contact Person:* Ramesh K. Nayak, PHD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5146, MSC 7840, Bethesda, MD 20892, 301–435–1026, *nayakr@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Integrative, Functional and Cognitive Neuroscience Integrated Review Group, Integrative, Functional and Cognitive Neuroscience 8.

*Date:* February 6–7, 2003.

*Time:* 8:30 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Holiday Inn Select Bethesda, 8120 Wisconsin Ave., Bethesda, MD 20814.

*Contact Person:* Bernard F. Driscoll, PhD., Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5158, MSC 7844, Bethesda, MD 20892, (301) 435–1242.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Synaptic Biochemistry, Neurosecretion, Neuronal Cell Biology, Cytoskeleton, and Protein and Membrane Trafficking.

*Date:* February 6–7, 2003.

*Time:* 9:30 a.m. to 4:00 p.m..

*Agenda:* To review and evaluate grant applications.

*Place:* Raddison Barcello, 2121 P Street, NW, Washington, DC 20037.

*Contact Person:* Carl D. Banner, PhD., Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5212, MSC 7850, Bethesda, MD 20892, (301) 435–1251, *bannerc@drg.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, ZRG1 SRB 09R: Bioengineering Partnerships: Bioengineering.

*Date:* February 9, 2003.

*Time:* 4:00 p.m. to 5:00 p.m..

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Eileen W. Bradley, DSC, Chief and Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5120, MSC 7854, Bethesda, MD 20892, (301) 435–1179, *bradleye@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, ZRG1–SB (50) Bioengineering Research Partnerships.

*Date:* February 9, 2003.

*Time:* 5:00 p.m. to 8:00 p.m..

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Teresa Nesbitt, DVM, PhD., Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5110, MSC 7854, Bethesda, MD 20892, (301) 435–1172.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; ZRG1 SB 51M Bioengineering Partnerships: Bioengineering.

*Date:* February 9, 2003.

*Time:* 8:00 p.m. to 9:00 p.m..

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Teresa Nesbitt, DVM, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5110, MSC 7854, Bethesda, MD 20892, (301) 435–1172.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Endocrinology and Reproductive Sciences Integrated Review Group, Reproductive Endocrinology Study Section.

*Date:* February 10–11, 2003.

*Time:* 8:00 a.m. to 3:00 p.m..

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Abubakar A. Shaikh, DVM, PhD., Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6168, MSC 7892, Bethesda, MD 20892, (301) 435–1042.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; SBIR/R01 Grant Application.

*Date:* February 10, 2003.

*Time:* 8:00 a.m. to 4:00 p.m..

*Agenda:* To review and evaluate grant applications.

*Place:* Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

*Contact Person:* Marcia Steinberg, PhD., Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5140, MSC 7840, Bethesda, MD 20892, (301) 435–1023, *steinberm@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Surgery, Radiology and Bioengineering Integrated Review Group, Surgery and Bioengineering Study Section.

*Date:* February 10–11, 2003.

*Time:* 8 a.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Teresa Nesbitt, DVM, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5118, MSC 7854, Bethesda, MD 20892, (301) 435–1172, *nesbitt@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Musculoskeletal and Dental Sciences Integrated Review Group, General Medicine B Study Section.

*Date:* February 10–11, 2003.

*Time:* 8 a.m. to 12 p.m.

*Agenda:* To review and evaluate grant applications and/or proposals.

*Place:* Holiday Inn Georgetown, 2101 Wisconsin Avenue, NW., Washington, DC 20007.

*Contact Person:* Shirley Hilden, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4218, MSC 7814, Bethesda, MD 20892, (301) 435–1198.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Nutritional and Metabolic Sciences Integrated Review Group; Nutrition Study Section

*Date:* February 10–11, 2003.

*Time:* 8:30 a.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Sooja K. Kim, PhD, RD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6182, MSC 7804, Bethesda, MD 20892, (301) 435–1780.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Biobehavioral and Behavioral Process Initial Review Group; Biobehavioral and Behavioral Processes 7, Motor Function, Speech and Rehabilitation.

*Date:* February 10, 2003.

*Time:* 9 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.

*Contact Person:* Weijia Ni, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3190, MSC 7848, Bethesda, MD 20892, (301) 435–1507, *niw@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Biobehavioral and Behavioral Process Initial Review Group, Biobehavioral and Behavioral Processes 1, Biobehavioral Regulation, Learning and Ethology.

*Date:* February 10–11, 2003.

*Time:* 9 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.

*Contact Person:* Luci Roberts, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3188, MSC, Bethesda, MD 20892, (301)0 435–0692.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Malarial Drug Resistance.

*Date:* February 10, 2003.

*Time:* 1:30 p.m. to 3:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Building 16, 16 Center Drive, Bethesda, MD 20892. (Telephone Conference Call).

*Contact Person:* Marian Wachtel, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3208, MSC 7858, Bethesda, MD 20892, 301–435–1148, *wachtelm@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, BRP SEP.

*Date:* February 10, 2003.

*Time:* 4 p.m. to 5:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

*Contact Person:* Marcia Steinberg, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5140, MSC 7840, Bethesda, MD 20892, (301) 435–1023, *steinberm@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Small Business Innovation Research.

*Date:* February 11–12, 2003.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

*Contact Person:* Gopal C. Sharma, DVM, MS, PhD, Diplomate American Board of Toxicology, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2184, MSC 7818, Bethesda, MD 20892, (301) 435–1783, *sharmag@csr.nih.gov.*

*Name of Committee:* Musculoskeletal and Dental Sciences Integrated Review Group; Oral Biology and Medical Subcommittee 1.

*Date:* February 11–12, 2003.

*Time:* 8:30 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* The River Inn, 924 25th Street NW., Washington, DC 20037.

*Contact Person:* J. Terrell Hoffeld, DDS, PhD, Dental Officer, USPHS, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4116, MSC 7816, Bethesda, MD 20892, 301/435–1781, *th88q@nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Helicobacter Immunity.

*Date:* February 11, 2003.

*Time:* 2 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852, (Telephone Conference Call).

*Contact Person:* Marian Wachtel, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3208, MSC 7858, Bethesda, MD 20892, 301–435–1148, *wachtelm@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine, 93.306; 93.333, Clinical Research, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 21, 2003.

**LaVerne Y. Stringfield,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 03–1979 Filed 1–28–03; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Center for Research Resources 2004 Strategic Plan

**AGENCY:** National Center for Research Resources, NIH, HHS.

**ACTION:** Notice.

**SUMMARY:** The National Center for Research Resources (NCRR), National Institutes of Health (NIH), is updating its 1998–2003 strategic plan entitled NCRR: *A Catalyst for Discovery.* Its purpose is to anticipate, meet, and set priorities for the biomedical research community's needs for critical research resources and technologies. The NCRR requests input from biomedical scientists to identify barriers to future research progress and to define future

needs for shared research resources and technologies that facilitate NIH-supported biomedical research. The NCRR's existing 1998–2003 strategic plan may be accessed over the World Wide Web: *http://www.ncrr.nih.gov/about_ncrr/plan98.asp.*

**DATES:** Submit responses to the Office of Science Policy and Public Liaison, NCRR (*see* below), on or before May 15, 2003.

**FOR FURTHER INFORMATION CONTACT:** The Office of Science Policy and Public Liaison, NCRR/NIH/DHHS, One Rockledge Centre, 6705 Rockledge Drive MSC 7965, Suite 5046, Bethesda, MD 20892–7965, telephone 301–435–0866, FAX 301–480–3654, e-mail *PLANEVAL@MAIL.NIH.GOV,* Internet *http://www.ncrr.nih.gov.*

**SUPPLEMENTARY INFORMATION:** The National Center for Research Resources (NCRR) serves as a ''catalyst for discovery'' by creating and providing critical research technologies and shared resources. This infrastructure underpins biomedical research and enables advances that improve the health of our Nation's citizens.

The NCRR serves a unique purpose at the NIH: to develop critical research technologies and to provide cost-effective, shared, multidisciplinary resources to biomedical investigators across the spectrum of research activities supported by the NIH. The NCRR's mission is to:

(1) Create resources and develop technologies and research models that are cost-effective, accessible, and responsive to the research needs of the biomedical research community. To meet these needs the NCRR must anticipate evolving trends in basic and clinical research to ensure that resources will be available to facilitate that research.

(2) Provide shared clinical, primate, and biomedical technology resources and instrumentation for use by investigators supported by NIH. These resources, primarily centers, serve more than 10,000 researchers, who are supported through more than $1 billion of competitive awards from NIH's categorical Institutes.

(3) Develop quick, flexible approaches to new and emerging biomedical research needs and opportunities. These innovations often involve high-risk research.

(4) Strengthen the Nation's biomedical research infrastructure by supporting institutional development programs that develop and enhance the capacity of institutions, including underrepresented groups, to participate in biomedical research; increasing the exposure of K–12 students, their teachers, and the public to the life sciences; and constructing or renovating biomedical research facilities.

Biomedical research investigators supported by the NIH require a broad array of technologies, tools, and materials for their research. The NCRR plays a key role in addressing trans-NIH research issues, such as access to state-of-the-art instrumentation and technologies; containment of the escalating costs of highly sophisticated research; development of appropriate, specialized research models; efforts to remedy the shortage of clinical and minority investigators; and efforts to improve the research infrastructure.

To ensure the continued relevance of its Strategic Plan, the NCRR seeks input to the following questions in terms of the issues described above:

(A) What are the most important research trend(s) that will drive biomedical research?

(B) What research resources and technologies will be critical in addressing these trend(s) and meeting biomedical investigators' needs?

(C) What strategies will eliminate barriers to progress and enhance access to research resources and technologies?

(D) Who would you recommend to serve as a panel member for NCRR's strategic planning process? Please list the name, degree, position title, department, institution name and address, phone and fax numbers, e-mail address, and specific area of expertise for each person recommended.

For your convenience we have provided a user-friendly response form at the NCRR's Strategic Planning Web site: *http://www.ncrr.nih.gov/sprecommend.asp.* If you do not have access, please send your responses to the above address.

Dated: January 22, 2003.

**Elias A. Zerhouni,**

*Director, NIH.*

[FR Doc. 03–1987 Filed 1–28–03; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

### Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (301) 443–7978.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

*Proposed Project:* The Family Treatment Drug Court Evaluation—New—The Substance Abuse and Mental Health Administration's (SAMHSA) Center for Substance Abuse Treatment (CSAT) will conduct an evaluation of Family Treatment Drug Courts. The Family Treatment Drug Court Evaluation will examine the effectiveness of family treatment drug courts in four settings: Suffolk County, New York; Washoe County, Nevada; San Diego County, California; and Santa Clara County, California. The study will employ a multi-method, quasi-experimental research design to investigate several key child welfare outcomes for family treatment drug courts as compared to traditional case processing, including whether the time to permanency for children is different in a family treatment drug court program than in traditional case processing.

In addition, the study will investigate rates of reunification and termination of parental rights; types, frequency, and length of out-of-home placements; and child welfare recidivism. The study will investigate the key mediators of program success, including the effect of family treatment drug courts on treatment access, treatment completion, parent motivation, and family well-being, among other key mediators.

The project consists of an outcome evaluation that includes administrative data collection and client interviews with a sample of treatment and comparison participants. The target population for the family treatment drug court consists of substance abusing parents who have a current child abuse or neglect case. The outcome evaluation will document whether family treatment

drug courts are more effective than traditional court settings in decreasing the time needed to reach permanent placements for children; increasing the frequency of successful parent-child reunifications and decreasing the frequency of terminations of parental rights; decreasing the time children spend in foster care; and reducing child welfare recidivism.

An intent-to-treat sampling model will be used for the treatment groups at each site during a 2.5-year recruitment window. The expected number of treatment group subjects varies by site based on program capacity, as illustrated in the table below. Comparison groups will be recruited in three of the four sites, with equal numbers of comparison group participants at each site; no comparison group will be used in San Diego because that county has implemented a system-wide reform. Interview data will be sought from all persons included in the administrative datasets.

Interview participants will take part in a baseline interview within one month of their dispositional hearing and three follow-up interviews. Follow-up One will take place six months later, Follow-Up Two will take place 12 months after baseline, and Follow-Up Three will take place 24 months after baseline. The interview tool will assess participants' perceptions of the services they are receiving and their interactions with the court, treatment, and child welfare systems; their understanding of what they need to do in order to be reunified with their children; and their feelings of empowerment and control over the process. Each interview will last approximately one hour. Administrative data, including child welfare and treatment data, will be collected annually to ascertain the type, frequency, and timeliness of services received and to capture the crucial child welfare outcomes of interest, including the timing and type of permanency plans for children, the length of time children spend in foster care, and subsequent involvement in the child welfare system.

The project is scheduled over a four-year time period. Therefore, the estimates in the table below are annualized based on planned activities for the entire four years.

| | No. of respondents | Responses/respondent | Hours/response | Total burden hrs. |
|---|---|---|---|---|
| Client Interviews | 1,295 | 4 | 1.0 | 5,180 |
| Tracking telephone calls | 1,295 | 3 | 0.17 | 220 |
| Total | 1,295 | | | 5,400 |
| 4-yr. Annual Average | 1,295 | | | 1,350 |

Send comments to Nancy Pearce, SAMHSA Reports Clearance Officer, Room 16–105, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: January 23, 2003.

**Richard Kopanda,**

*Executive Officer, Substance Abuse and Mental Health Services Administration.*

[FR Doc. 03–1998 Filed 1–28–03; 8:45 am]

**BILLING CODE 4162–20–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### Vacancies for Committee Members on the Transportation Equity Act for the 21st Century (TEA–21) Negotiated Rulemaking Committee

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice.

**SUMMARY:** There are several vacancies on the committee that the Department has convened to negotiate regulations to implement the Transportation Equity Act for the 21st Century. We propose filling these vacancies by naming current committee alternates and other qualified individuals. Tribes, tribal organizations, and individual tribal members who believe that their interests will not be adequately represented by the persons identified in this notice may submit comments on the proposed selection, apply for membership on the committee, or submit other nominations.

**DATES:** Comments on this notice and nominations for committee members must be received no later than February 13, 2003.

**ADDRESSES:** Send nominations and comments to Mr. LeRoy Gishi, Chief, Division of Transportation, Bureau of Indian Affairs, U.S. Department of the Interior, MS–4058–MIB, 1849 C Street NW., Washington, DC 20240; or fax to (202) 208–4696. Nominations and comments received by BIA will be available for inspection at the address listed above from 9 a.m. to 4 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Mr. LeRoy Gishi, (202) 208–4359.

**SUPPLEMENTARY INFORMATION:** On February 11, 1999, in a **Federal Register** notice (64 FR 6825), the Secretary of the Interior (Secretary) announced selection of members of the TEA–21 Negotiated Rulemaking Committee to develop proposed regulations for the Indian Reservation Roads program under the Negotiated Rulemaking Act and Section 1115 of TEA–21. The Secretary selected two primary tribal Committee representatives and two tribal alternates from nominees from tribes in each of the twelve Bureau of Indian Affairs (BIA) Regions. In addition, the Secretary selected five additional primary tribal Committee members from various regions to balance interests on the Committee and selected eleven Federal representatives. The Committee began negotiations on the proposed regulations in March 1999 and the Secretary published proposed regulations in August 2002.

The Committee must reconvene in early 2003 to consider public comments and make recommendations for final regulations. During the tenure of the Committee, some primary tribal Committee members have become unable to continue to serve on the Committee. In order to continue to fulfill the requirements of TEA–21 for tribal Committee membership, the Secretary must appoint representatives to fill tribal member vacancies on the Committee. Tribes, tribal organizations, and individual tribal members who believe that their interests will not be adequately represented by the persons identified in this notice may submit comments on the proposed selection, apply for membership on the committee, or submit other nominations by the date in the ''DATES'' section.

The Secretary is required to use a negotiated rulemaking process to issue regulations governing the Indian Reservation Roads program and establish a formula for allocating all contractible funds among Indian tribes for fiscal year 2000 and subsequent years (23 U.S.C. Section 202, as amended by TEA–21 (Pub. L. 105–178, 112 Stat. 154.)) The Secretary is also required to:

(1) Apply the procedures of negotiated rulemaking under subchapter III of chapter 5 of Title 5 (the Negotiated Rulemaking Act) in a manner that reflects the unique government-to-government relationship between the Indian tribes and the United States; and

(2) Ensure that the membership of the committee includes only representatives of the Federal Government and of geographically diverse small, medium, and large Indian tribes. For more information on the TEA–21 Negotiated Rulemaking Committee see 67 FR 51328, dated August 7, 2002.

Based upon recommendations for proposed regulations and a funding formula the TEA–21 Negotiated Rulemaking Committee provided to the Secretary, the Secretary published a Notice of Proposed Rulemaking (NPRM) on August 7, 2002 (67 FR 51328). The public comment period for the NPRM ended on November 7, 2002. The Committee must now reconvene to consider the public comments and make recommendations to the Secretary for final regulations and a funding formula. The Secretary must fill the primary tribal member vacancies on the Committee to ensure that tribal interests on the Committee, required by TEA–21, are balanced to include:

(1) Members of geographically diverse small, medium, and large Indian tribes;

(2) Members of tribes identified as Direct Services, Self-Determination, and Self-Governance tribes; and

(3) Members of tribes with various levels and types of experience in the diverse concerns of transportation development and management (*e.g.*, jurisdictional issues, complexity of transportation systems, climatic concerns, environmental issues, geographic isolation, etc.).

The Secretary proposes to fill primary tribal Committee membership vacancies by naming current tribal Committee alternates where alternates have participated in the Committee negotiations and, where those alternates are not available, naming other qualified individuals to fill vacancies of primary tribal Committee members. Current primary tribal Committee members who were originally selected to serve on the Committee are designated with an asterisk (*). The Secretary proposes that the TEA–21 Negotiated Rulemaking Committee be comprised of the following primary and alternate tribal Committee members when it reconvenes:

Representatives of Tribes, Tribal Organizations, and Individual Indians

**Great Plains Region**

*Pete Red Tomahawk, Transportation Planner, Standing Rock Sioux Tribe, Fort Yates, ND
Sherman Wright, Transportation Planner, Rosebud Sioux Tribe, Rosebud, SD
Alternate: Gilbert Red Dog, Northern Plains Transportation Advisory Council Member, Cheyenne River Sioux Tribe, Eagle Butte, South Dakota

**Southwest Region**

Edmond Gonzalez, Civil Engineer, Pueblo of San Ildefonso, Albuquerque, NM
Shannon McKenna, Lieutenant Governor, Pueblo of Nambe, Albuquerque, NM
*Edward Little, Mescalero Apache Tribe, Mescalero, NM

**Southern Plains Region**

*Chuck Tsoodle, Tribal Roads & Transit Director, Kiowa Tribe of Oklahoma, Carnegie, OK
*Tim Ramirez, Tribal Roads Director, Prairie Band of Potawatami Nation, Mayetta, KS
Alternates: Bill Tall Bear, Program Coordinator-Transportation Planner, Cheyenne-Arapaho Tribes of Oklahoma, Concho, OK
Ray Ball, Transportation Planner, Kaw Nation, Kaw City, Oklahoma

**Rocky Mountain Region**

*John Smith, Transportation Planner, Shoshone & Arapaho Tribes, Fort Washakie, WY
Caleb Shields, Chief of Staff, Ft. Peck Tribe, Poplar, MT
Alternates: John Healy, Transportation Planner, Fort Belknap Tribes, Harlem, MT
Cordell Ringel, Engineer, Montana-Wyoming Tribal Leaders Council, Billings, MT

**Eastern Region**

*Eddie Tullis, Chairman, Poarch Band of Creek Indians, Atmore, AL
*Jody Clark, Transportation Manager, Seneca Nation of Indians, Salamanca, NY

**Alaska Region**

*Loretta Bullard, President, Kawarek, Inc., Nome, AK
*Al Ketzler Sr., Fairbanks, AK
*Gideon James, Tribal Operations Director, Native Village of Venetie Tribal Government, Venetie, AK
Alternates: Dugan Nielsen, Director, Land & Resources, Bristol Bay Native Association, Dillingham, AK
Dan Moreno, Transportation Planner, Sitka Tribe, Juneau, AK

**Midwest Region**

*Jim Garrigan, Director of Tribal Roads, Red Lake Band of Chippewa Indians, Red Lake, MN
*Mike Christensen, Tribal Roads Committee, Lac Du Flambeau Chippewa, Lac du Flambeau, WI
Alternate: Bruce Danforth, Public Works Area Manager, Oneida Nation, Oneida, WI

**Eastern Oklahoma Region**

*Robert Endicott, Transportation Planner, Cherokee Nation, Tahlequah, OK
William McKee Eastern Shawnee of Oklahoma, Miami, OK
Alternate: Braven Dyer, Transportation Director, Chickasaw Nation, Ada, Oklahoma

**Navajo Region**

*Sampson Begay, Tribal Council, Navajo Nation, Window Rock, AZ
Lawrence Morgan, Tribal Council, Navajo Nation, Window Rock, AZ

**Western Region**

*Robyn Burdette, Chairperson, Summit Lake Paiute Tribe, Winnemucca, NV
Rita Martinez, Councilwoman, Tohono O'odham Nation, Sells, AZ
*Alex Cabillo Hualapai Tribe, Peach Springs, AZ

**Northwest Region**

*Michael Marchand, Colville Business Council, Confederated Tribes of Colville Indians, Nespelem, WA
*Dave Whitener, Squaxin Island Tribe, Shelton, WA
*Della Cree, Community Development Planner, Nez Perce Tribe, Lapwai, ID
Alternates: Andy Kampkoff, Construction Manager, Lummi Indian Business Council, Bellingham, WA
Mike Clement, Economic Development Manager, Confederated Tribes of Warm Springs, Warm Springs, OR

**Pacific Region**

*Vlayn McCovey, Yurok Tribe, Eureka, CA
*Mervin Hess, Vice Chairman, Bishop Indian Tribe, Bishop, CA
Alternate: Randolph Feliz, Tribal Vice Chair Hopland Band of Pomo Indians, Hopland, CA

In addition, the Secretary announces the following Federal Committee representatives:

Robert Baracker, Designated Federal Official, BIA Southwest Regional Office

LeRoy Gishi, Chief, BIA Division of Transportation

Justin P. Patterson, Consultant, Department of the Interior (Retired)

Mike Black, Regional Road Engineer, Rocky Mountain Region

Robert Martin, Regional Road Engineer, BIA Alaska Region

Harold Riley, Road Engineer, BIA Navajo Region

Todd Kennedy, Regional Road Engineer, BIA Midwest Region

Mike Smith, Director, BIA Office of Tribal Services

Paul Los, Program Coordinator, Federal Highway Administration, Department of Transportation

Vivian Philbin, Attorney, Federal Highway Administration, Department of Transportation

Robert Sparrow, Federal Lands Highway Program Engineer, Federal Highway Administration, Department of Transportation

If you believe that tribal interests will not be adequately represented by any tribal person identified in the updated tribal committee membership, you may apply or nominate another person for membership on the committee. Each application or nomination must be received by the date above and must include:

(1) The name of the nominee, business address, and telephone and fax numbers.

(2) The tribal interest(s) to be represented by the nominee (based on the requirements of TEA–21 listed above);

(3) Evidence that the applicant or nominee is authorized to represent parties related to the interest(s) the person proposed to represent;

(4) The reasons that the proposed members of the committee identified in this notice do not represent the interests of the person submitting the application or nomination; and

(5) Your name, address, telephone number, and the name of the tribe or tribal organization with which you are affiliated.

Dated: January 17, 2003.

**Aurene M. Martin,**

*Acting Assistant Secretary—Indian Affairs.*

[FR Doc. 03–2043 Filed 1–28–03; 8:45 am]

**BILLING CODE 4310–LY–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### Proposed Finding Against Federal Acknowledgment of the Golden Hill Paugussett Tribe

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of proposed finding.

**SUMMARY:** Pursuant to 25 CFR 83.10(h), notice is hereby given that the Assistant Secretary—Indian Affairs (AS–IA) proposes to decline to acknowledge that the Golden Hill Paugussett Tribe (GHP), c/o Mr. Aurelius H. Piper, Jr., Suite 236, 1440 Whalley Avenue, New Haven, Connecticut, 06515, is an Indian tribe within the meaning of Federal law. This notice is based on a determination that the petitioner does not satisfy all seven of the criteria set forth in 25 CFR Part 83.7, specifically criteria (b), (c), and (e), and therefore does not meet the requirements for a government-to-government relationship with the United States.

**DATES:** Publication of the AS–IA's notice of the proposed finding in the **Federal Register** initiates a 180-day comment period during which the petitioner, interested parties, informed parties, and the public may submit arguments and evidence to support or rebut the evidence relied upon in the proposed finding. Interested or informed parties must provide a copy of their comments to the petitioner. The regulations, 25 CFR 83.10(k), provide petitioners a minimum of 60 days to respond to any submissions on the proposed findings received from interested and informed parties during the comment period.

**ADDRESSES:** Comments on the proposed finding or requests for a copy of the report which summarizes the evidence, reasoning, and analyses that are the basis for this proposed finding, or a list of parties in the litigation, should be addressed to the Bureau of Indian Affairs, Branch of Acknowledgment and Research, 1849 C Street, NW., Mailstop 4660–MIB, Washington, DC 20240.

**FOR FURTHER INFORMATION CONTACT:** R. Lee Fleming, Chief, Branch of Acknowledgment and Research, (202) 208–3592.

**SUPPLEMENTARY INFORMATION:** This notice is published in accordance with authority delegated by the Secretary of the Interior (Secretary) to the AS–IA by 209 DM 8.

The GHP group's petition #81 is being considered under a court-approved negotiated agreement in pending litigation. This agreement, entered December 14, 2001, established time lines for the submission of materials to the Department of the Interior (Department) and deadlines for submitting comments, and issuing a proposed finding. The agreement neither modifies the regulatory time periods following the issuance of the proposed finding, nor modifies the criteria or the standards required to demonstrate that the criteria are met.

The GHP group submitted a letter of intent to the Department on April 13, 1982, to petition for Federal acknowledgment as an Indian tribe, a documented petition on April 12, 1993, and the Bureau of Indian Affairs (BIA) placed them on the ''Ready, Waiting for Active Consideration'' list on November 21, 1994. The BIA processed the GHP petition under 25 CFR 83.10(e), which permits an evaluation on only one criterion if the petition and response to the technical assistance review indicates that there is little or no evidence to demonstrate that a group can meet the criteria in 83.7(e), (f), or (g).

The Department published a notice of the proposed finding on June 8, 1995, in the **Federal Register** that declined to acknowledge that the GHP existed as an Indian tribe (60 FR 30430). The Department found the evidence clearly established that the GHP group did not meet the mandatory criterion 83.7(e), descent from a historical Indian tribe. Following an evaluation of the evidence submitted during the comment periods, the AS–IA issued a final determination on September 16, 1996 (61 FR 50501). The AS–IA concluded that the evidence did not establish a reasonable likelihood of the validity of the facts (see 25 CFR 83.6(d)) that the petitioner descended from a historic tribe, or that William Sherman, the ancestor through whom the GHP claimed tribal descent, had ancestry either from the historical Golden Hill tribe or from any other identified historical Indian tribe.

The GHP petitioner filed a request for reconsideration of the final determination with the Interior Board of Indian Appeals (IBIA) on December 26, 1996, pursuant to 25 CFR 83.11(b)(2). Another group, the Golden Hill Paugeesukg Tribal Nation, also requested reconsideration, claiming to be the actual governing body of the petitioning group. On September 8, 1998, the IBIA affirmed the decision not to acknowledge the GHP group as an Indian tribe, but referred five allegations of error to the Secretary (33 IBIA 4, 1998).

On December 22, 1998, the Secretary, without evaluating the merits, requested the AS–IA to address the five issues and provide a reconsidered determination in accordance with the applicable regulations. The AS–IA recused himself of this decision, and, on May 24, 1999, the Deputy AS–IA issued a reconsidered decision and an order that the GHP petition be considered under all seven mandatory criteria of the acknowledgment regulations. The Deputy AS–IA also ordered active consideration of the petition be suspended until the GHP petitioner made additional submissions, which it did, whereupon the BIA resumed active consideration.

On April 3, 2001, the GHP petitioner filed a complaint pursuant to the Administrative Procedure Act requesting the court to compel the Department to establish a date by which it would issue the new proposed finding under all seven mandatory criteria. The parties reached an agreement in December 2001, whereby the Department agreed to issue a proposed finding on or before January 21, 2003, after which consideration of the petition would be governed by the regulations. The Department began consideration of the evidence for the proposed finding on July 22, 2002.

The GHP petitioner meets criterion 83.7(a), which requires that the petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. The available identifications apply to a historical, state-recognized, Golden Hill entity, from which a portion of the petitioner's current membership claims descent. The available identifications do not pertain to the portion of the group, added in 1999, which claims descent from a historical Turkey Hill entity, and which the petitioner now contends was always a part of the historical Golden Hill entity. For criteria 83.7(b) and 83.7(c), the record provided does not demonstrate that a Golden Hill group and a Turkey Hill group ever combined and functioned as a single autonomous political entity. For the purposes of criterion 83.7(a), none of the available evidence shows that any outside observers at any time since 1900 identified such a combined group of Golden Hill and Turkey Hill Indians as a single Indian entity. Also, the available evidence does not identify the existence of a separate Turkey Hill group as an American Indian entity on a substantially continuous basis since 1900.

From 1900 onwards, the Golden Hill antecedents of the GHP petitioner have been identified on a substantially continuous basis as an American Indian entity in Federal and State documents, by academics, and newspaper articles. Identifications included two reports compiled in the 1940's by a Library of Congress researcher, William H. Gilbert, and published by the Government Printing Office. There was an identification from 1971 in a BIA publication. The State of Connecticut (State) generated documents that included legislative acts, official correspondence, minutes, and correspondence of State and local agencies, and the assignment of a seat on the Connecticut Indian Affairs Council to the Golden Hill in 1974. Identifications by academics during the 20th century included Theodore Taylor (1972), Neal Salisbury (1982), Alvin Josephy (1982), and Franz Laurens Wojciechowski (1992). Multiple newspaper articles appeared in every decade from the 1930's to the present.

The GHP does not meet criterion 83.7(b), which requires that a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present. The petitioner claims that a portion of its membership descends from the historical Golden Hill Indians, which evolved from a portion of the historical Pequannock tribe. During first sustained contact with non-Indians in the 1630's, the Pequannock tribe lived along the Pequonnock River in modern-day Bridgeport, Connecticut. The Colony of Connecticut set aside a reservation for the historical Golden Hill as early as 1639, on which the group resided until 1802, when the last portions of the reservation were sold by a State-appointed overseer with the approval of the historical Golden Hill and the Connecticut General Assembly.

In 1999, the petitioner's membership more than doubled. The new members, 68 percent of the named individuals on the 1999 membership list, claim descent from two individuals whom they believe to descend from the historical Turkey Hill Indians, a group which evolved from the historical Paugussett, one of the Indian tribes that resided in southwestern Connecticut in the Housatonic River valley at the time of first sustained contact with non-Indians.

The families at the Turkey Hill reservation, established by the Colony of Connecticut in 1680, evolved from the historical Paugussett, while those living at the Golden Hill reservation were originally part of the historical Pequannock, a separate tribe. The colonial (and later State) authorities consistently viewed and identified the historical Turkey Hill group as separate from the historical Golden Hill group. Both groups had separate colonial (later State) appointed guardians and were treated in the colonial and later state records as distinct and separate groups of people. The available record does not demonstrate that any continuous government-to-government relationship between the State and a Turkey Hill Indian entity existed after 1871, when the overseer sold the last of the Turkey Hill State reservation.

The evidence in the record does not demonstrate consistent interactions or significant social relationships between the historical Turkey Hill and historical Golden Hill groups after the establishment of their reservations. In order to demonstrate the existence of historical community, the petitioner would need to submit evidence that demonstrates such interactions and relationships existed. Nor does the documentary record demonstrate the historical Golden Hill exercised any political influence or authority over the historical Turkey Hill group, or vice versa. The available evidence does not demonstrate that the two groups functioned as a single autonomous political entity. In order to demonstrate an assertion of descent from two historical tribes that amalgamated and functioned as a single entity, the petitioner would need to submit evidence of political amalgamation.

In addition, the portion of the petitioning group presently claiming descent from the historical Turkey Hill has not demonstrated ancestry from that entity. The available record also does not demonstrate that this portion of the GHP ever functioned as a group, or had any significant interaction with a Golden Hill entity. Because a separate historical social community among the Turkey Hill Indians is not linked to the historical Golden Hill, it does not demonstrate criterion 83.7(b) for the GHP petitioner or its antecedents. Accordingly, this proposed finding focuses on the historical Golden Hill for evidence of community under criterion 83.7(b).

For the period from 1637 to the 1730's, there is sufficient evidence that the historical Golden Hill comprised a distinct community. The petitioner provided evidence, including population statistics, of the occupation of a distinct area, of land disputes with colonial settlers, and of some religious ceremonies and missionary activities. When evaluating tribes in the early years of contact with non-Indians, before substantial cultural and political changes occurred, this combined evidence is sufficient to demonstrate criterion 83.7(b) from 1637 to the 1730's for the historical Golden Hill.

For the period from the 1730's to 1802, there is also sufficient evidence that the historical Golden Hill comprised a distinct community. Population statistics demonstrate a rapidly declining but generally distinct community. The petitioner submitted evidence that demonstrates the historical Golden Hill resisted land infringements by non-Indians, particularly for the period from 1763 to 1802. These documents included petitions to the General Court (later General Assembly) and Colonial and State reports. The petitioner also provided a set of overseer records from

1763 to 1780 that present good evidence of continued community for a very small group of people. Such combined evidence is sufficient to demonstrate criterion 83.7(b) from the 1730's to 1802 for the historical Golden Hill.

There is sufficient evidence that the historical Golden Hill comprised a distinct community until approximately 1823. Overseers' reports after the sale of the historical Golden Hill's Bridgeport reservation in 1802 gave good insight into the composition of the group at the time, including interaction among Golden Hill members and their relatives living in Woodbridge, Connecticut. In 1823, the overseer also took a census, which named six adults and the unnamed daughters of three of the women. Some individuals on this census appeared in subsequent reports until 1826, when detailed overseers' reports ceased. Taken together, the evidence is sufficient to demonstrate criterion 83.7(b) for the portion of the group claiming descent from the historical Golden Hill group up to 1823.

After the 1823 census, the historical Golden Hill community ceased to appear as a group in the documented record. Several members died, left the area, or otherwise disappeared from the historical record for this period. The overseers paid more attention to the Golden Hill fund than to any group that may have continued, and their sporadic reports after 1826 contained little detail of who constituted the survivors. Smallpox was reported to have killed several members of related Indians in the 1830's in (what was then the town of) Derby, and there is no evidence presented of further interaction among the named Golden Hill fund claimants.

By 1841, the documented claimants to the benefits of the fund were two women, Ruby Mansfield and Nancy Sharpe and their unnamed children, for whom the State purchased land using money from the Golden Hill fund. Petitions filed with the State by these two women in 1841 and 1846 do not demonstrate sufficient communal activity or provide acceptable evidence of the continuation of a group. An overseer's reference in 1846 to the existence of other possible claimants neither named them nor described a community. After 1849, these two women do not appear in the record. The historical group fragmented by 1849, and by that time appears to have ceased to exist. Therefore, the petitioner does not meet criterion 83.7(b) from the period 1824 to 1849.

For 1849 to 1887, the evidence submitted is not sufficient to demonstrate that the historical Golden Hill group maintained a distinct community. Most of the available evidence for this period concerned William Sherman, an individual who resided in Trumbull, Connecticut, after 1857, who the petitioner claims provided leadership for a Golden Hill group at this time. William Sherman was not identified as an Indian in any records before 1870. There is nothing in the available record to indicate that William Sherman was part of an identifiable Golden Hill entity, nor is there evidence that he provided leadership or had followers.

The petitioner maintains that Sherman's leadership efforts during this period included establishing an ''Indian'' portion of a cemetery in Trumbull and arranging for land he purchased to be held in trust by the State for the benefit of a Golden Hill group after his death. The available evidence does not support these claims. Many non-Indians were buried in the ''Indian'' portion of the cemetery, and a number of William Sherman's own children, who died before he did, were not buried there. William Sherman, in 1875, purchased ¼ of an acre in Trumbull and built a house on the property using the land as collateral on an $800 mortgage received from the Golden Hill fund. Sherman's activities were similar to other non-Indians who also received mortgages from the Golden Hill fund. He was not identified as a beneficiary of the Golden Hill fund or as a member of any Golden Hill group on any of these transactions or any other official records. There is no evidence that this property functioned during his lifetime as land belonging to any identifiable group, or on which group activities occurred. Further, the activities in which Sherman engaged during his lifetime do not demonstrate any type of group activity. Therefore, the evidence presented for this period does not demonstrate the existence of community.

There is insufficient evidence presented to meet criterion 83.7(b) for 1887 to 1933. Most of the evidence submitted during this time period dealt with just two members of the Sherman family, George Sherman and his daughter, Ethel Sherman. Much of the evidence concerned an ongoing conflict over claims by Ethel Sherman to the ¼ acre property in Trumbull, Connecticut. However, there is insufficient evidence to indicate that these claims were made at the behest or for the benefit of anyone but Ethel Sherman. There are no available documents or letters signed by or attested to by a group to demonstrate that this property was of importance to a wider group of members. The property, declared a State reservation in 1933, would continue to be a point of contention for years to come, but until the 1970's, it does not appear that its fate concerned anyone except the direct descendants of George (and later Ethel) Sherman.

In summary, for the 47-year period from the death of William Sherman in 1886 and the establishment of the Trumbull property as a reservation in 1933, the petitioner has not demonstrated significant social interaction among members of an antecedent group. This lack of evidence for interaction is compounded by the unclear definition of who constituted the group during this period. Some Sherman family members continued to reside on the Trumbull property, but this fact is not evidence of a ''group'' interacting during these years. There is no submitted documentary evidence demonstrating the composition of a group that extended beyond some Sherman family members. Therefore, the materials submitted for 1897 to 1933 are not sufficient evidence of community for the portion of the petitioner claiming descent from the historical Golden Hill Indians.

The petitioner does not meet criterion 83.7(b) for the period 1933 to 1973. The petitioner has not submitted documentation that demonstrates any interaction occurring between the Sherman family siblings and any other larger group. The petitioner argues that knowledge was communicated orally among group members at regular gatherings, yet failed to provide specific evidence that such gatherings occurred. Abstracts from some interviews with members of the group contend that visiting among the various individuals and families occurred. However, the petitioner did not provide any specific evidence identifying the location, frequency, or content of such visiting. Therefore, the evidence presented by the petitioner is insufficient to demonstrate the existence of a distinct community for the period 1933 to 1973.

The petitioning group appears as an identifiable entity around 1973 under the leadership of Aurelius Piper, Sr, when it is now possible to see the participation of members in an identifiable organization. However, the organization appears to have been made up mostly of individuals who were closely related to Aurelius Piper, Sr. (*i.e.*, his children, siblings, or nieces and nephews). There are no records of a group of GHP members interacting through attendance at social gatherings or at significant events. Although Aurelius Piper, Sr. and some of his children were active in trying to establish the social life of the GHP, they

do not seem to have met with much success. Aurelius Piper, Sr. even voiced numerous complaints in the 1970's and 1980's about the inability of the group's members to act together in any significant fashion.

Since the mid-1990's, none of the documentation demonstrates that the petitioner has maintained a distinct community. The evidence presented by the petitioner, therefore, is insufficient to meet criterion 83.7(b) for the period 1972 to the present. In summary, the evidence shows that the historical Golden Hill dwindled from a viable community last identified in a 1823 overseer's census to two women who had petitioned the State in 1841 and 1846. The evidence for William Sherman and subsequent generations of GHP descendants does not demonstrate that this small family was part of a distinct community. Therefore, the GHP does not meet criterion 83.7(b) for any time since 1823.

The petitioner does not meet criterion 83.7(c), which requires a petitioner and its antecedents to have maintained political influence over its members as an autonomous entity from historical times to the present. The historical Golden Hill Indians and the historical Turkey Hill Indians were separate tribes that shared a similar culture and language. Land purchase documents for the 17th and 18th centuries show two separate entities. The Colony and later the State treated the historical Golden Hill and historical Turkey Hill as distinct political and legal entities evidence by separate reservations and overseers during this period. Therefore, evidence of political authority for the historical Turkey Hill Indians does not demonstrate the same for the historical Golden Hill Indians, and vice versa. The available evidence does not show that the two groups ever formed a single autonomous political entity. If the petitioner asserts that a historical amalgamation of the two groups occurred, it needs to submit specific evidence to demonstrate this amalgamation. Accordingly, the following summary focuses on the political influence of the historical Golden Hill and its predecessors.

For the period from the 1630's to 1761, there is sufficient evidence to demonstrate that the historical Golden Hill maintained political influence over their members as an autonomous entity. Deeds from the 17th century suggest the Pequannock sachems exercised political influence through consensus and consultation with other tribal members. Land transactions between the tribe and colonial authorities listed leaders and provided some information, from an external point of view, concerning the aboriginal political structure.

In 1761, the historical Golden Hill still had a sachem whom the Colony recognized as a leader. Since the Colony dealt with a group that had recognized leaders and the evidence documents the group acting in concert to exercise political influence, the petitioner meets 83.7(c) from 1637 to 1761 for the historical Golden Hill.

For the period from 1761 to 1802, the petitioner presented sufficient evidence that the historical Golden Hill Indians maintained political influence over the group's members as an autonomous entity. The last sachem, John Shoran, died in 1761. There is sufficient evidence in the form of protests against encroachments on the Golden Hill reservation by non-Indians to demonstrate that a very small group of Indians continued to display some measure of political influence or authority. The evidence consists mainly of petitions to the General Court (later General Assembly) and official government reports from 1763 to 1765, 1774 to 1780, and 1797 to 1802. The set of petitions from 1797 to 1802 documented the historical Golden Hill's approval of the sale of the last portions of the historical Golden Hill reservation, located in modern-day Bridgeport. Similar petitions have been accepted in previous acknowledgment decisions as sufficient evidence regarding political influence. Therefore, this evidence is sufficient to meet 83.7(c) from 1761 to 1802 for the historical Golden Hill.

The evidence does not demonstrate that there was an identifiable Golden Hill entity that maintained political influence among its members from 1802 to 1933. After the sale of the Bridgeport reservation in 1802, there were no further actions taken by a group as a political entity. There is no person identified in any official State reports as a sachem or leader after the death of John Shoran in 1761. After 1802, there were no further group petitions. The two petitions filed by Ruby Mansfield and Nancy Sharp alias Pease do not demonstrate influence or authority over a group because the two women petitioned as individuals and as ''sole surviving heirs'' of the Golden Hill Indians, not as representatives of a group or tribe. The petitioner maintains that William Sherman functioned as a leader during his lifetime (1825–1886). The evidence, however, does not demonstrate that he actually functioned as a leader of an identifiable Golden Hill group. The petitioner also claims that William Sherman's son, George Sherman, functioned as a leader in the late 19th and early 20th centuries. While George Sherman was referred to in some newspaper articles as a ''chief,'' there is no documentation available to show that any identifiable group acknowledged his authority or that he acted on any group's behalf. Therefore, the petitioner has not demonstrated political influence and authority for 1802 to 1933.

The material submitted to demonstrate political influence or authority from 1933 until 1972 does not meet the requirements of criterion 83.7(c). In 1933, George Sherman's daughter, Ethel Sherman, began referring to herself as a ''Chieftess.'' However, there is no available evidence to support the claim as anything more than self-identification. There is no evidence to indicate that Ethel Sherman was able to gather a number of people together or access any money or resources from them for group purposes. There is also no evidence submitted to demonstrate that her position came about as part of any group consensus. An analysis of the early and mid-20th century documents indicates that the individuals whom the petitioner now credits as political leaders were acting to guarantee individual interests, not those of any wider group. In order to overcome this deficiency, the petitioner must produce evidence of leaders acting in the interests of an identifiable group that extends beyond an individual or one branch of one family.

For the period 1972 to the present, the petitioner submitted a considerable amount of evidence relating to the activities of Aurelius Piper, Sr. The record indicates that he was the first person since 1761 acknowledged by the State as exercising political leadership within a group of individuals claiming to be Golden Hill group members.

The petitioner submitted notices of group meetings for the late 1970's and early 1980's, informing members of upcoming events and requesting their participation. The minutes of these meetings indicate there were low levels of participation by the group's members. The available evidence does not demonstrate that the issues important to Aurelius Piper, Sr. concerned or involved a predominant portion of the group. Much of the evidence for political influence for the late 1980's and early 1990's focused mostly on leadership disputes between Aurelius Piper, Sr. and his two sons, with occasional references to the involvement of two of his half-nephews. Even during the 1970's and 1980's when the GHP was most active, the actions taken were by a small number of individuals without broad representation across any family lines. It

is not demonstrated that the actions of the leaders, who were either self-appointed or appointed by close family members, reflected the concerns of a significant number of the group's members. To demonstrate political influence or authority, the petitioner must demonstrate more than a minimal level of involvement from most members of the group. Therefore, the petitioner has not provided sufficient evidence to demonstrate political influence or authority for the period from 1972 to the present. Accordingly, the petitioner has not met the requirements of criterion 83.7(c) from 1637 to the present.

The State has recognized a Golden Hill entity from colonial times to the present. Within the general parameters of Connecticut's laws regarding State-recognized tribes, the specifics of its tribal dealings differed from group to group. The historical Golden Hill had a State reservation from colonial times to 1802. The State established the group's present 1/4 acre reservation, located in Trumbull, not the original reservation land area of Bridgeport, in 1933. From the early 1800's to the 1970's, however, the State did not identify or deal with specific leaders of the group.

While State recognition and the existence of a State reservation can provide additional evidence to be weighed in combination with other specific evidence, State recognition in itself is not sufficient evidence to meet criteria 83.7(b) and (c). The particular relationship of the State to the GHP group, in combination with existing direct evidence for community and political process is so limited, that is not sufficient evidence to demonstrate that these two criteria are met.

The petitioner meets the requirements of criterion 83.7(d) because it has submitted a governing document, including a description of its membership criteria.

The petitioner does not meet criterion 83.7(e)(1) because the petitioner has not submitted evidence acceptable to the Secretary that its membership consists of individuals who descend from a historical Indian tribe or tribes that combined. There is no evidence in the record that the petitioner's claimed ancestors, William Sherman, Levi Allen and Delia Merrick, descended from a historical Indian tribe or tribes that amalgamated and functioned as a single entity. The evidence does not show that William Sherman descended from any person identified on the 1823 Census of the historical Golden Hill, or from either Ruby Mansfield or from Nancy Sharpe *alias* Pease, who were identified in historical State records in 1841, 1846, and 1849 as Golden Hill Indians and whom the petitioner claims were the ancestors of William Sherman.

There is no documentation in the record to verify that William Sherman or any of his children married Golden Hill, Pequannock, Paugussett, Turkey Hill, or other Indians; therefore, that portion of the membership claiming descent from William Sherman does not demonstrate Indian ancestry through any other possible Indian ancestors. Neither is there documentation in the record to verify that names recently added to the GHP membership list, who claim descent from Levi Allen and Delia Merrick, have Indian ancestry linked to any of these tribes.

The petitioner does not meet criterion 83.7(e)(2). The October 1, 1999, membership list of 214 names was used for this report. However, it was not separately certified by the governing body, and did not include each member's full name (and maiden name), date of birth, and residential address, as required by the regulations. Although the GHP group submitted several membership lists, none are sufficient to meet the criterion. The petitioner may correct this deficiency by resubmitting a properly completed membership list that is certified by the entire governing body of the group. None of the persons listed on petitioner's most recent membership list (October 1, 1999) have demonstrated descent from members of the historical tribe(s) listed in petitioner's membership criteria.

The petitioner meets criterion 83.7(f) because its members are not enrolled in other Federally recognized tribes, and criterion 83.7(g) because the group or its members have not been the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

The evidence available for this proposed finding demonstrates that the GHP group does not meet all seven criteria required for Federal acknowledgment. In accordance with the regulations, failure to meet any one of the seven criteria requires a determination that the group does not exist as an Indian tribe within the meaning of Federal law (83.6(c), 83.10(m)).

A copy of this proposed finding, which summarizes the evidence, reasoning, and analyses that are the basis for decision, is available upon written request (83.10(h)).

During the 180-day comment period (83.10(i)), the AS–IA shall provide technical advice concerning the proposed finding and shall make available to the petitioner in a timely fashion any records used for the proposed finding not already held by the petitioner, to the extent allowable by Federal law (83.10(j)(1)). In addition, the AS–IA shall, if requested by the petitioner or any interested party, hold a formal meeting for the purpose of inquiring into the reasoning, analyses, and factual bases for the proposed finding. The proceedings of this meeting shall be on the record. The meeting record shall be available to any participating party and become part of the record considered by the AS–IA in reaching a final determination (83.10(j)(2)).

If third party comments are received during the comment period, the petitioner shall have a minimum of 60 days to respond to these comments. This period may be extended at the AS–IA's discretion if warranted by the extent and nature of the comments (83.10(k)).

At the end of the comment and response periods, the AS–IA shall consult with the petitioner and interested parties to determine an equitable time frame for consideration of written arguments and evidence submitted during the comment and response periods, and notify the petitioner and interested parties of the date such consideration begins (83.10(l)). The AS–IA has the discretion to request additional information from the petitioner or commenting parties, and to conduct additional research (83.10(l)(1)). After consideration of the written arguments and evidence submitted during the comment period and the petitioner's response to the comments, the AS–IA shall make a final determination regarding the petitioner's status. A summary of the final determination will be published in the **Federal Register** (83.10(l)(2)).

Dated: January 21, 2003.

**Aurene M. Martin,**

*Acting Assistant Secretary—Indian Affairs.*

[FR Doc. 03–2044 Filed 1–28–03; 8:45 am]

BILLING CODE 4310–4J–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### Ho-Chunk Nation Alcohol Beverage Control Ordinance

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice.

**SUMMARY:** This notice publishes the Ho-Chunk Nation Alcohol Beverage Control Ordinance. The Ordinance regulates the control, possession, and sale of liquor on the Ho-Chunk Nation trust lands, to

be in conformity with the laws of the State of Wisconsin, where applicable and necessary. Although the Ordinance was adopted on August 6, 2002, it does not become effective until published in the **Federal Register** because the failure to comply with the ordinance may result in criminal charges.

**EFFECTIVE DATE:** This Ordinance is effective on January 29, 2003.

**FOR FURTHER INFORMATION CONTACT:** Iris Drew, Office of Tribal Services, 1951 Constitution Avenue NW., MS 320–SIB, Washington, DC 20245; Telephone (202) 513–7628.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner,* 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of the adopted liquor ordinances for the purpose of regulating liquor transaction in Indian country. The Ho-Chunk Nation Alcohol Beverage Control Ordinance, Resolution No. 8–6–02 F, was duly adopted by the Ho-Chunk Nation Legislature on August 6, 2002. The Ho-Chunk Nation, in furtherance of its economic and social goals, has taken positive steps to regulate retail sales of alcohol and use revenues to combat alcohol abuse and its debilitating effect among individuals and family members within the Ho-Chunk Nation.

This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Departmental Manual 8.1.

I certify that by Resolution No. 8–6–02 F, the Ho-Chunk Nation Alcohol Beverage Control Ordinance was duly adopted by the Ho-Chunk Nation Legislature on August 6, 2002.

Dated: January 17, 2003.

**Aurene M. Martin,**

*Assistant Secretary—Indian Affairs.*

The Ho-Chunk Nation Alcohol Beverage Control Ordinance, Resolution No. 8–6–02 F, reads as follows:

**Ho-Chunk Nation Code (HCC)**

*Title 5—Business and Finance Code*

Section 4—Alcohol Beverage Control Ordinance Enacted by Legislature: August 6, 2002

This Ordinance supersedes the Liquor Control Ordinance enacted by the Wisconsin Winnebago Business Committee Resolution 6/25/93D.

1. *Authority.*

a. Article V, Section 2(a) of the Constitution grants the Legislature the power to make laws, including codes, ordinances, resolutions, and statutes.

b. Article V, Section 2(h) of the Constitution grants the Legislature the power to enact all laws prohibiting and regulating conduct and imposing penalties upon all persons within the jurisdiction of the Nation.

c. Article V, Section 2(s) of the Constitution grants the Legislature the power to promote public health, education, charity, and such other services as may contribute to the social advancement of the members of the Ho-Chunk Nation.

d. Article V, Section 2(t) of the Constitution grants the Legislature the power to enact laws governing law enforcement on lands within the jurisdiction of the Nation.

2. *Purpose.* This Ordinance provides for the uniform regulation of the sale of intoxicating liquor, wine, and beer within the Ho-Chunk Nation on lands under the jurisdiction of the Nation.

3. *Policy.*

a. The sale, possession, and consumption of alcohol beverages on the Nation's lands will be strictly regulated in accordance with the provisions of this Ordinance and applicable sections of Chapter 125, *Wisconsin Statutes.*

b. No person under the age of 21 years shall purchase or have in his or her possession alcoholic beverages on Ho-Chunk land.

4. *Definitions.* Terms used in this Ordinance have the following meaning:

a. *Beer.* A fermented malt beverage made by alcohol fermentation of barley malt and hops containing 0.5% or more of alcohol by volume.

b. *Department.* The Ho-Chunk Nation Department of Business.

c. *Intoxicating Beverage.* Any intoxicating liquor, wine, or beer.

d. *Intoxicating Liquor.* All ardent, spirituous, distilled or vinous liquors, which are beverages and contain 0.5% or more of alcohol by volume.

e. *Wine.* Products and beverages obtained from the normal fermentation of the juice or must of grapes, other fruits, or other agricultural products, if such product or beverage contains 0.5% or more of alcohol by volume.

3. *Application for License.*

a. An application for a license to sell intoxicating beverages shall be submitted to the Nation's Department of Business. The application shall contain the following information:

(1) The name(s) of the individual and organization applying for the license;

(2) the address and telephone numbers of the applicant(s);

(3) the location, to include building and/or address, where the applicant will sell the intoxication beverages; and

(4) a copy of the local municipality (town, village, or city) license to sell intoxicating beverages.

b. The Department may reject any application for a license under this Ordinance if applicant has previously committed acts that would be in violation of this Ordinance or if an applicant has had a license revoked.

c. *Application Fee.* A non-refundable initial application fee will be established by the Department of Business and must be submitted with the initial application for license.

4. *Issuance of License.*

a. The Department of Business shall issue a license for the sale of intoxicating beverages if, on the basis of the information provided in the application or on additional information relevant by the Department, such issuance is in the interest of the Nation.

b. Licenses shall contain the following requirements.

(1) Each license shall require its holder to conform to the laws of the State of Wisconsin that relate to the sale or possession of intoxicating beverages.

(2) *License Fee.*

(a) The initial license fee shall be established and charged by the Department of Business.

(b) The annual license renewal fee shall be established and charged by the Department of Business.

(3) No license shall be effective for a term of more than one (1) year from the date of issuance. Each annual renewal shall be subject to the same requirements that apply to the initial issuance of a license.

(4) Each license shall explicitly state that its continued validity is dependent upon the compliance of its holder with all the provisions of this Ordinance and of the laws of the State of Wisconsin that relate to the sale and/or possession of intoxicating beverages.

5. *Suspension or Revocation of License.* The Department shall have the authority to suspend or revoke any license issued under this Ordinance.

a. Upon finding or receiving information that a holder of a license has violated the terms of the license or applicable law, the Department shall provide the license holder written notice that the Department intends to suspend or revoke the holder's license. The notice shall specify the grounds for the proposed suspension or revocation. Such notice shall be sent by certified mail, return receipt requested.

b. *Hearing.* A license holder upon receipt of the notice to suspend or revoke may, within seven (7) calendar days of receipt, submit a written request for a hearing to the Executive Director of the Department of Business.

(1) The President shall convene a Commission consisting of the Executive Director of Business and two (2) other non-interested Executive Directors to hear the license holder's case for not suspending or revoking his or her license. Such hearing will be held within thirty (30) days of receipt by the Department of Business of the request for a hearing.

(2) The license holder shall be permitted to present evidence to the Commission with respect to her or his compliance with this Ordinance and other applicable law.

(3) The Commission shall make a decision considering such evidence it deems relevant. The decision to suspend/revoke the license or dismiss the complaint shall be issued within three (3) days following the hearing.

(4) A decision to either suspend or revoke the holder's license shall take effect immediately at the close of the business day of the decision.

(5) The decision by the Commission shall be final.

6. *Approval.* This Ordinance shall be effective upon certification by the Assistant Secretary—Indian Affairs, Department of the Interior, and publication in the **Federal Register**.

[FR Doc. 03–2083 Filed 1–28–03; 8:45 am]

BILLING CODE 4310–4J–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[WY–100–03–1310–DB]**

### Notice of Intent to Conduct Scoping and Prepare an Environmental Impact Statement for the South Piney Natural Gas Development Project, Sublette County, Wyoming

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of intent (NOI) to conduct public scoping and prepare an Environmental Impact Statement (EIS) for the South Piney Natural Gas Development Project, Sublette County, Wyoming.

**SUMMARY:** Infinity Oil and Gas of Wyoming, Inc. (Infinity) and Williams Production RMT Company (Williams, and hereinafter referred to collectively as ''the Companies'') have submitted to the Bureau of Land Management (BLM) a proposal to develop Federal natural gas resources. The South Piney Natural Gas Development Project is located in the area known as South Piney, which is located in Sublette County, Wyoming. Under the provisions of section 102(2)(C) of the National Environmental Policy Act (NEPA) and pertinent Federal regulations, the BLM announces its intentions to prepare an EIS, and solicit public comments regarding issues and resource information pertaining to this proposed project.

**DATES:** This notice initiates the public scoping process. The BLM can best use public input if comments and resource information are submitted within 60 days of the publication of this notice. In addition, a scoping notice will be distributed by mail on, or about, the date that this notice is published in the **Federal Register**. Additional information, and a copy of the scoping notice may be obtained by writing, or visiting, the BLM Field Office listed below.

The BLM will be soliciting representatives from affected interests and stakeholders to participate in the environmental analysis process. In addition, the BLM will host a public meeting within 60 days of the publication of this notice. All comments received at the public meeting or submitted in writing by mail will aid the BLM in identifying issues, developing a range of alternatives, and analyzing environmental impacts. The BLM will announce public meetings and comment periods through local news media and/or the Pinedale Field Office Web site (*http://www.wy.blm.gov/pfo/info.htm*), at least 15 days prior to the event. The BLM will also provide additional opportunities for public participation throughout the preparation of the EIS.

**ADDRESSES:** Comments should be submitted in writing to: Field Manager, Bureau of Land Management, Pinedale Field Office, 432 East Mill Street, PO Box 768, Pinedale, Wyoming 82941.

**FOR FURTHER INFORMATION CONTACT:** Bill Lanning, Project Manager, BLM, Pinedale Field Office, PO Box 768, Pinedale, Wyoming 82941, telephone 307–367–5300.

**SUPPLEMENTARY INFORMATION:** In July 2002, the Companies submitted to the BLM a proposal to develop natural gas resources in the South Piney area. The total project area includes approximately 31,230 acres, of which approximately 15,440 acres are comprised of Federal surface and mineral estate managed by BLM; 1,760 acres of State of Wyoming surface and minerals; and 14,030 acres of private surface ownership. Of the 14,030 acres of private surface ownership, 11,413 acres are ''split estate'' (private surface/Federal minerals) lands, with the remaining 2,617 acres of mineral estate in private ownership.

The South Piney Natural Gas Development Project area is located in the southwest corner of Sublette County, approximately 12 miles west of Big Piney-Marbleton, 18 miles northwest of LaBarge, and approximately 28 miles southwest of Daniel, Wyoming. Drilling is proposed in Townships 29 and 30 North, Range 114 West, 6th Principal Meridian. Access to the project area is from U.S. Highway 189, Wyoming Highway 350, Sublette County Road No. 23–142, and existing roads and two-track trails in the overall project area.

The Companies propose to drill a minimum of 100 to a maximum of 210 natural gas wells within the overall project area. Infinity intends to drill wells to a maximum depth of approximately 5,000 feet to recover coalbed methane from the Upper Cretaceous Mesaverde Formation. Williams plans to drill wells to a maximum depth of 10,000 feet to recover natural gas from the Frontier Formation. The project area currently has five wells producing from coal seams in the Mesaverde Formation, one well currently producing from the Frontier Formation, one water disposal well, and four shut-in/temporarily abandoned deep Madison Formation gas wells. Williams drilled two additional Frontier Formation wells in Fall 2002.

The Companies' proposal includes a drilling program based on a 160-acre spacing pattern (four wells per section) for both the Mesaverde and Frontier Formations. The Companies have a joint interest in approximately 9,680 acres, and development in this area may result in the drilling of up to eight wells per section (four wells to the Mesaverde Formation and four wells to the Frontier Formation on a common or shared 160 acre spacing pattern). The remainder of the overall project area would see either Mesaverde or Frontier Formation development at a density of four wells per section.

The proposed gas field development would include the following associated structures and facilities:

1. Each well location would have a separator, dehydrator, and produced water storage tanks. Infinity's Mesaverde Formation well locations would require a surface-pumping unit for dewatering the Mesaverde coals. Infinity anticipates the need to install up to 20 central production facilities (production pods) within the overall project area. These production facilities would collect and compress methane produced from wells in the well field, as well as collect and dispose of produced water.

2. An access road and buried gas and produced water lines would be constructed to each well location. Infinity's Mesaverde Formation wells would require a water disposal line for transmission of produced water to a central disposal facility. The produced water line would be placed in a common trench with the gas line.

3. Up to four natural gas transmission pipelines would be constructed and would tie-in with an existing 4-inch diameter gas pipeline located east of the project area in Section 1, T29N, R114W. During the projected life of the project the existing 4-inch gas transmission line may need to be looped, or replaced, with a larger diameter line to accommodate the volume of gas produced from the area.

4. Infinity anticipates the installation of small reciprocating compressors at each of the individual Mesaverde Formation production pods within the well field for compression of methane produced from individual wells within the well field. Williams anticipates the need for one centralized compressor station for the compression of natural gas from the Frontier Formation.

5. A water disposal and injection well would be drilled at each of Infinity's centralized production pods for the subsurface disposal of water produced from the Mesaverde Formation. The produced water would be reinjected into a deep aquifer below the Mesaverde Formation.

The Companies propose to drill an average of approximately 30 wells/year over a 7-year period. After consultation with U.S. Fish and Wildlife Service regarding threatened and endangered species, BLM may authorize additional delineation wells while the EIS is being prepared. Results from additional delineation wells would assist the Companies in determining the actual level of development to achieve Federal regulatory mandates of ultimate maximum recovery of Federal mineral resources. Approval would be granted provided that, (1) the additional delineation wells would not result in potential significant impacts, and (2) that BLM's final decision would not be compromised.

The purpose of the natural gas development is to extract and recover natural gas from the South Piney Project area by allowing the Companies to provide more natural gas for distribution to consumers. The project would make additional supplies of clean-burning natural gas available to consumers. In addition, this project would meet the goals and objectives of the President's National Energy Plan, which includes diversifying domestic energy supplies, improving and accelerating environmental protection and strengthening America's energy security.

BLM personnel, other agencies, and individuals have identified the preliminary issues and management concerns listed below. They represent the BLM's knowledge to date on the existing conditions and potential issues in the proposed project area.

- Air quality and potential impacts to downwind Wilderness Areas and other Class I air sheds;
- Potential impacts to federally listed Threatened, Endangered, Candidate and Sensitive species and their habitats;
- Potential impacts to native Colorado River cutthroat trout habitat;
- Potential impacts to the Finnegan elk winter feed ground protected by No Surface Occupancy stipulations;
- Potential impacts to surface and groundwater resources;
- Short-term revegetation and restoration of disturbed areas and their long-term stabilization, including control of noxious weeds;
- Potential impacts on prehistoric and historic cultural resources including the Lander Cutoff Historic Immigrant Trail;
- Potential social and economic effects to the local communities from projected increased Federal, State, and local revenues;
- Potential impacts to wildlife habitat and fisheries;
- Potential impacts to nesting raptors;
- Potential impacts on wetlands and riparian areas;
- Use of potentially hazardous substances associated with drilling and well completion;
- Potential impacts to the visual resources and landscape; and,
- Potential impacts to recreation activities and opportunities such as hunting and fishing.

The BLM has identified the following opportunities that may be derived from the natural gas development: increased royalties and tax revenues to local, State and Federal governments; additional opportunities for employment and economic benefits for communities near the project area; increases in Wyoming's share of new and existing natural gas markets; and development of natural gas resources to assist in attainment of clean air in conformance with Presidential and Congressional directives. The proposed natural gas development is in conformance with the Pinedale Resource Management Plan (RMP) (1988).

Dated: November 25, 2002.

**Alan L. Kesterke,**

*Acting State Director.*

[FR Doc. 03–2046 Filed 1–28–03; 8:45 am]

BILLING CODE 4310–22–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[AK–933–1410–ET; AA–50617]**

### Public Land Order No. 7554; Revocation of Three Executive Orders; Alaska

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Public land order.

**SUMMARY:** This order revokes, in their entirety, three Executive Orders as they affect 2.538 acres of public lands withdrawn for administrative purposes for use by the Department of the Treasury at Wrangell, Alaska. The lands are no longer needed for the purpose for which they were withdrawn.

**EFFECTIVE DATE:** January 29, 2003.

**FOR FURTHER INFORMATION CONTACT:** Robbie J. Havens, Bureau of Land Management, Alaska State Office, 222 W. 7th Avenue, No. 13, Anchorage, Alaska 99513–7599, 907–271–5477.

**SUPPLEMENTARY INFORMATION:** A portion of the lands have been eroded by the ocean and are now submerged and a portion of the lands have been placed under the jurisdiction of the U.S. Postal Service. The remaining lands will continue to be subject to the terms and conditions of Public Land Order No. 5180, as amended, and any other withdrawal or segregation of record.

### Order

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1994), and by section 17(d)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1616(d)(1) (1994), it is ordered as follows:

1. Executive Order dated June 21, 1890, Executive Order No. 3077, dated April 16, 1919, and Executive Order No. 8054, dated February 23, 1939, which withdrew public lands for administrative purposes, are hereby revoked in their entirety as they affect the following described lands:

**Copper River Meridian**

Located within T. 62 S., R. 83 E., described as:

(a) U.S. Survey No. 125.

The area described contains 2.476 acres.

(b) U.S. Survey No. 1119, lots 12 and 13,

Block 9.

The area described contains .062 acre.

The areas described in (a) and (b) above aggregate 2.538 acres.

2. The lands described in paragraph 1(a) above have been placed under the jurisdiction of the U.S. Postal Service pursuant to section 2002(C) of the Postal Reorganization Act, 39 U.S.C. 101 (1994). The lands described in paragraph 1(b) will continue to be subject to the terms and conditions of Public Land Order No. 5180, as amended, and any other withdrawal or segregation of record.

Dated: January 9, 2003.

**Rebecca W. Watson,**

*Assistant Secretary—Land and Minerals Management.*

[FR Doc. 03–2045 Filed 1–28–03; 8:45 am]

**BILLING CODE 4310–JA–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[OR–958–1430–ET; HAG 03–0013 WAOR–22193A, WAOR–22197]**

### Public Land Order No. 7551; Partial Revocation of Executive Orders Dated July 15, 1875, and June 6, 1891; Washington

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Public land order.

**SUMMARY:** This order partially revokes two Executive Orders insofar as they affect approximately 209 acres of public lands reserved for use by the United States Coast Guard for Patos Light Station. The reservation is no longer needed.

**EFFECTIVE DATE:** January 29, 2003.

**FOR FURTHER INFORMATION CONTACT:** Charles R. Roy, BLM Oregon/Washington State Office, P.O. Box 2965, Portland, Oregon 97208–2965, 503–952–6189.

**SUPPLEMENTARY INFORMATION:** The reservation includes Patos and Little Patos Islands. The lands will remain closed to surface entry and mining due to an overlapping withdrawal. The lands have been and will remain open to mineral leasing.

**Order**

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1994), it is ordered as follows:

The Executive Orders dated July 15, 1875, and June 6, 1891, which reserved public lands for lighthouse purposes, are hereby revoked insofar as they affect the following described lands:

**Willamette Meridian**

T. 38 N., R. 2 W., unsurveyed,
Secs. 15, 16, and 17.

The areas described contain approximately 209 acres in San Juan County.

Dated: January 9, 2003.

**Rebecca W. Watson,**

*Assistant Secretary—Land and Minerals Management.*

[FR Doc. 03–2047 Filed 1–28–03; 8:45 am]

**BILLING CODE 4310–33–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[WY–957–02–9820–BJ–WY01]**

### Notice of Filing of Plats of Survey, Nebraska

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of filing of plats of survey, Nebraska.

**SUMMARY:** The Bureau of Land Management (BLM) has filed the plats of survey of the lands described below in the BLM Wyoming State Office, Cheyenne, Wyoming, on December 31, 2002.

**FOR FURTHER INFORMATION CONTACT:** Bureau of Land Management, 5353 Yellowstone Road, P.O. Box 1828, Cheyenne, Wyoming 82003.

**SUPPLEMENTARY INFORMATION:** These surveys were executed at the request of the U.S. Forest Service, and are necessary for the management of resources. The lands surveyed are:

The plat representing the dependent resurvey of portions of the east and south boundaries, and a portion of the subdivisional lines, Township 34 North, Range 54 West, Sixth Principal Meridian, Nebraska, was accepted December 31, 2002.

Copies of the preceding described plats are available to the public.

Dated: January 22, 2003.

**John P. Lee,**

*Chief Cadastral Surveyor, Division of Support Services.*

[FR Doc. 03–1951 Filed 1–28–03; 8:45 am]

**BILLING CODE 4310–22–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[WY–957–02–1420–BJ]**

### Notice of Filing of Plats of Survey, Wyoming

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of filing of plats of survey, Wyoming.

**SUMMARY:** The Bureau of Land Management (BLM) has filed the plats of survey of the lands described below in the BLM Wyoming State Office, Cheyenne, Wyoming, on December 31, 2002.

**FOR FURTHER INFORMATION CONTACT:** Bureau of Land Management, 5353 Yellowstone Road, P.O. Box 1828, Cheyenne, Wyoming 82003.

**SUPPLEMENTARY INFORMATION:** These surveys were executed at the request of the Bureau of Land Management, and are necessary for the management of resources. The lands surveyed are:

The plat representing the dependent resurvey of a portion of the south and east boundaries, and portions of the subdivisional lines, Township 56 North, Range 73 West, Sixth Principal Meridian, Wyoming, was accepted December 31, 2002.

The plat representing the dependent resurvey of portions of the west and north boundaries, and a portion of the subdivisional lines, and the subdivision of certain sections, Township 29 North, Range 85 West, Sixth Principal Meridian, Wyoming, was accepted December 31, 2002.

The plat representing the corrective dependent resurvey of the metes and bounds survey of Tract 39, correcting the numbering sequence from 84 to 89, Township 50 North, Range 99 West, Sixth Principal Meridian, Wyoming, was accepted December 31, 2002.

Copies of the preceding described plats are available to the public.

Dated: January 22, 2003.

**John P. Lee,**

*Chief Cadastral Surveyor, Division of Support Services.*

[FR Doc. 03–1950 Filed 1–28–03; 8:45 am]

**BILLING CODE 4310–22–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[WY–921–1990–ET; WYW 152450]**

### Notice of Meeting on Proposed Withdrawal; Beck Lake Area; Wyoming

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of public meeting.

**SUMMARY:** This notice sets forth the schedule and agenda for a forthcoming meeting for the proposed BLM withdrawal application for the protection of important scenic, open space, and recreational resource values in and around the Beck Lake area near Cody, WY. This meeting will provide the opportunity for public involvement in this proposed action as required by regulation. All comments will be considered when a final determination is made on whether this land should be withdrawn.

**DATES:** Meeting will be held on Tuesday, March 4, 2003, from 7 p.m. until approximately 8:30 p.m. All comments or requests to be heard should be received by close of business on Friday, February 21, 2003, at the BLM Wyoming State Office, PO Box 1828, 5353 Yellowstone Road, Cheyenne, WY 82003, or at the BLM Cody Field Office, PO Box 518, 1002 Blackburn, Cody, WY 82414.

**ADDRESSES:** The meeting will be held in the Cody Club Room of the Cody Auditorium, 1240 Beck Avenue, Cody, WY.

**FOR FURTHER INFORMATION CONTACT:** Janet Booth in Cheyenne at 307–775–6124 or Duane Feick in Cody at 307–578–5917.

**SUPPLEMENTARY INFORMATION:** The Notice of Proposed Withdrawal for the Beck Lake area which was published in the **Federal Register** on May 14, 2002 (67 FR 34469), is hereby modified to schedule a public meeting as provided by 43 U.S.C. 1714 and 43 CFR part 2310.

This meeting will be open to all interested persons; those who desire to be heard in person and those who desire to submit written comments on this subject. Please indicate if you want to speak so time can be scheduled. All comments and requests to be heard should be submitted by February 21, 2003, to the BLM Wyoming State Director, Bureau of Land Management, PO Box 1828, 5353 Yellowstone Road, Cheyenne, WY 82003, or to the BLM Cody Field Office Manager, PO Box 518, 1002 Blackburn, Cody, WY 82414.

Dated: January 23, 2003.

**Melvin Schlagel,**

*Realty Officer.*

[FR Doc. 03–2000 Filed 1–28–03; 8:45 am]

**BILLING CODE 4310–22–P**

## DEPARTMENT OF THE INTERIOR

### Minerals Management Service

### Environmental Documents Prepared for Proposed Oil and Gas Operations on the Gulf of Mexico Outer Continental Shelf (OCS)

**AGENCY:** Minerals Management Service, Interior.

**ACTION:** Notice of the availability of environmental documents prepared for OCS mineral proposals on the Gulf of Mexico OCS.

**SUMMARY:** Minerals Management Service (MMS), in accordance with Federal Regulations that implement the National Environmental Policy Act (NEPA), announces the availability of NEPA-related Site-Specific Environmental Assessments (SEA) and Findings of No Significant Impact (FONSI), prepared by MMS for the following oil and gas activities proposed on the Gulf of Mexico OCS.

**FOR FURTHER INFORMATION CONTACT:** Public Information Unit, Information Services Section at the number below. Minerals Management Service, Gulf of Mexico OCS Region, Attention: Public Information Office (MS 5034), 1201Elmwood Park Boulevard, Room 114, New Orleans, Louisiana 70123–2394, or by calling 1–800–200–GULF.

**SUPPLEMENTARY INFORMATION:** MMS prepares SEAs and FONSIs for proposals that relate to exploration for and the development/production of oil and gas resources on the Gulf of Mexico OCS. These SEAs examine the potential environmental effects of activities described in the proposals and present MMS conclusions regarding the significance of those effects. Environmental Assessments are used as a basis for determining whether or not approval of the proposals constitutes major Federal actions that significantly affect the quality of the human environment in the sense of NEPA Section 102(2)(C). A FONSI is prepared in those instances where MMS finds that approval will not result in significant effects on the quality of the human environment. The FONSI briefly presents the basis for that finding and includes a summary or copy of the SEA.

This notice constitutes the public notice of availability of environmental documents required under the NEPA Regulations.

This listing includes all proposals for which the Gulf of Mexico OCS Region prepared a FONSI in the period subsequent to publication of the preceding notice dated August 13, 2002.

| Activity/Operator | Location | Date |
|---|---|---|
| Murphy Exploration and Production Co., Initial Development Operations Coordination Plan, SEA No. N–7269 and S–5886. | Mississippi Canyon Area, Blocks 538 and 582, Leases OCS–G 16614 and 16623, located 36.8 miles from the nearest Louisiana shoreline. | 07/18/02 |
| Marathon Oil Company, Initial Exploration Plan, SEA Nos. N–7483 and N–7484. | Desoto Canyon Area; Blocks 445, 489, 490, 491 and 535; Leases OCS–G 23511, 23514, 23515, 23516 and 23520; located between 90 and 106 miles southeast of nearest coastline. | 09/12/02 |
| Anadarko Petroleum Corporation, Initial Exploration Plan, SEA No. N–7497. | Lloyd Ridge Area; Blocks 315, 316, 359 and 360; Leases OCS–G 23474, 23475, 23478 and 23479; located 130 miles from Louisiana coastline, 183 miles from Mississippi coastline, 179 miles from Alabama coastline, and 183 miles from Florida coastline. | 09/11/02 |
| W & T Offshore, Inc., Initial Development Operations Coordination Plan, SEA No. N–7328. | Garden Banks Area, Block 139, Lease OCS–G 17295, located 124 miles from the nearest Texas shoreline. | 10/07/02 |
| TotalFinaElf Exploration and Production U.S.A., Inc., Initial Development Operations Coordination Plan, SEA No. N–7249. | Mississippi Canyon Area, Block 243, Lease OCS–G 11080, located 25 miles from the nearest Louisiana shoreline. | 03/07/02 |
| Anadarko Petroleum Company, Initial Exploration Plan, SEA No. N–7533. | Lloyd Ridge Area, Blocks 5, 6, 49 and 50, Lease OCS–G 23450, 23451, 23457 and 23458 respectively, located 113 miles from the nearest Louisiana coastline, 161 miles from Mississippi, 158 miles from Alabama, 163 miles from Florida. | 11/01/02 |

| Activity/Operator | Location | Date |
|---|---|---|
| BP Exploration & Production, Inc., Initial Development Operations Coordination Plan, SEA No. N–7415. | Green Canyon Area, Block 826, Unit Agreement 754398016, Block 782, OCS–G 15610, Block 825, OCS–G 09981, Block 826, OCS–G 09982, located 128 miles from the nearest Louisiana coastline. | 12/03/02 |
| Freeport-McMoRan Sulphur, LLC, Revised Development Operations Coordination Plan, SEA No. R–3816. | Main Pass Area, Block 299, located 16 miles from shore, east of the Mississippi River Delta and Plaquemines Parish, Louisiana. | 12/10/02 |
| Energy Resource Technology, Inc., Structure Removal Activity, SEA Nos. ES/SR 02–089 and 02–090. | Eugene Island Area and Vermilion Area, Blocks 128A and 201, Leases OCS–G 00442 and 02075, located 30 miles southwest of Terrebonne Parish, Louisiana, and 60 miles south-southwest of Morgan City, Louisiana, located 55 miles south-southwest of Vermilion Parish, Louisiana, and 125 miles southwest of Morgan City, Louisiana, all respectively. | 08/28/02 |
| The Louisiana Land and Exploration Company, Structure Removal Activity, SEA Nos. ES/SR RA–2002–03 and RA–2002–04. | Eugene Island (South Addition) Area, Block 384, Lease OCS–G 03159, located 79 miles south-southwest of Terrebonne Parish, Louisiana, and 110 miles southwest of Fourchon, Louisiana. | 10/15/02 |
| Magnum Hunter Production, Inc., Structure Removal Activity, SEA No. ES/SR 02–114. | South Timbalier (South Addition) Area, Block 266, Lease OCS–G 15338, located 50 miles south of Lafourche Parish, Louisiana, and 58 miles south-southwest of Fourchon, Louisiana. | 10/08/02 |
| Spinnaker Exploration Company, Structure Removal Activity, SEA No. ES/SR 02–115. | High Island Area, Block 162, Lease OCS–G 21343, located 29 miles southeast of Jefferson County, Texas, and 44 miles east of Galveston, Texas. | 10/16/02 |
| J. M. Huber Corporation, Structure Removal Activity, SEA No. ES/SR 02–116. | Grand Isle Area, Block 55, Lease OCS–G 09676, located 23 miles southeast of Lafourche Parish, Louisiana, and 26 miles southeast of Fourchon, Louisiana. | 10/30/02 |
| Burlington Resources Offshore, Inc., Structure Removal Activity, SEA Nos. ES/SR RA–2002–06 and RA–2002–07. | Eugene Island Area, Block 159, OCS–G 04449, located 38 miles southwest of Terrebonne Parish, Louisiana, and 92 miles west of Fourchon, Louisiana. | 11/14/02 |
| ATP Oil & Gas Corporation, Structure Removal Activity, SEA Nos. 02–117 and 02–118. | West Cameron Area, Blocks 92 and 201, OCS–G 13829 and 13833 respectively, located 15 miles south of Cameron Parish, Louisiana, and 25 to 30 miles southwest of Cameron Parish, Louisiana, and 37 miles south-southeast of Cameron, Louisiana. | 11/15/02 |
| Walter Oil & Gas Corporation, Structure Removal Activity, SEA No. 02–119. | Grand Isle Area, Block 65, OCS–G 08730, located 23 miles southeast of LaFourche Parish, Louisiana, and 24 miles southeast of Fourchon, Louisiana. | 11/05/02 |
| ATP Oil & Gas Corporation, Structure Removal Activity, SEA No. 02–120. | West Cameron Area, Block 263, OCS–G 15072, located 50 miles south of Cameron Parish, Louisiana, and 60 miles south of Cameron, Louisiana. | 12/11/02 |

Persons interested in reviewing environmental documents for the proposals listed above or obtaining information about SEAs and FONSIs prepared for activities on the Gulf of Mexico OCS are encouraged to contact MMS at the address or telephone listed in the **FOR FURTHER INFORMATION CONTACT** section.

Dated: December 23, 2002.

**Chris C. Oynes,**

*Regional Director, Gulf of Mexico OCS Region.*

[FR Doc. 03–2042 Filed 1–28–03; 8:45 am]

**BILLING CODE 4310–MR–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Importation of Controlled Substances; Notice of Application

Pursuant to Section 1008 of the Controlled Substances Import and Export Act (21 U.S.C. 958(i)), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in Schedule I or II and prior to issuing a regulation under Section 1002(a) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with Section 1301.34 of Title 21, Cod of Federal Regulations (CFR), notice is hereby given that on July 31, 2002, Cerilliant Corporation, 811 Paloma Drive, Suite A, Round Rock, Texas 78664, made application by renewal to the Drug Enforcement Administration to be registered as an importer of the basic classes of controlled substances listed below:

| Drug | Schedule |
|---|---|
| Cathinone (1235) | I |
| Methcathinone (1237) | I |
| N-Ethylamphetamine (1475) | I |
| Gamma hydroxybutyric acid (2010). | I |
| Ibogaine (7260) | I |
| Tetrahydrocannabinols (7370) | I |
| Mescaline (7381) | I |
| 4-Bromo-2,5-dimethoxyamphetamine (7391). | I |
| 4-Bromo-2,5-dimethoxyphenethylamine (7392). | I |
| 4-Methyl-2,5-dimethoxyamphetamine (7395). | I |
| 2,5-Dimethoxyamphetamine (7396). | I |
| 3,4-Methylenedioxyamphetamine (7400). | I |
| 3,4-Methylenedioxy-N-ethylamphetamine (7404). | I |
| 3,4-Methylenedioxymethamphetamine (7405). | I |
| 4-Methoxyamphetamine (7411) | I |
| Psilocybin (7437) | I |
| Psilocyn (7438) | I |
| Etorphine (9056) | I |
| Heroin (9200) | I |
| Pholcodine (9314) | I |
| Cocaine (9041) | II |
| Codeine (9050) | II |
| Amphetamine (1100) | II |
| Methamphetamine (1105) | II |
| Amobarbital (2125) | II |
| Pentobarbital (2270) | II |
| Dihydrocodeine (9120) | II |
| Oxycodone (9143) | II |
| Hydromorphone (9150) | II |
| Benzoylecgonine (9180) | II |
| Ethylmorphine (9190) | II |
| Meperidine (9230) | II |
| Methadone (9250) | II |
| Dextropropoxyphene, bulk (non-dosage forms) (9273). | II |

| Drug | Schedule |
|---|---|
| Morphine (9300) | II |
| Thebaine (9333) | II |
| Levo-alphacetylmethadol (9648) | II |
| Oxymorphone (9652) | II |

The firm plans to import small quantities of the listed controlled substances for the manufacture of analytical reference standards.

Any manufacturer holding, or applying for, registration as a bulk manufacturer of these basic classes of controlled substances may file written comments on or objections to the application described above and may, at the same time, file a written request for a hearing on such application in accordance with 21 CFR 1301.43 in such form as prescribed by 21 CFR 1316.47.

Any such comments, objections or requests for a hearing may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than February 28, 2003.

This procedure is to be conducted simultaneously with and independent of the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice at 40 FR 43745–46 (September 23, 1975), all applicants for registration to import the basic classes of any controlled substances in Schedule I or II are and will continue to be required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1301.34(a), (b), (c), (d), (e), and (f) are satisfied.

Dated: January 7, 2002.

**Laura M. Nagel,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 03–1944 Filed 1–28–03; 8:45 am]

**BILLING CODE 4410–09–M**

## DEPARTMENT OF JUSTICE

### Federal Bureau of Investigation

### Agency Information Collection Activities: Reinstatement, With Change; Comments Requested

**ACTION:** 30 day notice of information collection Under Review: reinstatement, with change, of a previously approved collection for which approval has expired; postgraduate evaluation of the FBI National Academy and FBI National Academy training needs assessment for agency executives.

The Department of Justice, Federal Bureau of Investigation, has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (Volume 67, Number 226, pages 70459–70460 on November 22, 2002 allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until February 28, 2003. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained this notice, especially 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 20503.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments 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 functions 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 collection:

(1) *Type of Information Collection:* Reinstatement, with change, of a previously approved collection for which approval has expired.

(2) *Title of the Form/Collection:* Postgraduate Evaluation of the FBI National Academy and FBI National Academy Training Needs Assessment For Agency Executives.

(3) *Agency form Number, of any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: None. Federal Bureau of Investigation, FBI Academy.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: State and Local Law Enforcement Officers.Other: None. Abstract: This survey will consist of two instruments: Post Graduate Evaluation of the FBI National Academy; and FBI National Academy Training Needs Assessment For Agency Executives. These are surveys to collect training related information and there are no sensitive or personal questions, therefore confidentiality is not guaranteed or necessary.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 3,700 responses who will each require an average of 15 minutes to respond.

(6) *An estimate of the total public burden (in hours) associated with the collection:*

The total annual public burden hours for this information collection is estimated to be 925 hours.

If additional information is required contact: Mr. Robert B. Briggs, Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, 601 D Street NW., Washington DC 20004.

Dated: January 24, 2003.

**Robert B. Briggs,**

*Departmental Clearance Officer, United States Department of Justice.*

[FR Doc. 03–2049 Filed 1–28–03; 8:45 am]

**BILLING CODE 4410–02–M**

## DEPARTMENT OF JUSTICE

### Immigration and Naturalization Service

**[INS No. 2149–01]**

### Implementation of Class Action Judgment in Proyecto San Pablo v. INS

**AGENCY:** Immigration and Naturalization Service, Justice.

**ACTION:** Notice.

**SUMMARY:** This notice implements the class action judgment in *Proyecto San Pablo* v. *INS,* No. Civ 89–456–TUC–WDB (D.Ariz.) by notifying aliens who

applied for legalization under section 245A of the Immigration and Nationality Act (Act), 8 U.S.C. 1255a, of their rights under the judgment. This notice is necessary because neither the class counsel nor the Immigration and Naturalization Service (Service or INS) has reliable information concerning the names and addresses of class members.

**DATES:** This notice is effective January 29, 2003.

**FOR FURTHER INFORMATION CONTACT:** Robert Raymond, Office of the General Counsel, Immigration and Naturalization Service, 425 I Street NW., Room 6109, Washington DC 20536, telephone (202) 514–2895.

**SUPPLEMENTARY INFORMATION:**

**1. Why Is the Service Publishing This Notice?**

The Service is publishing this notice to comply with the judgment entered on March 27, 2001, as amended, in the class action entitled *Proyecto San Pablo* v. *INS* No. Civ 89–456–TUC–WDB (D.Ariz.) (*Proyecto* case). Service regulations do not permit aliens to file motions to reopen in legalization cases under section 245A of the Act, 8 U.S.C. 1255a. The Court's judgment, however, requires the Service to reopen certain legalization cases and make new decisions in those cases. This notice explains how to obtain a new decision in your case.

**2. To Whom Do the Personal Pronouns ''I,'' ''Me,'' ''My,'' ''You'' and ''Your'' Refer?**

In this Notice, the personal pronouns ''I,'' ''me,'' ''my,'' ''you'' and ''your'' refer to any alien who filed a timely application for legalization and who believes that he or she may be a class member in the *Proyecto* case.

**3. Does This Notice Apply to My Case?**

This notice applies to your case if you meet each of the following requirements:

(a) You filed an application for legalization under section 245A of the Act during the period that began May 5, 1987, and ended May 4, 1988;

(b) You filed this application with a legalization office in the former Northern or Western region of the Service (that is, in: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington (State), Wisconsin, or Wyoming);

(c) The Service denied your application for legalization or terminated your temporary residence under section 245A(g)(2)(B)(i) of the Act because, at some time during the period beginning before January 1, 1982, and ending on the date you filed your legalization application, you were ''outside the United States as a result of a departure under an order of deportation.''

**4. What Does the Court's Order Permit Me To Do?**

If this Notice applies to your case, then you may obtain a new Service decision on your legalization application. You may also obtain employment authorization, in 1-year increments, until the Service makes a new decision in your case. The Service may not deport you until it makes a new decision in your case. In addition, you will be given an opportunity to obtain a copy of your prior deportation or exclusion records under the Freedom of Information Act (FOIA). You will also be able to submit and have adjudicated, Form I–690, Application for Waiver of Grounds of Excludability Under sections 245A or 210 of the Immigration and Nationality Act, or any other waiver you deem appropriate, although the parties continue to dispute the legal effect of such a waiver.

**5. How Do I Obtain Employment Authorization?**

The *Proyecto* judgment requires the Service to extend your employment authorization until the Service reopens your case and makes a new decision. If your current employment authorization document has expired, or is about to expire, you should apply for a new employment authorization document by completing Form I–765, Application for Employment Authorization, and filing it, without fee. Follow the instructions listed on the Form I–765. To make it clear that you are claiming to be a *Proyecto* class member, you must write the word ''Proyecto'' in box 16 on the Form I–765. The Employment Authorization Application must be adjudicated within 90 days of the date of its receipt. You must file your Form I–765 with the Nebraska Service Center. The address is: Immigration and Naturalization Service, Nebraska Service Center, *Attn:* Proyecto Unit, PO Box 87687, Lincoln, NE 68501–7687.

**6. Will the Service Give Me a New Employment Authorization Card, if My Card Expires Before My Case Is Decided?**

Yes, any employment authorization card will be valid for 1 year, and so long as you have filed a motion to reopen as described below in paragraph 10, you may apply for renewal until the Service makes a final decision in your case. You will not be eligible for an extension of employment authorization, however, if you fail to file a motion to reopen within 1 year from the date you receive this notice. So long as you file a timely motion to reopen, the Service may not deport you until it issues a new decision in your legalization application.

**7. How Do I Obtain a New Decision in My Case?**

Because the legalization application period ended more than 13 years ago, it is not likely that the Service will have a current address for you. For this reason, the Service will not act to reopen your case until you notify the Service that you want the Service to do so. If you want to exercise your rights under the *Proyecto* decision, you must file with the Service a motion to reopen, without fee. As described below, your motion to reopen may include all information and/or waiver applications you wish the Service to consider. As such, you should first attempt to obtain any information you may need through the FOIA process as described below in question 8. In addition, you should prepare any waiver applications you wish to be considered and submit all of the information along with your motion to reopen. If you have not received a response to your FOIA request at the time you must file your motion to reopen, then you must still file your motion to reopen, but you may wait to submit the supporting documents until after you receive the response to any FOIA requests that you have made.

To avoid delays, please make sure that your motion to reopen clearly states that you are seeking the reopening of your case under the judgment in the *Proyecto* case.

**8. Where Do I File My FOIA Requests?**

The Service's FOIA requests are filed according to the instructions on Form G–639, Freedom of Information/Privacy Act Request (available on the Service's Web site at *http://www.ins.usdoj.gov*). To make a FOIA request, you may use Form G–639, or a letter specifically indicating which records are being requested. The form approved by the Court for requesting your Service records is attached.

*A. Service Records*

In order to obtain a copy of your prior Service file you must file a FOIA request with the Service. File your FOIA request with the Nebraska Service Center. The address is: Immigration and Naturalization Service, Nebraska

Service Center, *Attn:* FOIA/PA Unit, PO Box 82521, Lincoln, NE 68501–2521.

*B. Immigration Court Records*

In order to obtain a copy of your prior deportation or exclusion records from the Immigration Court, you must file a FOIA request with the Executive Office of Immigration Review (EOIR). Since EOIR is not part of the Service, you must send your EOIR FOIA request directly to EOIR at the following address: Office of the General Counsel, Executive Office for Immigration Review, FOIA/PA Requests, 5107 Leesburg Pike, Suite 2400, Falls Church, VA 22041.

The EOIR does not have its own special FOIA request form. However, EOIR will accept either the Form G–639, or a letter specifically indicating which records are being requested. The form approved by the Court for requesting your EOIR records is included as an appendix to this notice.

**9. Where Must I File the Motion to Reopen?**

You must file your motion to reopen with the Nebraska Service Center. The address is: Immigration and Naturalization Service, Nebraska Service Center, Attn: Proyecto Unit, PO Box 87687, Lincoln, NE 68501–7687.

**10. When Must I File the Motion to Reopen?**

You must file your motion to reopen no later than 1 year from the date you are personally served with this Notice by the Service, as described below.

The Service will personally serve you with a copy of this notice in one of three ways. First, on or about the time of the publication of this Notice in the **Federal Register**, if you are known to meet the *Proyecto* class definition, the Service will mail this Notice, by certified mail return receipt requested, to your last known address contained in your file. Second, after publication of this Notice in the **Federal Register**, when you file an application for employment authorization (Form I–765), the Service will check your alien file to see if there is written confirmation that you previously received this notice. If there is no such confirmation, the Service will mail a copy of this Notice, by certified mail return receipt requested to you at the address listed on the application for employment authorization, or to your attorney or representative as required by 8 CFR 292.5, if a Form G–28, Notice of Entry of Appearance as Attorney or Representative has been filed since the publication of this notice in the **Federal Register**. Third, the Service may personally deliver a copy of this Notice to you at any time the Service encounters you.

The 1-year time period for filing your motion to reopen begins on the date that personal service in one of the three ways described above is confirmed to have occurred. The Service cannot deny your legalization application, or deny work authorization pursuant to this Notice, unless the Service can confirm that this Notice has been served on you in one of the three ways described above.

If you need to file FOIA requests before you can file your motion to reopen, then you must still file your motion to reopen within the 1-year time period described above. If you have not yet received the results from your FOIA requests, then your motion to reopen must include a statement that you are awaiting your FOIA results.

**11. What Must I Include With My Motion To Reopen?**

You should include in your motion to reopen:

(1) A copy of any documents that you received from the Service and EOIR in response to your FOIA requests that you want to have included in your legalization record of proceeding,

(2) A waiver application (Form I–690) with the fee established in 8 CFR 103.7(b) (currently $35) (available on the Service's Web site at *http://www.ins.usdoj.gov*) if you wish the Service to adjudicate a waiver,

(3) Any brief, any other waiver that you wish to have adjudicated, and any other evidence you wish to submit in support of your motion; and

(4) Either a statement that you are ready to have a new decision entered in your case, or a statement that you are still awaiting the results of your FOIA requests.

**12. What if I Have Not Yet Received the Results of My FOIA Request?**

If you are still awaiting FOIA results you must still file the motion to reopen no later than the period described in paragraph 10, above. You may include with your motion a copy of any waiver application you wish to file, a copy of your FOIA requests, any evidence you want to submit other than evidence from your FOIA requests, and a statement indicating that you are awaiting the results of the FOIA requests. You must then submit, no later than 6 months after you receive the results of your FOIA requests, any brief you wish to file and a complete copy of any documents that you want to have included in your legalization record of proceeding.

**13. When Will the Service Decide My Case?**

Because your motion to reopen should include any and all evidence that you want included in your legalization record of proceeding, any brief you wish to file, and any waiver application that you wish to have considered, the Service may decide your motion to reopen at any time after you file it, unless you indicate in your motion that you are still awaiting the results of your FOIA requests. If you are still awaiting the results of your FOIA requests, the Service will not rule on your motion until you have had an opportunity to obtain and review the FOIA documents. You must submit a brief and any documents you want the Service to consider no later than 6 months after you have received a response to both of your FOIA requests.

**14. What if I Do Not File a Motion To Reopen?**

The Service will not make a new decision in your case unless you file a motion to reopen, which you must do within the 1-year period described in this notice under the heading ''When Must I File The Motion to Reopen?'' (Paragraph 10). If you have received employment authorization pursuant to these instructions and do not file a motion to reopen, your employment authorization will not be renewed.

**15. What if I Do Not Get This Notice With These Instructions Within a Year?**

You will be permitted to file a motion to reopen and take the other steps outlined here if you come to the attention of the Service more than a year after these instructions are published, unless the Service can confirm that this Notice has been personally served on you in the manner described in this notice under the heading ''When Must I File The Motion to Reopen?'' (Question 10).

**16. Does the Proyecto Judgment Entitle Me to a Stay of Deportation?**

The March 27, 2001, Judgment of the Court requires the Service to stay your deportation and to release you from custody without bond, so long as you are a class member. Filing either the application for a new employment authorization document or the motion to reopen will help notify the Service that you are entitled to this stay and release without bond. The stay will remain in effect until the Service makes a final decision in your case.

**17. Does the Proyecto Judgment Make Me Eligible for Legalization?**

Not necessarily. According to the order of the District Court, the Service is required to reopen and readjudicate your legalization application. This does not necessarily mean that the Service will approve your application.

**18. Do the Legalization Confidentiality Rules Apply to My Case?**

The legalization confidentiality rules apply to your case in the same way that they apply to any other legalization case. Your applications and file requests cannot be used for any other reason than to make a determination on your eligibility for legalization. They cannot be used in removal, deportation or exclusion proceedings.

**19. Do I Have the Right to Have an Attorney or Other Person Represent Me?**

By statute and regulation, you have the right to be represented before the Service by any attorney or other person authorized to represent people before the Service.

Please note that Robert Gibbs, Esq., Gloria A. Goldman, Esq., and Robert Pauw, Esq., have represented the class in this case. You may retain Mr. Gibbs, Ms. Goldman, or Mr. Pauw to represent you, but you also have the right to retain any other attorney or other person authorized to represent people before the Service. If you want Mr. Gibbs or Mr. Pauw to represent you, or want further information about this case, you may contact them at: Gibbs Houston Pauw, 1000 Second Avenue, Suite 1600, Seattle, Washington 98104; telephone (206) 682–1080; Web site: *www.ghp-law.net.* You may also contact Ms. Goldman at 1575 West Ina Road, Tucson, Arizona 85704–1926, telephone (520) 797–9229.

If you already have your own attorney or representative, he or she may also contact Mr. Gibbs, Ms. Goldman, or Mr. Pauw for information about this case.

*20. What if My Address Changes?*

It is very important that you inform the Service of any change of address while your case is pending. You should promptly notify the Service in writing of a change of address by sending the change of address to any office where you filed a FOIA request, and to the Nebraska Service Center as shown below: Immigration and Naturalization Service, Nebraska Service Center, Attn: Proyecto Unit, PO Box 87687, Lincoln, NE 68501–7687.

**Paperwork Reduction Act**

The documentary requirements included when filing a motion to reopen your case, including the form approved by the Court for requesting your records is not considered an information collection under 5 CFR 1320.4(a)(2).

Dated: January 23, 2003.

**Michael J. Garcia,**

*Acting Commissioner, Immigration and , Naturalization Service.*

**Note:** The appendix to this notice contains the FOIA request form provided for in the Proyecto judgment.

BILLING CODE 4410–10–P

## APPENDIX

THE FOLLOWING IS THE FOIA REQUEST FORM PROVIDED FOR IN THE PROYECTO JUDGMENT

**PROYECTO SAN PABLO V. INS, 89-456 WDB (D. AZ.)**
**FREEDOM OF INFORMATION ACT FILE REQUEST FORM**

(1) For a copy of your SERVICE A-File, send this form to:

**Immigration and Naturalization Service**
**Nebraska Service Center**
**ATTN: FOIA/PA Unit**
**PO Box 82521**
**Lincoln NE 68501-2521**

(2) For a copy of your immigration court records, send this form to:

**Office of General Counsel**
**Executive Office of Immigration Review**
**FOIA/PA Requests**
**5107 Leesburg Pike, Suite 2400**
**Falls Church, VA 22041**

Dear Sir or Madam:

Pursuant to the Court order in Proyecto San Pablo v. INS, Civ. No. 89-456 WDB (D. Az.), I request that you send me a complete copy of any and all documents contained in immigration files relating to me. Please include copies of all prior A-files under any A-number assigned to me, any prior deportation or exclusion files, and any immigration court files. Please provide me with a copy of the tape and/or transcript of any deportation or exclusion hearings.

Sincerely,

Name _____
Address _____
_____
A-Number (if known) _____
(List all A-numbers) _____

**Instruction to applicant:** Send one of these requests to the INS Nebraska Service Center for INS records and another to the Executive Office of Immigration Review for records of a prior deportation or exclusion hearing. You should send these letters by certified mail, return receipt requested, and keep copies for your own records.

[FR Doc. 03–1959 Filed 1–28–03; 8:45 am]
BILLING CODE 4410–10–C

## DEPARTMENT OF LABOR

### Employment Standards Administration

### Proposed Collection; Comment Request

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment Standards Administration is soliciting comments concerning the proposed collection: Employment Under Special Certificates of Apprentices, Messengers and Learners (including Student Learners) (WH–205, WH–209). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addresses section below on or before March 31, 2003.

**ADDRESSES:** Ms. Patricia A. Forkel, U.S. Department of Labor, 200 Constitution Ave., NW,. Room S–3201, Washington, DC 20210, telephone (202) 693–0339, fax (202) 693–1451, E-mail *pforkel@fenix2.dol-esa.gov.* Please use only one method of transmission for comments (mail, fax, or E-mail).

**SUPPLEMENTARY INFORMATION:**

### I. Background

Under section 14(a) of the Fair Labor Standards Act (FLSA), the Secretary of Labor is required, to the extent necessary to prevent curtailment of employment opportunities, to provide for employment under special certificates of categories of workers who may be paid less than the statutory minimum wage. This section also authorizes the Secretary to set limitations on such employment as to time, number, proportion and length of service. These workers include apprentices, messengers and learners. Form WH–209 is an Application for a Certificate to Employ Learners/Messengers at Subminimum Wages. The WH–205 is an Application to Employ Student Learners at Subminimum wages. In addition, an employer may obtain authority from the Department to employ apprentices at subminimum wages. There is no application form associated with the application for apprentices; the employer must submit a copy of the registered apprenticeship program or agreement. These requirements are found at 29 CFR part 520. This information collection is currently approved for use through July 31, 2003.

### II. Review Focus

The Department of Labor is particularly interested in comments which:

- 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;
- 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;
- Enhance the quality, utility and clarity of the information to be collected; and
- 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 submissions of responses.

### III. Current Actions

The Department of Labor seeks the extension of approval to collect this information in order to determine whether statutory and regulatory requirements for the employment of messengers/apprentices/learners have been met. There is no change in the substance or method of collection since the last OMB approval.

*Type of Review:* Extension.

*Agency:* Employment Standards Administration.

*Title:* Employment Under Special Certificates of Apprentices, Messengers and Learners (including Student Learners).

*OMB Number:* 1215–0192.

*Agency Number:* WH–205, WH–209.

*Affected Public:* Business or other for-profit, Individuals or households, Not-for-profit institutions, State, Local or Tribal Government.

| Form/requirement | Respondents/ responses | Time per response | Burden hours |
|---|---|---|---|
| WH–209 | 0 | NA | 0 |
| WH–205 | 400 | 30 min. | 200 |
| Apprentice Application | 0 | NA | 0 |

*Total Respondents/Responses:* 400.

*Frequency:* Annually.

*Estimated Total Burden Hours:* 400.

*Total Burden Cost (capital/startup):* $0.

*Total Burden Cost (operating/maintenance):* $2,866.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: January 23, 2003.

**Bruce Bohanon,**

*Chief, Branch of Management Review and Internal Control, Division of Financial Management, Office of Management, Administration and Planning, Employment Standards Administration.*

[FR Doc. 03–2015 Filed 1–28–03; 8:45 am]

**BILLING CODE 4510–27–P**

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### National Endowment for the Arts

### Federal Advisory Committee on International Exhibitions—Notice of Change

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that the teleconference meeting of the Federal Advisory Committee on

International Exhibitions (FACIE), originally scheduled for Wednesday, January 29, 2003, has been rescheduled for January 31, 2003, from 2–4 p.m. in room 709 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC, 20506.

Further information with reference to this meeting can be obtained from Ms. Kathy Plowitz-Worden, Panel Coordinator, National Endowment for the Arts, Washington, DC, 20506, or call 202/682–5691.

Dated: January 23, 2003.

**Kathy Plowitz-Worden,**

*Panel Coordinator, Panel Operations, National Endowment for the Arts.*

[FR Doc. 03–2085 Filed 1–28–03; 8:45 am]

**BILLING CODE 7537–01–P**

## NATIONAL WOMEN'S BUSINESS COUNCIL

### Notice of Public Meeting

In accordance with the Women's Business Ownership Act, Public Law 106–554 as amended, the National Women's Business Council (NWBC) would like to announce a forthcoming Council meeting. The meeting will introduce the National Women's Business Council's agenda and action items for fiscal year 2003 included but not limited to procurement, access to capital, access to training and technical assistance, access to markets and affordable health care. The meeting will be held Tuesday, February 11, 2003 at the U.S. Small Business Administration located at 409 Third Street, SW, Washington, DC. The meeting will be conducted in the Eisenhower Conference Room B, 2nd Floor at 1 pm to 4 pm. This meeting is opened to the public. (Attendance by RSVP only). Anyone wishing to attend or make an oral presentation at the meeting must contact Gilda Presley, no later than Monday, February 3, 2003 at 202/205–6695.

**Candace Stoltz,**

*Director of Advisory Councils.*

[FR Doc. 03–2206 Filed 1–27–03; 2:42 pm]

**BILLING CODE 8025–01–M**

## NUCLEAR REGULATORY COMMISSION

### Draft Regulatory Guide; Issuance, Availability

The Nuclear Regulatory Commission (NRC) has issued for public comment a proposed revision of a guide in its Regulatory Guide Series and Draft Standard Review Plan Chapter 15.0.2. Regulatory Guides are developed to describe and make available to the public such information as methods acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques used by the staff in evaluating specific problems or postulated accidents, and data needed by the staff in its review of applications for permits and licenses.

The draft guide is temporarily identified by its task number, DG–1120, which should be mentioned in all correspondence concerning this draft guide. Draft Regulatory Guide DG–1120, ''Transient and Accident Analysis Methods'' is being developed to describe a process that is acceptable to the NRC staff for the development and assessment of evaluation models that may be used to analyze transient and accident behavior that are within the design-basis of the plant.

This draft guide has not received complete staff approval and does not represent an official NRC staff position.

Comments may be accompanied by relevant information or supporting data. Written comments may be submitted by mail to the Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555; or they may be hand-delivered to the Rules and Directives Branch, ADM, at 11555 Rockville Pike, Rockville, MD. Copies of comments received may be examined at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD. Comments will be most helpful if received by March 24, 2003.

You may also provide comments via the NRC's interactive rulemaking Web site through the NRC home page (*http://www.nrc.gov*). This site provides the ability to upload comments as files (any format) if your Web browser supports that function. For information about the interactive rulemaking Web site, contact Ms. Carol Gallagher, (301) 415–5905; e-mail *CAG@NRC.GOV*. For information about Draft Regulatory Guide DG–1120, contact Mr. Joseph Staudenmeier at (301) 415–7002, e-mail *JLS4@NRC.GOV*.

Although a deadline is given for comments on these draft guides, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

Regulatory guides are available for inspection at the NRC's Public Document Room, 11555 Rockville Pike, Rockville, MD; the PDR's mailing address is USNRC PDR, Washington, DC 20555; telephone (301) 415–4737 or (800) 397–42056; fax (301) 415–3548; e-mail *PDR@NRC.GOV*. Requests for single copies of draft or final regulatory guides (which may be reproduced) or for placement on an automatic distribution list for single copies of future draft guides in specific divisions should be made in writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Reproduction and Distribution Services Section, or by fax to (301) 415–2289; e-mail *DISTRIBUTION@NRC.GOV*. Telephone requests cannot be accommodated. Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

(5 U.S.C. 552(a))

Dated at Rockville, Maryland, this 21st day of January 2003.

For the Nuclear Regulatory Commission

**Farouk Eltawila,**

*Director, Division of Systems Analysis and Regulatory Effectiveness, Office of Nuclear Reactor Regulation.*

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–47236; File No. SR–NASD–2003–06]**

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. to Delay the Implementation of Fee Changes for the Nasdaq Testing Facility

January 23, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and rule 19b–4 thereunder,[2] notice is hereby given that on January 17, 2003, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in items I, II, and III below, which items have been prepared by Nasdaq. Nasdaq filed the proposal pursuant to section 19(b)(3)(A)(i) of the Act,[3] and rule 19b–4(f)(1)[4] thereunder, as one constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule, which renders the proposal effective upon filing with the Commission. The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(i).

[4] 17 CFR 240.19b–4(f)(1).

Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

Nasdaq has delayed until January 1, 2003, the implementation of certain fee changes for the Nasdaq Testing Facility (''NTF'') established by SR–NASD–2002–72 [5] and SR–NASD–2002–73.[6] There is no proposed rule language.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for its proposal and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in item IV below. Nasdaq has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

The purpose of the proposed rule change is to notify the Commission and other interested parties of the delay until January 1, 2003, of the implementation of certain fee changes for the NTF. The fee changes were established by SR–NASD–2002–72 and SR–NASD–2002–73. In those filings, Nasdaq, among other things, amended rule 7050(d)(1) to apply the hourly testing fees for use of the NTF to testing of Nasdaq Workstation II (''NWII'') application programming interface (''API'') and market data vendor feeds. The hourly testing fees had formerly applied only to testing of computer-to-computer interfaces (''CTCI'').[7] Under the filings, the fee change was effective and to be implemented upon filing for members and upon Commission approval for non-members. However, Nasdaq delayed implementation of the testing fees for NWII API because of delays in the availability of a system that could accurately record the time spent by a particular NTF user in testing NWII API. This delay has now been addressed, and Nasdaq implemented the fee for NWII API testing as of January 1, 2003. Prior to that time, Nasdaq has made the NTF available for testing of NWII API without charge, and Nasdaq has notified users of the NTF as to the implementation of the testing fees. All other aspects of SR–NASD–2002–72 and SR–NASD–2002–73 were implemented as of the effective dates of those filings.

Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,[8] in general, and with section 15A(b)(5) of the Act,[9] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers, and other persons using any facility or system which the NASD operates or controls.

*B. Self-Regulatory Organization's Statement of Burden on Competition*

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others*

Written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing proposal has become effective pursuant to section 19(b)(3)(A)(i) of the Act,[10] and rule 19b–4(f)(1) [11] thereunder, in that it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to file number SR–NASD–2003–06 and should be submitted by February 19, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

**Margaret H. McFarland,**

*Deputy Secretary.*

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[5] Securities Exchange Act Release No. 46065 (June 12, 2002), 67 FR 41556 (June 18, 2002)(SR–NASD–2002–72)(immediately effective fees for members).

[6] Securities Exchange Act Release No. 46234 (July 19, 2002), 67 FR 48693 (July 25, 2002)(SR–NASD–2002–73)(approval of fees for non-members).

[7] Prior to the amendments, the rule had also made reference to testing of ''digital interface (DIS/CHPS),'' a technology that is not currently in use by Nasdaq. These references were deleted.

[8] 15 U.S.C. 78o–3.

[9] 15 U.S.C. 78o–3(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A)(i).

[11] 17 CFR 240.19b–4(f)(1).

[12] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–47233; File No. SR–NASD–2002–127]**

## Self Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval to Proposed Rule Change and Amendment No. 1 Thereto Amending Rule 11890 Concerning Clearly Erroneous Transactions

January 22, 2003.

**I. Introduction**

On September 24, 2002, the National Association of Securities Dealers, Inc., through its subsidiary, the Nasdaq Stock Market, Inc. (''Nasdaq'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and rule 19b–4 thereunder,[2] a proposed rule change to amend NASD rule 11890, which provides Nasdaq with authority to nullify or modify transactions. On November 1, 2002, Nasdaq filed Amendment No. 1 that entirely replaced

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

the original rule filing.[3] The proposed rule change, as amended, was published for comment in the **Federal Register** on December 9, 2002.[4] The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

## II. Description of the Proposal

Nasdaq proposes to amend NASD rule 11890, which provides Nasdaq with the authority to nullify or modify transactions.

*a. Review of Transactions Pursuant to Complaint of Market Participant*

Under NASD rule 11890, Nasdaq has the authority to receive petitions from market participants requesting that designated officers of Nasdaq review the terms of a transaction and nullify or modify it if the transaction is found to be clearly erroneous. Among other things, NASD rule 11890, as amended by this proposal, will explicitly limit Nasdaq's purview to transactions arising out of the use or operation of Nasdaq execution or communication systems and explicitly require that the parties to a reviewable transaction be readily identifiable by Nasdaq through its systems. Amended NASD rule 11980 will also clarify, in part, that it covers transactions entered into by a member of a UTP exchange through a Nasdaq execution system. Thus, the rule will cover transactions executed between a Nasdaq member and a member of a UTP exchange that had agreed to accept automatic executions through SuperSOES or SuperMontage, but will not cover transactions where the UTP exchange merely posted a quote and was accessible only via telephone. The amended rule would also clarify that information submitted by parties to Nasdaq must be received by Nasdaq within the time frames specified in the rule.

*b. Review of Transactions on Nasdaq's Own Motion*

Nasdaq proposes to amend NASD rule 11890 to state that Nasdaq's authority to review transactions based upon its own motion may be exercised in the event of extraordinary market conditions or other circumstances in which the nullification or modification of transactions may be necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest. Amended NASD rule 11890 will also clarify that Nasdaq's authority to review transactions based upon its own motion may be applied to any transaction arising out of or reported through a Nasdaq quotation, execution, communication, or trade reporting system, including transactions entered into by a member of a UTP exchange through a Nasdaq execution system (but excluding transactions entered into through, or reported to, a UTP exchange).

Additionally, the proposed rule change will amend the time frame for action to require that the Nasdaq officer, either the Nasdaq President or Executive Vice President designated by the President, on Nasdaq's own motion, act, except in extraordinary circumstances, no later than 3 p.m. on the next trading day. Finally, Nasdaq is adding interpretative material after the rule to provide that it shall be considered conduct inconsistent with just and equitable principles of trade for a member to refuse to take action that is necessary to effectuate a final decision of a Nasdaq officer or the Market Operations Review Committee (''MORC'').

*c. Review by the Market Operations Review Committee*

NASD rule 11890 governs review by the MORC, a standing committee composed of representatives of member firms as well as ''non-industry'' representatives. Persons seeking to appeal a determination by Nasdaq must submit their appeal within the time parameters specified by the rule. Both parties are then given the opportunity to submit supporting arguments in writing, and the matter is submitted to the MORC for a determination. Nasdaq proposes, however, that an officer empowered to review transactions on Nasdaq's own motion (*i.e.*, the President or an Executive Vice President) may determine that the number of transactions affected by a decision to break or modify trades on Nasdaq's own motion is such that the decision must be accorded immediate finality in order to maintain a fair and orderly market and to protect investors and the public interest.

*d. Communications Between Nasdaq and Market Participants*

Amended NASD rule 11890 will describe in greater detail the parameters for communications between Nasdaq and market participants. Specifically, the proposal will provide that materials submitted to Nasdaq or the MORC must be submitted via facsimile machine and must be received within the time parameters specified by the rule. However, if requested, Nasdaq staff may authorize submission of materials via electronic mail on a case-by-case basis.[5] Materials shall be deemed received at the time indicated by a facsimile machine or computer that receives the materials. Nasdaq reserves the right to reject or accept material that is not received within the time parameters specified by the rule.

Nasdaq will provide notice of determinations under the rule via facsimile machine, electronic mail, or telephone (including voicemail). However, in cases where an officer nullifies or modifies a large number of transactions pursuant to Nasdaq's authority to act on its own motion, individual notice may not be practicable. In that case, Nasdaq may provide notice to market participants via the Nasdaq Workstation II Service, a press release, or any other method reasonably expected to provide rapid notice to many market participants.

## III. Discussion

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association,[6] and in particular, the requirements of section 15A(b)(6) of the Act,[7] which, among other things, requires that the association's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, the Commission believes that Nasdaq's proposal may clarify the scope of Nasdaq's authority to review erroneous transactions and the procedural aspects of reviewing such transactions.

Nasdaq proposes to delineate, in part, the conditions under which Nasdaq will consider petitions by market participants to review transactions. Proposed NASD rule 11890 explicitly

[3] *See* letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated November 1, 2002.

[4] *See* Securities Exchange Act Release No. 46939 (December 3, 2002), 67 FR 72994 (December 9, 2002) (SR–NASD–2002–127).

[5] For example, if a party wishes to submit, pursuant to subparagraph (a)(2)(A) of the amended rule, a large document containing supporting information, it may be preferable to submit the document via electronic mail. Electronic mail may be used only when specifically authorized by Nasdaq staff, however, because it is impossible to control the delivery time of electronic mail.

[6] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78o–3(b)(6).

limits its purview to transactions arising out of the use or operation of Nasdaq execution or communication systems and explicitly requires that the parties to a reviewable transaction be readily identifiable by Nasdaq through its systems. The Commission believes that the amended rule better reflects Nasdaq's interpretation of the scope of its rule. Nasdaq has represented that in the past it has declined to adjudicate petitions on the grounds that the transaction would be more appropriately reviewed by the market center on which it was executed. Therefore, the Commission believes that the proposed rule change clarifies the application and operation of the rule for market participants.

Nasdaq also proposes to amend NASD rule 11890 to state that Nasdaq's authority to review transactions based upon its own motion may be exercised in the event of extraordinary market conditions or other circumstances in which the nullification or modification of transactions may be necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest. The Commission believes that the proposal clarifies Nasdaq's authority to nullify or modify transactions on its own motion and provides Nasdaq with the flexibility to address a variety of extraordinary market conditions expeditiously. The Commission notes that Nasdaq expects to assert its authority primarily in circumstances where the disruption or malfunction of a system resulted in the execution of trades with obvious errors, such as a price substantially unrelated to the inside market. Nasdaq has also represented that it will not attempt to break or modify trades entered into through, or reported to, a UTP exchange. Nasdaq will endeavor to coordinate its actions with other market centers to achieve consistent treatment of trades outside Nasdaq's jurisdiction.

Regarding the review of Nasdaq determinations by the MORC, Nasdaq proposes that an officer empowered to review transactions on Nasdaq's own motion (*i.e.*, the President or an Executive Vice President) may determine that the number of transactions affected by a decision to break or modify trades on Nasdaq's own motion is such that the decision must be accorded immediate finality in order to maintain a fair and orderly market and to protect investors and the public interest. The Commission believes that Nasdaq's proposal is reasonable and that the market may be well served by the finality it provides. Furthermore, Nasdaq has represented, and the Commission expects, that Nasdaq would use this authority only on rare occasions. For example, Nasdaq believes that there may be circumstances in which review by the MORC of a large number of trades would be impractical and could expose market participants to unacceptable levels of risk.[8]

Finally, Nasdaq proposes to describe in greater detail the parameters for communications between Nasdaq and market participants. The Commission believes that the proposal may clarify procedural aspects of the process of reviewing transactions and therefore promote the fair and efficient resolution of disputes.

## IV. Conclusion

For the reasons discussed above, the Commission finds that the proposal, as amended, is consistent with the Act and the rules and regulations thereunder. It is therefore ordered, pursuant to section 19(b)(2) of the Act,[9] that the proposed rule change (SR–NASD–2002–127), as amended, be and hereby is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 03–2017 Filed 1–28–03; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–47223; File No. SR–PCX–2002–75]**

## Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Exchange, Inc., Through Its Subsidiary PCX Equities, Inc., Relating to New Order Types and To Amend PCXE Rule 7.37

January 21, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and rule 19b–4 thereunder,[2] notice is hereby given that on December 9, 2002, the Pacific Exchange, Inc. (''PCX'' or ''Exchange''), through its subsidiary, PCX Equities, Inc. (''PCXE''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in items I, II, and III below, which items have been prepared by the PCX. On January 15, 2003, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PCX, through its wholly owned subsidiary, PCXE, proposes to amend its rules governing the Archipelago Exchange, the equities trading facility of PCXE, by: (1) Adopting several new order types to accommodate the trading of securities listed on the Nasdaq Stock Market, Inc., on an unlisted trading privileges (''UTP'') basis; (2) amending PCXE rule 7.37 to provide for a limited exemption from the trade-through restrictions for some of these new order types; (3) amending certain provisions of the Working Order Process to reflect the unique operational requirements of two proposed order types; and (4) making several minor technical rule changes to conform to the Nasdaq UTP Plan, which extends UTP to Nasdaq SmallCap securities. The text of the proposed rule change follows:

Additions are *italicized*; deletions are in [brackets].

PCX Equities, Inc.

Rule 1 Definitions

Rule 1.1(a)–(z)—No change.

**Nasdaq[/NM] Security**

(aa) The term ''Nasdaq[/NM] Security'' shall mean any security (i) designated as *an eligible* [national market system] security pursuant to the *''Nasdaq Unlisted Trading Privileges Plan'', as amended*, [NASD's ''National Market System Securities Designation Plan with respect to Nasdaq Securities,''] filed with and approved by the Commission pursuant to SEC rule 11Aa2–1 under the Exchange Act and (ii) that is either listed on the Corporation pursuant to rule 5 or as to which unlisted trading privileges have been granted pursuant to section 12(f) of the Exchange Act.

Rule 1.1 (bb)–(hh)—No change.

**OTC/UTP Plan**

(ii) The term ''OTC/UTP Plan'' shall mean the Nasdaq *Unlisted Trading*

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[8] For example, Nasdaq believes that if an erroneously priced order or quote causes a large number of transactions to occur at prices far in excess of a security's true value and if a decision is made to break all of the affected trades, some sellers may appeal the decision to break the trades. If a market participant is a party to trades on both sides of the market, and some remain broken while others are appealed and reinstated, it will suffer losses that arise solely from the inconsistent treatment of its trades.

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, the Exchange submitted a new form 19b–4, which replaced the original filing in its entirety.

*Privileges* [National Market/Unlisted Trading System/Unlisted Trading Privileges] Plan, as from time to time amended according to its provisions.

**OTC/UTP *Listing* [Primary] Market**

(jj) The term ''OTC/UTP *Listing* [Primary] Market'' for a Nasdaq[/NM] Security means *the OTC/UTP Participant's Market on which the Nasdaq Security is listed. If the Nasdaq Security is dually listed, OTC/UTP Listing Market shall mean the OTC/UTP Participant's Market on which the Nasdaq Security is listed that also has the highest number of the average of the reported transactions and reported share volume for the preceding 12-month period. The OTC/UTP Listing Market for dually-listed Nasdaq Securities shall be determined at the beginning of each calendar quarter.* [Nasdaq; provided, however, that if for any 12-month period the number of reported transactions and the reported share volume in a Nasdaq/NM Security in any other OTC/UTP Participant's market exceeds 50% of the aggregate reported transactions and reported share volume of all OTC/UTP Participants in such security, then that OTC/UTP Participant's market shall be the OTC/UTP Primary Market.]

**OTC/UTP Regulatory Halt**

(kk) The term ''OTC/UTP Regulatory Halt'' means a trade suspension or halt called by the OTC/UTP *Listing* [Primary] Market for the purpose of dissemination of material news.

* * * * *

Rule 7 Equities Trading

Trading in Nasdaq[/NM] Securities

Rule 7.18(a) Access.

(1) The Corporation shall permit each Nasdaq Market Maker, acting in its capacity as a market maker, telephone access, or such other access as may be established between the Corporation and the Nasdaq System (collectively, ''approved access''), to the Corporation for each Nasdaq[/NM] Security in which such market maker is registered as a market maker. Such approved access shall include appropriate procedures to assure the timely response to communications received through telephone or other approved access.

(2) Nasdaq Market Makers may use such approved access to transmit orders for execution on the Corporation. Market Makers, via the facilities of the Corporation, may send orders via approved access to any Nasdaq Market Maker in each Nasdaq[/NM] security in which it displays quotations.

(3)—No change.

(4) No Market Maker shall permit the imposition of any access or execution fee, or any other fee or charge, with respect to transactions in Nasdaq[/NM] Securities effected with Nasdaq Market Makers that are communicated to the Corporation through telephone access.

(b)—No change.

(c) OTC/UTP Regulatory Halts. Whenever, in the exercise of its regulatory function, the OTC/UTP *Listing* [Primary] Market for a Nasdaq[/NM] Security determines that an OTC/UTP Regulatory Halt is appropriate, the Corporation shall halt or suspend trading in that security until the notification by the OTC/UTP *Listing* [Primary] Market that the halt or suspension is no longer in effect. The Corporation will assume that adequate publication or dissemination has occurred upon the expiration of one hour after initial publication in a national news dissemination service of the information that gave rise to an OTC/UTP Regulatory Halt and may, at its discretion, reopen trading at that time, notwithstanding notification from the OTC/UTP *Listing* [Primary] Market that the halt or suspension is no longer in effect.

(d) Applicability. The following rules of the Corporation will not be applicable to transactions on the Corporation in Nasdaq[/NM] Securities: rules 7.16, 7.55–7.57.

* * * * *

Orders and Modifiers

Rule 7.31(a)—(c)—No change.

(d) Inside Limit Order. A Limit Order, which, if routed away pursuant to rule 7.37(d), will be routed to the market participant with the best displayed price. Any unfilled portion of the order will not be routed to the next best price level until all quotes at the current best bid or offer are exhausted. If the order is no longer marketable it will be ranked in the Arca Book pursuant to rule 7.36. [Reserved.]

(e) Immediate-or-Cancel Order. A market or limit order that is to be executed in whole or in part as soon as such order is received, and the portion not so executed is to be treated as canceled. An immediate-or-cancel order for Trade-Through Exempt Securities (as defined in rule 7.37) will be permitted to trade at a price no more than three cents ($0.03) away from the NBBO displayed in the Consolidated Quote. *The NBBO price protection provision set forth in rule 7.37 will not apply to immediate-or-cancel orders in Nasdaq securities.*

(f)—(g)—No change.

(h) Working Order. Any order with a conditional or undisplayed price and/or size designated as a ''Working Order'' by the Corporation, including, without limitation:

(1)—No change.

(2) Discretionary Order. An order to buy or sell a stated amount of a security at a specified, undisplayed price (the ''discretionary price''), in addition to at a specified, displayed price (''displayed price.'')

*(A) Passive Discretionary Order. A Discretionary Order may be designated as a Passive Discretionary Order and such order will be routed pursuant to rule 7.37(d) only if the displayed price is marketable against an away market participant.*

*(i) For Passive Discretionary Orders in exchange-listed securities, if the discretionary price is marketable, such order will only interact with trading interest in the Arca Book pursuant to rule 7.37(b)(2) and will not be routed away. A Passive Discretionary Order for ITS Trade-Through Exempt Securities will be permitted to trade at a price no more than three cents ($0.03) away from the NBBO displayed in the Consolidated Quote.*

*(ii) For Passive Discretionary Orders in Nasdaq securities, if the discretionary price can be matched against orders in the Arca Book, such order will intereact with trading interest in the Arca Book pursuant to 7.37(b)(2). The NBBO price protection provision set forth in rule 7.37 will not apply to Passive Discretionary Orders in Nasdaq securities.*

*(B) Discretion Limit Order. A Discretionary Order may be designated as a Discretion Limit Order for Nasdaq securities only. If the discretionary price of a Discretion Limit Order can be matched against trading interest in the Arca Book, then such order will be executed at the discretionary price or better. If the discretionary price of a Discretion Limit Order can be matched against an away market participant, then such order will be routed pursuant to rule 7.37(d) but only if the displayed share size of the Discretion Limit Order is equal to or less than the displayed share size of the away market participant. The NBBO price protection provision set forth in rule 7.37 will not apply to Discretion Limit Orders in Nasdaq securities.*

(3) Reserve Order. A limit order with a portion of the size displayed and with a reserve portion of the size (''reserve size'') that is not displayed on the Corporation.

*(A) Sweep Reserve Order. A Reserve Order may be designated as a Sweep Reserve Order. Based upon a User's instruction, if the displayed price of a Sweep Reserve Order is marketable*

*against an away market participant(s), then such order will be routed (i) serially as component orders, such that each component corresponds to the displayed price, or (ii) only once in its entirety, including both the displayed and reserve portions.*

*(B) Random Reserve Order. A Reserve Order designated as a Random Reserve Order will have a random reserve value which, as a range of round lots, will vary the displayed size of the Reserve Order. A random reserve value set to zero will permit the displayed size of the Reserve Order to vary to within 20% of the original specified displayed size.*

(i)—(u)—No change.

(v) NOW Order. A Limited Price Order that is to be executed in whole or in part on the Corporation, and the portion not so executed shall be routed pursuant to rule 7.37(d) only to one or more NOW Recipients for immediate execution as soon as the order is received by the NOW Recipient. Any portion not immediately executed by the NOW Recipient shall be cancelled. If a NOW Order is not marketable when it is submitted to the Corporation, it shall be cancelled. NOW Orders may not be Directed Orders. NOW Orders for *ITS* Trade-Through Exempt Securities (as defined in rule 7.37) may be routed and executed at a price that is no more than three cents ($0.03) away from the NBBO displayed in the Consolidated Quote. *The NBBO price protection provision set forth in rule 7.37 will not apply to NOW Orders in Nasdaq securities.*

(w) PNP Order (Post No Preference). A limit order to buy or sell that is to be executed in whole or in part on the Corporation, and the portion not so executed is to be ranked in the Arca Book, without routing any portion of the order to another market center; provided, however, the Corporation shall cancel a PNP Order that would lock or cross the NBBO. PNP Orders for Trade-Through Exempt Securities (as defined in rule 7.37) will not be canceled at the time of order entry if such orders would lock or cross the NBBO. PNP Orders in *ITS* Trade-Through Exempt Securities may be executed at a price no more than three cents ($0.03) away from the NBBO displayed in the Consolidated Quote. *The NBBO price protection provision set forth in Rule 7.37 will not apply to PNP Orders in Nasdaq securities.*

(x)—(z)—No change.

*(aa)—(bb)—Reserved.*

*(cc) Pegged Order. A limit order to buy or sell a stated amount of a security at a display price set to track the current bid or ask of the NBBO in an amount specified by the User. The associated price of each Pegged Order that is updated will be assigned a new entry time with priority in accordance with rule 7.36(a). A Pegged Order may be designated as a Reserve Order or Discretionary Order.*

* * * * *

Order Execution

Rule 7.37. Subject to the restrictions on short sales under rule 10a–1 under the Exchange Act, like-priced orders, bids and offers shall be matched for execution by following Steps 1 through 5 in this rule; provided, however, for an execution to occur in any Order Process, the price must be equal to or better than the NBBO, unless the Archipelago Exchange has routed orders to away markets at the NBBO, where applicable (however, a User may submit a NOW Order or Primary Only Order that may be routed to an away market without consideration of the NBBO). This rule will not apply to *designated order types including IOC, NOW, PNP, Passive Discretionary, Discretion Limit (except for exchange-listed securities), IOC Cross and PNP Cross orders in Nasdaq securities or* securities that are subject to an exemption from the Commission under SEC rule 11Aa3–2(f) to the trade-through provisions of the *ITS* Plan (''*ITS* Trade-Through Exempt Securities''). Orders in *ITS* Trade-Through Exempt Securities [designated as IOC, NOW and PNP orders] will be effected at a price no more than three cents ($0.03) away from the best bid and offer quoted in CQS.

(a)—No change.

(b)(1)—No change.

(2) Step 3: Working Order Process.

(A) An incoming marketable order shall be matched for execution against orders in the Working Order Process in the following manner:

(i)—(iii)—No change.

(iv) *Determination of a Passive Discretionary Order's Execution Price.*

*(a) For Nasdaq Securities, if the BBO is outside the NBBO and a Passive Discretionary Order(s) within the Working Order Process has a discretionary price worse than the NBBO, then the incoming order will execute against such Passive Discretionary Order(s) at the price of the incoming order or the displayed price of the Discretionary Order(s), whichever is better.*

*(b) For Nasdaq Securities, if the BBO is outside the NBBO and a Passive Discretionary Order(s) within the Working Order Process has a discretionary price equal to or better than the NBBO, then the incoming order will execute against such Passive Discretionary Order(s) pursuant to subsection (2)(A)(ii) above.*

*(c) For ITS Trade-Through Exempt Securities (as defined in Rule 7.37), if the BBO is outside the NBBO and a Passive Discretionary Order(s) within the Working Order Process has a discretionary price worse than the NBBO by three cents ($0.03) or less, the incoming order will execute against such Passive Discretionary Order(s) at the price of the incoming order or the displayed price of the Discretionary Orders(s), whichever is better.*

*(v)*—No change.

(B) An incoming order that is not marketable shall be matched for execution against orders in the Working Order Process in the following manner:

(i)—(ii)—No change.

(C) *With the exception of Passive Discretionary Orders and Discretion Limit Orders,* [I]*if* any change in the NBBO or other available away trading interest would cause a potential match between the away order and an order in the Working Order Process, a commitment to trade shall be sent to that market center or market participant pursuant to Step 5 below after having proceeded through Step 4.

*(i) Passive Discretionary Orders will be routed away only if the displayed price is marketable against an away market participant.*

*(ii) Discretion Limit Orders will be routed away only if the displayed share size of the Discretion Limit Order is equal to or less than the displayed share size of the away market participant.*

(c)—(e)—No change.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. PCX has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

Purpose

1. *Proposed New Order Types*

As part of its ongoing preparation for the trading of Nasdaq securities on the Archipelago Exchange (''ArcaEx'')

facility pursuant to UTP,[4] PCX proposes to adopt several new order types, which are currently in use on the Archipelago electronic communication network (''ECN'').[5] These proposed order types will apply to both Nasdaq and listed securities traded on ArcaEx.[6] The Exchange believes that these order types will provide ETP Holders[7] and Sponsored Participants[8] (collectively ''Users'') greater flexibility in determining how their orders will be executed. The proposed order types are discussed below.

a. *Inside Limit Order*

An Inside Limit Order is a limit order that is to be executed in whole or in part on ArcaEx, and the portion not so executed would be routed pursuant to rule 7.37(d) to the market participant[9] with the best displayed price. Any unfilled portion of the order would not be routed to the next best price level until all quotes at the current best bid or offer are exhausted. For example, after having proceeded through the four order execution processes of the ArcaEx Book,[10] there remains an unexecuted portion of an Inside Limit Order to buy at a price of 12.50. ArcaEx would route the order to the away market participant with the best displayed offer. Suppose the best displayed offer by other market participants is Market A at 12.45, Market B at 12.46, Market C at 12.47, and Market D at 12.50. The Inside Limit Order would be routed first to Market A at 12.45. The balance of the Inside Limit Order would not be routed to the next price level (*i.e.*, Market B at 12.46) until the current offer is exhausted. Each successive number of shares remaining (if any) would be routed at the next price level in the same manner. If the Inside Limit Order is no longer marketable it would be ranked in the Arca Book pursuant to rule 7.36.

b. *Discretionary Orders*

Currently, a User can submit a Discretionary Order, which is an order to buy or sell a stated amount of a security at a specified, undisplayed price (the ''discretionary price''), as well as at a specified, displayed price. The undisplayed prices of a Discretionary Order are represented in the Working Order Process[11] and can be matched with orders on the other side of the market under prescribed conditions. Since the Discretionary Order type allows a User to represent a single order at multiple price points, investors are able to express their trading interest more accurately than is possible with traditional order types. The Exchange is proposing to adopt two new variations of the Discretionary Order called a ''Passive Discretionary Order'' and a ''Discretion Limit Order,'' which would provide Users with more flexibility when such orders are routed to away market participants. A summary of these proposed order types is discussed below.

i. *Passive Discretionary*

The Exchange proposes to add PCXE rule 7.31(h)(2)(A) to define a Passive Discretionary Order. A Discretionary Order may be designated as a Passive Discretionary Order and such order would be routed pursuant to rule 7.37(d) only if the displayed price is marketable against an away market participant. If the discretionary price of a Passive Discretionary Order were marketable, such order would only interact with trading interest in the ArcaEx Book pursuant to rule 7.37(b)(2) and would not be routed away. Under the proposal, the Passive Discretionary order type will be available for exchange-listed and Nasdaq securities. For Passive Discretionary Orders in exchange-listed securities, if the discretionary price is marketable, such order will only interact with trading interest in the ArcaEx Book pursuant to rule 7.37(b)(2) and will not be routed away. A Passive Discretionary Order for ITS Trade-Through Exempt Securities (as defined in rule 7.37) will be permitted to trade at a price no more than three cents ($0.03) away from the NBBO displayed in the Consolidated Quote. For Passive Discretionary Orders in Nasdaq securities, if the discretionary price can be matched against orders in the ArcaEx Book, then such order will interact with trading interest in the ArcaEx Book pursuant to 7.37(b)(2). The NBBO price protection provision set forth in rule 7.37 will not apply to Passive Discretionary Orders in Nasdaq securities.

To illustrate how this order type is processed by the ArcaEx trading system, suppose that a User submits a Passive Discretionary Order to buy 1000 shares at 12.48 (discretion to 12.50). After first attempting to match the order with available trading interest in the ArcaEx Book (up to a price of 12.50), ArcaEx would route the order to an away market participant, but only if the offer published by the market participant is equal to or less than the displayed price of 12.48. In the event that a Passive Discretionary Order routed from ArcaEx to another market participant is not executed in its entirety at the other market participant's quote, ArcaEx would attempt to match the residual against trading interest in the ArcaEx Book pursuant to rule 7.37. Finally, if the Passive Discretionary Order is no longer marketable it would be ranked in the ArcaEx Book pursuant to rule 7.36.

ii. *Discretion Limit*

The Exchange also proposes to add PCXE rule 7.31(h)(2)(B) to define a Discretion Limit Order. A Discretionary Order may be designated as a Discretion Limit Order for Nasdaq securities only. If the discretionary price of a Discretion Limit Order could be matched against trading interest in the ArcaEx Book, then such order would be executed at the discretionary price or better against the displayed share size of available trading interest in the ArcaEx Book, regardless of size. If the discretionary price of a Discretion Limit Order could be matched against an away market participant, then such order would be routed pursuant to rule 7.37(d) but only if the displayed share size of the Discretion Limit Order is equal to or less than the displayed share size of the away market participant. As discussed in more detail in section 2 below, the Exchange is proposing that the NBBO price protection provision set forth in rule 7.37 will not apply to Discretion Limit Orders.

c. *Reserve Orders*

Under current PCXE rule 7.31(h)(3), a Reserve Order is a limit order with a portion of the size displayed and with a reserve portion of the size (''reserve size'') that is not displayed on the

[4] The Nasdaq UTP Plan was initially approved in 1990. *See* Securities Exchange Act Release No. 28146 (June 26, 1990), 55 FR 27919 (July 6, 1990) (S7–24–89). It has subsequently been amended on several occasions to, among other things, admit new Participants. *See also* Securities Exchange Act Release No. 46381 (August 19, 2002), 67 FR 54687 (August 23, 2002) (S7–24–89) (Order approving most recent amendments to Nasdaq UTP Plan, the 13th Amendment).

[5] The broker-dealer commonly referred to as the Archipelago ECN is Archipelago Securities, a wholly owned subsidiary of Archipelago Holdings LLC and a member of the NASD. The ECN function will cease to operate as such once all the Nasdaq securities have been transferred to ArcaEx.

[6] The proposed Discretion Limit order type will apply to Nasdaq securities only. *See* proposed PCXE rule 7.31(h)(2)(B).

[7] *See* PCXE rule 1.1(n).

[8] A ''Sponsored Participant'' means ''a person which has entered into a sponsorship arrangement with a Sponsoring ETP Holder pursuant to [PCXE] rule 7.29.'' *See* PCXE rule 1.1(tt).

[9] *See* PCXE rule 1.1(w) (definition of ''market participant'').

[10] ArcaEx maintains an electronic file of orders, called the ArcaEx Book, through which orders are displayed and matched. The ArcaEx Book is divided into four components, called processes—the Directed Order Process, the Display Order Process, the Working Order Process, and the Tracking Order Process. *See* PCXE rule 7.37 for a detailed description of these order execution processes.

[11] The Working Order Process is the third step in the ArcaEx execution algorithm. Working Orders are defined to include any order with a conditional or undisplayed price and/or size, including All-or-None, Discretionary, and Reserve Orders. *See* PCXE rule 7.37(b)(2) (description of ''Working Order Process'').

ArcaEx Book. For example, a User could submit a Reserve Order to buy 5000 shares of XYZ security at 20 with a request that 1000 shares are displayed and 4000 shares, as the reserve size, are not displayed. With this filing, the Exchange is proposing to adopt two new variations of the Reserve Order called a ''Sweep Reserve Order'' and a ''Random Reserve Order.'' These proposed order types would be ranked and maintained in the Display Order Process [12] and/or Working Order Process of the ArcaEx Book according to price-time priority and would be processed for internal matches in a manner no different than a standard Reserve Order pursuant to PCXE rule 7.37(b)(2). The proposed rule change regarding Sweep Reserve Orders merely provides a clarification as to the manner in which such orders would be treated through ArcaEx's trading system when the routing of these orders to other market participants is required. In the case of a Random Reserve Order, the proposed rule change would allow a User to define the original display quantity and a random reserve value that would be used to determine the displayed quantity within a defined range each time it is replenished. These proposed order types are discussed separately below.

i. *Sweep Reserve Order*

Under proposed PCXE rule 7.31(h)(3)(A), a Reserve Order may be designated as a Sweep Reserve Order. Based upon a User's instruction, if the displayed price of a Sweep Reserve Order is marketable against an away market participant(s), then such order will be routed (i) serially as component orders, such that each component corresponds to the displayed price, or (ii) only once in its entirety, including both the displayed and reserve portions. The Exchange believes that this rule change codifies current order routing methodology, and that the proposed Sweep Reserve Order type is clearly implied in current PCXE rule 7.37(d)(2)(A)(ii).

ii. *Random Reserve Order*

The Exchange proposes to add PCXE rule 7.31(h)(3)(B) to define a Random Reserve Order. Under the rule proposal, a User could define not only a display and reserve quantity, but also a random reserve delta that could be used to determine the displayed quantity within a defined range each time it is replenished in a random amount (rounded to the nearest round lot). Users are required to display at least 100 shares for all Reserve Orders including Random Reserve Orders. The following examples illustrate the use of the Random Reserve Order.

Suppose a User entered a Random Reserve Order for 10,000 shares with a display quantity of 2000 shares and a random reserve delta of 200 shares. This order would randomly display orders at 1800 (200 shares less than the original display quantity), 1900 (100 shares less than the original display quantity), 2000, 2100 (100 shares more than the original display quantity) or 2200 shares (200 shares more than the original display quantity) each time the displayed portion of the order is replenished. If the User does not specify the random reserve delta or the random reserve delta is set to zero, the ArcaEx system would assign the displayed size of the Reserve Order to vary to within 20% of the original specified displayed size. In the example above, the displayed amount would fall within a 400-share range (*i.e.*, 20% of 2000 shares is 400 shares).

Should a User enter a Random Reserve Order with a display amount of 500 shares or less and a random reserve delta that is unspecified or set to zero, the order would be handled as a regular Reserve Order. Suppose a User entered a Random Reserve Order with a display amount of 100 shares, a reserve amount of 1,000 shares, and a random reserve of zero. The ArcaEx system would treat this order as a regular Reserve Order and the display quantity will be refreshed at the original displayed size (100 shares), *i.e.*, the ArcaEx system would not vary the display quantity for this order.

d. *Pegged Orders*

The Exchange is proposing to modify the ArcaEx trading system to accept Pegged Orders. A Pegged Order is a limit order to buy or sell a stated amount of a security at a display price set to track the current bid or ask of the NBBO in an amount specified by the User.[13] The tracking of the relevant Consolidated Quote information for Pegged Orders would occur on a real-time basis in a dynamic fashion. The associated price of each Pegged Order that is updated would be assigned a new entry time with priority in accordance with rule 7.36(a). A Pegged Order may be designated as a Reserve Order or Discretionary Order and would be subject to the applicable order execution rules. Finally, Pegged Orders are only eligible during the Core Session.

2. *Amendment to PCXE Rule 7.37*

The Exchange's current rules governing the order execution processes for orders in the ArcaEx Book are set forth in PCXE rule 7.37. Presently, rule 7.37 provides, in part, that for an execution to occur in any Order Process, the price must be equal to or better than the NBBO. The requirements of this rule do not apply to orders designated as Immediate-or-Cancel (''IOC''), NOW and Post No Preference (''PNP'') in certain exchange-traded funds (''ETFs'') that are subject to the Commission's order granting a *de minimis* exemption from the trade-through restrictions of the Intermarket Trading System (''ITS'') Plan; provided, however, that any resulting executions will be at a price no more than three cents ($0.03) away from the NBBO displayed in the Consolidated Quote.[14] The current proposal would also broaden this exception to include Passive Discretionary, IOC Cross and PNP Cross order types.[15] The definition for a Passive Discretionary Order includes a provision clarifying the application of the Commission's *de minimis* exemption order. The Exchange is also proposing that the aforementioned NBBO price protection restriction would not apply to certain existing order types (IOC, NOW and PNP orders) and proposed new order types (Passive Discretionary, Discretion Limit, IOC Cross and PNP Cross) [16] in Nasdaq securities. The definition for IOC, NOW, PNP, Passive Discretionary and Discretion Limit order types [17] includes a provision clarifying that the NBBO price protection requirement set forth in rule 7.37 will not apply to these order types in Nasdaq securities. Unlike the market for listed securities, there is no linkage between participants in the Nasdaq UTP Plan and, therefore, no rules that prohibit a participant from trading through another participant's quote.[18] Consequently, the Exchange believes that it would not be praticable to attempt to provide such orders with intermarket price protection. The

[12] The Display Order Process is the second step in the ArcaEx execution algorithm. In this process, the ArcaEx system matches an incoming marketable order against orders in the Display Order Process at the display price of the resident order for the total size available at the that price or for the size of the incoming order. *See* PCXE rule 7.37(b) (description of ''Display Order Process'').

[13] *See* proposed PCXE rule 7.31(cc) (definition of ''Pegged Order'').

[14] *See* Securities Exchange Act Release No. 46428 (August 28, 2002), 67 FR 56607 (September 4, 2002) (Order Pursuant to Section 11A of the Act and Rule 11Aa3–2(f) thereunder Granting a De Minimus Exemption for Transactions in Certain ETFs from the ITS Trade-Through Provisions. *See also* Securities Exchange Act Release No. 46684 (October 17, 2002), 67 FR 65618 (October 25, 2002) (SR-PCX–2002–69).

[15] The Exchange notes that it has filed a separate proposed rule change relating to IOC Cross and PNP Cross Orders. *See* Securities Exchange Act Release No. 47010 (December 16, 2002), 67 FR 78554 (December 24, 2002) (SR–PCX–2002–74).

[16] *Id.*

[17] *See generally* PCXE rule 7.31.

[18] *See* note 1, *supra.*

Exchange also believes that these proposed orders are sophisticated types of orders, and persons using these orders will understand the benefits and limitations of their use. Moreover, such orders are still subject to a broker's duty of best execution for its customer.

3. *Working Order Process*

The Exchange proposes the following conforming changes to certain provisions of the Working Order Process set forth in PCXE rule 7.37(b)(2):

a. *Current PCXE Rule 7.37(b)(2)(C)*—This section has been modified to clarify the conditions in which a Passive Discretionary Order and Discretion Limit Order would be routed to an away market participant's quote. Passive Discretionary Orders would be routed away only if the displayed price is marketable against an away market participant. Discretion Limit Orders would be routed away only if the displayed share size of such order is equal to or less than the displayed share size of the away market participant.

b. *Proposed PCXE Rule 7.37(b)(2)(A)(iv)*—Several pricing scenarios have been added to the Working Order Process regarding incoming marketable orders that could be matched against a Passive Discretionary Order. First, for Nasdaq securities, if the BBO is outside the NBBO and a Passive Discretionary Order(s) within the Working Order Process has a discretionary price worse than the NBBO, then the incoming order would execute against such Passive Discretionary Order(s) at the price of the incoming order or the displayed price of the Discretionary Order(s), whichever is better. Second, for Nasdaq securities, if the BBO is outside the NBBO and a Passive Discretionary Order(s) within the Working Order Process has a discretionary price equal to or better than the NBBO, then the incoming order would execute against such Passive Discretionary Order(s) pursuant to current rule 7.37(b)(2)(A)(ii). Finally, for ITS Trade-Through Exempt Securities (as defined in rule 7.37), if the BBO is outside the NBBO and a Passive Discretionary Order(s) within the Working Order Process has a discretionary price worse than the NBBO by three cents ($0.03) or less, the incoming order would execute against such Passive Discretionary Order(s) at the price of the incoming order or the displayed price of the Discretionary Orders(s), whichever is better.

4. *Technical Changes*

Minor technical changes have been made throughout PCXE rules 1.1 and 7.18 to conform to the Nasdaq UTP Plan, which extends UTP to Nasdaq SmallCap securities. Accordingly, the Exchange is proposing to delete references to the term ''Nasdaq/NM Security'' and replacing it with ''Nasdaq Security.'' In addition, several definitions contained in rule 1.1 are being amended to reflect the change in name of the Nasdaq UTP Plan. Finally, current PCXE rule 1.1(jj), which defines the term ''OTC/UTP Primary Market,'' is being amended to reflect that the Listing Market, rather than the Primary Market, would have the authority to call a Regulatory Halt pursuant to PCXE rule 7.18(c). A definition of ''OTC/UTP Listing Market'' is being adopted from the Nasdaq UTP Plan.[19]

The Exchange believes that the implementation of the aforementioned order types will facilitate enhanced order interaction and foster price competition. The proposal also promotes a more efficient and effective market operation, and provides market participants with greater flexibility in determining how their orders would be executed.

Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act, [20] in general, and further the objectives of section 6(b)(5),[21] in particular, because it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments and perfect the mechanisms of a free and open market and to protect investors and the public interest. In addition, the Exchange believes that the proposed rule change is consistent with provisions of section 11A(a)(1)(B) of the Act,[22] which states that new data processing and communications techniques create the opportunity for more efficient and effective market operations.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others*

Written comments on the proposed rule change were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the PCX consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filings will also be available for inspection and copying at the principal office of the PCX. All submissions should refer to File No. SR–PCX–2002–75 and should be submitted by February 19, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[23]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 03–1978 Filed 1–28–03; 8:45 am]

**BILLING CODE 8010–01–P**

[19] *Id.*

[20] 15 U.S.C. 78f(b).

[21] 15 U.S.C. 78f(b)(5).

[22] 15 U.S.C. 78k–1(a)(1)(B).

[23] 17 CFR 200.30–3(a)(12).

## DEPARTMENT OF STATE

**[Public Notice 4253]**

### Culturally Significant Objects Imported for Exhibition Determinations: ''The Glory of the Silk Road: Art from Ancient China''

**AGENCY:** 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), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *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 ''The Glory of the Silk Road: Art from Ancient China,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners. I also determine that the exhibition or display of the exhibit objects at the Dayton Art Institute, Dayton, OH, from on or about February 8, 2003 to on or about May 11, 2003, at the Memphis Brooks Museum of Art from on or about June 7, 2003 to on or about August 3, 2003, and at possible additional venues yet to be determined, 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 Office of the Legal Adviser, U.S. Department of State, (telephone: 202/619–6982). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: January 22, 2003.

**Patricia S. Harrison,**

*Assistant Secretary for Educational and Cultural Affairs, Department of State.*

[FR Doc. 03–2024 Filed 1–28–03; 8:45 am]

**BILLING CODE 4710–08–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice Before Waiver With Respect to Land at Twin County Airport, Galax, VA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of intent of waiver with respect to land.

**SUMMARY:** The FAA is publishing notice of proposed release of 5.664 acres of land at the Twin County Airport, Galax, Virginia to the Twin County Airport Commission of which 1 acre will be sold for the construction of a local fire department substation. There are no adverse impacts to the Airport and the land is not needed for airport development as shown on the Airport Layout Plan. Fair Market Value of the land will be deposited into a sponsor owned interest bearing account, and used for airport purposes.

**DATES:** Comments must be received on or before February 28, 2003.

**ADDRESSES:** Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Terry J. Page, Manager, FAA Washington Airports District Office, 23723 Air Freight Lane, Suite 210, Dulles, VA 20166.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Michael Coomes, Chairman of Twin County Airport Commission, at the following address: Michael Coomes, Chairman, Twin County Airport Commission, PO Box 1100, Galax, VA 24333.

**FOR FURTHER INFORMATION CONTACT:** Mr. Terry Page, Manager, Washington Airports District Office, 23723 Air Freight Lane, Suite 210, Dulles, VA 20166; telephone (703) 661–1354, fax (703) 661–1370, e-mail: *Terry.Page@faa.gov*.

**SUPPLEMENTARY INFORMATION:** On April 5, 2000, new authorizing legislation became effective. That bill, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 10–181 (Apr. 5, 2000; 114 Stat. 61) (AIR 21) requires that a 30 day public notice must be provided before the Secretary may waive any condition imposed on an interest in surplus property.

Issued in Chantilly, Virginia on January 16, 2003.

**Terry J. Page,**

*Manager, Washington Airports District Office, Eastern Region.*

[FR Doc. 03–2055 Filed 1–28–03; 8:45 am]

**BILLING CODE 4910–13–M**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Approval of Noise Compatibility Program Brownsville/South Padre Island International Airport Brownsville, TX

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice.

**SUMMARY:** The Federal Aviation Administration (FAA) announces its findings on the noise compatibility program submitted by city of Brownsville for Brownsville/South Padre Island International Airport under the provisions of Title 49, USC, Chapter 475 and CFR part 150. These findings are made in recognition of the description of Federal and non-Federal responsibilities in Senate Report No. 96–52 (1980). On June 25, 2002, the FAA determined that the noise exposure maps submitted by the city of Brownsville for Brownsville/South Padre Island International Airport under Part 150 were in compliance with applicable requirements. On December 22, 2002, the Administrator approved the noise compatibility program. Most of the recommendations of the program were approved.

**EFFECTIVE DATE:** The effective date of the FAA's approval of the noise compatibility program for Brownsville/ South Padre Island International Airport is December 22, 2002.

**FOR FURTHER INFORMATION CONTACT:** Ms. Nan L. Terry, Department of Transportation, Federal Aviation Administration, 2601 Meacham Boulevard, Fort Worth, Texas, 76137, (817) 222–5607. Documents reflecting this FAA action may be reviewed at this same location.

**SUPPLEMENTARY INFORMATION:** This notice announces that the FAA has given its overall approval to the noise compatibility program for Brownsville/ South Padre Island International Airport, effective December 22, 2002.

Under Title 49 USC, Section 47504 (hereinafter referred to as ''Title 49''), an airport operator who has previously submitted a noise exposure map may submit to the FAA a noise compatibility program which sets forth the measures taken or proposed by the airport operator for the reduction of existing non-compatible land uses within the area covered by the noise exposure maps. Title 49 requires such programs to be developed in consultation with interested and affected parties including local communities, government

agencies, airport users, and FAA personnel.

Each airport noise compatibility program developed in accordance with Federal Aviation Regulations (FAR) Part 150 is a local program, not a Federal program. The FAA does not substitute its judgment for that of the airport proprietor with respect to which measures should be recommended for action. The FAA's approval or disapproval of FAR Part 150 program recommendations is measured according to the standards expressed in Part 150 and Title 49 and is limited to the following determinations:

a. The noise compatibility program was developed in accordance with the provisions and procedures of FAR Part 150,

b. Program measures are reasonably consistent with achieving the goals of reducing existing non-compatible land uses around the airport and preventing the introduction of additional non-compatible land uses,

c. Program measures would not create an undue burden on interstate or foreign commerce, unjustly discriminate against types or classes of aeronautical uses, violate the terms of airport grant agreements, or intrude into areas preempted by the Federal government, and

d. Program measures relating to the use of flight procedures can be implemented within the period covered by the program without derogating safety, adversely affecting the efficient use and management of the navigable airspace and air traffic control systems, or adversely affecting other powers and responsibilities of the Administrator prescribed by law.

Specific limitations with respect to the FAA's approval of an airport noise compatibility program are delineated in FAR part 150, § 150.5. Approval is not a determination concerning the acceptability of land uses under Federal, state, or local law. Approval does not by itself constitute a FAA implementing action. A request for Federal action or approval to implement specific noise compatibility measures may be required, and a FAA decision on the request may require an environmental assessment of the proposed action. Approval does not constitute a commitment by the FAA to financially assist in the implementation of the program nor a determination that all measures covered by the program are eligible for grant-in-aid funding from the FAA. Where Federal funding is sought, requests for project grants must be submitted to the FAA Airports Division Office in Forth Worth, Texas.

The city of Brownsville submitted to the FAA the noise exposure maps, descriptions, and other documentation produced during the noise compatibility planning study. The Brownsville/South Padre Island International Airport noise exposure maps were determined by the FAA to be in compliance with applicable requirements on June 25, 2002. Notice of this determination was published in the **Federal Register** on June 25, 2002.

The Brownsville/South Padre Island International Airport study contains a proposed noise compatibility program comprised of actions designed for phased implementation by airport management and adjacent jurisdictions from the date of study completion to the year 2005. It was requested that the FAA re-evaluate and approve this material as a noise compatibility program as described in Title 49. The FAA began its review of the program and was required by a provision of the Act to approve or disapprove the program within 180 days (other than the use of new flight procedures for noise control). Failure to approve or disapprove such program within the 180-day period shall be deemed to be an approval of such program.

The submitted program contained thirteen proposed actions for noise mitigation on and off the airport. The FAA completed its review and determined that the procedural and substantive requirements of Title 49 and FAR Part 150 have been satisfied. The overall program, therefore, was approved by the Administrator effective December 22, 2002.

Approval in part was granted for 12 of the 13 proposed action elements in the noise compatibility program proposed action elements in the noise compatibility program. The specific FAA action for each noise compatibility program element is set forth in the enclosed Record of Approval. The Administrator disapproved one of the thirteen proposed action elements in the noise compatibility program, pending submission of additional analysis. All of the approval and disapproval actions are more fully explained in the enclosed Record of Approval.

These determinations are set forth-in detail in a Record of Approval endorsed by the Administrator on December 22, 2002. The Record of Approval, as well as other evaluation materials and the documents comprising the submittal, are available at the FAA office listed above and at the administrative offices of the Department of Aviation, City of Brownsville, 700 S. Minnesota Avenue, Brownsville/South Padre Island International Airport, Brownsville, Texas 78521.

Issued in Forth Worth, Texas, January 22, 2003.

**Naomi L. Saunders,**

*Manager, Airports Division.*

[FR Doc. 03–2058 Filed 1–28–03; 8:45 am]

**BILLING CODE 4910–13–M**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### RTCA Special Committee 181/ EUROCAE Working Group 13: Standards of Navigation Performance

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of RTCA Special Committee 181/EUROCAE Working Group 13 meeting.

**SUMMARY:** The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 181/ EUROCAE Working Group 13: Standards of Navigation Performance.

**DATES:** The meeting will be held February 10–14, 2003 starting at 9 am.

**ADDRESSES:** The meeting will be held at the RTCA Inc., Suite 805, 1828 L Street, NW., Washington, DC 20036.

**FOR FURTHER INFORMATION CONTACT:** (1) RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC, 20036; telephone (202) 833–9339; fax (202) 833–9434; web site *http://www.rtca.org*.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 181/EUROCAE Working Group 13 meeting.

**Note:** Working Groups 1 & 4 will meet separately February 10–13.

The Plenary agenda will include:

- September 20
- Opening Plenary Session (Chairman Remarks, Review/Approval of Previous Meeting Minutes)
- Review Working Group (WG) Progress
  - WG–1 Report
  - WG–4 Report
- Review/Approval—Final Draft of Revised DO–257, Minimum Operational Performance Standards for the Depiction of Navigation Information on Electronic Maps, RTCA Paper No. 003–03/SC181–196
- Review/Approval—Proposed Change 1 to DO–283, Minimum Operational Performance Standards for Required Navigation Performance for Area

Navigation, RTCA Paper No. 005–03/SC181–198
- Other business
  - Aircraft Owner & Pilots Association Input to WG–4
  - FAA Position Paper
  - Terminal Area Operation Aviation Rulemaking Committee Related Activities
- Future of SC–181
- Closing Plenary Session (New Business, Review of Action Items, Future Meeting Schedule, Adjourn)

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Dated: Issued in Washington, DC, on Janaury 14, 2003.

**Janice L. Peters,**

*FAA Special Assistant, RTCA Advisory Committee.*

[FR Doc. 03–2057 Filed 1–28–03; 8:45 am]

**BILLING CODE 4910–13–M**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice of Intent To Rule on Application To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Four Corners Regional Airport, Farmington, NM

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of intent to rule on application.

**SUMMARY:** The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Four Corners Regional Airport under the provisions of the Aviation Safety and Capacity Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

**DATES:** Comments must be received on or before February 28, 2003.

**ADDRESSES:** Comments on this application may be mailed or delivered in triplicate copies to the FAA at the following address: Mr. G. Thomas Wade, Federal Aviation Administration, Southwest Region, Airports Division, Planning and Programming Branch, ASW–611, Fort Worth, Texas 76193–0610.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Richard Stein, Airport Manager of Four Corners Regional Airport at the following address: Four Corners Regional Airport, 800 Municipal Drive, Farmington, New Mexico 87401–2663.

Air carriers and foreign air carriers may submit copies of the written comments previously provided to the Airport under § 158.23 of part 158.

**FOR FURTHER INFORMATION CONTACT:** Mr. G. Thomas Wade, Federal Aviation Administration, Southwest Region, Airports Division, Planning and Programming Branch, ASW–611, Fort Worth, Texas 76193–0610, (817) 222–5613.

The application may be reviewed in person at this same location.

**SUPPLEMENTARY INFORMATION:** The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Four Corners Regional Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On January 21, 2003, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Airport was substantially complete within the requirements of § 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than May 15, 2003.

The following is a brief overview of the application.

*Level of the proposed PFC:* $3.00.

*Proposed charge effective date:* July 1, 2003.

*Proposed charge expiration date:* June 1, 2011.

*Total estimated PFC revenue:* $661.102.

*PFC application number:* 03–01–C–FMN.

Brief description of proposed project(s):

**Projects To Impose and Use PFC's**

A. Runway Improvements
B. Taxiway Improvements
C. Apron Improvements
D. Drainage Improvements
E. Airfield Signage Improvements
F. Airfield Electrical Improvements
G. Security Improvements
H. Terminal Improvements
I. Non-Revenue Parking Improvements
J. Acquire Safety Equipment
K. Conduct Planning Studies
L. Service Road Improvements
M. PFC Administrative Costs

Proposed class or classes of air carriers to be exempted from collecting PFC's: Air Taxi/Commercial Operators under Part 135 filing FAA Form 1800–31.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA regional Airports office located at: Federal Aviation Administration, Southwest Region, Airports Division, Planning and Programming Branch, ASW–610, 2601 Meacham Blvd., Fort Worth, Texas 76137–4298.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at Four Corners Regional Airport.

Issued in Fort Worth, Texas on January 22, 2003.

**Naomi L. Saunders,**

*Manager, Airports Division.*

[FR Doc. 03–2059 Filed 1–28–03; 8:45 am]

**BILLING CODE 4910–13–M**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice of Intent To Rule on Application To Improve and Use the Revenue From a Passenger Facility Charge (PFC) at Monterey Peninsula Airport, Monterey, CA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of intent to rule on application.

**SUMMARY:** The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Monterey Peninsula Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

**DATES:** Comments must be received on or before February 28, 2003.

**ADDRESSES:** Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Federal Aviation Administration, Airports Division, 15000 Aviation Blvd., Lawndale, CA 90261, or San Francisco Airports District Office, 831 Mitten Road, Room 210, Burlingame, CA 94010–1303. In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Tom Greer, Assistant

Manager, Monterey Peninsula Airport District, at the following address: 200 Fred Kane Drive, Suite 200, Monterey, CA 93940. Air carriers and foreign air carriers may submit copies of written comments previously provided to the Monterey Peninsula Airport District under § 158.23 of part 158.

**FOR FURTHER INFORMATION CONTACT:** Marlys Vandervelde, Airports Program Analyst, San Francisco Airports District Office, 831 Mitten Road, Room 210, Burlingame, CA 94010–1303, Telephone: (650) 876–2806. The application may be reviewed in person at this same location.

**SUPPLEMENTARY INFORMATION:** The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Monterey Peninsula Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On January 15, 2003, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Monterey Peninsula Airport District was substantially complete within the requirements of § 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than April 15, 2003. The following is a brief overview of the use application No. 03–09–C–00–MRY:

*Level of proposed PFC:* $4.50.

*Proposed charge effective date:* May 1, 2003.

*Proposed charge expiration date:* April 1, 2004.

*Total estimated PFC revenue:* $688,938.

*Brief description of the proposed projects:* Access Security Control, Extension of Fire Alarm System to Safety Building, Acquisition of Property at 2825 Salinas/Monterey Highway, Passback Security System, Terminal Improvements and Modifications, Terminal Fire Door Replacement, Phase 2, Generator Power to Security Gate, Environmental Impact Report (EIR) for Airport Roadway Circulation Projects (Terminal Road, North Access Road, and 28L Service Road), and Terminal Expansion—Second Level.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Unscheduled Part 135 Air Taxi Operators.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA Regional Airports Division located at: Federal Aviation Administration, Airports Division, 15000 Aviation Blvd., Lawndale, CA 90261. In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Monterey Peninsula Airport District.

Issued in Lawndale, California, on January 15, 2003.

**Mia Paredes Ratcliff,**

*Acting Manager, Airports Division Western-Pacific Region.*

[FR Doc. 03–2056 Filed 1–28–03; 8:45 am]

**BILLING CODE 4910–13–M**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Petition for Waiver of Compliance

In accordance with Title 49 Code of Federal Regulations (CFR), parts 211.9 and 211.41 notice is hereby given that the Federal Railroad Administration (FRA) has received a request for waiver of compliance from certain requirements of Federal railroad safety regulations. The individual petition is described below, including the parties seeking relief, the regulatory provisions involved, the nature of the relief being requested and the petitioner's arguments in favor of relief.

**Burlington Northern and Santa Fe Railway Company**

Docket Number FRA–2003–14216

The Burlington Northern and Santa Fe Railway Company (BNSF) seeks a waiver of compliance from certain sections of 49 CFR parts 216, Special Notice and Emergency Order Procedures: Railroad Track, Locomotive and Equipment; 217, Railroad Operating Rules; 218, Railroad Operating Practices; 229, Railroad Locomotive Safety Standards; 233, Signal Systems Reporting Requirements; 235, Instructions Governing Applications for Approval of a Discontinuance or Material Modification of a Signal System or Relief from the Requirements of Part 236; 236, Rules, Standards, and Instructions Governing the Installation, Inspection, Maintenance, and Repair of Signal and Train Control Systems, Devices, and Appliances; and 240, Qualification and Certification Of Locomotive Engineers, under § 211.51, Tests, to allow them to develop, implement, and test technology designed to prevent train authority violations, overspeed violations and accidents caused by passing restricted signals and open switches. The program would enable BNSF to demonstrate and validate the technology, referred to as Train Sentinel, before it is implemented on a larger scale.

*Petitioner's Justification*

The petitioner provided the following justification for relief:

Train Sentinel is a non-vital safety overlay that works in conjunction with existing methods of operation and signal and control systems to protect against the consequences of human error. This approach provides a ''safety net'' for train operations while retaining the existing systems as a primary means of control. Because these systems continue in operation, a failure or deactivation of the Train Sentinel System has the effect only of suspending the safety enhancements associated with the Train Sentinel System, without compromising the underlying safety provisions of existing systems and operating rules.

The Train Sentinel System safety enhancements are achieved through a communication-based system that enforces movement authority and speed restrictions for Train Sentinel equipped trains. Four segments work together to provide the enforcement: The location segment, the locomotive segment, the dispatcher system segment and the communications segment. The dispatcher segment delivers the enforceable authority and temporary speed limits for each train under Train Sentinel control. This information is delivered through the communications segment to the locomotive segment. Procedures are implemented to ensure the data received is complete and correct. Failsafe design dictates that an undelivered message will stop the train at the end of its active authority. The locomotive segment confirms the locomotive's location and enforces a train's movement and speed limits by monitoring the train's location and speed and applying the brakes to stop the train if necessary to prevent a violation.

The Train Sentinel System will be tested and demonstrated on the BNSF's Wichita Falls subdivision in the State of Texas between Fort Worth, milepost 0 and Valley Junction, milepost 118.4. In addition, the system will be tested and demonstrated on the Brookfield subdivision in the State of Illinois between Galesburg, milepost 168 and West Bushnell, milepost 192.4. Finally, the system will be tested and demonstrated on the Beardstown subdivision in the State of Illinois and the Commonwealth of Kentucky between Bushnell, Illinois, milepost 159.6 and Paducah, Kentucky, milepost 239.0. The combined distance of the test territory is 439.3 miles. The present

method of operation on the BNSF is by Track Warrant Control and Centralized Traffic Control. These methods of operation will not be affected during the Train Sentinel test period.

Train Sentinel testing may require temporary changes of a benign nature in operating practices, but only on Train Sentinel equipped trains and only when a test is in progress. Such changes in operating practices will include Train Sentinel initialization procedures, digital transmission and on-board display of text authorities and restrictions, on-board display of signal aspect, on-board display of monitored switches, enforcement limits of authority and speed limits/restrictions through automatic brake applications, and procedures for recovery following an enforcement action.

The waiver is requested for a testing period commencing March 1, 2003, and extending to the conclusion of the test phase. The testing period is not expected to exceed one year and will terminate March 1, 2004 unless BNSF notifies FRA of an earlier termination date.

The following are the specific waiver requests and their justifications. References are to Chapter II, Subtitle B, Title 49 of the Code of Federal Regulations.

Section 216.13 Special Notice for Repairs—Locomotive

Waiver is requested for Train Sentinel locomotives to the extent that non-operation of Train Sentinel equipment installed on board, whether through malfunction or deactivation shall not be construed as an unsafe condition requiring special notice for repairs. Waiver is sought for non-equipped-Train Sentinel-equipped locomotives operating in the Train Sentinel pilot territory to the extent that the absence of Train Sentinel equipment on-board shall not be construed as an unsafe condition requiring special notice for repairs.

*Justification:* With or without Train Sentinel equipment operating on board the controlling locomotive, a train remains subject to existing signal and control systems and to railroad operating rules. (Train Sentinel is an overlaid system, enhancing current safety without affecting the operation of existing systems.) Train Sentinel tests require flexibility in installing, removing, turning on, and turning off the on-board equipment. The Train Sentinel tests will involve only a small subset of locomotives operating in the pilot territory.

Section 217.9 Program of Operational Tests and Inspections; Recordkeeping

Waiver is requested exempting operation of Train Sentinel equipment and procedures from the requirements for operational tests, inspections, and associated recordkeeping.

*Justification:* The Train Sentinel pilot is a test program during which procedures for using Train Sentinel equipment and functions will be refined and modified. Until such procedures are defined, they cannot be addressed in the code of operating rules, timetables, and timetable special instructions to which this section applies.

Section 217.11 Program of Instruction on Operating Rules; Recordkeeping; and Electronic Recordkeeping

Waiver is requested exempting operation of Train Sentinel equipment and procedures from the requirements for instruction and associated record keeping.

*Justification:* The Train Sentinel pilot is a test program during which procedures for using Train Sentinel equipment and functions will be refined and modified. Until such procedures are defined, they cannot be addressed in the code of operating rules.

Part 218 Subpart D: Prohibition Against Tampering With Safety Devices

Waiver is requested exempting on-board Train Sentinel equipment from the requirements of §§ 218.51, 218.53, 218.55, 218.57, 218.59, and 218.61 to the extent that Train Sentinel equipment on board a locomotive shall not be considered a ''safety device'' subject to the provisions of this subpart at any time during the pilot program.

*Justification:* The Train Sentinel pilot is a test program. Train Sentinel tests require flexibility in installing, removing, turning on, and turning off the on-board equipment. BNSF requires the flexibility to permanently disable or remove Train Sentinel equipment in the event that a production system is not implemented.

Section 229.135 Event Recorders

Waiver is requested to the extent that Train Sentinel equipment on-board a locomotive shall not be considered an ''event recorder'' subject to the provisions of this section.

*Justification:* Train Sentinel equipment by design will operate intermittently during the pilot program. Train Sentinel tests require flexibility in installing, removing, turning on, and turning off the on-board equipment. BNSF requires the flexibility to temporarily or permanently disable on-board Train Sentinel equipment.

Section 233.9 Reports

Waiver is requested exempting Train Sentinel operations in the pilot program from the reporting requirements of this section.

*Justification:* While a Train Sentinel production system may belong to the category of ''other similar appliances, methods, and systems'' specified in 233.1, this requirement would impose an unnecessary paperwork burden for a test program.

Section 235.5 Changes Requiring Filing of Application

Waiver is requested exempting the Train Sentinel pilot program from the filing requirements of this section.

*Justification:* The Train Sentinel pilot is a test program. Train Sentinel tests require flexibility in installing, removing, turning on, and turning off the on-board equipment. BNSF requires the flexibility to permanently disable or remove on-board Train Sentinel equipment in the event the Train Sentinel system is not implemented.

Section 236.4 Interference With Normal Functioning of Device

Waiver is requested to the extent that Train Sentinel equipment shall be excluded from this requirement during the pilot program.

*Justification:* The Train Sentinel pilot is a test program through which the normal functioning of Train Sentinel will be defined and redefined. Train Sentinel tests require flexibility in installing, removing, turning on, and turning off the on-board equipment. With or without Train Sentinel; equipment on-board the controlling locomotive, the train remains subject to the provisions of the existing signal and control systems and to the BNSF operating rules.

Section 236.5 Design of Control Circuits on Closed Circuit Principle

Waiver is requested exempting Train Sentinel equipment from the closed circuit design requirement.

*Justification:* Train Sentinel is composed of solid-state components that are software driven. Neither the hardware nor software can be designed technically to meet the provisions of this section.

Section 236.11 Adjustment, Repair, or Replacement of Component

Waiver is requested exempting Train Sentinel components on-board a locomotive from the requirements of this section.

*Justification:* Train Sentinel tests require flexibility in installing, removing, modifying, turning on and

turning off equipment. Failure of a component during the test phase will not jeopardize the safety of train operations. With or without Train Sentinel equipment operating on-board the controlling locomotive, the train remains subject to the provisions of the rules governing the existing method of operation.

Section 236.15 Timetable Instructions

Waiver is requested exempting the Train Sentinel pilot territory from the timetable designation requirement of this section.

*Justification:* Since the pilot program will consist of tests and demonstrations, identifying the test territory in the timetable as ''Train Sentinel'' (or some similar label) would be both premature and an unnecessary paperwork burden.

Section 236.23 Aspects and Indications

Waiver is requested to the extent that the Train Sentinel display on-board an equipped locomotive shall not be construed to represent or correspond to signal aspects or indications subject to the requirements of this section.

*Justification:* The Train Sentinel design excludes any visual display of signal aspects or indications. Train Sentinel enforceable authorities which may or may not derive from signal indications are on-board. Text authorities such as name of signal or track bulletins are displayed to the train crew. Information on the Train Sentinel display will correspond with authority conveyed through wayside signals.

Section 236.76 Tagging of Wires and Interference of Wires or Tags With Signal Apparatus

Waiver is requested exempting Train Sentinel equipment from the wire-tagging requirement.

*Justification:* Train Sentinel hardware consists of computers, computer peripherals, and communication devices. While the inapplicability of this section to circuit boards, connectors, and cables would appear obvious, waiver is sought for clarification.

Section 236.101 Purpose of Inspection and Tests; Removal From Service of Relay or Device Failing To Meet Test Requirements

Waiver is requested exempting Train Sentinel equipment from the requirement for removal of failed equipment from service.

*Justification:* Train Sentinel requires flexibility in installing, removing, turning on, and turning off the equipment. With or without Train Sentinel equipment operating on-board, a train remains subject to the provisions of the rules governing the existing methods of operation.

Section 236.107 Ground Tests

Waiver is requested exempting Train Sentinel equipment from the requirement for ground testing during the test phase.

*Justification:* Train Sentinel hardware consists of computers, computer peripherals, and communication devices. Ground tests would serve no purpose in ensuring safety and could be damaging to the equipment.

Section 236.109 Time Releases, Timing Relays and Timing Devices

Waiver is requested exempting Train Sentinel equipment from the testing requirement of this section during the test phase.

*Justification:* The timing devices in Train Sentinel equipment are software-driven, have no moving parts, and are far more reliable than the devices for which this regulation was promulgated to address.

Section 236.110 Results of Tests

Waiver is requested exempting Train Sentinel tests from the record keeping requirements of this section.

*Justification:* The Train Sentinel pilot is a test program during which the types of tests needed to ensure appropriate levels of maintenance will be defined.

Section 236.501 Forestalling Device and Speed Control

Waiver is requested exempting Train Sentinel from the requirement for medium-speed restriction.

*Justification:* Train Sentinel will not be connected to a signal system, but will receive input from the signal system and operate to perform its intended function in the event of failure of the engineer to obey a restrictive condition displayed in the cab. Train Sentinel will enforce speed restrictions reflected in the track database or issued through the dispatcher system.

Section 236.504 Operation Interconnected With Automatic Block-Signal System

Waiver is requested exempting Train Sentinel from the requirement of interconnection with an automatic block-signal system.

*Justification:* The Train Sentinel system will have no connection to the signal system; however Train Sentinel will receive input from the signal system and operate to perform its intended function in the event of failure of the engineer to obey a restrictive condition displayed in the cab.

Section 236.511 Cab Signals Controlled in Accordance With Block Conditions Stopping Distance in Advance

Waiver is requested exempting the Train Sentinel onboard display from the cab-signal requirements in this section.

*Justification:* Train Sentinel is not an automatic cab signal system and will have no connection to a signal system but will receive input from the signal system and display the signal name that forms the basis for limits of authority that will be depicted on the display.

Section 236.514 Interconnection of Cab Signal System With Roadway Signal System

Waiver is requested exempting Train Sentinel from the requirement of interconnection with a roadway signal system.

*Justification:* The Train Sentinel system is not a cab signal system and will have no connection with the signal system. However, Train Sentinel will receive input from the signal system and display the signal name that forms the basis for limits of authority.

Section 236.515 Visibility of Cab Signals

Waiver is requested exempting the Train Sentinel display from the visibility requirement of this section during the test phase.

*Justification:* Train Sentinel is not a cab signal system. However, Train Sentinel receives input from the signal system and displays the signal name governing the movement. The visibility requirements of this rule will be met in the Train Sentinel production system.

Section 236.534 Entrance to Equipped Territory; Requirements

Waiver is requested exempting Train Sentinel from the requirements of this section during the test phase.

*Justification:* Train Sentinel tests require flexibility in installing, removing, turning on, and turning off Train Sentinel equipment.

Section 236.552 Insulation Resistance; Requirement

Waiver is requested exempting Train Sentinel equipment from the insulation resistance requirement of this section.

*Justification:* Train Sentinel equipment consists of computers, computer peripherals, and communications equipment. Insulation resistance tests could be damaging to such components.

Section 236.553 Seal, Where Required

Waiver is requested exempting Train Sentinel from the seal requirement of this section.

*Justification:* Train Sentinel tests require flexibility in installing, removing, turning on, and turning off Train Sentinel equipment.

Section 236.566 Locomotive of Each Train Operating in Train Stop, Train Control or Cab Signal Territory; Equipped

Waiver is requested to the extent that the equipment requirements in this section shall not apply to Train Sentinel during the test phase.

*Justification:* A small subset of locomotives operating in the test territory will be Train Sentinel equipped; the majority of trains will not be equipped. Train Sentinel tests require flexibility in installing, removing, turning on and turning off the on-board equipment. In any case, all Train Sentinel tests will be conducted under the provisions of the rules governing the existing methods of operation.

Section 236.567 Restrictions Imposed When Device Fails and/or Is Cut Out Enroute

Waiver is requested exempting Train Sentinel tests from the restrictions associated with device failure or cutout.

*Justification:* Train Sentinel tests require flexibility in installing, removing, turning on and turning off the onboard equipment. All Train Sentinel tests will be conducted under the provisions of the rules governing the existing methods of operation. A failure or deactivation of Train Sentinel equipment will not jeopardize safety of train operations.

Section 236.586 Daily or After Trip Test

Waiver is requested exempting the Train Sentinel from the requirements of this section during the test phase.

*Justification:* During the Train Sentinel test phase, the requirements for a daily or after trip test, if necessary, will be defined. An objective is to perform this test without human intervention.

Section 236.587 Departure Test

Waiver is requested exempting the Train Sentinel from the requirements of this section during the test phase.

*Justification:* During the Train Sentinel test phase, the requirements for a departure test will be defined. An objective is to perform this test without human intervention.

Section 236.588 Periodic Test

Waiver is requested exempting Train Sentinel from the requirements of this section during the test phase.

*Justification:* During the Train Sentinel test phase, the requirements for a departure test will be defined.

Section 236.703 Aspect

Clarification is requested exempting the Train Sentinel display from this definition.

*Justification:* Train Sentinel is not an automatic cab signal system.

Section 236.805 Signal, Cab

Clarification is requested exempting the Train Sentinel display from this definition.

*Justification:* Train Sentinel is not an automatic cab signal system.

Section 240.127 Criteria for Examining Skill Performance

Waiver is requested exempting Train Sentinel from the testing requirements of this section during the test phase.

*Justification:* Criteria and procedures for Train Sentinel performance evaluation do not yet exist; they will be identified and defined during the Train Sentinel test phase.

Section 240.129 Criteria for Monitoring Operational Performance of Certified Engineers

Waiver is requested exempting Train Sentinel from the performance monitoring procedures during the Train Sentinel test phase.

*Justification:* Criteria and procedures for Train Sentinel performance evaluation do not yet exist; they will be identified and defined during the Train Sentinel test phase.

It is acknowledged for clarification that Train Sentinel, when fully operative during the test phase, will comply with the following regulations:

Section 236.8 Operating Characteristics of Electromagnetic, Electronic, or Electrical Apparatus

Train Sentinel computing equipment will comply with this regulation.

Section 236.501 Forestalling Device and Speed Control

Train Sentinel is designed to enforce maximum authorized speeds, speed restrictions, slow speed and absolute stop. Train Sentinel will comply with § 236.501 except for paragraph (b)(2).

Section 236.502 Automatic Brake Application, Initiation by Restrictive Block Conditions Stopping Distance in Advance

Train Sentinel is designed to initiate an automatic brake application stopping distance in advance of the end of limits of authority, or the beginning of each speed restriction in the route.

Section 236.503 Automatic Brake Application; Initiation When Predetermined Rate of Speed Exceeded

Train Sentinel will comply with this regulation.

Section 236.505 Proper Operative Relation Between Parts Along Roadway and Parts on Locomotive

Train Sentinel will function as intended under all conditions of speed, weather, oscillation and shock. Train Sentinel will comply with this regulation.

Section 236.506 Release of Brakes After Automatic Application

After a Train Sentinel initiated brake application, brakes cannot be released until the train is stopped.

Section 236.507 Brake Application; Full Service

Train Sentinel will comply with this regulation.

Section 236.508 Interference With Application of Brakes by Means of Brake Valve

Train Sentinel equipment will not interfere with or impair the efficiency of the automatic or independent brake valves.

Section 236.509 Two or More Locomotives Coupled

Train Sentinel will be made operative only on the controlling locomotive; however, Train Sentinel tests that do not affect train operations may occur on the trailing locomotives.

Section 236.513 Audible Indicator

The audible indicator for Train Sentinel will have a distinctive sound and be clearly audible under all operating conditions.

Section 236.516 Power Supply

Train Sentinel equipment will have its own isolated power supply.

Section 236.565 Provision Made for Preventing Operation of Pneumatic Brake-Applying Apparatus by Double-Heading Cock; Requirement

Operation of the double-heading cock (cutoff pilot valve) will not cut out Train Sentinel before the automatic brake is cut out.

Section 236.590 Pneumatic Apparatus

Pneumatic apparatus will be inspected and cleaned as required.

Part 236 Subpart G Definitions

Train Sentinel will comply with the definitions as applicable, except §§ 236.703 and 236.805.

*Proceedings*

Interested parties are invited to participate in these proceedings by submitting written views, data or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. Any interested party who desires an opportunity for oral comment should notify FRA in writing before the end of the comment period, specifying the basis for the request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.*, Waiver Petition Docket Number FRA–2002–12113) and must be submitted to the Docket Clerk, DOT Central Docket Management Facility, Room PL–401 (Plaza Level), 400 Seventh Street, SW.,Washington, DC 20590–0001. Communications received within 30 days of the date of this notice will be considered by 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 a.m.–5 p.m.) at the above facility. 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.*

Issued in Washington, D.C. on January 23, 2003.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. 03–2054 Filed 1–28–03; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Research and Special Programs Administration

### Office of Hazardous Materials Safety; Notice of Applications for Exemptions

**AGENCY:** Research and Special Programs Administration, DOT.

**ACTION:** List of applicants for exemptions.

**SUMMARY:** In accordance with the procedures governing the application for, and the processing of, exemptions from the Department of Transportation's Hazardous Materials Regulations (49 CFR part 107, subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the applications described herein. Each mode of transportation for which a particular exemption is requested is indicated by a number in the ''Nature of Application'' portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

**DATES:** Comments must be received on or before February 28, 2003.

**ADDRESS COMMENTS TO:** Records Center, Research and Special Programs, Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the exemption application number.

**FOR FURTHER INFORMATION CONTACT:** Copies of the applications (*see* Docket Number) are available for inspection at the New Docket Management Facility, PL–401, at the U.S. Department of Transportation, Nassif Building, 400 7th Street, SW., Washington, DC 20590 or at *http://dms.dot.gov.*

This notice of receipt of applications for new exemptions is published in accordance with Part 107 of the Federal hazardous material transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on January 23, 2003.

**R. Ryan Posten,**

*Exemptions Program Officer, Office of Hazardous Materials, Exemptions and Approvals.*

NEW EXEMPTIONS

| Application No. | Docket No. | Applicant | Regulation(s) affected | Nature of exemption thereof |
|---|---|---|---|---|
| 13188–N | RSPA–03–14314. | General Dynamics, Lincoln, NE. | 49 CFR 173.301(f), 173.302(a), 173.34(d). | To authorize the transportation in commerce of certain flammable and nonflammable compressed gases in non–DOT specification filament-wound reinforced plastic lined cylinders, having a maximum service pressure of 7,000 psig, comparable to CGA C–19–2002 FRP–3. (Modes 1, 2, 3.) |
| 13190–N | RSPA–03–14316. | Air Products & Chemicals, Allentown, PA. | 49 CFR 177.834(i)(3) | To authorize cargo tanks to be unloaded without meeting the attendance requirements. (Mode 1.) |
| 13192–N | RSPA–03–14315. | Onyx Environmental Services, L.L.C., Flanders, NJ. | 49 CFR 173.12(b) | To authorize the transportation in commerce of certain labpack quantities of hazardous materials with shrink-wrap as an overpack without required markings and labels. (Modes 1, 3, 4.) |
| 13194–N | | Cryogenic Manufacturing and Repair, Inc., Eagle Lake, TX. | 49 CFR 173.318, 173.76(g)(1), 178.338–10, 178.338–13(b), (c). | To authorize the manufacture, mark, sale and use of non-DOT specification insulated portable tanks for use in transporting Division 2.2 hazardous materials. (Mode 3.) |

[FR Doc. 03–2005 Filed 1–28–03; 8:45 am]
BILLING CODE 4910–60–M

## DEPARTMENT OF TRANSPORTATION

### Research and Special Programs Administration

### Office of Hazardous Materials Safety; Notice of Applications for Modification of Exemption

**AGENCY:** Research and Special Programs Administration, DOT.

**ACTION:** List of applications for modification of exemptions.

**SUMMARY:** In accordance with the procedures governing the application for, and the processing of, exemptions from the Department of Transportation's Hazardous Materials Regulations (49 CFR part 107, subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the applications described herein. This notice is abbreviated to expedite docketing and public notice. Because the sections affected, modes of transportation, and the nature of application have been shown in earlier **Federal Register** publications, they are not repeated here. Requests for modifications of exemptions (*e.g.* to provide for additional hazardous materials, packaging design changes, additional mode of transportation, *etc.*) are described in footnotes to the application number. Application numbers with the suffix ''M'' denote a modification request. These applications have been separated from the new applications for exemptions to facilitate processing.

**DATES:** Comments must be received on or before February 13, 2003.

**ADDRESS COMMENTS TO:** Records Center, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the exemption number.

**FOR FURTHER INFORMATION CONTACT:** Copies of the applications are available for inspection in the Records Center, Nassif Building, 400 7th Street, SW., Washington, DC or at *http://dms.dot.gov.*

This notice of receipt of applications for modification of exemptions is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on January 23, 2003.

**R. Ryan Posten,**

*Exemptions Program Officer, Office of Hazardous Materials, Exemptions and Approvals.*

| Application No. | Docket No. | Applicant | Modification of exemption |
|---|---|---|---|
| 9419–M | ..... | FIBA Technologies, Inc., Westboro, MA. (*See* Footnote 1.) ..... | 9419 |
| 9421–M | ..... | Taylor-Wharton (Gas & Fluid Control Group), Harrisburg, PA. (*See* Footnote 2.). | 9421 |
| 9706–M | ..... | Taylor-Wharton (Gas & Fluid Control Group), Harrisburg, PA. (*See* Footnote 3.). | 9706 |
| 10047–M | ..... | Taylor-Wharton (Gas & Fluid Control Group), Harrisburg, PA. (*See* Footnote 4.). | 10047 |
| 10049–M | ..... | Martin Transport, Inc., Kilgore, TX. (*See* Footnote 5.) ..... | 10049 |
| 10143–M | ..... | Eurocom, Inc., Irving, TX. (*See* Footnote 6.) ..... | 10143 |
| 11194–M | ..... | Carleton Technologies, Inc., Glen Burnie, MD. (*See* Footnote 7.). | 11194 |
| 11580–M | ..... | Columbiana Boiler Co., Columbiana, OH. (*See* Footnote 8.) ..... | 11580 |
| 12022–M | RSPA–98–3308 | Taylor-Wharton (Gas & Fluid Control Group), Harrisburg, PA. (*See* Footnote 9.). | 12022 |
| 12698–M | RSPA–01–9652 | Integrated Environmental Services, Inc., Atlanta, GA. (*See* Footnote 10.). | 12698 |
| 12838–M | RSPA–01–10859. | City Machine & Welding, Inc., Amarillo, TX. (*See* Footnote 11.) | 12838 |
| 13104–M | RSPA–02–13279. | Consumers Energy (Big Rock Point Restoration Proj), Charlevoix, MI. (*See* Footnote 12.). | 13104 |
| 13144–M | RSPA–02–13718. | Baker Petrolite, Sugar Land, TX. (*See* Footnote 13.) ..... | 13144 |
| 13163–M | RSPA–02–13801. | Pacific Bio-Material Management, Inc., Fresno, CA. (*See* Footnote 14.). | 13163 |

*(1)* To modify the exemption to authorize the use of DOT Specification 3AX cylinders that are retested by means other than the hydrostatic retest for the transportation of certain gases.

*(2)* To modify the exemption to authorize an alternative immersion UE test system for non-DOT specification steel cylinders transporting certain Division 2.1, 2.2 and 2.3 materials.

*(3)* To modify the exemption to authorize an alternative immersion UE test system for non-DOT specification steel cylinders transporting certain Division 2.1, 2.2 and 2.3 materials and eliminating the Fracture Toughness Test requirement

*(4)* To modify the exemption to authorize an alternative immersion UE test system for non-DOT specification steel cylinders transporting certain Division 2.1, 2.2 and 2.3 materials and eliminating the Fracture Toughness Test requirement.

*(5)* To modify the exemption to authorize the transportation of additional Division 2.1 materials and the use of additional polyurethane insulated non-DOT specification cargo tanks.

*(6)* To modify the exemption to authorize the transportation of additional Division 2.2 materials in a non-refillable non-DOT specification inside metal container.

*(7)* To modify the exemption to authorize the transportation of additional Division 2.2 materials in a non-DOT specification fully wrapped carbon-fiber reinforced aluminum lined cylinder.

*(8)* To modify the exemption to authorize changes to the hydrostatic and physical test requirements for qualification of the non-DOT specification stainless steel cylinders.

*(9)* To modify the exemption to authorize the use of DOT Specification 3A cylinders for the transportation of certain Division 2.1, 2.2 and 2.3 materials and the use of an alternative immersion UE test system.

*(10)* To modify the exemption to authorize design changes to the non-DOT specification full open head, steel/stainless steel salvage cylinders for the transportation of various Classes/Divisions of hazardous materials.

*(11)* To modify the exemption to authorize the use of DOT Specification 3A cylinders, with revised diameter/wall thickness requirements, for the transportation of certain Division 2.1, 2.2 and 2.3 materials.

*(12)* To modify the exemption to authorize the use of an alternative closure material for the steam drum nozzle as part of non-DOT specification packaging for the transportation of Class 7 material.

*(13)* To reissue the exemption originally issued on an emergency basis and to authorize continued use of the DOT Specification 4BW240 welded steel cylinders equipped with locking ball valves and a pressure relief device for the transportation of a Division 6.1 material.

*(14)* To reissue the exemption originally issued on an emergency basis for the transportation of certain Division 6.2 materials in specially designed packaging.

[FR Doc. 03–2006 Filed 1–28–03; 8:45 am]

**BILLING CODE 4910–60–M**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[Ex Parte No. 333]**

### Sunshine Act Meeting

**TIME AND DATE:** 10 a.m., Friday, January 31, 2003.[1]

**PLACE:** The Board's Hearing Room, Surface Transportation Board, 1925 K Street, NW, Washington, DC 20423

**STATUS:** The Board will meet to discuss among themselves the following agenda items. Although the conference is open for public observation, no public participation is permitted.

**MATTERS TO BE DISCUSSED:** STB Finance Docket No. 34178, *Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holding, Inc.—Control—Iowa, Chicago & Eastern Railroad Corporation.*

STB Finance Docket No. 33697, *National Railroad Passenger Corporation—Petition for Declaratory Order—Weight of Rail.*

STB Finance Docket No. 33995, *SF&L Railway, Inc.—Acquisition and Operation Exemption—Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL.*

STB Finance Docket No. 33996, *Kern W. Schumacher and Morris H. Kulmer—Continuance in Control—SF&L Railway, Inc.*

STB Docket No. AB–448 (Sub-No. 2X), *SF&L Railway, Inc.—Abandonment Exemption—in Hancock, McDonough, Fulton and Peoria Counties, IL.*

STB Docket No. AB–565 (Sub-No. 11X), *New York Central Lines, LLC—Abandonment-Exemption—in Lake County, OH.*

STB Docket No. AB–55 (Sub-No. 617X), *CSX Transportation, Inc.—Discontinuance of Service Exemption—in Lake County, OH.*

STB Finance Docket No. 34114, *Yolo Shortline Railroad Company—Lease and Operation Exemption—Port of Sacramento.*

STB Finance Docket No. 34304, *The Burlington Northern and Santa Fe Railway Company—Trackage Rights Exemption—The Portland & Western Railroad, Inc.*

STB Ex Parte No. 282 (Sub-No. 20), *Railroad Consolidation Procedures: Class Exemption for Temporary Trackage Rights Transactions.*

**FOR FURTHER INFORMATION CONTACT:** A. Dennis Watson, Office of Congressional and Public Services, Telephone: (202) 565–1596, FIRS: 1–800–877–8339.

Dated: January 27, 2003.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 03–2229 Filed 1–27–03; 4:01 pm]

**BILLING CODE 4915–00–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Docket No. AB–364 (Sub–No. 7X)]**

### The Texas Northeastern Division, Mid-Michigan Railroad, Inc.—Discontinuance of Service Exemption—in Grayson County, TX

The Texas Northeastern Division, Mid-Michigan Railroad, Inc. (TNER), has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments and Discontinuances of Service* to discontinue service over 10.51 miles of railroad between milepost 662.54 in Denison and milepost 673.05 in Sherman, in Grayson County, TX (the line).[1] The line traverses United States Postal Service Zip Codes 75020, 75021, 75090, 75091, and 75092.

TNER has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic on the line can be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the discontinuance shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on February 28, 2003, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues [2] and formal expressions of intent to file an OFA for continued rail service under 49 CFR 1152.27(c)(2),[3] must be filed by February 10, 2003.[4] Petitions to reopen must be filed by February 18, 2003, with: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423.

[1] The Voting Conference originally scheduled for Thursday, January 30, 2003, has been rescheduled for January 31, 2003.

[1] According to TNER's Environmental Report, the Missouri-Kansas-Texas Railroad Company (MKT) operated the line until MKT merged into the Missouri Pacific Railroad Company (MP). At the time of the merger, MKT was authorized to abandon the line. *See Union Pacific Corp. et al.*—Cont.–MO–KS–TX Co. *et al.,* 4 I.C.C.2d 409, 488–89 (1988) (UP/MKT). Although TNER contends that MKT consummated the abandonment before the line was leased to TNER, it appears that this was not the case, as an exemption was obtained for lease of the line from MP, now Union Pacific Railroad Company (UP), in *Mid Michigan Railroad Company, Inc.—Lease and Operation Exemption—Missouri Pacific Railroad Company,* Finance Docket No. 31646 (ICC served Aug. 28, 1990). In addition, it does not appear that the abandonment could have been consummated because there is an historic preservation condition under section 106 of the National Historic Preservation Act, 16 U.S.C. 470(f), imposed in *UP/MKT* at 577, that remains outstanding. Accordingly, although TNER is the last carrier operating over this line, UP, as the owner of the line and successor-in-interest to MP, retains a common carrier obligation.

[2] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[3] Each OFA must be accompanied by the filing fee, which is currently set at $1,100. *See* 49 CFR 1002.2(f)(25).

[4] Because this is a discontinuance proceeding and not an abandonment, trail use/rail banking and public use conditions are not appropriate.

A copy of any petition filed with the Board should be sent to TNER's representative: Louis E. Gitomer, Ball Janik LLP, 1455 F St., NW., Suite 225, Washington, DC 20005.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

TNER has filed a separate environmental report which addresses the discontinuance's effects, if any, on the environment and historic resources. SEA will issue an environmental assessment (EA) by February 3, 2003. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 565–1552. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental or historic preservation conditions will be imposed, where appropriate, in a subsequent decision.

Board decisions and notices are available on our Web site at ''*http://www.stb.dot.gov.*''

Decided: January 24, 2003.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 03–2041 Filed 1–28–03; 8:45 am]

**BILLING CODE 4915–00–P**

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

January 17, 2003.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Pub. L. 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 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

**DATES:** Written comments should be received on or before February 28, 2003 to be assured of consideration.

**Internal Revenue Service (IRS)**

*OMB Number:* 1545–1146.

*Regulation Project Number:* PS–54–89 Final.

*Type of Review:* Extension.

*Title:* Applicable Conventions Under the Accelerated Cost Recovery System.

*Description:* The regulations describe the time and manner of making the notation required to be made on Form 4562 under certain circumstances when the taxpayer transfers property in certain non-recognition transactions. The information is necessary to monitor compliance with the section 168 rules.

*Respondents:* Business or other for-profit, Farms.

*Estimated Number of Respondents:* 700.

*Estimated Burden Hours Per Respondent:* 6 minutes.

*Frequency of Response:* On occasion, Annually.

*Estimated Total Reporting Burden:* 700 hours.

*OMB Number:* 1545–1290.

*Regulation Project Number:* FI–81–86 Final.

*Type of Review:* Extension.

*Title:* Bad Debt Reserves of Banks.

*Description:* Section 585© of the Internal Revenue Code requires large banks to change from the reserve method of accounting to the specific charge off method of accounting for bad debts. The information required by section 1.585–8 of the regulations identifies any election made or revoked by the taxpayer in accordance with section 585(c).

*Respondents:* Business or other for-profit.

*Estimated Number of Respondents:* 2,500.

*Estimated Burden Hours Per Respondent:* 15 minutes.

*Frequency of Response:* Annually.

*Estimated Total Reporting Burden:* 625 hours.

*Clearance Officer:* Glenn Kirkland, (202) 622–3428, Internal Revenue Service, Room 6411–03, 1111 Constitution Avenue, NW., Washington, DC 20224.

*OMB Reviewer:* Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

**Mary A. Able,**

*Departmental Reports Management Officer.*

[FR Doc. 03–2025 Filed 1–28–03; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

January 22, 2003.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Pub. L. 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 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

**DATES:** Written comments should be received on or before February 28, 2003 to be assured of consideration.

**Financial Management Service (FMS)**

*OMB Number:* 1510–0048.

*Form Number:* FMS Form 3144.

*Type of Review:* Extension.

*Title:* Minority Bank Deposit Program (MBDP) Certification for Admission.

*Description:* A financial institution who wants to participate in the MBDP must complete this form. The approved application certifies the institution as minority and is admitted into the program. Once in the program, the institution may receive assistance and guidance from Federal agencies, State and local governments and private sector organizations.

*Respondents:* Business or other for-profit.

*Estimated Number of Respondents:* 150.

*Estimated Burden Hours Per Respondent:* 30 minutes.

*Frequency of Response:* Annually.

*Estimated Total Reporting Burden:* 75 hours.

*Clearance Officer:* Juanita Holder, Financial Management Service, 3700 East West Highway, Room 135, PGP II, Hyattsville, MD 20782.

*OMB Reviewer:* Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

**Mary A. Able,**

*Departmental Reports Management Officer.*

[FR Doc. 03–2026 Filed 1–28–03; 8:45 am]

**BILLING CODE 4810–35–P**

## DEPARTMENT OF THE TREASURY

### Departmental Offices

### Interim Guidance Concerning Certain Conditions for Federal Payment, Non-U.S. Insurers, and Scope of Insurance Coverage in the Terrorism Risk Insurance Act of 2002

**AGENCY:** Departmental Offices, Treasury.

**ACTION:** Notice.

**SUMMARY:** This notice provides additional interim guidance concerning certain conditions for Federal payment in title I of the Terrorism Risk Insurance Act of 2002 as implemented in Department of Treasury's Terrorism Risk Insurance Program.

**DATES:** This notice is effective immediately and will remain in effect until superceded by regulations or by subsequent notice.

**FOR FURTHER INFORMATION CONTACT:** Mario Ugoletti, Deputy Director, Office of Financial Institutions and GSE Policy 202–622–2730; Martha Ellett, Attorney-Advisor, Office of the Assistant General Counsel (Banking and Finance) 202–622–0480.

**SUPPLEMENTARY INFORMATION:** This notice provides additional interim guidance to assist insurers in ascertaining how they may comply with certain immediately applicable provisions of title I of the Terrorism Risk Insurance Act of 2002 (Pub. L. 107–297) (the Act) prior to the issuance of regulations by the Department of the Treasury (Treasury). This notice provides interim guidance concerning the timing and certification of disclosures that Treasury expects to require from an insurer that is making a claim for federal payment under the Terrorism Risk Insurance Program. In addition, this interim guidance addresses the ''separate line item'' disclosure requirement in section 103(b)(2)(C), non-U.S. insurer participation in the Program, and the scope of ''insured loss.'' The interim guidance contained in this notice, along with interim guidance issued previously by Treasury, may be relied upon by insurers in complying with these statutory requirements prior to the issuance of regulations on these issues. This interim guidance remains in effect until superceded by regulations or subsequent notice.

## I. Background

On November 26, 2002, the President signed into law the Terrorism Risk Insurance Act of 2002. The Act became effective immediately. It establishes a temporary Federal program of shared public and private compensation for insured commercial property and casualty losses resulting from an ''act of terrorism,'' as defined in the Act. The Terrorism Risk Insurance Program is administered and implemented by Treasury and will sunset on December 31, 2005.

## II. Interim Guidance

Treasury will be issuing regulations to administer and implement certain elements of the Terrorism Risk Insurance Program (Program). To assist insurers in complying with certain statutory requirements prior to the issuance of regulations, Treasury has previously issued interim guidance, located at 67 FR 76206 (December 11, 2002) and at 67 FR 78864 (December 26, 2002) (also located on Treasury's Terrorism Risk Insurance Program Web site at *http://www.treasury.gov/trip*). This notice contains additional interim guidance concerning disclosures as conditions for Federal payment in section 103(b)(2) of the Act, non-U.S. insurer participation in the Program, and the scope of ''insured loss.''

### *How May an Insurer Comply With the Section 103(b)(2) Requirements for Disclosure ''at the Time of Offer, Purchase and Renewal of the Policy?''*

As conditions for Federal payment under the Program, section 103(b)(2) requires that an insurer provide clear and conspicuous disclosure to the policyholder, for existing policies and for new policies, of the premium charged for insured losses covered by the Program and the Federal share of compensation for insured losses under the Program. For policies issued after the date of enactment (November 26, 2002), sections 103(b)(2)(B) and (C) require these disclosures to be made to the policyholder ''at the time of offer, purchase and renewal of the policy.'' For purposes of interim guidance, Treasury deems an insurer to be in compliance with these disclosure requirements ''at the time of offer, purchase and renewal'' if the insurer makes the required clear and conspicuous disclosures to the policyholder or applicant no later than at the time that the insurer first formally offers to provide insurance coverage or renew a policy for a current policyholder, and makes clear and conspicuous reference back to that disclosure as well as the final terms of terrorism insurance coverage at the time the transaction is completed. The required disclosures can be communicated by the use of channels, methods and forms of communication normally used to communicate similar policyholder information. This interim guidance is provided as a safe harbor to assist insurers in complying with conditions for Federal payment prior to the issuance of regulations. It is not the exclusive means by which an insurer may comply with the section 103(b)(2)(B) and (C) requirements.

### *How May an Insurer Comply With the ''Separate Line Item'' Requirement for Policies Issued More Than 90 days After Date of Enactment?*

Section 103(b)(2)(C) requires that an insurer make the required clear and conspicuous disclosures on a ''separate line item'' in the policy for any policy issued more than 90 days after the date of enactment of the Act (November 26, 2002). In previous interim guidance, published at 67 FR 76206 (December 11, 2002), Treasury indicated that additional interim guidance, as appropriate, as well as regulations would be issued on the ''separate line item'' requirement. For purposes of interim guidance, Treasury deems an insurer to be in compliance with the separate line item requirement of section 103(b)(2)(C) if it makes the required ''clear and conspicuous'' disclosure: (i) On the declarations page of the policy; (ii) elsewhere within the policy itself; or (iii) in any rider or endorsement that is made a part of the policy, as long as the disclosure is clear and conspicuous and otherwise meets the requirements of section 103(b)(2) and previous interim guidance. This interim guidance is provided as a safe harbor to assist insurers in complying with conditions for Federal payment prior to the issuance of regulations; however, it is not the exclusive means by which an insurer may comply with the section 103(b)(2)(C) ''separate line item'' requirement.

### *How May an Insurer Certify Its Compliance With Required Disclosures as a Condition for Payment in Section 103(b) of the Act?*

Section 103(b) of the Act sets forth conditions for Federal payments for an insured loss that is covered by an insurer, including provision of clear and conspicuous disclosure to the policyholder of the premium charged for insured losses covered by the Program and the Federal share of compensation for insured losses under the Program. The Act also requires as a condition for payment that an insurer process a claim for an insured loss and submit a claim to Treasury for payment of the Federal share of compensation for the insured loss, along with certain written certifications, including certification of the insurer's compliance

with the provisions of section 103(b) of the Act. In previous interim guidance, Treasury has addressed the statutory terms ''insurer'' and ''insured losses'' under the Program, 67 FR 78864 (December 26, 2002), and Treasury intends to issue regulations establishing claims procedures for Federal payments under the Program. With regard to an insurer's certification of its compliance with the disclosure requirements in section 103(b)(2), Treasury expects to propose regulations that will require an insurer to certify that it complied with the required disclosure(s) to the policyholder on the underlying claim or claims submitted by the insurer for Federal payment under the Program.

*How Do the Nullification Requirement of Section 105 and Other Provisions of the Act Apply to Non-U.S. Insurers?*

For the purposes of this interim guidance, Treasury views the nullification requirement of section 105 and other provisions of the Act as they apply to non-U.S. insurers in the context of such insurers' required participation under the Act. The provisions of the Act apply to entities that meet the definition of ''insurer'' under section 102(6) of the Act and with the respect to an ''insured loss'' covered by the Program. Included among the other requirements of the Act are: The ''make available'' requirements of section 103(c); the disclosure requirements as a condition for Federal payment contained in section 103(b)(2); and the policy surcharge (recoupment) provisions of section 103(e)(8). For non-U.S. insurers that are required to participate in the Program, participation requirements for existing policies that provide coverage for ''insured losses'' include the ''make available'' and other requirements in the Act, such as those listed above, even in the absence of nullification under section 105. The disclosure standards referenced in this and other interim guidance also would apply.

*For the Purpose of Determining the Scope of ''Insured Loss,'' How Is Section 102(5)(B) Interpreted as It Relates to U.S. Air Carriers and U.S. Flag Vessels?*

Section 102(5)(B) defines an ''insured loss'' to include losses that occur ''to an air carrier (as defined in section 40102 of title 49, United States Code), to a United States flag vessel (or vessel based principally in the United States, on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States) regardless of where the loss occurs.'' Section 40102 defines an ''air carrier'' generally as a United States citizen (individual, partnership, or corporation) that provides foreign or interstate ''air transportation.''

For the purposes of interim guidance, Treasury is providing further clarification that insured losses under section 102(5)(B) are only those losses that are incurred by the air carrier or the United States flag vessel. Insured losses under section 102(5)(B) would not include losses incurred by third parties that are associated with losses incurred by a United States air carrier or a United States flag vessel, unless the cause of the loss originated within the United States.

Dated: January 22, 2003.

**Wayne A. Abernathy,**

*Assistant Secretary of the Treasury.*

[FR Doc. 03–2116 Filed 1–28–03; 8:45 am]

**BILLING CODE 4810–25–P**

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

### Agency Information Collection Activities: Proposed Extension of Information Collection; Comment Request

**AGENCY:** Office of the Comptroller of the Currency (OCC), Treasury.

**ACTION:** Notice and request for comment.

**SUMMARY:** The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. An agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. The OCC is soliciting comment concerning its information collection titled, ''Bank Activities and Operations—12 CFR 7.''

**DATES:** You should submit written comments by March 31, 2003.

**ADDRESSES:** You should direct comments to the Communications Division, Office of the Comptroller of the Currency, Public Information Room, Mailstop 1–5, Attention: 1557–0204, 250 E Street, SW., Washington, DC 20219. Due to delays in paper mail in the Washington area, commenters are encouraged to submit comments by fax or e-mail. Comments may be sent by fax to (202) 874–4448, or by e-mail to *regs.comments@occ.treas.gov*. You can inspect and photocopy the comments at the OCC's Public Information Room, 250 E Street, SW., Washington, DC 20219. You can make an appointment to inspect the comments by calling (202) 874–5043.

A copy of the comments should also be sent to the OMB Desk Officer for the OCC: Joseph F. Lackey, Jr., Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503, or by e-mail to *jlackeyj@omb.eop.gov*.

**FOR FURTHER INFORMATION CONTACT:** You can request additional information from Jessie Dunaway, OCC Clearance Officer, or Camille Dixon, (202) 874–5090, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

**SUPPLEMENTARY INFORMATION:** The OCC is proposing to extend OMB approval of the following information collection: *Title*: Bank Activities and Operations '' 12 CFR 7. *OMB Number*: 1557–0204. *Description*: This submission covers an existing regulation and involves no change to the regulation or to the information collection requirements. The OCC requests only that OMB extend its approval of the information collection.

The information collection requirements ensure that national banks conduct their operations in a safe and sound manner and in accordance with applicable Federal banking statutes and regulations. The information is necessary for regulatory and examination purposes.

The information collection requirements in part 7 are as follows:

12 CFR 7.1000(d)(1) (National bank ownership of property—Lease financing of public facilities): National bank lease agreements must provide that the lessee will become the owner of the building or facility upon the expiration of the lease.

12 CFR 7.1014 (Sale of money orders at nonbanking outlets): A national bank may designate bonded agents to sell the bank's money orders at nonbanking outlets. The responsibility of both the bank and its agent should be defined in a written agreement setting forth the duties of both parties and providing for remuneration of the agent.

12 CFR 7.2000(b) (Corporate governance procedures '' Other sources of guidance): A national bank shall designate in its bylaws the body of law selected for its corporate governance procedures.

12 CFR 7.2004 (Honorary directors or advisory boards): Any listing of a national bank's honorary or advisory directors must distinguish between them and the bank's board of directors or indicate their advisory status.

12 CFR 7.2014(b) (Indemnification of institution-affiliated parties '' Administrative proceeding or civil actions not initiated by a Federal agency): A national bank shall designate in its bylaws the body of law selected for making indemnification payments. *Type of Review*: Extension of a currently approved collection. *Affected Public*: Businesses or other for-profit. *Estimated Number of Respondents*: 1,600. *Estimated Total Annual Responses*: 1,600. *Frequency of Response*: On occasion. *Estimated Total Annual Burden*: 480 hours.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;

(b) The accuracy of the agency's estimate of the burden of the collection of information;

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

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

(e) Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 23, 2003.

**Mark J. Tenhundfeld,**

*Assistant Director, Legislative and Regulatory Activities Division Division.*

[FR Doc. 03–2028 Filed 1–28–03; 8:45 am]

**BILLING CODE 4810–33–P**

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Office of the Comptroller of the Currency (OCC), Treasury.

**ACTION:** Notice and request for comment.

**SUMMARY:** The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. An agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless the information collection displays a currently valid OMB control number. The OCC is soliciting comment concerning its information collection titled, ''Recordkeeping Requirements for Securities Transactions—12 CFR 12.'' The OCC also gives notice that it has sent the information collection to OMB for review and approval.

**DATES:** You should submit your comments to the OCC and the OMB Desk Officer by February 28, 2003.

**ADDRESSES:** You should direct comments to:

Communications Division, Office of the Comptroller of the Currency, Public Information Room, Mailstop 1–5, Attention: 1557–0142, 250 E Street, SW., Washington, DC 20219. Due to delays in paper mail in the Washington area, commenters are encouraged to submit comments by fax or e-mail. Comments may be sent by fax to (202) 874–4448, or by e-mail to *regs.comments@occ.treas.gov.* You can inspect and photocopy the comments at the OCC's Public Information Room, 250 E Street, SW., Washington, DC 20219. You can make an appointment to inspect the comments by calling (202) 874–5043.

Joseph F. Lackey, Jr., OMB Desk Officer for the OCC, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** You can request additional information or a copy of the collection from Jessie Dunaway, OCC Clearance Officer, or Camille Dixon, (202) 874–5090, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

**SUPPLEMENTARY INFORMATION:** The OCC is proposing to extend OMB approval of the following information collection:

*Title:* Recordkeeping Requirements for Securities Transactions—12 CFR 12.

*OMB Number:* 1557–0142.

*Description:* This submission covers an existing regulation and involves no change to the regulation or to the information collection requirements. The OCC requests only that OMB extend its approval of the information collection.

The information collection requirements in 12 CFR part 12 are required to ensure national bank compliance with securities laws and to improve the protection afforded persons who purchase and sell securities through banks. The transaction confirmation information provides customers with a record regarding the transaction and provides banks and the OCC with records to ensure compliance with banking and securities laws and regulations. The OCC uses the required information in its examinations to, among other things, evaluate a bank's compliance with the antifraud provisions of the Federal securities laws.

The information collection requirements contained in 12 CFR part 12 are as follows:

Section 12.3 requires a national bank effecting securities transactions for customers to maintain records for at least three years. The records required by this section must clearly and accurately reflect the information required and provide an adequate basis for the audit of the information.

Section 12.4 requires a national bank to give or send to the customer a written notification of transaction or a copy of the registered broker/dealer confirmation relating to the securities transaction.

Sections 12.5(a), (b), (c), and (e) require a national bank, as an alternative to complying with § 12.4, to provide notification to customers of trust transactions, agency transactions, and periodic plan transactions.

Sections 12.7(a)(1) through (a)(3) require a national bank to develop and maintain written securities trading policies and procedures.

Section 12.7(a)(4) requires bank officers and employees to report to the bank all personal transactions in securities made by them or on their behalf in which they have a beneficial interest.

Section 12.8 requires a national bank to file a written request with the OCC for a waiver of one or more of the requirements set forth in §§ 12.2 through 12.7.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Businesses or other for-profit.

*Estimated Number of Respondents:* 685.

*Estimated Total Annual Responses:* 685.

*Frequency of Response:* On occasion.

*Estimated Total Annual Burden:* 3,713 hours.

Dated: January 21, 2003.

**Mark J. Tenhundfeld,**

*Assistant Director, Legislative and Regulatory Activities Division.*

[FR Doc. 03–2027 Filed 1–28–03; 8:45 am]

**BILLING CODE 4810–33–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

**[EE–28–78]**

### Proposed Collection; Comment Request for Regulation Project

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, EE–28–78 (TD 7845). Inspection of Applications for Tax Exemption and Applications for Determination Letters for Pension and Other Plans (§§ 301.6104(a)–1, 301.6104(a)–5, 301.6104(a)–6, 301.6104(b)–1, and 301.6104(c)–1.

**DATES:** Written comments should be received on or before March 31, 2003, to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn Kirkland, Internal Revenue Service, room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the regulation should be directed to Larnice Mack (202) 622–3179, or *Larnice.Mack@irs.gov,* or Internal Revenue Service, room 6407, 1111 Constitution Avenue, NW., Washington, DC 20224.

**SUPPLEMENTARY INFORMATION:**

*Title:* Inspection of Applications for Tax Exemption and Applications for Determination Letters for Pension and Other Plans.

*OMB Number:* 1545–0817.

*Regulation Project Number:* EE–28–78.

*Abstract:* Internal Revenue Code section 6104 requires applications for tax exempt status, annual reports of private foundations, and certain portions of returns to be open for public inspection. Some information may be withheld from disclosure. The Internal Revenue Service needs the required information to comply with requests for public inspection.

*Current Actions:* There is no change to this existing regulation.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Individuals or households, business or other for-profit organizations, not-for-profit institutions, Federal Government, and state, local or tribal government.

*Estimated Number of Respondents:* 42,370.

*Estimated Time Per Respondent:* 12 min.

*Estimated Total Annual Burden Hours:* 8,538 hours.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

**Request for Comments**

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 14, 2003.

**Glenn Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. 03–2064 Filed 1–28–03; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

**[IA–17–90]**

### Proposed Collection; Comment Request For Regulation Project

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, IA–17–90 (TD 8571), Reporting Requirements for Recipients of Points Paid on Residential Mortgages (§§ 1.6050H–1 and 1.6050H–2).

**DATES:** Written comments should be received on or before March 31, 2003, to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn Kirkland, Internal Revenue Service, room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of this regulation should be directed to Allan Hopkins, at (202) 622–6665, or through the Internet (*Allan.M.Hopkins@irs.gov*), Internal Revenue Service, room 6407, 1111 Constitution Avenue, NW., Washington, DC 20224.

**SUPPLEMENTARY INFORMATION:**

*Title:* Reporting Requirements for Recipients of Points Paid on Residential Mortgages.

*OMB Number:* 1545–1380.

*Regulation Project Number:* IA–17–90.

*Abstract:* These regulations require the reporting of certain information relating to payments of mortgage interest. Taxpayers must separately state on form 1098 the amount of points and the amount of interest (other than points) received during the taxable year on a single mortgage and must provide to the payer of the points a separate statement setting forth the information being reported to the IRS.

*Current Actions:* There is no change to this existing regulation.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 37,644.

*Estimated Time Per Respondent:* 7 hrs., 31 minutes.

*Estimated Total Annual Burden Hours:* 283,056.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

**Request for Comments**

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 21, 2003.

**Glenn Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. 03–2065 Filed 1–28–03; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

**[IA–14–91]**

### Proposed Collection; Comment Request For Regulation Project

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, IA–14–91 (TD 8454), Adjusted Current Earnings (§ 1.56(g)–1).

**DATES:** Written comments should be received on or before March 31, 2003, to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn Kirkland, Internal Revenue Service, room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of this regulation should be directed to Allan Hopkins, at (202) 622–6665, or through the Internet (*Allan.M.Hopkins@irs.gov*), Internal Revenue Service, room 6407, 1111 Constitution Avenue, NW., Washington, DC 20224.

**SUPPLEMENTARY INFORMATION:**

*Title:* Adjusted Current Earnings.

*OMB Number:* 1545–1233.

*Regulation Project Number:* IA–14–91 (Final).

*Abstract:* Section 1.56(g)–1(r) of the regulation sets forth rules pursuant to section 56(g) of the Internal Revenue Code that permit taxpayers to elect a simplified method of computing their inventory amounts in order to compute their alternative minimum tax.

*Current Actions:* There is no change to this existing regulation.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 1,000.

*Estimated Time Per Respondent:* 1 hour.

*Estimated Total Annual Burden Hours:* 1,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

**Request for Comments**

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 21, 2003.

**Glenn Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. 03–2066 Filed 1–28–03; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

**[IA–74–93]**

### Proposed Collection; Comment Request For Regulation Project

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, IA–74–93, (TD 8623), Substantiation Requirement for Certain Contributions (§ 1.170A–13).

**DATES:** Written comments should be received on or before March 31, 2003, to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn Kirkland, Internal Revenue Service, room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of this regulation should be directed to Allan Hopkins, (202) 622–6665, or through the Internet (*Allan.M.Hopkins@irs.gov*), Internal Revenue Service, room 6407, 1111 Constitution Avenue, NW., Washington, DC 20224.

**SUPPLEMENTARY INFORMATION:**

*Title:* Substantiation Requirement for Certain Contributions.

*OMB Number:* 1545–1431.

*Regulation Project Number:* IA–74–93 (Final).

*Abstract:* These regulations provide that, for purposes of substantiation for certain charitable contributions, consideration does not include *de minimis* goods or services. It also provides guidance on how taxpayers may satisfy the substantiation requirement for contributions of $250 or more.

*Current Actions:* There is no change to this existing regulation.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Individuals or households, business or other for-profit organizations, and non-profit institutions.

*Estimated Number of Respondents:* 16,000.

*Estimated Time Per Respondent:* 3 hours, 13 minutes.

*Estimated Total Annual Burden Hours:* 51,500.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

**Request for Comments**

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 21, 2003.

**Glenn Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. 03–2067 Filed 1–28–03; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Quarterly Publication of Individuals, Who Have Chosen to Expatriate, as Required by Section 6039G

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice.

**SUMMARY:** This notice is provided in accordance with IRC section 6039G, as amended, by the Health Insurance Portability and Accountability Act (HIPPA) of 1996. This listing contains the name of each individual losing United States citizenship (within the meaning of section 877(a)) with respect to whom the Secretary received information during the quarter ending December 31, 2002.

| LNAME | FNAME | MNAME |
|---|---|---|
| Andersen | Inger | Marie |
| Aslet | Peter | M |
| Baca | Susan | Berry |
| Blank | Chip | |
| Bodmer | Philip | Daniel |
| Brands | Marcus | A |
| Brecelnick | Natalie | Ann |
| Bromberg | Ruth | |
| Budd | Sandra | Alice |
| Buschina | Magdalena | |
| Cabatuando | Antonio | Miranda |
| Chiarizia | Anita | Ulack |
| Chung | Edwin | |
| Doroski | Mark | Joseph |
| Doroski | Cheryl | Marie |
| Ernst | Joan | Claudia |
| Fisher | Jonathan | Asher |
| Fisher | Mina | |
| Fok | Helen | Hsi Lin |
| Fontaine(aka Rene Joseph Sylvio Fontain) | Joseph | Rene Sylvio |
| Foo | Robert | Sung Ting |
| Fraser | Anthony | A |
| Freeman | Gunhild | B. |
| Fung | Amy | Pik-Mei |
| Gaib | Connie | Sue |
| Gill | Gwendolyn | Jeanne |
| Gilman | Andrew | Curtis |
| Goodwin Jr | Gilbert | Lenell |
| Grabo | Anders | P |
| Greene Jr | Charles | Sheldon |
| Hallyday | David | |
| Hart | Linda | Joan |
| Hoffmann | Eric | Christian |
| Husar | Lubomyr | |
| Ito | Mark | Kenichiro |
| Jastrow | Lee | |
| Jeffrey | Lisa | Claire |

| LNAME | FNAME | MNAME |
|---|---|---|
| Kabe | Noriko | |
| Keneally | Kristina | Kerscher |
| Kent | Yasuko | N |
| Kubo | Katsuyuki | |
| Kusharsky | Alexander | |
| Kwon | Lana | |
| Lee | Ericka | Jong |
| Lee | Choohye | |
| Lehnert | Colleen | Dione |
| Lengyel | Alice | Wolf |
| Lin | Heng-yeh | |
| Lubsesn | Sigismundus | |
| MacDougall | Lorna | Grace |
| Machon | Stephen | Charles |
| Matsuhashi | Shuko | |
| Matthews | Janet | Elizabeth |
| McNicol | Sharon-Ann | Arlene |
| Oskanian | Vartan | |
| Ozols | Ivars | Juris |
| Paegle | Vaira | |
| Paleg | Leslie | Godell |
| Pecherek | Craig | Matthew |
| Piantedosi | Domenica | |
| Pilch | Jozef | |
| Poulsen | Poul | |
| Robertson | James | Vincent |
| Rosenberg | Michael | M. |
| Rothemund | Virginia | |
| Sasson | Diane | Claude |
| Scheid | Katrin | Anja |
| Sen (aka Amita Mukherjee & Amita Ray) | Amita | |
| Shimakawa | Hiroyuki | |
| Sim | Richard | G |
| Simon | Robert | Samuel |
| Sinclair Jr. | Merle | Elwood |
| Sirois | Claudia | Nancy |
| Skierka | Alice | May |
| Smith | Scott | Leon |
| Smith | Gregg | Alan |
| Speck | Paul | Theodore |
| Speck | Barbara | Jean |
| Speck | Matthew | Ernest |
| Speck | Daniel | Anthony |
| Steinbock | Rachel | |
| Strassler | Ronald | Philip |
| Strecher | Sabine | |
| Tesluk | Timothy | Michael |
| Thompson | Kirsten | Deborah |
| Trezise | John | Adrian |
| Turdo | Rino | Bennie |
| Usleber | Gudrun | |
| Vahey | Grainne | Cuffe |
| Warne | Robert | Denis |
| Weston | Jennie | Fairbanks |
| Wong | Yuk | W. |
| Xu | Yanping | |
| Yue Gee Fung | Daniel | Kenneth |
| Yun | Theresa | Heeyul |
| Zisserson | Warren | |
| Zisserson | Marilynn | |
| Zyner | Leanne | Frances |
| Zyner | Grzegorz | Bogulsaw |

Dated: January 13, 2003.

**Samuel Brown,**

*Team Manager—Examination Operation, Philadelphia Compliance Services.*

[FR Doc. 03–2068 Filed 1–28–03; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Open Meeting of the Taxpayer Advocacy Panel, E-Filing Issue Committee

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice.

**SUMMARY:** An open meeting of the Taxpayer Advocacy Panel, E-Filing Issue Committee will be conducted (via teleconference).

**DATES:** The meeting will be held Thursday, March 13, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mary Ann Delzer at 1–888–912–1227, or (414) 297–1604.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel, E-Filing Issue Committee will be held Thursday, March 13, 2003, from 2 p.m. central time to 3 p.m. central standard time via a telephone conference call. The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service. You can submit written comments to the panel by faxing to (414) 297–1623, or by mail to Taxpayer Advocacy Panel, Stop1006MIL, 310 West Wisconsin Avenue, Milwaukee, WI 53203–2221. Public comments will also be welcome during the meeting. Please contact Mary Ann Delzer at 1–888–912–1227 or (414) 297–1604 for dial-in information.

The agenda will include the following: Various IRS issues.

**Note:** Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: January 23, 2003.

**Deryle Temple,**

*Director, Taxpayer Advocacy Panel.*

[FR Doc. 03–2070 Filed 1–28–03; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Open Meeting of the Area 5 Taxpayer Advocacy Panel (Including the States of Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Texas)

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice.

**SUMMARY:** An open meeting of the Area 5 Taxpayer Advocacy Panel will be conducted (via teleconference).

**DATES:** The meeting will be held Monday, March 10, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mary Ann Delzer at 1–888–912–1227, or (414) 297–1604.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 5 Taxpayer Advocacy Panel will be held Monday, March 10, 2003, from 2:30 to 3:30 p.m. Central standard time via a telephone conference call. The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service. You can submit written comments to the panel by faxing to (414) 297–1623, or by mail to Taxpayer Advocacy Panel, Stop1006MIL, 310 West Wisconsin Avenue, Milwaukee, WI 53203–2221. Public comments will also be welcome during the meeting. Please contact Mary Ann Delzer at 1–888–912–1227 or (414) 297–1604 for more information.

The agenda will include the following: Various IRS issues.

**Note:** Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: January 23, 2003.

**Deryle Temple,**

*Director, Taxpayer Advocacy Panel.*

[FR Doc. 03–2071 Filed 1–28–03; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Open Meeting of the Area 4 Taxpayer Advocacy Panel (Including the States of Illinois, Indiana, Kentucky, Michigan, Ohio, West Virginia, and Wisconsin)

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice.

**SUMMARY:** An open meeting of the Area 4 Taxpayer Advocacy Panel will be conducted (via teleconference).

**DATES:** The meeting will be held Wednesday, March 5, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mary Ann Delzer at 1–888–912–1227, or (414) 297–1604.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 4 Taxpayer Advocacy Panel will be held Wednesday, March 5, 2003, from 11 a.m. central time to noon central standard time via a telephone conference call. The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service. You can submit written comments to the panel by faxing to (414) 297–1623, or by mail to Taxpayer Advocacy Panel, Stop1006MIL, 310 West Wisconsin Avenue, Milwaukee, WI 53203–2221. Public comments will also be welcome during the meeting. Please contact Mary Ann Delzer at 1–888–912–1227 or (414) 297–1604 for dial-in information.

The agenda will include the following: various IRS issues.

**Note:** Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: January 23, 2003.

**Deryle Temple,**

*Director, Taxpayer Advocacy Panel.*

[FR Doc. 03–2072 Filed 1–28–03; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Open Meeting of the Joint Committee of the Taxpayer Advocacy Panel

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice.

**SUMMARY:** An open meeting of the Joint Committee of the Taxpayer Advocacy Panel will be conducted via teleconference.

**DATES:** The meeting will be held Tuesday, February 18, 2003.

**FOR FURTHER INFORMATION CONTACT:** Barbara Toy at 1–888–912–1227, or 414–297–1611.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988)

that an open meeting of the Joint Committee of the Taxpayer Advocacy Panel (TAP) will be held Tuesday, February 18, 2003, from 1:30 to 3 p.m. e.s.t. via a telephone conference call. Public comments will be welcome during the meeting. If you would like to have the Joint Committee of TAP consider a written statement, please call 1–888–912–1227 or 414–297–1611, or write Barbara Toy, TAP Office, MS–1006-MIL, 310 West Wisconsin Avenue, Milwaukee, WI 53203–2221, or FAX to 414–297–1623. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Barbara Toy. Ms. Toy can be reached at 1–888–912–1227 or 414–297–1611, or FAX 414–297–1623.

The agenda will include the following: monthly committee summary report, discussion of issues brought to the joint committee, office report and discussion of next meeting.

**Note:** Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: January 23, 2003.

**Deryle Temple,**

*Director, Taxpayer Advocacy Panel.*

[FR Doc. 03–2073 Filed 1–28–03; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Open Meeting of the Small Business/ Self Employed—Payroll Tax Committee of the Taxpayer Advocacy Panel

**ACTION:** Notice.

**SUMMARY:** An open meeting of the Small Business/Self Employed—Payroll Tax Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference).

**DATES:** The meeting will be held Thursday, February 6, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mary O'Brien at 1–888–912–1227, or 206 220–6096.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Small Business/Self Employed—Payroll Tax Committee of the Taxpayer Advocacy Panel will be held Thursday, February 6, 2003, from 3 p.m. e.s.t. to 4 p.m. e.s.t. via a telephone conference call. The public is invited to make oral comments. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 206–220–6096, or write to Mary O'Brien, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Mary O'Brien. Ms O'Brien can be reached at 1–888–912–1227 or 206–220–6096.

The agenda will include the following: various IRS issues.

**Note:** Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: January 21, 2003.

**Deryle J. Temple,**

*Director, Taxpayer Advocacy Panel.*

[FR Doc. 03–2074 Filed 1–28–03; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Open Meeting of the Small Business/ Self Employed—Schedule C Non-Filers Committee of the Taxpayer Advocacy Panel

**ACTION:** Notice.

**SUMMARY:** An open meeting of the Small Business/ Self Employed Schedule C Non-Filers Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference).

**DATES:** The meeting will be held Tuesday, February 11, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mary O'Brien at 1–888–912–1227, or 206–220–6096.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Small Business/Self Employed—Schedule C Non-Filers Committee of the Taxpayer Advocacy Panel will be held Tuesday, February 11, 2003, from 2 p.m. e.s.t. to 3 p.m. e.s.t. via a telephone conference call. The public is invited to make oral comments. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 206–220–6096, or write to Mary O'Brien, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Mary O'Brien. Ms. O'Brien can be reached at 1–888–912–1227 or 206–220–6096.

The agenda will include the following: various IRS issues.

**Note:** Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: January 21, 2003.

**Deryle J. Temple,**

*Director, Taxpayer Advocacy Panel.*

[FR Doc. 03–2075 Filed 1–28–03; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Open Meeting of the Area 6 Taxpayer Advocacy Panel (Including the States of Alaska, Arizona, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming)

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice.

**SUMMARY:** An open meeting of the Area 6 Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference).

**DATES:** The meeting will be held Monday, February 24, 2003.

**FOR FURTHER INFORMATION CONTACT:** Anne Gruber at 1–888–912–1227, or 206–220–6096.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 6 Committee of the Taxpayer Advocacy Panel will be held Monday, February 24, 2003 from 2 pm PST to 4 pm PST via a telephone conference call. The public is invited to make oral comments. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider an oral or written statement, please call 1–888–912–1227 or 206–220–6096, or write Anne Gruber, TAP Office, 915 2nd Ave, M/S W406, Seattle, WA 98174. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Anne Gruber. Ms. Gruber can be reached at 1–888–912–1227 or 206–220–6096.

*The agenda will include the following:* Various IRS issues.

**Note:** Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: January 21, 2003.

**Deryle J. Temple,**

*Director, Taxpayer Advocacy Panel.*

[FR Doc. 03–2076 Filed 1–28–03; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Open Meeting of the Small Business/Self Employed—Payroll Tax Committee of the Taxpayer Advocacy Panel

**ACTION:** Notice.

**SUMMARY:** An open meeting of the Small Business/Self Employed—Payroll Tax Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference).

**DATES:** The meeting will be held Thursday, March 6, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mary O'Brien at 1–888–912–1227, or 206 220–6096.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Small Business/Self Employed—Payroll Tax Committee of the Taxpayer Advocacy Panel will be held Thursday, March 6, 2003 from 3 pm EST to 4 pm EST via a telephone conference call. The public is invited to make oral comments. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 206–220–6096, or write to Mary O'Brien, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Mary O'Brien. Ms O'Brien can be reached at 1–888–912–1227 or 206–220–6096.

*The agenda will include the following:* various IRS issues.

**Note:** Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: January 21, 2003.

**Deryle J. Temple,**

*Director, Taxpayer Advocacy Panel.*

[FR Doc. 03–2077 Filed 1–28–03; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Open Meeting of the Small Business/Self Employed—Schedule C Non-Filers Committee of the Taxpayer Advocacy Panel

**ACTION:** Notice.

**SUMMARY:** An open meeting of the Small Business/Self Employed Schedule C Non-Filers Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference).

**DATES:** The meeting will be held Tuesday, March 11, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mary O'Brien at 1–888–912–1227, or 206–220–6096.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Small Business/Self Employed—Schedule C Non-Filers Committee of the Taxpayer Advocacy Panel will be held Tuesday, March 11, 2003 from 2 pm EST to 3 pm EST via a telephone conference call. The public is invited to make oral comments. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 206–220–6096, or write to Mary O'Brien, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Mary O'Brien. Ms O'Brien can be reached at 1–888–912–1227 or 206–220–6096.

*The agenda will include the following:* various IRS issues.

**Note:** Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: January 21, 2003.

**Deryle J. Temple,**

*Director, Taxpayer Advocacy Panel.*

[FR Doc. 03–2078 Filed 1–28–03; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Open Meeting of the Wage & Investment Reducing Taxpayer Burden (Notices) Issue Committee of the Taxpayer Advocacy Panel

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice.

**SUMMARY:** An open meeting of the Wage & Investment Reducing Taxpayer Burden (Notices) Issue Committee of the Taxpayer Advocacy Panel will be conducted.

**DATES:** The meeting will be held Friday, February 21, 2003.

**FOR FURTHER INFORMATION CONTACT:** Sallie Chavez at 1–888–912–1227, or 954–423–7979.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Wage & Investment Reducing Taxpayer Burden (Notices) Issue Committee of the Taxpayer Advocacy Panel will be held Friday, February 21, 2003, from 1 pm CST to 4 pm CST and 6 pm CST to 7 pm CST at the Homewood Suites, 4143 Governor's Row, Austin, Texas. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 954–423–7979, or write Sallie Chavez, TAP Office, 1000 South Pine Island Rd., Suite 340, Plantation, FL 33324. Due to limited space, notification of intent to participate in the meeting must be made with Sallie Chavez. Ms. Chavez can be reached at 1–888–912–1227 or 954–423–7979.

*The agenda will include the following:* IRS Notices.

**Note:** Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: January 22, 2003.

**Deryle J. Temple,**

*Director, Taxpayer Advocacy Panel.*

[FR Doc. 03–2079 Filed 1–28–03; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Open Meeting of the Area 2 Taxpayer Advocacy Panel (Including the states of Delaware, North Carolina, South Carolina, New Jersey, Maryland, Pennsylvania, Virginia and the District of Columbia)

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice.

**SUMMARY:** An open meeting of the Area 2 Taxpayer Advocacy Panel will be conducted.

**DATES:** The meeting will be held Friday, February 28, 2003, and Saturday, March 1, 2003.

**FOR FURTHER INFORMATION CONTACT:** Inez E. De Jesus at 1–888–912–1227, or 954–423–7977.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 2 Taxpayer Advocacy Panel will be held Friday, February 28, 2003 from 8 am EST to 5 pm EST; and on Saturday, March 1, 2003, from 8 am EST to Noontime EST, at One Washington Circle Hotel, One Washington Circle, NW., Washington, DC. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 954–423–7977, or write Inez E. De Jesus, TAP Office, 1000 South Pine Island Rd., Suite 340, Plantation, FL 33324. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Inez E. De Jesus. Ms. De Jesus can be reached at 1–888–912–1227 or 954–423–7977.

*The agenda will include the following:* Various IRS issues.

**Note:** Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: January 22, 2003.

**Deryle J. Temple,**

*Director, Taxpayer Advocacy Panel.*

[FR Doc. 03–2080 Filed 1–28–03; 8:45 am]

**BILLING CODE 4830–01–P**

# Corrections

**Federal Register**

Vol. 68, No. 19

Wednesday, January 29, 2003

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 TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2002–14047; Airspace Docket No. 02–AGL–20]**

## Proposed Establishment of Class E Airspace; Berrien Springs, MI

*Correction*

In proposed rule document 03–1130 beginning on page 2461 in the issue of Friday, January 17, 2003, make the following correction:

**§71.1 [Corrected]**

On page 2462, in the first column, in §71.1, in the sixth line from the bottom, the heading **AGL MI E5 Berien Springs, MI [New]** should read, **AGL MI E5 Berrien Springs, MI [New]**.

[FR Doc. C3–1130 Filed 1–28–03; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Wednesday,
January 29, 2003

Part II

# Department of Housing and Urban Development

## Notice of Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2002; Notice

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–4767–N–03]**

## Notice of Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2002

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Public notice of the granting of regulatory waivers from July 1, 2002, through September 30, 2002.

**SUMMARY:** Section 106 of the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act) requires HUD to publish quarterly **Federal Register** notices of all regulatory waivers that HUD has approved. Each notice must cover the quarterly period since the most recent **Federal Register** notice. The purpose of this notice is to comply with the requirements of section 106 of the HUD Reform Act. This notice contains a list of regulatory waivers granted by HUD during the quarter beginning on July 1, 2002, and ending on September 30, 2002.

**FOR FURTHER INFORMATION CONTACT:** For general information about this notice, contact Aaron Santa Anna, Assistant General Counsel for Regulations, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500; telephone (202) 708–3055 (this is not a toll-free number). Hearing- or speech-impaired persons may access this number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8391.

For information concerning a particular waiver action for which public notice is provided in this document, contact the person whose name and address follow the description of the waiver granted in the accompanying list of waiver-grant actions.

**SUPPLEMENTARY INFORMATION:** As part of the HUD Reform Act, the Congress adopted, at HUD's request, legislation to limit and control the granting of regulatory waivers by HUD. Section 106 of the HUD Reform Act added a new section 7(q) to the Department of Housing and Urban Development Act (2 U.S.C. 3535(q)), which provides that:

1. Any waiver of a regulation must be in writing and must specify the grounds for approving the waiver;

2. Authority to approve a waiver of a regulation may be delegated by the Secretary only to an individual of Assistant Secretary or equivalent rank, and the person to whom authority to waive is delegated must also have authority to issue the particular regulation to be waived;

3. Not less than quarterly, the Secretary must notify the public of all waivers of regulations that HUD has approved, by publishing a notice in the **Federal Register**. These notices (each covering the period since the most recent previous notification) shall:

a. Identify the project, activity, or undertaking involved;

b. Describe the nature of the provision waived, and the designation of the provision;

c. Indicate the name and title of the person who granted the waiver request;

d. Describe briefly the grounds for approval of the request; and

e. State how additional information about a particular waiver-grant action may be obtained.

Section 106 of the HUD Reform Act also contains requirements applicable to waivers of HUD handbook provisions that are not relevant to the purpose of this notice.

This notice follows procedures provided in HUD's Statement of Policy on Waiver of Regulations and Directives issued on April 22, 1991 (56 FR 16337). This notice covers HUD's waiver-grant activity from July 1, 2002, through September 30, 2002. For ease of reference, the waivers granted by HUD are listed by HUD program office (for example, the Office of Community Planning and Development, the Office of Housing, the Office of Public and Indian Housing, etc.). Within each program office grouping, the waivers are listed sequentially by the section of title 24 being waived. For example, a waiver-grant action involving the waiver of a provision in 24 CFR part 58 would come before a waiver of a provision in 24 CFR part 570.

Where more than one regulatory provision is involved in the grant of a particular waiver request, the action is listed under the section number of the first regulatory requirement that appears in title 24 of the Code of Federal Regulations and that is being waived as part of the waiver-grant action. For example, a waiver of both § 58.73 and § 58.74 would appear sequentially in the listing under § 58.73.

Waiver-grant actions involving the same initial regulatory citation are in time sequence beginning with the earliest-dated waiver-grant action.

Should HUD receive additional reports of waiver actions taken during the period covered by this report before the next report is published, the next updated report will include these earlier actions, as well as those that occurred during October 1, 2002, through December 31, 2002.

Accordingly, information about approved waiver requests pertaining to HUD regulations is provided in the Appendix that follows this notice.

Dated: January 16, 2003.

**Alphonso Jackson,**

*Deputy Secretary.*

### Appendix

Listing of Waivers of Regulatory Requirements Granted by Offices of the Department of Housing and Urban Development July 1, 2002, through September 30, 2002

*Note to Reader:* More information about the granting of these waivers, including a copy of the waiver request and approval, may be obtained by contacting the person whose name is listed as the contact person directly after each set of waivers granted.

The regulatory waivers granted appear in the following order:

I. Regulatory waivers granted by the Office of Community Planning and Development.

II. Regulatory waivers granted by the Office of Housing.

III. Regulatory waivers granted by the Office of Public and Indian Housing.

### I. Regulatory Waivers Granted by the Office of Community Planning and Development

For further information about the following waiver actions, please see the name of the contact person who immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 91.225(b)(4)(ii).

*Project/Activity:* The city of Abilene, Texas, requested a waiver of the regulations to change its selected period of certification to comply with the requirement that a least 70 percent of its Community Development Block Grant (CDBG) funds expended during that period are for activities that benefit low- and moderate-income persons.

*Nature of Requirement:* Section 91.225(b)(4)(ii) provides that each CDBG grantee must certify that it will achieve the primary objective of benefiting low- and moderate-income persons over a period of one, two, or three consecutive program years selected by the grantee.

*Granted by:* Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

*Date Granted:* September 27, 2002.

*Reasons Waived:* The city of Abilene requested the waiver in order to undertake a major downtown revitalization program in 2002, the renovation of the Wooten Hotel. The developer was unable to attract investors and secure loans for redevelopment of the Wooten as a hotel

that would have met the low- and moderate-income national objective through job creation; however, the project will be able to meet a national objective on the basis of elimination of slum or blight. Because the amount of Section 108 funding needed for this project is almost equivalent to the city's annual entitlement amount, the city is unable to undertake this needed project and meet the overall benefit test in the currently identified certification period (2000–2002). By shortening the existing certification period to two years, the city will be able to meet the primary benefit test for two years and then have three years to comply with this test for 2002–2005. The Department has determined that this waiver is appropriate because the city has consistently exceeded the overall benefit requirement and failure to grant the waiver would prohibit the city from undertaking this worthwhile development project. Further, the city will be able to meet the overall benefit test in both the shortened period and the longer period.

*Contact:* Cornelia Robertson-Terry, Office of Community Planning and Development, Room 7152, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–2565, extension 4556.

• *Regulation:* 24 CFR 91.520(a).

*Project/Activity:* The city of Trenton, New Jersey, requested a waiver of the submission deadline for the city's 2001 program year Consolidated Annual Performance and Evaluation Report (CAPER).

*Nature of Requirement:* Section 91.520(a) requires each grantee to submit a performance report to HUD within 90 days after the close of the grantee's program year.

*Granted by:* Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

*Date Granted:* August 28, 2002.

*Reasons Waived:* The city requested a two-month extension because the city experienced the departure of key staff and these departures resulted in a delay in the processing time. While HUD desires timely reports, the Department is interested in ensuring that the reports prepared by grantees are complete and accurate. The performance reports provide local residents with information on the city's accomplishments during the year, and the report data goes into HUD's national database that is used for various reporting purposes, including the annual report to Congress.

*Contact:* Cornelia Robertson-Terry, Office of Community Planning and Development, Room 7152, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–2565, extension 4556.

• *Regulation:* 24 CFR 91.520(a).

*Project/Activity:* The city of Pittsburg, California, requested a waiver of the submission deadline for the city's 2001 program year CAPER.

*Nature of Requirement:* 24 CFR 91.520(a) requires each grantee to submit a performance report to HUD within 90 days after the close of the grantee's program year.

*Granted by:* Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

*Date Granted:* September 25, 2002.

*Reasons Waived:* The city requested a 45-day extension because the city's community development department recently relocated to a new building and is currently not able to access HUD's Integrated Disbursement and Information System, which contains the data used to prepare the CAPER. As a result of the office relocation and recent staff changes, the city was unable to submit the report before the deadline. While HUD desires timely reports, the Department is interested in ensuring that the reports prepared by grantees are complete and accurate. The performance reports provide local residents with information on the city's accomplishments during the year, and the report data goes into HUD's national database that is used for various reporting purposes, including the annual report to Congress.

*Contact:* Cornelia Robertson-Terry, Office of Community Planning and Development, Room 7152, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–2565, extension 4556.

• *Regulation:* 24 CFR 91.520(a).

*Project/Activity:* The state of Virginia requested a waiver of the submission date for its 2001 CAPER program year.

*Nature of Requirement:* Section 91.520(a) requires each grantee to submit a performance report to HUD within 90 days after the close of the grantee's program year. The CAPER for the state of Virginia is due to HUD by September 28, 2002.

*Granted by:* Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

*Date Granted:* September 25, 2002.

*Reasons Waived:* The state requested an extension of its submission deadline due to reevaluations of the state's programs to meet the Governor's new fiscal priorities. Failure to grant the request would prevent the state from submitting a comprehensive report of its 2001 program. While HUD desires timely reports, the Department is also interested in ensuring that the performance reports prepared by grantees are complete and accurate.

*Contact:* Cornelia Robertson-Terry, Office of Community Planning and Development, Room 7152, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–2565, extension 4556.

• *Regulation:* 24 CFR 91.520(a).

*Project/Activity:* The city and county of Honolulu, the state of Hawaii, the county of Kauai, the county of Hawaii, and the county of Maui requested a waiver of the submission date for submitting their 2001 program year CAPERs. All of these CAPERs are due September 30, 2002.

*Nature of Requirement:* Section 91.520(a) requires each grantee to submit a performance report to HUD within 90 days after the close of the grantee's program year.

*Granted by:* Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

*Date Granted:* September 26, 2002.

*Reasons Waived:* The grantees are requesting extensions in order to allow the working group time to improve the format of the CAPER submission to make it more understandable for citizens and HUD. The grantees will be unable to submit comprehensive reports of their 2001 program year if the extensions are not granted. While HUD desires timely reports, the Department is also interested in ensuring that the performance reports prepared by grantees are complete and accurate. The grantees received an extension to December 15, 2002, for submission CAPERs.

*Contact:* Cornelia Robertson-Terry, Office of Community Planning and Development, Room 7152, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–2565, extension 4556.

• *Regulation:* 24 CFR 91.520(a).

*Project/Activity:* The city of Baltimore, Maryland, requested a waiver of the submission deadline for the city's 2001 program year CAPER.

*Nature of Requirement:* Section 91.520(a) requires each grantee to submit a performance report to HUD within 90 days after the close of the grantee's program year.

*Granted by:* Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

*Date Granted:* September 26, 2002.

*Reasons Waived:* The city of Baltimore requested an extension of the CAPER submission to allow additional time to properly report its Section 108 program beneficiary information. While HUD desires timely reports, the Department is interested in ensuring that the reports prepared by grantees are complete and accurate. The performance reports provide local residents with information on the city's accomplishments during the year, and the report data goes into HUD's national database that is used for various reporting purposes, including the annual report to Congress.

*Contact:* Cornelia Robertson-Terry, Office of Community Planning and Development, Room 7152, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–2565, extension 4556.

• *Regulation:* 24 CFR 91.520(a).

*Project/Activity:* The city of Hopewell, Virginia, requested a waiver of the submission deadline for the city's 2001 program year CAPER.

*Nature of Requirement:* Section 91.520(a) requires each grantee to submit a performance report to HUD within 90 days after the close of the grantee's program year.

*Granted by:* Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

*Date Granted:* September 26, 2002.

*Reasons Waived:* The city of Hopewell requested an extension to allow sufficient time for citizens to comment and for the city to consider any comments received and respond, if appropriate. While HUD desires timely reports, the Department is interested in ensuring that the reports prepared by grantees are complete and accurate and involves citizen comments. The performance reports provide local residents with information on the city's accomplishments during the year, and the report data goes into HUD's national database that is used for various reporting purposes, including the annual report to Congress.

*Contact:* Cornelia Robertson-Terry, Office of Community Planning and Development, Room 7152, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–2565, extension 4556.

• *Regulation:* 24 CFR 91.520(a).

*Project/Activity:* Chesterfield County, Virginia, requested a waiver of the submission deadline for the county's 2001 program year CAPER.

*Nature of Requirement:* Section 91.520(a) requires each grantee to submit a performance report to HUD within 90 days after the close of the grantee's program year.

*Granted by:* Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

*Date Granted:* September 26, 2002

*Reasons Waived:* The county requested an extension because the staff member normally responsible for compiling the report had to report for military duty on September 16, 2002. Although the staff member is expected to return on September 30, 2002, her absence will delay the report and will not allow the county to submit the report before the deadline. While HUD desires timely reports, the Department is interested in ensuring that the reports prepared by grantees are complete and accurate. The performance reports provide local residents with information on the county's accomplishments during the year, and the report data goes into HUD's national database that is used for various reporting purposes, including the annual report to Congress.

*Contact:* Cornelia Robertson-Terry, Office of Community Planning and Development, Room 7152, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–2565, extension 4556.

• *Regulation:* 24 CFR 91.520(a).

*Project/Activity:* The city of Erie, Pennsylvania, requested a waiver of the submission deadline for the city's 2001 program year CAPER.

*Nature of Requirement:* Section 91.520(a) requires each grantee to submit a performance report to HUD within 90 days after the close of the grantee's program year.

*Granted by:* Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

*Date Granted:* September 27, 2002.

*Reasons Waived:* The city requested a 15-day extension to revise the data regarding its efforts to affirmatively further fair housing. In addition to this information, the extension will allow the city to collect housing performance data from one of its primary recipients. While HUD desires timely reports, the Department is interested in ensuring that the reports prepared by grantees are complete and accurate. The performance reports provide local residents with information on the city's accomplishments during the year, and the report data goes into HUD's national database that is used for various reporting purposes, including the annual report to Congress.

*Contact:* Cornelia Robertson-Terry, Office of Community Planning and Development, Room 7152, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–2565, extension 4556.

• *Regulation:* 24 CFR 91.520(a).

*Project/Activity:* The Dakota County Consortium, of the state of Minnesota, requested a waiver of the submission deadline for the county's 2001 program year CAPER. The extension is needed to allow Ramsey County, one of the consortium members, time to prepare its portion of the CAPER.

*Nature of Requirement:* Section 91.520(a) requires each grantee to submit a performance report to HUD within 90 days after the close of the grantee's program year.

*Granted by:* Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

*Date Granted:* September 27, 2002.

*Reasons Waived:* The county requested a one-month extension because the staff person responsible for preparing Ramsey County's portion of the CAPER experienced a death in the family and left the state to attend to family matters. While HUD desires timely reports, the Department is interested in ensuring that the reports prepared by grantees are complete and accurate. The performance reports provide local residents with information on the county's accomplishments during the year, and the report data goes into HUD's national database that is used for various reporting purposes, including the annual report to Congress.

*Contact:* Cornelia Robertson-Terry, Office of Community Planning and Development, Room 7152, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–2565, extension 4556.

• *Regulation:* 24 CFR 92.500(d)(1)(C).

*Project/Activity:* The Municipality of Carolina, Puerto Rico, requested a waiver of its Fiscal Year 1996 HOME Investment Partnerships (HOME) expenditure deadline.

*Nature of Requirement:* Section 92.500(d)(1)(C) requires HUD to deobligate any funds in the United States Treasury account which are not expended within 5 years of the last day HUD notifies the participating jurisdiction of HUD's execution of the HOME Investment Partnership Agreement.

*Granted by:* Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

*Date Granted:* July 30, 2002.

*Reasons Waived:* HUD found good cause for granting the waiver. The

Municipality has made substantial progress in addressing the administrative and programmatic problems that have negatively affected the effective and timely use of its HOME funds. The 1996 expenditure was fully expended less than one month from the regulatory deadline.

*Contact:* Cornelia Robertson-Terry, Office of Community Planning and Development, Room 7152, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–2565, extension 4556.

• *Regulation:* 24 CFR 570.208(a)(3).

*Project/Activity:* Clark County, Washington, requested a waiver of the Community Development Block Grant (CDBG) regulations at 24 CFR 570.208(a)(3), which describe the criteria for assistance used to provide or improve housing to meet the national objective of benefit to low- and moderate-income households.

*Nature of Requirement:* Section 570.208(a)(3) establishes the criteria that housing activities must meet in order to meet the national objectives of benefit to low- and moderate-income households.

*Granted by:* Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

*Date Granted:* July 3, 2002.

*Reasons Waived:* The methodology identified in the regulations for determining compliance is not required by statute. The Department determined that the county demonstrated good cause for requesting the waiver. This project significantly promotes the purposes of the Housing and Community Development Act and provides an income mix and economic opportunities in a redeveloping area. This project is a mixed-use building, including 160 housing units. Low- and moderate-income households will occupy one hundred and thirty-nine housing units. This represents 86 percent of the units and CDBG funds will constitute 14 percent of the total cost of the acquisition and 1.3 percent of the total development cost.

*Contact:* Cornelia Robertson-Terry, Office of Community Planning and Development, Room 7152, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–2565, extension 4556.

• *Regulation:* 24 CFR 570.208(a)(3).

*Project/Activity:* Dakota County, Minnesota, requested a waiver of the CDBG regulations, which describe the criteria for assistance used to provide or improve housing to meet the national objective of benefit to low- and moderate-income households.

*Nature of Requirement:* Section 570.208(a)(3) establishes the criteria that housing activities must meet in order to meet the national objectives of benefit to low- and moderate-income households.

*Granted by:* Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

*Date Granted:* July 25, 2002.

*Reasons Waived:* Although Dakota County requested a waiver of 24 CFR 570.208(a)(4), the correct citation should have been 24 CFR 570.208(3). The methodology identified in the regulations for determining compliance is not required by statute. The Department determined that the county has demonstrated good cause for requesting the waiver. This project significantly promotes the purposes of the Housing and Community Development Act and provides for an income mix and economic opportunities in a redeveloping area. This mixed-use development will include 51 senior housing units and three commercial spaces. The waiver is granted with the understanding that low- and moderate-income households will occupy all of the housing units and CDBG funds constitute 22.1 percent of the total cost of the acquisition and 3.8 percent of the total development cost.

*Contact:* Cornelia Robertson-Terry, Office of Community Planning and Development, Room 7152, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–2565, extension 4556.

• *Regulation:* 24 CFR 882.805(d)(1)(ii)(B).

*Project/Activity:* The San Francisco, California Housing Authority requested a waiver of the subject section 8 Moderate Rehabilitation Single Room Occupancy (SRO) requirements.

*Nature of Requirement:* The applicable regulations for the SRO Moderate Rehabilitation program state that the cost of rehabilitation that may be included for the purpose of calculating the initial contract rent must not exceed the current per unit cost limitation that was established in the **Federal Register**, in this case $18,200, minus the cost of fire and safety improvements. Section 882.805(d)(1)(ii)(B) states that this amount may be multiplied by 2.4 in areas where the housing authority has demonstrated to HUD's satisfaction that the increase is reasonable to accommodate special local conditions, including high construction costs. In the case of San Francisco, this would allow a maximum rehabilitation cost of $43,680.

*Granted by:* Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

*Date Granted:* September 25, 2002.

*Reasons Waived:* The final per unit rehabilitation cost for this project is projected to be $60,494, well above the maximum approvable cost. A waiver of the per unit cost limitation for this project was determined appropriate as the current Fair Market Rents (FMRs) are sufficient to support the debt service for the project and this housing will address a critical need in the city's Continuum of Care by housing homeless individuals. HUD determined that there was good cause for this waiver in view of the extremely high cost of construction in San Francisco and the difficulty in finding and acquiring suitable properties for the SRO program.

*Contact:* Cornelia Robertson-Terry, Office of Community Planning and Development, Room 7152, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–2565, extension 4556.

**II. Regulatory Waivers Granted by the Office of Housing**

For further information about the following waivers actions, please see the name of the contact person who immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 200.54(a).

*Project/Activity:* Sycamore Place Apartments, Ashland, TN; Project Number: 086–35276.

*Nature of Requirement:* Section 200.54(a) establishes the procedures for a pro-rata disbursement of the mortgagor's front money escrow funds and Federal Housing Administration (FHA) insured mortgage proceeds for the subject property.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 15, 2002.

*Reason Waived:* The regulation was waived since the front money escrow is so large, the insured proceeds would not be disbursed for several months, resulting in payment of extension fees to the investors who purchased the Government National Mortgage Association (GNMA) mortgage-backed securities. Providing a waiver of 24 CFR 200.54(a) permitted the Nashville Multifamily Program Center Hub to approve a pro-rata disbursement of front money and mortgage proceeds, thereby allowing the mortgagee not to pay GNMA extension fees.

*Contact:* Michael McCullough, Director, Office of Multifamily Development, Department of Housing

and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000; telephone: (202) 708–1142.

• *Regulation:* 24 CFR 200.54(a).

*Project/Activity:* Eagle Ridge Apartments, San Antonio, TX; Project Number: 115–35398.

*Nature of Requirement:* Section 200.54(a) establishes the procedures for a pro-rata disbursement of the mortgagor's front money escrow funds and Federal Housing Administration (FHA) insured mortgage proceeds for the subject property.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 20, 2002.

*Reason Waived:* The regulation was waived because the front money escrow is so large, the insured proceeds would not be disbursed for several months, resulting in payment of extension fees to the investors who purchased the GNMA mortgage-backed securities. Providing a waiver of 24 CFR 200.54(a) permitted the San Antonio Multifamily Program Center Hub to approve a pro-rata disbursement of front money and mortgage proceeds, thereby allowing the mortgagee not to pay GNMA extension fees.

*Contact:* Michael McCullough, Director, Office of Multifamily Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000; telephone: (202) 708–1142.

• *Regulation:* 24 CFR 200.54(a).

*Project/Activity:* Lauderdale Court Apartments, Memphis, TN, Project Number: 081–35225.

*Nature of Requirement:* Section 200.54(a) establishes the procedures for a pro-rata disbursement of the mortgagor's front money escrow funds and Federal Housing Administration (FHA) insured mortgage proceeds for the subject property.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 26, 2002.

*Reason Waived:* The regulation was waived because the front money escrow is so large, the insured proceeds would not be disbursed for several months, resulting in payment of extension fees to the investors who purchased the GNMA mortgage-backed securities. Providing a waiver of 24 CFR 200.54(a) permitted the Nashville Multifamily Program Center Hub to approve a pro-rata disbursement of front money and mortgage proceeds, thereby allowing the mortgagee not to pay GNMA extension fees.

*Contact:* Michael McCullough, Director, Office of Multifamily Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000; telephone: (202) 708–1142.

• *Regulation:* 24 CFR 200.54(a).

*Project/Activity:* Majestic Stove Lofts, St. Louis, MO; Project Number: 085–35454.

*Nature of Requirement:* Section 200.54(a) establishes the procedures for a pro-rata disbursement of the mortgagor's front money escrow funds and Federal Housing Administration (FHA) insured mortgage proceeds for the subject property.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 27, 2002.

*Reason Waived:* The regulation was waived because the front money escrow is so large, the insured proceeds would not be disbursed for several months, resulting in payment of extension fees to the investors who purchased the GNMA mortgage-backed securities. Providing a waiver of 24 CFR 200.54(a) permitted the Kansas City Multifamily Hub to approve a pro-rata disbursement of front money and mortgage proceeds, thereby allowing the mortgagee not to pay GNMA extension fees.

*Contact:* Michael McCullough, Director, Office of Multifamily Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000; telephone: (202) 708–1142.

• *Regulation:* 24 CFR 200.54(a).

*Project/Activity:* Park Avenue West Residences, Denver, CO; Project Number: 101–35557.

*Nature of Requirement:* Section 200.54(a) establishes the procedures for a pro-rata disbursement of the mortgagor's front money escrow funds and Federal Housing Administration (FHA) insured mortgage proceeds for the subject property.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 27, 2002.

*Reason Waived:* The regulation was waived because the front money escrow is so large, the insured proceeds would not be disbursed for several months, resulting in payment of extension fees to the investors who purchased the GNMA mortgage-backed securities. Providing a waiver of 24 CFR 200.54(a) permitted the Denver Multifamily Hub to approve a pro-rata disbursement of front money and mortgage proceeds, thereby allowing the mortgagee not to pay GNMA extension fees.

*Contact:* Michael McCullough, Director, Office of Multifamily Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000; telephone: (202) 708–1142.

• *Regulation:* 24 CFR 200.54(a).

*Project/Activity:* The Premiere Mill, Morganton, NC; Project Number: 053–32002.

*Nature of Requirement:* Section 200.54(a) establishes the procedures for a pro-rata disbursement of the mortgagor's front money escrow funds and Federal Housing Administration (FHA) insured mortgage proceeds for the subject property.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 27, 2002.

*Reason Waived:* The regulation was waived because the front money escrow is so large, the insured proceeds would not be disbursed for several months, resulting in payment of extension fees to the investors who purchased the GNMA mortgage-backed securities. Providing a waiver of 24 CFR 200.54(a) permitted the Greensboro Multifamily Hub to approve a pro-rata disbursement of front money and mortgage proceeds, thereby allowing the mortgagee not to pay GNMA extension fees.

*Contact:* Michael McCullough, Director, Office of Multifamily Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000; telephone: (202) 708–1142.

• *Regulation:* 24 CFR 200.54(a).

*Project/Activity:* Livingston Park Apartments, Cleveland, OH; Project Number: 042–35485.

*Nature of Requirement:* Section 200.54(a) establishes the procedures for a pro-rata disbursement of the mortgagor's front money escrow funds and Federal Housing Administration (FHA) insured mortgage proceeds for the subject property.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 16, 2002.

*Reason Waived:* The regulation was waived because the front money escrow is so large, the insured proceeds would not be disbursed for several months, resulting in payment of extension fees to the investors who purchased the GNMA mortgage-backed securities. Providing a waiver of 24 CFR 200.54(a) permitted the Cleveland Multifamily Program Center Hub to approve a pro-rata disbursement of front money and mortgage proceeds, thereby reducing the amount of negative arbitrage representing the difference between the investment rate on un-disbursed

mortgage proceeds and the rate on the tax exempt bonds

*Contact:* Michael McCullough, Director, Office of Multifamily Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000; telephone: (202) 708–1142.

• *Regulation:* 24 CFR 200.54(a).

*Project/Activity:* Paul Brown Building, St. Louis, MO; Project Number: 085–32017.

*Nature of Requirement:* Section 200.54(a) establishes the procedures for a pro-rata disbursement of the mortgagor's front money escrow funds and Federal Housing Administration (FHA) insured mortgage proceeds for the subject property.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 16, 2002.

*Reason Waived:* The regulation was waived because the front money escrow is so large, the insured proceeds would not be disbursed for several months, resulting in the payment of extension fees to the investors who purchased the GNMA mortgage-backed securities. Providing a waiver of 24 CFR 200.54(a) permitted the Kansas City Multifamily Hub to approve a pro-rata disbursement of front money and mortgage proceeds, thereby allowing the mortgagee not to pay GNMA extension fees.

*Contact:* Michael McCullough, Director, Office of Multifamily Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000; telephone: (202) 708–1142.

• *Regulation:* 24 CFR 200.54(a).

*Project/Activity:* Laurel House Apartments, Nashville, TN; Project Number: 086–32005.

*Nature of Requirement:* Section 200.54(a) establishes the procedures for a pro-rata disbursement of the mortgagor's front money escrow funds and Federal Housing Administration (FHA) insured mortgage proceeds for the subject property.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 27, 2002.

*Reason Waived:* The regulation was waived because the front money escrow is so large, the insured proceeds would not be disbursed for several months after initial endorsement, resulting in payment of extension fees to the investors who purchased the GNMA mortgage-backed securities. Providing a waiver of 24 CFR 200.54(a) permitted the Nashville Multifamily Program Center to approve a pro-rata disbursement of front money and mortgage proceeds, thereby allowing the mortgagee not to pay GNMA extension fees.

*Contact:* Michael McCullough, Director, Office of Multifamily Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000; telephone: (202) 708–1142.

• *Regulation:* 24 CFR 202.3(c)(2)(iii).

*Project/Activity:* Credit Watch Termination Threshold; Washington, DC.

*Nature of Requirement:* Section 202.3(c)(2)(iii) establishes the threshold for placing a HUD/FHA approved lender on Credit Watch status when its default and claim rate exceeds the field office default and claim rate.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 8, 2002.

*Reason Waived:* Waiver of the regulation permits HUD/FHA to initially focus on those lenders originating the worst performing loans. The waiver allows for adjustment of the Credit Watch Termination threshold from a range of 150 percent to 200.9 percent of the HUD field office default and claim rate to a range of 201 percent to 300.9 percent of that rate. This waiver gradually reduces the threshold to the regulated 200 percent; the reduction occurs in quarterly increments through Fiscal Year 2003.

*Contact:* Joy L. Hadley, Director, Quality Assurance Division, U. S. Department of Housing and Urban Development, 451 Seventh Street, SW., Room B133–P3214, Washington, DC 20410–7000; telephone (202) 708–2830.

• *Regulation:* 24 CFR 236.725.

*Project/Activity:* Brookside Terrace, Newton, NJ; Project Number: 031–059NI.

*Nature of Requirement:* Section 236.725 requires that a rental assistance contract shall be limited to the term of the mortgage or 40 years from the date of the first payment made under the contract, whichever is the lesser.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 30, 2002.

*Reason Waived:* The non-insured Section 236 mortgage has exceeded its 20th year; therefore, the mortgagor could unilaterally prepay the mortgage and turn the project into a higher income, market rate property. The project will be maintained as an affordable housing resource to the maturity date of the non-insured Section 236 mortgage plus an additional 5 years, through the execution and recording of a ''Decoupling Use Agreement.'' This permits the rental assistance payments subsidy to continue until the maturity date of the original non-insured Section 236 mortgage.

*Contact:* Beverly J. Miller, Director, Office of Asset Management, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 6160, Washington, DC 20410–7000; telephone (202) 708–3730.

• *Regulation:* 24 CFR 266.626.

*Project/Activity:* Legacy at Lowery, Denver, CO; Project Number: 101–98041.

*Nature of Requirement:* Section 266.626 specifies the procedures for notice of default (when a mortgagor fails to make any payment due under the mortgage) and filing an insurance claim.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 4, 2002.

*Reason Waived:* The Colorado Housing and Finance Authority (CHFA) requested a waiver for the subject project because the current occupancy level will not support the project. The project experienced substantial delays in lease up and the borrower was unable to commence amortization of the permanent loan. The borrower requested the CHFA to restructure the loan to provide a 2-year deferral of payments on the mortgage to provide the borrower time to reach a sufficient occupancy level. The CHFA believed it could accomplish that goal by filing a partial payment of claim (PPC). HUD encouraged the lender to accept a PPC in lieu of a full claim, which caused a delay in the lender's filing of the application within the required period. The time frame for filing an application for initial claim was extended.

*Contact:* Beverly J. Miller, Director, Office of Asset Management, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 6160, Washington, DC 20410–7000; telephone (202) 708–3730.

• *Regulations:* 24 CFR 401.600.

*Project/Activity:* The following projects requested waivers to the 12-month limit at above-market rents (24 CFR 401.600):

| FHA No. | Project Name | State |
|---|---|---|
| 04535170 ..... | Baughman Towers. | WV |
| 04635548 ..... | Belle Vista Estates. | OH |
| 05235335 ..... | Bishop's Garth Apartments. | MD |
| 01335105 ..... | Brandegee Gardens. | NY |

| FHA No. | Project Name | State |
|---|---|---|
| 04335257 ..... | Calumet/Horizon .. | OH |
| 07435170 ..... | Castlewood Apartments. | IA |
| 05235292 ..... | Center Place ..... | MD |
| 09335088 ..... | Chair III ..... | MT |
| 06535318 ..... | Cooks Avenue Apts. | MS |
| 10235134 ..... | Eastwood Apartments. | KS |
| 06535271 ..... | Elmwood Apartments. | MS |
| 04635522 ..... | Glendale Apartments. | OH |
| 03435160 ..... | Lansford Townhouses. | PA |
| 08735119 ..... | McGhee Square .. | TN |
| 10135276 ..... | Newland Square .. | CO |
| 07335352 ..... | Princeton Creek Apartments. | IN |
| 06535323 ..... | Rose Garden Apartments. | MS |
| 02435050 ..... | Rumford Island Complex. | ME |
| 11535197 ..... | Sandy Oaks Apartments. | TX |
| 10235153 ..... | Silverwood Apartments. | KS |
| 06435226 ..... | The Meadows Apartments. | LA |
| 04235324 ..... | Warner House ..... | OH |
| 08735114 ..... | Westgate Towers | TN |
| 08235196 ..... | White River Apartments. | AR |
| 13335044 ..... | Winwood of Plainview. | TX |

*Nature of Requirement:* Section 401.600 requires that projects be marked down to market rents within 12 months of their first expiration date after January 1, 1998. The intent of this provision is to ensure timely processing of requests for restructuring, and that the properties will not default on their FHA insured mortgages during the restructuring process.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 12, 2002.

*Reasons Waived:* The projects listed above were not assigned to the participating administrative entities (PAEs) in a timely manner or for which the restructuring analysis was unavoidably delayed due to no fault of the owner.

*Contact:* Alberta Zinno, Office of Multifamily Housing Assistance Restructuring, Department of Housing and Urban Development, Portals Building, Suite 400, 1280 Maryland Avenue, SW., Washington, DC 20410; telephone (202) 708–0001.

• *Regulations:* 24 CFR 401.600.

*Project/Activity:* The following projects requested waivers to the 12-month limit at above-market rents (24 CFR 401.600):

| FHA No. | Project Name | State |
|---|---|---|
| 04335244 ..... | Belle Village Apartments. | OH |
| 01257045 ..... | Carbrook Apartments. | NY |
| 10935046 ..... | Cheyenne Station Apartments. | WY |
| 06535316 ..... | Church Garden Apartments. | MS |
| 01257146 ..... | Concourse Flatiron Apartments. | NY |
| 01257373 ..... | Concourse Green | NY |
| 06635173 ..... | Cypress Courts Apartments. | FL |
| 10235154 ..... | Eastview Gardens | KS |
| 04235327 ..... | Fostoria Townhouses. | OH |
| 04235316 ..... | Glenville Apartments. | OH |
| 04235357 ..... | Greenview Gardens. | OH |
| 06535315 ..... | Herdy Micou Homes. | MS |
| 04235333 ..... | Hilltop Village ..... | OH |
| 01335102 ..... | James F. Lettis Apartments. | NY |
| 10235159 ..... | Knightsbridge Manor. | KS |
| 01335100 ..... | Mechanicville Hsg. for the Elderly. | NY |
| 01257123 ..... | Miramar Court ..... | NY |
| 08735124 ..... | Norris Gardens .... | TN |
| 04235295 ..... | Oakwood Gardens | OH |
| 11435346 ..... | Royal Palms Apts | TX |
| 08635139 ..... | Shelby Hills Apartments. | TN |
| 07135422 ..... | South of the Yards. | IL |
| 00035341 ..... | Southern Hills Apartments. | DC |
| 10135265 ..... | Southgate Commons Apartments. | CO |
| 07335420 ..... | The Meadows Apartments. | IN |
| 10135259 ..... | University Plaza ... | CO |
| 08335342 ..... | Valley View Apartments. | KY |

*Nature of Requirement:* Section 401.600 requires that projects be marked down to market rents within 12 months of their first expiration date after January 1, 1998. The intent of this provision is to ensure timely processing of requests for restructuring, and that the properties will not default on their FHA insured mortgages during the restructuring process.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 6, 2002.

*Reasons Waived:* The list of projects above were not assigned to the PAEs in a timely manner or for which the restructuring analysis was unavoidably delayed due to no fault of the owner.

*Contact:* Alberta Zinno, Office of Multifamily Housing Assistance Restructuring, Department of Housing and Urban Development, Portals Building, Suite 400, 1280 Maryland Avenue, SW., Washington, DC 20410; telephone (202) 708–0001.

• *Regulation:* 24 CFR 883.606(b).

*Project/Activity:* Minnesota Housing Finance Agency (the HFA) proposed refunding of its Series 1991 refunding bonds, which refinanced 27 Section 8 assisted projects. The financing terms proposed by the HFA and approved by HUD include an override above the bond yield, *i.e.*, the project note rate is higher than the bond interest rate, as permitted by the Internal Revenue Code within a 150 basis points limitation. The HFA also collects the administrative fee in the projects included in this bond refunding.

*Nature of Requirement:* Section 883.606(b) prohibits the collection of an override and a Housing Assistance Payments Contract (HAPC) administration fee in connection with the same project.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 26, 2002.

*Reason Waived:* The Minnesota HFA allocates the override revenue to its affordable housing programs, including very low-income housing and activities in support of its Section 8 assisted inventory, including these 27 projects. Both override and HAPC administration fees are pledged to secure the bond issue until the bonds are paid off. HUD finds that the uses of the revenues are consistent with the objectives of the McKinney Act bond refunding program. HUD also finds it impractical to upset the security arrangements which are relied upon by rating agencies, bond underwriters, and investors in the marketing of the bonds and which assure favorable bond interest rates.

*Contact:* James B. Mitchell, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone (202) 708–3944, extension 2612.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* Floyd County Apartments, Minnie, KY; Project Number: 083–EE070/KY36–S001–003.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 10, 2002.

*Reason Waived:* The project is located in a floodplain that requires extensive engineered fills at the building pad and parking lot locations. The sponsor

exhausted all efforts to obtain additional funding. The project is economically designed and is comparable in cost to similar projects developed in the area.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* The Lambs Farm of Green Oaks, Green Oaks, IL; Project Number: 071–HD115/Il06–Q991–005.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 10, 2002.

*Reason Waived:* The sponsor exhausted all efforts to obtain additional funding. The project is economically designed and is comparable in cost to similar projects developed in the area.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* St. Timothy Manor, Cleveland, OH; Project Number: 042–EE111/OH12–S991–004.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 12, 2002.

*Reason Waived:* The project is economically designed, is comparable to other similar projects in the area, and the sponsor exhausted all efforts to obtain additional funding from other sources.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* Pensdale Apartments, Philadelphia, PA; Project Number: 034–EE100/PA26–S991–009.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 18, 2002.

*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor has exhausted all efforts to obtain additional funding from other sources.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* St. George Cathedral Manor, Philadelphia, PA; Project Number: 034–EE097/PA26–S991–006.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 19, 2002.

*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor exhausted all efforts to obtain additional funding from other sources.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* Greater Allen Cathedral Senior Residence, Jamaica, Queens, NY; Project Number: 012–EE291/NY36–S001–006.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 19, 2002.

*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the jurisdiction, the sponsor exhausted all efforts to obtain additional funding from other sources. In addition a determination that the costs are reasonable is based on an extensive design review of the project.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* Options Supported Housing Project VII, Central Islip, NY; Project Number: 012–HD096/NY36–Q001–001.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 19, 2002.

*Reason Waived:* The project is economically designed, the project is comparable in cost to similar projects, and the sponsor cannot contribute any additional funds.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* Westminster Senior Housing, Los Angeles, CA; Project Number: 122–EE143/CA16–S981–012.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 19, 2002.

*Reason Waived:* The project is economically designed and comparable to other similar projects in the area. The sponsor has exhausted all efforts to obtain additional funding from other sources, and the requested increase is due to the high cost of materials and labor in southern California.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* Hale Mahaolu Eono 5, Lahaina, HI; Project Number: 140–EE021/HI10–S0001–001.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 19, 2002.

*Reason Waived:* The project is economically designed, and is comparable to other similar projects developed in the area. The sponsor exhausted all efforts to obtain additional funding from other sources.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing

and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* Ottawa River Estates, Toledo, OH; Project Number: 042–HD072/OH12–Q971–004.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.
*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.
*Date Granted:* July 19, 2002.
*Reason Waived:* The project is economically designed and is comparable to other similar projects developed in the area. The sponsor exhausted all efforts to obtain additional funding from other sources.
*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* Villa Seton, Port St. Lucie, FL; Project Number: 067–EE107/FL29–S001–005.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.
*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.
*Date Granted:* July 24, 2002.
*Reason Waived:* The project is economically designed and is comparable to other similar projects developed in the area. The sponsor exhausted all efforts to obtain additional funding from other sources.
*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* White Sands Manor II, Fort Walton Beach, FL; Project Number: 063–EE022/FL29–S991–009.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.
*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.
*Date Granted:* August 5, 2002.
*Reason Waived:* The project is economically designed, and is comparable to other similar projects developed in the area. The sponsor has exhausted all efforts to obtain additional funding from other sources.
*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* Owings Mills Town Center Apartments, Owings Mills, MD; Project Number: 052–EE038/MD06–S011–001.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.
*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.
*Date Granted:* August 6, 2002.
*Reason Waived:* The project is economically designed and is comparable to other similar projects developed in the area. The sponsor has exhausted all efforts to obtain additional funding from other sources.
*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* West Street Needham, MA; Project Number: 023–HD138/MA06–Q981–001.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.
*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.
*Date Granted:* August 12, 2002.
*Reason Waived:* The project is economically designed. The sponsor received $198,353 in secondary financing from the Facilities Consolidation Fund (FCF). Construction costs in the area are greater than in other parts of the country.
*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* Simpson Mid-Town Apartments, Philadelphia, PA; Project Number: 034–EE107–WAH/PA26–S001–007.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.
*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.
*Date Granted:* August 23, 2002.
*Reason Waived:* The owner has incurred construction costs due to a change in its building configuration from three to four stories as a result of a loss of one of the parcels through a tax sale. The sponsor exhausted all efforts to obtain additional funding. The project is economically designed and is comparable to other similar projects developed in the area.
*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* Howard Street Senior Apartments, San Francisco, CA; Project Number: 121–EE121/CA39–S981–014.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.
*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.
*Date Granted:* August 27, 2002.
*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor exhausted all efforts to obtain additional funding.
*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* Passumpsic View, St. Johnsbury, VT; Project Number: 024–EE057/VT36–S001–001.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.
*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.
*Date Granted:* August 27, 2002.
*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor has exhausted all efforts to obtain additional funding.
*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* Meadow Park, Sarasota, FL; Project Number: 067–EE106/FL29–S001–001.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the

amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 27, 2002.

*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor has exhausted all efforts to obtain additional funding.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* A. Kornegay Senior Housing, New York, NY; Project Number: 012–EE303/NY36–S001–018.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 30, 2002.

*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the city of New York will provide funds for site preparation.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* Talbot Bernard Senior Housing, Dorchester, MA; Project Number: 023–EE120/MA06–S001–005.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 30, 2002.

*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor obtained additional funding from other sources in the amount of $2,000,000.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* Waycross VOA Housing, Waycross, GA; Project Number: 061–HD076/GA06–Q001–002.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 30, 2002.

*Reason Waived:* The project is economically designed and is comparable to other similar projects developed in the area. In addition, the sponsor exhausted all efforts to obtain additional funding.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* Reidsville VOA Housing, Reidsville, GA; Project Number: 061–HD077/GA06–Q001–003.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 30, 2002.

*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor has exhausted all efforts to obtain additional funding.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* Bergen Street Apartments, Providence, RI; Project Number: 016–HD029/RI43–Q991–005.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 30, 2002.

*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor has exhausted all efforts to obtain additional funding.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* Palmer Park Senior Housing, Palmer Park, MD; Project Number: 000-EE056/MD39–S011–001.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 30, 2002.

*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor obtained a grant from the state of Maryland's Affordable Housing Trust in the amount of $75,000.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* CNR Senior Housing, Brooklyn, NY; Project Number: 012–EE298/NY36–S001–013.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 30, 2002.

*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor exhausted all efforts to obtain additional funding.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* Discovering Horizons, Northridge, CA; Project Number: 122–HD135/CA16–Q001–006.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 30, 2002.

*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor exhausted all efforts to obtain additional funding.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* Fuller Gardens, San Leandro, CA; Project Number: 121–HD073/CA39–Q001–002.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.
*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.
*Date Granted:* August 30, 2002.
*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor exhausted all efforts to obtain additional funding from other sources.
*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* Ghost Creek Housing, River Falls, WI; Project Number: 075–HD067/WI39–Q001–004.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.
*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.
*Date Granted:* August 30, 2002.
*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor exhausted all efforts to obtain additional funding from other sources.
*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* Hale O Mana'o Lana Hou II, Wailuku, Maui, HI; Project Number: 140–HD015/HI10–Q961–001.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.
*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.
*Date Granted:* August 30, 2002.
*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor could not contribute any additional funds.
*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* Share VIII, Selden, NY; Project Number: 012–HD099/NY36–Q001–004.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.
*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.
*Date Granted:* August 30, 2002.
*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor exhausted all efforts to obtain additional funding from other sources.
*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* The Owen House, Fair Haven, VT; Project Number: 024–HD032/VT36–Q001–001.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.
*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.
*Date Granted:* August 30, 2002.
*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor exhausted all efforts to obtain additional funding from other sources.
*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* The Harvey House, Castleton, VT; Project Number: 024–HD033/VT36–Q001–002.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.
*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.
*Date Granted:* August 30, 2002.
*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor exhausted all efforts to obtain additional funding from other sources.
*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* Fiesta House, Reseda, CA; Project Number: 122–EE166/CA16–S001–003.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.
*Granted by:* John C. Weicher, Assistant Secretary for Housing—-Federal Housing Commissioner.
*Date Granted:* August 30, 2002.
*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor exhausted all efforts to obtain additional funding from other sources.
*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* NAF/Imperial Senior Housing, Imperial, NE; Project Number: 103–EE024/NE26–S001–003.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.
*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.
*Date Granted:* September 6, 2002.
*Reason Waived:* The project is economically designed, is comparable in cost to similar projects, and the sponsor could not contribute any additional funds.
*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).
*Project/Activity:* Margaret Wagner Apartments, Cleveland Heights, OH, Project Number: 042–EE118/OH12–S001–002.
*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.
*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.
*Date Granted:* September 12, 2002.
*Reason Waived:* The project is economically designed, is comparable to

other similar projects developed in the area, and the sponsor has exhausted all efforts to obtain additional funding from other sources.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* Trinity Terrace, Fort Washington, MD, Project Number: 000–EE054/MD39–S001–001.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 12, 2002.

*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor exhausted all efforts to obtain additional funding from other sources.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* Walter S. Brooks Elderly Homes at Ormont Court, New Haven, CT, Project Number: 017–EE059/CT26–S001–002.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 16, 2002.

*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor exhausted all efforts to obtain additional funding from other sources.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

*Project/Activity:* Reseda Horizons, Northridge, CA; Project Number: 122–HD136/CA16–Q001–007.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 16, 2002.

*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor exhausted all efforts to obtain additional funding from other sources.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

*Project/Activity:* Holy Rosary Senior Residence, Union City, NJ, Project Number: 031–EE049/NJ39–S981–006.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 22, 2002.

*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor secured additional secondary financing for a portion of the shortfall. Additional time was needed for the firm commitment to be reprocessed due to an increase in construction costs.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

*Project/Activity:* Independent Living Horizons VII, Thomson, GA; Project Number: 061–HD062/GA06–Q981–001.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 5, 2002.

*Reason Waived:* The project is economically designed and comparable to other similar projects developed in the area. The sponsor exhausted all efforts to obtain additional funding from other sources. The sponsor incurred delays in identifying a site due to circumstances beyond their control.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

*Project/Activity:* The Orange County Two-Site Project, Town of Hamptonburgh, NY; Project Number: 012–HD091/NY36–Q991–002.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 30, 2002.

*Reason Waived:* The project is economically designed and is comparable to other similar projects developed in the area. One of the original sites had to be replaced and the Sponsor encountered delays due to a major difficulty in securing an affordable site because of the escalation of land costs.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

*Project/Activity:* George and Lois Brown Estates, Henderson, NV; Project Number: 125–HD067/NV25–Q991–001.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 30, 2002.

*Reason Waived:* The project is economically designed, is comparable to other similar projects developed in the area, and the sponsor exhausted all efforts to obtain additional funding from other sources. In addition, the sponsor incurred delays when the original architect had to withdraw from the project and the city of Henderson raised issues concerning the classification of the project, which had to be resolved.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

*Project/Activity:* Jawonio Residential Opportunities II, Hillcrest NY; Project Number: 012–HD094/NY36–Q991–005.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 23, 2002.

*Reason Waived:* The project is economically designed and is comparable to other similar projects developed in the area. The New York State Office of Mental Retardation and Developmental Disabilities will provide $393,271 in secondary funding. The project encountered delays in its effort to secure zoning and environmental approvals, and took time to reconcile design reviews and feasibility with related constructions costs.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

*Project/Activity:* Main and Arnold Senior Housing, Half Moon Bay, San Mateo County, CA; Project Number: 121–EE126/CA39–S991–005.

*Nature of Requirement:* Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 23, 2002.

*Reason Waived:* The project is economically designed and comparable to other projects developed in the area. The sponsor exhausted all efforts to find additional funding to cover the development cost shortfall. The project incurred significant delays associated with the local approval process required to ensure that the project will be designed in compliance with the California Environmental Quality Act.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Vermont Seniors, Los Angeles, CA; Project Number: 122–EE148/CA16–S981–017.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 11, 2002.

*Reason Waived:* The project incurred delays primarily due to demolition of commercial and residential structures, the relocation process, and the time taken to receive additional funding for land acquisition and development costs.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Main Street New Hope Courtyard Apartments, Los Angeles, CA; Project Number: 122–HD127/CA16–Q991–011.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 12, 2002.

*Reason Waived:* Additional time is needed to resolve the use of the new California State Multifamily Housing Program funds, and to obtain the bridge financing that will meet program requirements during construction.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Cedar Street Senior Apartments, Garberville, CA; Project Number: 121–EE118/CA39–S981–011.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 15, 2002.

*Reason Waived:* The project was delayed while the owner resolved site formation and market issues.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Rhinelander Elderly Housing, Rhinelander, WI; Project Number: 075–EE090/WI39–S991–010.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 17, 2002.

*Reason Waived:* The project was delayed while the owner resolved a series of site problems.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Community Hope II Consumer Home, Roxbury, NJ; Project Number: 031–HD104/NJ39–Q991–010.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 18, 2002.

*Reason Waived:* A new contractor was hired for the project forcing the completion of new documents and changed drawings.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Somerset Consumer Home, North Plainfield, NJ; Project Number: 031–HD103/NJ39–Q991–009.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 18, 2002.

*Reason Waived:* The owner experienced delays due to the difficulty in obtaining building permits.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* St. Mary's Home for the Elderly, Trujillo Alto, PR, Project Number: 056–EE039/RQ46–S991–003.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 19, 2002.

*Reason Waived:* Delays were incurred due to the sponsor's inability to obtain the needed endorsements and permits from the regulatory agencies in a timely manner.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Loretto Heritage Apartments, Syracuse, NY; Project Number: 014–HD084/NY06–Q991–001.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 19, 2002.

*Reason Waived:* Additional time was needed for the sponsor to secure financing in order to cover the installation cost of a new water line.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Harborside II ILC, Paterson, NJ; Project Number: 031–HD102/NJ39–S991–007.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 19, 2002.

*Reason Waived:* Title corrections were needed on all of the condominium units in the building.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Ray Rawson Villas, Las Vegas, NV; Project Number: 125–HD064/NV25–Q971–001.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 19, 2002.

*Reason Waived:* The sponsor needed to raise significant local funds for additional construction costs. There were delays in obtaining acceptable bids from contractors. The project architect withdrew due to ill health.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Inglis Gardens at Evesham, Newark, NJ; Project Number: 035–HD040/NJ39–Q981–001.

*Nature Of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 26, 2002.

*Reason Waived:* Additional time was needed for the issuance of a soil conservation permit from the county and for the HUD field office to resolve an issue regarding the engineering documents for the project.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Lowell Residence, Lowell, MA; Project Number: 023–HD146/MA06–Q981–009.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 26, 2002.

*Reason Waived:* There were architectural design and construction bidding issues due to the market conditions of the area, environmental issues which required further testing, and subsequent amendments to the plans and specifications for asbestos removal. There were also changes to the sponsor's Board of Directors.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Homes Anew I, Southold, NY; Project Number: 012–HD095/NY36–Q991–006.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital

advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 6, 2002.

*Reason Waived:* The sponsor was unable to achieve closing due to difficulties imposed by the two localities in issuing building permits.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Community Hope I Consumer Home, Parsippany, NJ; Project Number: 031–HD100/NJ39–Q991–005.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 6, 2002.

*Reason Waived:* Additional time was needed for the owner to revise the drawings to include a chair lift/inclinator instead of a ramp in order to meet the requirements of the Americans with Disabilities Act, and for the township to review the revised drawings.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Three Bridges, Readington Township, NJ; Project Number: 031–EE042/NJ39–S961–008.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 7, 2002.

*Reason Waived:* Additional time was needed for the owner to secure an alternate site because the project could not proceed at the original site due to the fact that the sewer allocation for the township had been exceeded.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Carrie P. Meek Manor, Miami, FL; Project Number: 066–EE071/FL29–S991–016.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 27, 2002.

*Reason Waived:* Additional time was needed for the owner to complete the firm commitment application and for the closing.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Henderson Supportive Housing, Henderson, Clark County, NV; Project Number: 125–HD067/NV25–Q991–001.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 23, 2002.

*Reason Waived:* The sponsor needed additional time to identify funding sources to cover shortfalls.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Pine Street Inn Housing II, Dorchester, MA; Project Number: 023–EE098/MA06–S981–003.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 23, 2002.

*Reason Waived:* Additional time was needed for the owner to correct the deficiencies in the firm commitment application.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Employment Options, Marlboro, MA; Project Number: 023–HD131/MA06–Q971–012.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 25, 2002.

*Reason Waived:* The project was delayed while the owner sought secondary financing and resolved a site problem with subsurface ledge.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Waltham Residence, Waltham, MA; Project Number: 023–HD145/MA06–Q981–008.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 30, 2002.

*Reason Waived:* The project experienced delays while the sponsor secured secondary financing and changed housing consultants.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Three Gems, Lowell, MA; Project Number: 023–HD161/MA06–Q991–009.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 30, 2002.

*Reason Waived:* The sponsor had to secure secondary financing for the project and the concurrence of the Massachusetts Historical Commission since the project is of historical significance, and asbestos abatement also had to be performed.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

*Project/Activity:* Bolton Senior Housing, Bolton, MA; Project Number: 023–EE080/MA06–S961–016.

*Nature of Requirement:* Section 891.165 provides that the duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 30, 2002.

*Reason Waived:* It took over nine months for the town of Bolton to approve Massachusetts Housing Partnership documents concerning the site. Additional delays were incurred to resolve project design issues raised by local community residents. The project is now proceeding in an expeditious manner; and the owner's appeal for an additional extension of the fund reservation was granted. There is a stipulation that no further reservation will be granted. The extension expires March 31, 2003.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.205.

*Project/Activity:* Sullivan House Phase II, Virginia Beach, VA; Project Number: 051–EE086/VA36–S011–009.

*Nature of Requirement:* Section 891.205 requires that Section 202 project owners be single-purpose corporations.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 23, 2002.

*Reason Waived:* The sponsor, Catholic Diocese of Richmond, wants to add 65 units to its existing Section 202 project. The sponsor requested authorization to place a second mortgage on this second Phase II project.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.205.

*Project/Activity:* Greater Allen Cathedral of New York Senior Residence, Jamaica, Queens, NY; Project Number: 012–EE291/NY36–S001–006.

*Nature of Requirement:* Section 891.205 requires that Section 202 project owners to have timely IRS tax-exempt status rulings.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 23, 2002.

*Reason Waived:* The required tax-exemption ruling for the owner from the Internal Revenue Service was not expected to be issued in time for the scheduled initial closing of the project.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.205.

*Project/Activity:* William F. (Bill) Brown Manor, Belzoni, MS; Project Number: 065–EE036/MS26–S011–005.

*Nature of Requirement:* Section 891.205 requires that Section 202 project owners have timely IRS tax-exempt status rulings.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 30, 2002.

*Reason Waived:* The required tax-exemption ruling for the owner from the Internal Revenue Service was not expected to be issued in time for the scheduled initial closing of the project.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.310(b)(1) and (b)(2).

*Project/Activity:* Options Supported Housing Project VII, Central Islip, NY; Project Number: 012–HD096/NY36–Q001–001.

*Nature of Requirement:* Sections 891.310(b)(1) and (b)(2) require that all entrances, common areas, units to be occupied by resident staff, and amenities must be readily accessible to, and usable by, persons with disabilities.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 27, 2002.

*Reason Waived:* Eleven percent of the bedrooms of the project were determined to meet all accessibility requirements and the majority of the potential residents did not require accessibility features.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.310(b)(1) and (b)(2).

*Project/Activity:* Project Share VIII, Selden, NY; Project Number: 012–HD099/NY36–Q001–004.

*Nature of Requirement:* Sections 891.310(b)(1) and (b)(2) require that all entrances, common areas, units to be occupied by resident staff, and amenities must be readily accessible to, and usable by, persons with disabilities.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* August 30, 2002.

*Reason Waived:* Ten percent of the project's bedrooms were determined to meet all accessibility requirements and the majority of the potential residents did not require accessibility features.

*Contact:* Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–3000.

• *Regulation:* 24 CFR 891.410(c).

*Project/Activity:* Greenridge Place Apartments, Meeker, OK; Project Number: 117–EE023.

*Nature of Requirement:* Section 891.410 relates to admission of families to projects for elderly or handicapped families that received reservations under section 202 of the Housing Act of 1959 and housing assistance under section 8 of the U.S. Housing Act of 1937. Section 891.410(c) limits occupancy to very low-income elderly persons; that is, households of one or more persons at least one of whom is 62 years of age at the time of initial occupancy.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 17, 2002.

*Reason Waived:* The Kansas City Multifamily Hub requested an age waiver for the subject project because the current occupancy level of eligible persons and families does not support successful operation of the projects. This waiver allows the project owner/management agent to rent units to persons between the ages of 55 and 62 years of age with or without disabilities, thus, allowing the owner flexibility in renting up these vacant units. This waiver is in effect for one year from date of approval.

*Contact:* Beverly J. Miller, Director, Office of Asset Management, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 6160, Washington, DC 20410–7000; telephone: (202) 708–3730.

• *Regulation:* 24 CFR 891.410(c).

*Project/Activity:* Piney Grove Apartments, Jasper, AL, Project Number: 062–EE034.

*Nature of Requirement:* Section 891.410 relates to admission of families to projects for elderly or handicapped families that received reservations under section 202 of the Housing Act of 1959 and housing assistance under section 8 of the U.S. Housing Act of 1937. Section 891.410(c) limits occupancy to very low-income elderly persons; that is, households of one or more persons at least one of whom is 62 years of age at the time of initial occupancy.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* July 24, 2002.

*Reason Waived:* The Jacksonville Multifamily Hub requested permission to waive the age requirements of the subject project to alleviate the occupancy and financial problems at property. The owner/management agent pointed to the income limits in the area as a ''root cause'' of their problem, stating that many of the elderly applicants fall within the ''low-income'' limits but do not fall within the ''very low-income'' bracket. Providing for a waiver of the elderly, handicapped, and very low-income requirements allows the owner to rent to persons 55 years and older and low-income applicants. If the waiver had not been granted, the owner would not have had the flexibility to offer units to persons 55 years and older or low-income applicants, and therefore, would not be able to maintain full occupancy and the project would fail. This waiver is in effect for one year from date of approval.

*Contact:* Beverly J. Miller, Director, Office of Asset Management, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 6160, Washington, DC 20410–7000; telephone: (202) 708–3730.

• *Regulation:* 24 CFR 891.410(c).

*Project/Activity:* Main Creek Villa, Conrath, WI; Project Number: 075–EE071.

*Nature of Requirement:* Section 891.410 relates to admission of families to projects for elderly or handicapped families that received reservations under section 202 of the Housing Act of 1959 and housing assistance under section 8 of the U.S. Housing Act of 1937. Section 891.410(c) limits occupancy to very low-income elderly persons; that is, households of one or more persons at least one of whom is 62 years of age at the time of initial occupancy.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 16, 2002.

*Reason Waived:* The Minneapolis-St. Paul Multifamily Hub requested waiver of the age and income requirements for the subject property. The owner/management agent of the subject project requested permission to waive the elderly and low-income requirements to alleviate the current occupancy and financial problems at the property. The property will be allowed to rent to the non-elderly between the ages of 55 and 62 years and allow the applicants to meet the low-income eligibility requirements. Providing for a waiver to the elderly and low-income restrictions allows the owner additional flexibility to rent vacant units. The owner will have the flexibility to offer units to the non-elderly, low-income applicants, and therefore, will be able to achieve full occupancy and the project will not fail. This waiver is effective for one year from date of approval.

*Contact:* Beverly J. Miller, Director, Office of Asset Management, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 6160, Washington, DC 20410–7000; telephone: (202) 708–3730.

• *Regulation:* 24 CFR 891.410(c).

*Project/Activity:* Lincoln Unity Apartments, West Hamlin, WV; Project Number: 045–EH098.

*Nature of Requirement:* Section 891.410 relates to admission of families to projects for elderly or handicapped families that received reservations under section 202 of the Housing Act of 1959 and housing assistance under section 8 of the U.S. Housing Act of 1937. Section 891.410(c) limits occupancy to very low-income elderly persons; that is, households of one or more persons at least one of whom is 62 years of age at the time of initial occupancy.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 20, 2002.

*Reason Waived:* The Charleston Multifamily Program Center requested indefinite waiver of the elderly and very low-income requirements for the subject property until it reaches 97 percent occupancy. The owner/management agent of the subject project requested permission to waive the elderly and low-income requirements to alleviate the current occupancy problem at the property. The property is located in West Hamlin, West Virginia, and currently has 79 percent occupancy. The market is ''soft'' in this area and the potential market for persons between the ages of 55 and 62 is good. The property will be allowed to rent to the non-elderly between the ages of 55 and 62 years with or without disabilities, and allow the applicants or families to meet the low-income eligibility requirements. Providing for a waiver to the elderly and low-income restrictions allows the owner additional flexibility to rent vacant units. The owner will have the flexibility to offer units to the non-elderly, low-income, disabled, and handicapped applicants, and therefore, will be able to achieve full occupancy and the project will not fail. This waiver is effective for one year from date of approval.

*Contact:* Beverly J. Miller, Director, Office of Asset Management, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 6160, Washington, DC 20410–7000; telephone: (202) 708–3730.

• *Regulation:* 24 CFR 891.410(c).

*Project/Activity:* Wild Goose Landing Apartments, Oakfield, WI; Project Number: 075–EE051/NP/WAH/L8.

*Nature of Requirement:* Section 891.410 relates to admission of families to projects for elderly or handicapped families that received reservations under section 202 of the Housing Act of 1959 and housing assistance under section 8 of the U.S. Housing Act of 1937. Section 891.410(c) limits occupancy to very low-income elderly persons; that is, households of one or more persons at least one of whom is 62 years of age at the time of initial occupancy.

*Granted by:* John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* September 30, 2002.

*Reason Waived:* The Minneapolis-St. Paul Multifamily Hub requested a

waiver of the income restrictions for the subject project because the current occupancy level of eligible persons and families does not support successful operation of the project. This waiver allows the project owner/management agent to rent units to persons between the ages of 55 years and 62 years, and allows the applicants to meet the low-income eligibility requirement. The owner will have the flexibility to offer units to the non-elderly, low-income applicants, and therefore, will be able to achieve full occupancy and the project will not fail. This waiver is in effect for one year from date of approval.

*Contact:* Beverly J. Miller, Director, Office of Asset Management, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 6160, Washington, DC 20410–7000; telephone: (202) 708–3730.

**III. Regulatory Waivers Granted by the Office of Public and Indian Housing**

For further information about the following waivers actions, please see the name of the contact person who immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 902.33(a).

*Project/Activity:* Coolidge Housing Authority, Coolidge, TX; TX228.

*Nature of Requirement:* Section 902.33(a) establishes the financial reporting requirements for public housing agencies.

*Granted by:* Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* August 2, 2002.

*Reason Waived:* The housing authority experienced auditor, accountant, transmission problems, and therefore, requested an extension of the report due date. The request was granted to allow the housing authority to address these problems.

*Contact:* Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC, 20410; telephone: (202) 708–4932, extension 3464.

• *Regulation:* 24 CFR 902.33(a).

*Project/Activity:* Housing Authority City of Canyon, Canyon, TX; TX045.

*Nature of Requirement:* Section 902.33(a) establishes the financial reporting requirements for public housing agencies.

*Granted by:* Paula O. Blunt, for Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* September 9, 2002.

*Reason Waived:* The housing authority requested an extension of the reporting deadline due to internal delays as a result of a change in administration at the housing authority. The extension was granted.

*Contact:* Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–4932, extension 3464.

• *Regulation:* 24 CFR 902.33(a).

*Project/Activity:* Housing Authority of the City of Andrews, Andrews, TX; TX315.

*Nature of Requirement:* Section 902.33(a) establishes the financial reporting requirements for public housing agencies.

*Granted by:* Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* September 19 2002.

*Reason Waived:* The housing authority requested an extension of the report due date because of difficulty in obtaining an accountant, and also computer upgrading problems. The extension was granted.

*Contact:* Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC, 20410; telephone: (202) 708–4932, extension 3464.

• *Regulation:* 24 CFR 902.63(a).

*Project/Activity:* Princeville Housing Authority, Princeville, NC: NC169

*Nature of Requirement:* Section 902.63(a) requires submissions by the public housing agency followed by scoring under the four Public Housing Assessment System (PHAS) indicators.

*Granted by:* Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* July 2, 2002.

*Reason Waived:* The housing authority requested a waiver of three of the four indicators due to hurricane damage to its facility. The request was granted requiring an audit submission only.

*Contact:* Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–4932, extension 3464.

• *Regulation:* 24 CFR 902.63(a).

*Project/Activity:* Habitat Property Management, Chicago, IL: IL802

*Nature of Requirement:* Section 902.63(a) requires submissions by the public housing agency followed by scoring under the four PHAS indicators.

*Granted by:* Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* July 18, 2002.

*Reason Waived:* PHAS scoring requires public housing agencies to be scored in all four indicators to determine an overall score. However, the Habitat Property Management is not a traditional housing authority. This company is an agency that builds units and transfers title to the Chicago Housing Authority. The request was granted to waive three of the four indicators requiring submission of audits.

*Contact:* Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: (202) 708–4932, extension 3464.

• *Regulation:* 24 CFR 982.505(d).

*Project/Activity:* Housing Authority of the city of Los Angeles, Los Angeles, CA; Housing Choice Voucher Program.

*Nature of Requirement:* Section 982.505(d) allows a public housing agency (PHA) to approve a higher payment standard within the basic range for a family that includes a person with disabilities as a reasonable accommodation.

*Granted by:* Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* July 26, 2002.

*Reason Waived:* Approval of the waiver was granted to allow a housing choice voucher participant with a debilitating disease to remain in his current unit, which rents for an amount that exceeds 120 percent of the fair market rent. Due to the participant's health, it would be an undue hardship for the program participant to seek a unit to lease within the established payment standard amount and relocate.

*Contact:* Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410; telephone: (202) 708–0477.

• *Regulation:* 24 CFR 982.532 (a)(4).

*Project/Activity:* Housing and Community Development Corporation of Hawaii (HCDCH), Honolulu, Hawaii; Housing Choice Voucher Program. HCDCH requested a waiver to allow a program participant, who is a person with disabilities, to rent housing from the University of Hawaii as a reasonable accommodation.

*Nature of Requirement:* Section 982.532(a)(4) defines college dormitories or other school dormitories as types of housing that are ineligible for tenant-based assistance.

*Granted by:* Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* August 16, 2002.

*Reason Waived:* Approval of the waiver was granted because the voucher participant needed to live in housing on the college campus for easier access to classes. The voucher participant is dependent on an electric wheelchair for mobility and there is no other affordable housing on or near the University.

*Contact:* Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Housing Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410; telephone: (202) 708–0477.

• *Regulation:* 24 CFR 983.51.

*Project/Activity:* The Housing Authority of the County of Chester (HACC), Chester, Pennsylvania; Project-based Assistance Program. The HACC requested a waiver of the aforementioned program regulation to allow for the selection of units for project-based assistance that were competitively selected for tax credits, and competitively awarded HOPE VI grant funds without requiring HUD review and approval of a written selection policy, and without advertising for a competitive selection of units under the project-based program. The HACC is the general partner of the entity that owns the development.

*Nature of Requirement:* Section 983.51 requires HUD review and approval of a written selection policy and advertisement for the competitive selection of units to receive project-based assistance.

*Granted by:* Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* September 27, 2002.

*Reason Waived:* The waiver was granted on the basis that the units had already undergone a total of two competitive processes and on the HACC's desire to induce capital contributions from its limited partners to assist in the restructuring of the financing on the project.

*Contact:* Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Housing Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410; telephone: (202) 708–0477.

• *Regulation:* 24 CFR 983.51(a), (b), and 983.56(a) and (c).

*Project/Activity:* Housing Authority of New Orleans (HANO), New Orleans, Louisiana; Project-based Assistance Program. The HANO requested a waiver of competition requirements under the project-based assistance program and the requirement of HUD field office review of new construction applications. The project is a previous public housing site owned by the HANO. The HANO plans to transform the site into a stable, mixed-income community.

*Nature of Requirement:* Section 983.51 requires HUD review and approval of a written selection policy and advertisement for the competitive selection of units to receive project-based assistance. Section 983.56 deals with HUD field office review of new construction applications.

*Granted by:* Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* August 30, 2002.

*Reason Waived:* The waiver was granted on the basis that the HANO has a substantial interest in the property and the waiver would allow the units to be used as replacement housing in conjunction with HOPE VI program activities to further local revitalization objectives.

*Contact:* Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Housing Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410; telephone: (202) 708–0477.

• *Regulation:* 24 CFR 983.51.

*Project/Activity:* The High Point Housing Authority (HPHA), High Point, North Carolina; Project-based Assistance Program. The HPHA requested a waiver of competitive selection of owner proposals.

*Nature of Requirement:* Section 983.51 requires competitive selection of owner proposals in accordance with a housing authority's HUD-approved advertisement and unit selection policy.

*Granted by:* Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* July 26, 2002.

*Reason Waived:* Competitive selection was waived since the Springfield Community Development Partners (SCDP) had already gone through two rounds of competitive selection. The HPHA competitively selected the SCDP as its HOPE VI partner to revitalize the former Springfield Townhomes public housing project. In addition, the SCDP was also awarded low-income housing tax credits for the same project through a competitive process conducted by the North Carolina Housing Finance Agency.

*Contact:* Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Housing Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410; telephone: (202) 708–0477.

• *Regulation:* 24 CFR 1000.214.

*Project/Activity:* The submission of the Indian Housing Plan (IHP) by the Native Village of Tanana (Tanana, AK) for Fiscal Year (FY) 2002 funding made available under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA).

*Nature of Requirement:* Section 1000.214 establishes a July 1st deadline for the submission of an IHP.

*Reason Waived:* The Native Village of Tanana stated that the Executive Director was told that the IHP had been prepared and submitted to the Office of Native American Programs (ONAP) by the required deadline. When discovered that the Executive Director had not submitted the IHP, the Executive Director completed and electronically submitted the plan. Had subsistence needs not precluded the Executive Director's presence in the office June 28, 2002, through July 8, 2002, the misrepresentation would have been discovered and corrected.

*Granted by:* Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* September 27, 2002.

*Contact:* Deborah Lalancette, Director, Grants Management, Denver Program ONAP, Department of Housing and Urban Development, 1999 Broadway, Suite 3390, Denver, CO 80202; telephone: (303) 675–1625.

• *Regulation:* 24 CFR 1000.214.

*Project/Activity:* The submission of the IHP by the Native Village of Tanacross (Tanacross, AK) for FY 2002 funding made available under NAHASDA.

*Nature of Requirement:* Section 1000.214 establishes a July 1st deadline for the submission of an IHP.

*Reason Waived:* The Native Village of Tanacross stated, and ONAP believes, that the IHP was mailed prior to the regulatory deadline and the submission was lost in the mail.

*Granted by:* Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* September 27, 2002.

*Contact:* Deborah Lalancette, Director, Grants Management, DPONAP, Department of Housing and Urban Development, 1999 Broadway, Suite 3390, Denver, CO 80202; telephone: (303) 675–1625.

• *Regulation:* Section II subpart E and subpart F of the January 16, 2001, **Federal Register** Notice, Revisions to PHA Project-Based Assistance (PBA) Program; Initial Guidance.

*Project/Activity:* The Minneapolis Public Housing Authority (MPHA), Minneapolis, Minnesota; Project-based Assistance Program. The MPHA requested an exception to the initial guidance to permit it to attach PBA to the Phillips Park Initiative that is in a census tract with a poverty rate that exceeds 20 percent. The MPHA also requested an exception to waive the requirement that no more than 25 percent of the dwelling units in any building may be assisted under a housing assistance payments (HAP) contract for PBA except for dwelling units that are specifically made available for elderly families, disabled families and families receiving supportive services for this project.

*Nature of Requirement:* Section II subpart E of the initial guidance requires that in order to meet the Department's goal of deconcentration and expanding housing and economic opportunities, the projects must be in census tracts with poverty rates of less than 20 percent. Section II subpart F requires that no more than 25 percent of the dwelling units in any building may be assisted under a housing assistance payments (HAP) contract for PBA except for dwelling units that are specifically made available for elderly families, disabled families, and families receiving supportive services.

*Granted by:* Michael Liu, Assistant Secretary For Public And Indian Housing.

*Date Granted:* July 26, 2002.

*Reason Waived:* Approval of the exception for deconcentration was granted since the Phillips Park Initiative is in the Minneapolis Empowerment Zone the goals of which are to open new businesses, create jobs, housing, and new educational and healthcare opportunities. These goals are consistent with the goal of deconcentration and expanding housing and economic opportunities. Approval of the exception for the number of units in a building that may be project-based was granted because the families living in the building will receive supportive services including tenant education, budgeting, parenting skills and will be able to access the Train to Work program that will prepare them for entry-level jobs in the community. These supportive services are consistent with the statute.

*Contact:* Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Housing Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410; telephone: (202) 708–0477.

• *Regulation:* Section II subpart E of the January 16, 2001, **Federal Register** Notice, Revisions to PHA Project-Based Assistance (PBA) Program; Initial Guidance.

*Project/Activity:* San Francisco Housing Authority, San Francisco, California; Project-based Assistance Program. The San Francisco Housing Authority requested an exception to the initial guidance to permit it to attach PBA to six projects that are in census tracts with poverty rates that exceed 20 percent.

*Nature of Requirement:* Section II subpart E of the initial guidance requires that in order to meet the Department's goal of deconcentration and expanding housing and economic opportunities, the projects must be in census tracts with poverty rates of less than 20 percent.

*Granted by:* Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* July 16, 2002.

*Reason Waived:* Approval of the exception was granted since one of the projects, the Dudley Hotel was within the boundaries of Rochester's HUD-designated Enterprise Community whose goals of creating jobs, housing, and new educational and healthcare opportunities are consistent with the goal of deconcentration and expanding housing and economic opportunities, and the other five projects (999 Geary Street, 145 Taylor Street, the West Hotel, the Dalt Hotel, and 421 Turk Street) are located within the Tenderloin Neighborhood Revitalization Area designated as such in the City of San Francisco's Consolidated Plan whose goals are also consistent with the statute.

*Contact:* Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Housing Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410; telephone: (202) 708–0477.

• *Regulation:* Section II subpart F of the January 16, 2001, **Federal Register** Notice, Revisions to PHA Project-Based Assistance (PBA) Program; Initial Guidance and 24 CFR 983.51.

*Project/Activity:* Fort Wayne Housing Authority (FWHA), Fort Wayne, Indiana; Project-based Assistance Program. FWHA requested an exception to the initial guidance to permit it to attach PBA to units at McMillan Park that exceed the 25 percent cap on the number of units in a building to which PBA can be attached for families receiving supportive services. The FWHA also requested a waiver of competitive selection of owner proposals.

*Nature of Requirement:* Section II subpart F of the initial guidance requires that unless waived, no more than 25 percent of the dwelling units in any building may be assisted under a housing assistance payments contract for PBA except for dwelling units that are specifically made available for elderly families, disabled families, and families receiving supportive services. Section 983.51 requires competitive selection of owner proposals in accordance with a housing authority's HUD-approved advertisement and unit selection policy.

*Granted by:* Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* July 5, 2002.

*Reason Waived:* Approval of the exception was granted because the families living in McMillan Park will participate in the FWHA's Family Self-Sufficiency program and will have access to a Neighborhood Networks Center, after-school tutoring programs for children and adult educational classes. These supportive services are consistent with the statute. Competitive selection was conditionally waived since the FWHA will acquire a 50 percent interest in the general partner and will maintain the project as a housing resource for low-income families. The waiver was conditional based on sale of the property to the FWHA within six months of the approval date.

*Contact:* Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Housing Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410; telephone: (202) 708–0477.

• *Regulation:* Section II subpart F of the January 16, 2001, **Federal Register** Notice, Revisions to PHA Project-Based Assistance (PBA) Program; Initial Guidance.

*Project/Activity:* Laurinburg Housing Authority (LHA); Laurinburg, North

Carolina; Project-based Assistance Program. Laurinburg Housing Authority requested an exception to the initial guidance to permit it to attach PBA to units in Scottish Glen Apartments that exceed the 25 percent cap on the number of units in a building to which PBA can be attached for families receiving supportive services.

*Nature of Requirement:* Section II subpart F of the initial guidance requires that unless waived, no more than 25 percent of the dwelling units in any building may be assisted under a HAP contract for PBA except for dwelling units that are specifically made available for elderly families, disabled families, and families receiving supportive services.

*Granted by:* Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* July 16, 2002.

*Reason Waived:* Approval of the exception was granted because the families living in Scottish Glen Apartments will receive supportive services through participation in the LHA's Family Self-Sufficiency Program. Services will include: access and resources for health care; case management to coordinate and deliver services; educational opportunities through a variety of local colleges; financial management and homebuyer education; and an array of other programs and services provided by local community organizations.

*Contact:* Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Housing Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410; telephone: (202) 708–0477.

• *Regulation:* Section II subpart F of the January 16, 2001, **Federal Register** Notice, Revisions to PHA Project-Based Assistance (PBA) Program; Initial Guidance.

*Project/Activity:* Rochester Housing Authority (RHA), Rochester, New York; Project-Based Assistance Program. RHA requested an exception to the requirement that no more than 25 percent of the dwelling units in any building may be assisted under a HAP contract for PBA except for dwelling units that are specifically made available for elderly families, disabled families, and families receiving supportive services for two buildings owned by the YWCA.

*Nature of Requirement:* Section II subpart F of the initial guidance requires that no more than 25 percent of the dwelling units in any building may be assisted under a housing assistance payments (HAP) contract for PBA except for dwelling units that are specifically made available for elderly families, disabled families, and families receiving supportive services.

*Granted by:* Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* September 18, 2002.

*Reason Waived:* Approval of the exception for the number of units in a building that may be project-based was granted because the families living in the units owned by the YWCA will receive the following services: case management; alcohol and drug evaluation and treatment; mental health services; and linkages to YWCA employment services, financial empowerment workshops; and a nutrition outreach program and child care. These supportive services are consistent with the statute.

*Contact:* Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Housing Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410; telephone: (202) 708–0477.

• *Regulation:* Section II subpart E of the January 16, 2001, **Federal Register** Notice, Revisions to PHA Project-Based Assistance (PBA) Program; Initial Guidance.

*Project/Activity:* San Diego Housing Commission, San Diego, California; Project-based Assistance Program. The San Diego Housing Commission requested an exception to the initial guidance to permit it to attach PBA to Bandaar Salaam Apartments that is in a census tract with a poverty rate of 27 percent.

*Nature of Requirement:* Section II subpart E of the initial guidance requires that in order to meet the Department's goal of deconcentration and expanding housing and economic opportunities, the projects must be in census tracts with poverty rates of less than 20 percent.

*Granted by:* Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* August 5, 2002.

*Reason Waived:* Approval of the exception was granted since the project was within the boundaries of one of San Diego's HUD-designated Enterprise Communities whose goals of creating jobs, housing, and new educational and healthcare opportunities are consistent with the goal of deconcentration and expanding housing and economic opportunities.

*Contact:* Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Housing Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410; telephone: (202) 708–0477.

• *Regulation:* Section II subpart E of the January 16, 2001, **Federal Register** Notice, Revisions to PHA Project-Based Assistance (PBA) Program; Initial Guidance.

*Project/Activity:* Rental Assistance Corporation, Buffalo, New York; Project-based Assistance Program. The Rental Assistance Corporation requested an exception to the initial guidance to permit it to attach PBA to Frederick Douglass Towers Phase II that is located in a census tract with a poverty rate of 49 percent.

*Nature of Requirement:* Section II subpart E of the initial guidance requires that in order to meet the Department's goal of deconcentration and expanding housing and economic opportunities, the projects must be in census tracts with poverty rates of less than 20 percent.

*Granted by:* Michael Liu, Assistant Secretary for Public and Indian Housing.

*Date Granted:* August 5, 2002.

*Reason Waived:* Approval of the exception was granted since the project was within the boundaries of a HUD-designated Enterprise Zone whose goals of creating jobs, housing, and new educational and healthcare opportunities are consistent with the goal of deconcentration and expanding housing and economic opportunities.

*Contact:* Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Housing Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410; telephone: (202) 708–0477.

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Federal Register

Wednesday,
January 29, 2003

## Part III

# Federal Trade Commission

**16 CFR Part 310**
**Telemarketing Sales Rule; Final Rule**

**FEDERAL TRADE COMMISSION**

**16 CFR Part 310**

**Telemarketing Sales Rule**

**AGENCY:** Federal Trade Commission.

**ACTION:** Final Amended Rule.

**SUMMARY:** In this document, the Federal Trade Commission (''FTC'' or ''Commission'') issues its Statement of Basis and Purpose (''SBP'') and final amended Telemarketing Sales Rule (''amended Rule''). The amended Rule sets forth the FTC's amendments to the Telemarketing Sales Rule (''original Rule'' or ''TSR''). The amended Rule is issued pursuant to the Commission's Rule Review, the Telemarketing and Consumer Fraud and Abuse Prevention Act (''Telemarketing Act'' or ''Act'') and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (''USA PATRIOT Act'').

**EFFECTIVE DATES:** The amended Rule will become effective March 31, 2003. Full compliance with § 310.4(a)(7), the caller identification transmission provision, is required by January 29, 2004. The Commission will announce at a future time the date by which full compliance with § 310.4(b)(1)(iii)(B), the ''do-not-call'' registry provision, will be required. The Commission anticipates that full compliance with the ''do-not-call'' provision will be required approximately seven months from the date a contract is awarded to create the national registry.

**ADDRESSES:** Requests for copies of the amended Rule and this SBP should be sent to: Public Reference Branch, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580. The complete record of this proceeding is also available at that address. Relevant portions of the proceeding, including the amended Rule and SBP, are available at http://www.ftc.gov.

**FOR FURTHER INFORMATION CONTACT:** Catherine Harrington-McBride, (202) 326–2452, Karen Leonard, (202) 326–3597, Michael Goodman, (202) 326–3071, or Carole Danielson, (202) 326–3115, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** The amended Rule: (1) retains most of the original Rule's requirements concerning deceptive and abusive telemarketing acts or practices without major substantive changes; (2) establishes a national ''do-not-call'' registry maintained by the Commission; (3) defines ''upselling'' to clarify the amended Rule's application to these transactions, requires specific disclosures for upsell transactions, and expressly excludes upselling transactions from certain exemptions in the amended Rule; (4) requires that sellers and telemarketers accepting payment by methods other than credit and debit cards subject to certain protections obtain express verifiable authorization from their customers; (5) retains the exemptions for pay-per-call, franchise, and face-to-face transactions, but makes these transactions subject to the national ''do-not-call'' registry and certain other provisions in the abusive practices section of the Rule; (6) specifies requirements for the use of predictive dialers; (7) requires disclosures and prohibits misrepresentations in connection with the sale of credit card loss protection plans; (8) requires an additional disclosure in connection with prize promotions; (9) requires disclosures and prohibits misrepresentations in connection with offers that include a negative option feature; (10) eliminates the general media and direct mail exemptions for the telemarketing of credit card loss protection plans and business opportunities other than business arrangements covered by the Franchise Rule[1]; (11) requires telemarketers to transmit caller identification information; (12) eliminates the use of post-transaction written confirmation as a means of obtaining a customer's express verifiable authorization when the goods or services are offered on a ''free-to-pay conversion'' basis; (13) prohibits the disclosure or receipt of the customer's or donor's unencrypted billing information for consideration, except in limited circumstances; and (14) requires that the seller or telemarketer obtain the customer's express informed consent to all transactions, with specific requirements for transactions involving ''free-to-pay conversions'' and preacquired account information.

## Statement of Basis and Purpose

### I. Background

*A. Telemarketing and Consumer Fraud and Abuse Prevention Act.*

The early 1990s saw heightened Congressional attention to burgeoning problems with telemarketing fraud.[2] The culmination of Congressional efforts to protect consumers against telemarketing fraud occurred in 1994 with the passage of the Telemarketing Act, which was signed into law on August 16, 1994.[3] The purpose of the Act was to combat telemarketing fraud by providing law enforcement agencies with new tools and to give consumers new protections.

The Telemarketing Act directed the Commission to issue a rule prohibiting deceptive and abusive telemarketing acts or practices, and specified, among other things, certain acts or practices the FTC's rule must address. The Act also required the Commission to include provisions relating to three specific ''abusive telemarketing acts or practices:'' (1) a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the consumer would consider coercive or abusive of his or her right to privacy; (2) restrictions on the time of day telemarketers may make unsolicited calls to consumers; and (3) a requirement that telemarketers promptly and clearly disclose in all sales calls to consumers that the purpose of the call is to sell goods or services, and make other disclosures deemed appropriate by the Commission, including the nature and price of the goods or services sold.[4] Section 6102(a) of the Act not only required the Commission to define and prohibit deceptive telemarketing acts or practices, but also authorized the FTC to define and prohibit acts or practices that ''assist or facilitate'' deceptive telemarketing.[5] The Act further directed the Commission to consider including recordkeeping requirements in the rule.[6] Finally, the Act authorized state Attorneys General, other appropriate state officials, and private persons to bring civil actions in federal district court to enforce compliance with the FTC's rule.[7]

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[1] Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures (''Franchise Rule''), 16 CFR Part 436.

[2] Statutes enacted by Congress to address telemarketing fraud during the early 1990s include the Telephone Consumer Protection Act of 1991 (''TCPA''), 47 U.S.C. 227 *et seq.*, which restricts the use of automatic dialers, bans the sending of unsolicited commercial facsimile transmissions, and directs the Federal Communications Commission (''FCC'') to explore ways to protect residential telephone subscribers' privacy rights; and the Senior Citizens Against Marketing Scams Act of 1994, 18 U.S.C. 2325 *et seq.*, which provides for enhanced prison sentences for certain telemarketing-related crimes.

[3] 15 U.S.C. 6101–6108.

[4] 15 U.S.C. 6102(a)(3)(A)-(C).

[5] Examples of practices that would ''assist or facilitate'' deceptive telemarketing under the Rule include credit card laundering and providing contact lists or promotional materials to fraudulent sellers or telemarketers. *See* 60 FR 43842, 43853 (Aug. 23, 1995).

[6] 15 U.S.C. 6102(a)(3).

[7] 15 U.S.C. 6103, 6104.

*B. Original Rule.*

The FTC adopted the original Rule on August 16, 1995.[8] The Rule, which became effective on December 31, 1995, requires that telemarketers promptly tell each consumer they call several key pieces of information: (1) the identity of the seller; (2) the fact that the purpose of the call is to sell goods or services; (3) the nature of the goods or services being offered; and (4) in the case of prize promotions, that no purchase or payment is necessary to win.[9] Telemarketers must, in any telephone sales call, also disclose cost and other material information before consumers pay.[10] In addition, the original Rule requires that telemarketers have consumers' express verifiable authorization before using a demand draft (or ''phone check'') to debit consumers' bank accounts.[11] The original Rule prohibits telemarketers from calling before 8:00 a.m. or after 9:00 p.m. (in the time zone where the consumer is located), and from calling consumers who have said they do not want to be called by or on behalf of a particular seller.[12] The original Rule also prohibits misrepresentations about the cost, quantity, and other material aspects of the offered goods or services, and the terms and conditions of the offer.[13] Finally, the original Rule bans telemarketers who offer to arrange loans, provide credit repair services, or recover money lost by a consumer in a prior telemarketing scam from seeking payment before rendering the promised services,[14] and prohibits credit card laundering and other forms of assisting and facilitating fraudulent telemarketers.[15]

The Rule expressly exempts from its coverage several types of calls, including calls where the transaction is completed after a face-to-face sales presentation, calls subject to regulation under other FTC rules (*e.g.*, the Pay-Per-Call Rule,[16] or the Franchise Rule),[17] calls initiated by consumers that are not in response to any solicitation, calls initiated by consumers in response to direct mail, provided certain disclosures are made, and calls initiated by consumers in response to advertisements in general media, such as newspapers or television.[18] Lastly, catalog sales are exempt, as are most business-to-business calls, except those involving the sale of non-durable office or cleaning supplies.[19]

*C. Rule Review and Request for Comment.*

The Telemarketing Act required that the Commission initiate a Rule Review proceeding to evaluate the Rule's operation no later than five years after its effective date of December 31, 1995, and report the results of the review to Congress.[20] Accordingly, on November 24, 1999, the Commission commenced the mandatory review with publication of a **Federal Register** notice announcing that Commission staff would conduct a forum on January 11, 2000, limited to examination of issues related to the ''do-not-call'' provision of the Rule, and soliciting applications to participate in the forum.[21]

On February 28, 2000, the Commission published a second notice in the **Federal Register**, broadening the scope of the inquiry to encompass the effectiveness of all the Rule's provisions. This notice invited comments on the Rule as a whole and announced a second public forum to discuss the provisions of the Rule other than the ''do-not-call'' provision.[22] In response to this notice, the Commission received 92 comments from representatives of industry, law enforcement, and consumer groups, as well as from individual consumers.[23]

The commenters generally praised the effectiveness of the TSR in combating the fraudulent practices that had plagued the telemarketing industry before the Rule was promulgated. They also strongly supported the Rule's continuing role as the centerpiece of federal and state efforts to protect consumers from interstate telemarketing fraud. Commenters consistently stressed that it is important to retain the Rule. However, commenters were less sanguine about the effectiveness of the Rule's provisions dealing with consumers' right to privacy, such as the ''do-not-call'' provision and the provision restricting calling times. They also identified a number of areas of continuing or developing fraud and abuse, as well as the emergence of new technologies that affect telemarketing for industry members and consumers alike. Commenters identified several changes in the marketplace that had occurred in the five years since the Rule was promulgated and that threatened the Rule's effectiveness. Those changes included increased consumer concern about personal privacy,[24] the development of novel payment methods,[25] and the increased use of

[8] 60 FR at 43842 (codified at 16 CFR 310 (1995)).

[9] 16 CFR 310.4(d).

[10] 16 CFR 310.3(a)(1).

[11] 16 CFR 310.3(a)(3).

[12] 16 CFR 310.4(c), and 310.4(b)(1)(ii).

[13] 16 CFR 310.3(a)(2).

[14] 16 CFR 310.4(a)(2)-(4).

[15] 16 CFR 310.3(b) and (c).

[16] Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 (''Pay-Per-Call Rule''), 16 CFR Part 308.

[17] 16 CFR 310.6(a)-(c).

[18] 16 CFR 310.6(d)-(f).

[19] 16 CFR 310.2(u) (pursuant to 15 U.S.C. 6106(4) (catalog sales)); 16 CFR 310.6(g) (business-to-business sales). In addition to these exemptions, certain entities including banks, credit unions, savings and loans, common carriers engaged in common carrier activity, non-profit organizations, and companies engaged in the business of insurance regulated by state law are not covered by the Rule because they are specifically exempt from coverage under the FTC Act. 15 U.S.C. 45(a)(2); *but see* discussion below concerning the USA PATRIOT Act amendments to the Telemarketing Act. Finally, a number of entities, and individuals associated with them, that sell investments and are subject to the jurisdiction of the Securities and Exchange Commission or the Commodity Futures Trading Commission are exempt from the Rule. 15 U.S.C. 6102(d)(2)(A); 6102(e)(1).

[20] 15 U.S.C. 6108.

[21] 64 FR 66124 (Nov. 24, 1999). Comments regarding the Rule's ''do-not-call'' provision, § 310.4(b)(1)(ii), as well as the other provisions of the Rule, were solicited in a later **Federal Register** notice on February 28, 2000. *See* 65 FR 10428 (Feb. 28, 2000). Seventeen associations, individual businesses, consumer groups, and law enforcement agencies were selected to engage in the forum's roundtable discussion (''Do-Not-Call'' Forum), which was held on January 11, 2000, at the FTC offices in Washington, D.C. References to the ''Do-Not-Call'' Forum transcript are cited as ''DNC Tr.'' followed by the appropriate page designation.

[22] 65 FR 10428 (Feb. 28, 2000) (the ''February 28 Notice''). The Commission extended the comment period from April 27, 2000, to May 30, 2000. 65 FR 26161 (May 5, 2000).

[23] A list of the commenters and the acronyms used to identify each commenter who submitted a comment in response to the February 28 Notice is attached hereto as Appendix A. Appendix B is a list of the commenters and the acronyms used to identify each commenter who submitted a comment in response to the Notice of Proposed Rulemaking (''NPRM''), discussed below, including supplemental comments and comments submitted on the user fee proposal. References to comments are cited by the commenter's acronym followed by the appropriate page designation. ''RR'' after the commenter's acronym indicates that the comment was received in response to the Rule Review. ''NPRM'' after the commenter's acronym indicates that the comment was received in response to the NPRM. ''Supp.'' after the commenter's acronym indicates that the comment was received as a Supplemental Comment. ''User Fee'' after the commenter's acronym indicates the comment was submitted in response to the request for comments on the Commission's user fee proposal.

[24] The past several years have seen a greater public and governmental focus on the ''do-not-call'' issue. Related to the ''do-not-call'' issue is the proliferation of technologies, such as caller identification service, that assist consumers in managing incoming calls to their homes. Similarly, privacy advocates have raised concerns about technologies used by telemarketers (such as predictive dialers and deliberate blocking of caller identification information) that hinder consumers' attempts to screen calls or make requests to be placed on a ''do-not-call'' list.

[25] The growth of electronic commerce and payment systems technology has led, and likely will continue to lead, to new forms of payment and further changes in the way consumers pay for goods and services they purchase through telemarketing. In addition, billing and collection systems of telephone companies, utilities, and mortgage lenders are becoming increasingly available to a

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preacquired account telemarketing[26] and upselling.[27]

Following the receipt of public comments, the Commission held a second forum on July 27 and 28, 2000 (''Rule Review Forum''), to discuss provisions of the Rule other than the ''do-not-call'' provision and to discuss the Rule's effectiveness.[28] Both the ''Do-Not-Call'' Forum and the Rule Review Forum were open to the public, and time was reserved to receive oral comments from members of the public in attendance. Both proceedings were transcribed and, along with the comments received, placed on the public record.[29]

Based on the record developed during the Rule Review, as well as the Commission's law enforcement experience, the Commission determined to retain the Rule but proposed to amend it to better address recurring abuses and to reach emerging problem areas.

*D. The USA PATRIOT Act of 2001.*

On October 25, 2001, the USA PATRIOT Act[30] became effective. This legislation contains provisions that have significant impact on the TSR. Specifically, § 1011 of that Act amends the Telemarketing Act to extend the coverage of the TSR to reach not just telemarketing to induce the purchase of goods or services, but also charitable fundraising conducted by for-profit telemarketers on behalf of charitable organizations. Because enactment of the USA PATRIOT Act took place after the comment period for the Rule Review closed, the Commission did not raise issues relating to charitable fundraising by telemarketers in the Rule Review.

Section 1011(b)(3) of the USA PATRIOT Act amends the definition of ''telemarketing'' that appears in the Telemarketing Act, 15 U.S.C. § 6106(4), expanding it to cover any ''plan, program, or campaign which is conducted to induce . . . a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones and which involves more than one interstate telephone call . . . .''

In addition, § 1011(b)(2), among other things, adds a new section to the Telemarketing Act directing the Commission to include new requirements in the ''abusive telemarketing acts or practices'' provisions of the TSR.[31] Finally, § 1011(b)(1) amends the ''deceptive telemarketing acts or practices'' provision of the Telemarketing Act, 15 U.S.C. § 6102(a)(2), by specifying that ''fraudulent charitable solicitation'' is to be included as a deceptive practice under the TSR.

*E. Notice of Proposed Rulemaking.*

On January 30, 2002, the Commission published its NPRM, proposing revisions to the TSR (''proposed Rule'') in order to ensure that consumers receive the protections that the Telemarketing Act mandated, and to effectuate § 1011 of the USA PATRIOT Act.[32] The Commission proposed a number of changes, including creating a national ''do-not-call'' registry maintained by the FTC, a ban on receiving from or disclosing to a third party a consumer's billing information, a prohibition against blocking caller identification information, and a requirement that sellers or telemarketers accepting payment via novel payment methods obtain the customer's express verifiable authorization. During the course of this NPRM proceeding, the Commission received about 64,000 electronic and paper comments from representatives of industry, law enforcement, consumer and privacy groups, and from individual consumers.[33] On June 5, 6 and 7, 2002, the Commission held a forum (''June 2002 Forum'') to discuss the issues raised by commenters regarding the FTC's proposed revisions.[34] The forum was open to the public, and time was reserved to receive oral comments from members of the public in attendance. During the forum, the Commission announced that it would accept supplemental comments until June 28, 2002.[35] The forum proceeding was transcribed and placed on the public record. The public record, including many comments and all forum transcripts, has been placed on the Commission's website on the Internet.[36]

Individual consumers generally favored the Commission's proposals, particularly with regard to a national ''do-not-call'' registry. Consumer groups and state law enforcement representatives also generally supported the proposed amendments, although they expressed concern about the effect of the proposal on state ''do-not-call''

wide variety of vendors of all types of goods and services. These newly available payment methods in many instances are relatively untested, and may not provide protections for consumers from unauthorized charges.

[26] The practice of preacquired account telemarketing—where a telemarketer acquires the customer'sbilling information prior to initiating a telemarketing call or transaction—has increasingly resulted in complaints from consumers about unauthorized charges. Billing information can be preacquired in a variety of ways, including from a consumer'sutility company, from the consumer in a previous transaction, or from another source. In many instances, the consumer is not involved in the transfer of the billing information and is unaware that the seller possesses it during the telemarketing call.

[27] The practice of ''upselling'' has also become more prevalent in telemarketing. Through this technique, customers are offered additional items for purchase after the completion of an initial sale. In the majority of upselling scenarios, the seller or telemarketer already has received the consumer's billing information, either from the consumer or from another source.

[28] References to the Rule Review Forum transcript are cited as ''RR Tr.'' followed by the appropriate page designation.

[29] Relevant portions of the entire record of the Rule Review proceeding, including all transcripts and comments, can be viewed on the FTC'swebsite at http://www.ftc.gov/bcp/rulemaking/tsr/tsr-review.htm. In addition, the full paper record is available in Room 130 at the FTC, 600 Pennsylvania Avenue, N.W., Washington, DC 20580, telephone number: 1–202–326–2222.

[30] Pub. L. 107–56, 115 Stat. 272 (Oct. 26, 2001).

[31] Specifically, § 1011(b)(2)(d) mandates that the TSR include in its regulation of abusive telemarketing acts and practices ''a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.'' Pub. L. 107–56 (Oct. 26, 2001).

[32] 67 FR 4492 (Jan. 30, 2002).

[33] Of these, more than forty-five were supplemental comments from organizations and individuals, and about 15,000 supplemental comments were from Gottschalks' customers submitted by Gottschalks. Simultaneous with, but separate from, the NPRM proceeding, the Commission has been exploring possible methods for implementing the proposed national ''do-not-call'' registry. On February 28, 2002, the Commission published a Request for Information (''RFI'') that solicited information from potential contractors on various aspects of implementing the proposed registry. The RFI comment period closed on March 29, 2002. On August 2, 2002, the Commission issued a Request for Quotes to selected vendors. Final proposals were submitted on September 20, 2002, and are being evaluated by Commission staff. On May 29, 2002, the Commission published a Notice of Proposed Rulemaking, soliciting comments on a proposed amendment to the TSR that would establish the methods by which fees for use of the registry would be set. 67 FR 37362 (May 29, 2002). The comment period ended June 28, 2002. The proposed amendment received about forty comments (cited as ''[Name of Commenter]-User Fee at [page number]''), virtually all of which argued that the Commission does not have the authority to issue a user fee, or that it was premature to propose a user fee because the Commission did not have sufficient information upon which to base the proposal. The user fee proposal remains under review as the Commission continues to evaluate the issues raised in the comments.

[34] References to the June 2002 Forum transcript are cited as ''June 2002 Tr.'' followed by the appropriate day (I, II, or III, referring to June 5, 6, or 7, respectively) and page designation.

[35] June 2002 Tr. II at 254. References to the supplemental comments received are cited as ''[Name of Commenter]-Supp. at [page number].''

[36] Much of the record in this proceeding can be viewed on the FTC's website at http://www.ftc.gov/bcp/rulemaking/tsr/tsr-review.htm. In addition, the full paper record is available in Room 130 at the FTC, 600 Pennsylvania Avenue, N.W., Washington, DC 20580, telephone number: 1–202–326–2222.

and other laws. Business and industry commenters generally opposed the proposal, but suggested changes that they believed would make the proposed amendments less burdensome on legitimate business while still achieving the desired consumer protections. Comments from charitable organizations focused primarily on the FTC proposal which would require for-profit telemarketers who solicit on behalf of charitable organizations to comply with the proposed ''do-not-call'' registry. Charitable organizations consistently opposed such a requirement. The comments and the basis for the Commission's decision on the various recommendations are analyzed in detail in Section II below.

*F. The Amended Rule.*

The Commission has carefully reviewed the entire record developed in its rulemaking proceeding. The record, as well as the Commission's law enforcement experience, leave little doubt that important changes have occurred in the marketplace, and that modifications to the original Rule are necessary if consumers are to receive the protections that Congress intended to provide when it enacted the Telemarketing Act. Based on that record and on the Commission's law enforcement experience, the Commission has modified the proposed Rule published in the NPRM and now promulgates this amended Rule, as described in this SBP.

The Commission's decision to retain certain provisions of the original Rule while supplementing or amending others is made pursuant to the Rule Review requirements of the Telemarketing Act,[37] and pursuant to the rulemaking authority granted to the Commission by that Act to protect consumers from deceptive and abusive practices,[38] including practices that may be coercive or abusive of the consumer's interest in protecting his or her privacy.[39] The Commission's decision to amend the original Rule also is made pursuant to the authority granted to the Commission by § 1011 of the USA PATRIOT Act.

As discussed in detail herein, the Commission believes that it is necessary to amend the original Rule to ensure that the Telemarketing Act's goals are met—that is, encouraging the growth of the legitimate telemarketing industry, while curtailing those practices that are abusive or deceptive. The record in this rulemaking proceeding demonstrates that many of the changes in the marketplace that have occurred since the original Rule was promulgated have led to the growth of deceptive and abusive practices in areas not adequately addressed by the original Rule. The amended Rule addresses these practices by responding to the changes in the marketplace in a manner consistent with the intent of Congress in enacting the Telemarketing Act and § 1011 of the USA PATRIOT Act. The Commission believes that the amended Rule strikes a balance, maximizing consumer protections without imposing unnecessary burdens on the telemarketing industry. Each of the amendments is discussed in detail in this SBP. A summary of the major changes from the original Rule is set forth below. The amended Rule:

- Supplements the current company-specific ''do-not-call'' provision with a provision that will empower a consumer to stop calls from all companies within the FTC's jurisdiction by placing his or her telephone number on a central ''do-not-call'' registry maintained by the FTC, except when the consumer has an ''established business relationship'' with the seller on whose behalf the call is made;
- Permits consumers who have put their numbers on the national ''do-not-call'' registry to provide permission to call to any specific seller by an express written agreement;
- Explicitly exempts solicitations to induce charitable contributions via outbound telephone calls from coverage under the national ''do-not-call'' registry provision;
- Modifies § 310.3(a)(3) to require express verifiable authorization for all transactions except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z, or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E;
- Modifies § 310.3(a)(3)(iii), the provision allowing a telemarketer to obtain express verifiable authorization by sending written confirmation of the transaction to the consumer prior to submitting the consumer's billing information for payment;
- Mandates disclosures in the sale of credit card loss protection, and prohibits misrepresenting that a consumer needs offered goods or services in order to receive protections he or she already has under 15 U.S.C. § 1643 (limiting a cardholder's liability for unauthorized charges on a credit card account);
- Explicitly mandates that all required disclosures in § 310.3(a)(1) and § 310.4(d) be made truthfully;
- Expands upon the current prize promotion disclosures to include a statement that any purchase or payment will not increase a consumer's chances of winning;
- Prohibits disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing, except when the disclosure or receipt is to process a payment for goods or services or a charitable contribution pursuant to a transaction;
- Prohibits causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor;
- Sets out guidelines for what evidences express informed consent in transactions involving preacquired account information and ''free-to-pay conversion'' features;
- Requires telemarketers to transmit the telephone number, and name, when available, of the telemarketer to any caller identification service;
- Prohibits telemarketers from abandoning any outbound telephone call, and provides, in a safe harbor provision, that to avoid liability under this provision, a telemarketer must: abandon no more than three percent of all calls answered by a person; allow the telephone to ring for fifteen seconds or four rings; whenever a sales representative is unavailable within two seconds of a person's answering the call, play a recorded message stating the name and telephone number of the seller on whose behalf the call was placed; and maintain records documenting compliance;
- Extends the applicability of most provisions of the Rule to ''upselling'' transactions;
- Prohibits denying or interfering in any way with a consumer's right to be placed on a ''do-not-call'' list;
- Requires maintenance of records of express informed consent and express agreement;
- Narrows certain exemptions of the Rule;
- Clarifies that facsimile transmissions, electronic mail, and other similar methods of delivery are direct mail for purposes of the direct mail exemption; and
- Modifies various provisions throughout the Rule to effectuate expansion of the Rule's coverage to include charitable solicitations, pursuant to Section 1011 of the USA PATRIOT Act, and adds new mandatory disclosures and prohibited misrepresentations in charitable solicitations.

[37] 15 U.S.C. 6108.

[38] 15 U.S.C. 6102(a)(1) and (a)(3).

[39] 15 U.S.C. 6102(a)(3)(A).

*G. Proposed Rule Adopted with Some Modifications.*

Based on the entire record in this proceeding, the amended Rule adopted by the Commission is substantially similar to the proposed Rule. However, the amended Rule contains some important differences from the proposed Rule. These further modifications to the original Rule were based on the recommendations of commenters and on the Commission's more comprehensive law enforcement experience in certain areas over the months since publishing the NPRM.

The major differences between the proposed Rule and the amended Rule adopted here are as follows:

- The definition of ''charitable contribution'' no longer contains exceptions for religious and political groups;
- Sellers who have an ''established business relationship'' with the consumer are exempted from the national ''do-not-call'' registry;
- For-profit telemarketers who solicit charitable contributions are exempted from the national ''do-not-call'' registry, but remain subject to the entity-specific ''do-not-call'' provision;
- The original Rule's definition of ''outbound call'' has been reinstated, and the proposed Rule modified to require specific disclosures in an upsell transaction;
- Disclosures regarding negative option features are required;
- Express verifiable authorization is required for all payments, except those made by a credit or debit card subject to certain statutorily-mandated consumer protections;
- For express oral authorization to be deemed verifiable, a seller must ensure the customer's or donor's receipt of the date the charge will be submitted for payment (rather than the date of the payment) and identify the account to be charged with sufficient specificity such that the customer or donor understands what account is being used to collect payment (rather than provide the account name and number);
- The use of written post-sale confirmations is permitted, subject to the requirement that such confirmations be clearly and conspicuously labeled as such; however, this method is not permitted in transactions involving a ''free-to-pay conversion'' feature and preacquired account information;
- In charitable solicitations, the prohibited misrepresentation regarding the percentage or amount of any charitable contribution that will go to a charitable organization or program is no longer delimited by the phrase ''after any administrative or fundraising expenses are deducted;''
- The Rule now specifies that billing charges to a consumer's account without the consumer's authorization is an abusive practice and a Rule violation; and the Rule now requires that a customer's express informed consent be provided in every transaction;
- The ban on the transfer of consumers' billing information has been replaced with a ban on transferring unencrypted consumer account numbers;
- The failure to transmit caller identification information is prohibited, rather than the affirmative blocking of such information;
- Abandoned calls are prohibited, subject to a ''safe harbor'' that requires a telemarketer to: abandon no more than three percent of all calls answered by a person; allow the telephone to ring for fifteen seconds or four rings; whenever a sales representative is unavailable within two seconds of a person's answering the call, play a recorded message stating the name and telephone number of the seller on whose behalf the call was placed; and maintain records documenting compliance;
- Records of express informed consent or express agreement must be maintained;
- The exemptions for certain kinds of calls are explicitly unavailable to upselling transactions;
- The exemption for business-to-business telemarketing is once again available to telemarketing of Web services and Internet services, as well as the solicitation of charitable contributions.

## II. Discussion of the Amended Rule

The amendments to the Rule do not alter § 310.7 (Actions by States and Private Persons), or § 310.8 (Severability), although § 310.8 (Severability) has been renumbered as § 310.9 in the amended Rule. Section 310.8 of the amended Rule is now reserved.

*A. Section 310.1 — Scope of Regulations.*

Section 310.1 of the amended Rule states that ''this part [of the CFR] implements the [Telemarketing Act], *as amended*,'' reflecting the amendment of the Telemarketing Act by § 1011 of the USA PATRIOT Act.[40] This section discusses comments received regarding the implementation of the USA PATRIOT Act amendments as well as other issues relating to the scope of coverage of the TSR.

*Effect of the USA PATRIOT Act.*

As noted in the NPRM, § 1011(b)(3) of the USA PATRIOT Act amends the definition of ''telemarketing'' that appears in the Telemarketing Act, 15 U.S.C. § 6306(4), by inserting the underscored language:

> The term 'telemarketing' means a plan, program, or campaign which is conducted to induce purchases of goods or services *or a charitable contribution, donation, or gift of money or any other thing of value*, by use of one or more telephones and which involves more than one interstate telephone call. . . .

In addition, § 1011(b)(2) adds a new section to the Telemarketing Act requiring the Commission to include in the ''abusive telemarketing acts or practices'' provisions of the TSR:

> a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.

Finally, § 1011(b)(1) amends the ''deceptive telemarketing acts or practices'' provision of the Telemarketing Act, 15 U.S.C. § 6102(a)(2), by inserting the underscored language:

> The Commission shall include in such rules respecting deceptive telemarketing acts or practices a definition of deceptive telemarketing acts or practices *which shall include fraudulent charitable solicitations* and which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering.

Notwithstanding the amendment of these provisions of the Telemarketing Act, neither the text of § 1011 nor its legislative history suggests that it amends § 6105(a) of the Telemarketing Act—the provision which incorporates the jurisdictional limitations of the FTC Act into the Telemarketing Act and, accordingly, the TSR. Section 6105(a) of the Act states:

> Except as otherwise provided in sections 6102(d) [with respect to the Securities and Exchange Commission], 6102(e) [Commodity Futures Trading Commission], 6103 [state Attorney General actions], and 6104 [private consumer actions] of this title, this chapter shall be enforced by the Commission under the Federal Trade Commission Act (15 U.S.C. § 41 *et seq.*). *Consequently, no activity which is outside of the jurisdiction of that Act shall*

[40] 15 U.S.C. 6101-6108. The Telemarketing Act was amended by the USA PATRIOT Act on October 25, 2001. Pub. L. 107-56 (Oct. 26, 2001).

*be affected by this chapter.* (emphasis added).[41]

One type of ''activity which is outside the jurisdiction'' of the FTC Act, as interpreted by the Commission and federal court decisions, is that conducted by non-profit entities. Sections 4 and 5 of the FTC Act, by their terms, provide the Commission with jurisdiction only over persons, partnerships, or ''corporations organized to carry on business for their own profit or that of their members.''[42]

Reading the amendments to the Telemarketing Act effectuated by § 1011 of the USA PATRIOT Act together with the unchanged sections of the Telemarketing Act compels the conclusion that for-profit entities that solicit charitable donations now must comply with the TSR, although the Rule's applicability to charitable organizations themselves is unaffected.[43] The USA PATRIOT Act brings the Telemarketing Act's jurisdiction over charitable solicitations in line with the jurisdiction of the Commission under the FTC Act by expanding the Rule's coverage to include not only the sale of goods or services, but also charitable solicitations by for-profit entities on behalf of nonprofit organizations.

The Commission received numerous comments regarding the change in scope to the TSR required by the USA PATRIOT Act amendments of the Telemarketing Act. Some comments supported the Commission's interpretation of the USA PATRIOT Act amendments, and the coverage of for-profit telemarketers who solicit on behalf of exempt charitable organizations.[44] However, the majority of commenters who addressed this issue believed the Commission had misinterpreted the mandate of the USA PATRIOT Act amendments. Law enforcement agencies and consumer groups, including NAAG and NASCO, generally expressed the view that the Commission had underestimated the jurisdictional powers conferred on it by the USA PATRIOT Act amendments, and urged that the Rule apply not only to for-profit solicitors who call on behalf of charities, but also to the charities themselves.[45] These commenters argued that the language of the USA PATRIOT Act and its legislative history do not support limiting the applicability of the TSR to telemarketers who call on behalf of non-profits, rather than extending it to cover charitable organizations as well.[46]

On the other hand, most non-profit organizations that commented argued that the Commission's interpretation of the USA PATRIOT Act amendments was too expansive. Several of these commenters argued that in adopting § 1011 of the USA PATRIOT Act, ''Congress meant only to apply certain disclosure requirements—and not the other aspects of the Rule—to professional fundraisers for charities and to for-profit entities soliciting charitable contributions for their own philanthropic purposes.''[47] Others suggested that ''Congress intended only to address bogus charitable solicitation where the non-profit or charitable cause or organizational scheme itself is of a criminal or fraudulent nature.''[48] These commenters cite statements made by the legislation's chief sponsor to the effect that concerns about fraudulent charities prompted him to introduce the legislation.[49]

The Commission believes that concerns about bogus charitable fundraising in the wake of the events of September 11, 2001, in large measure propelled passage of § 1011 of the USA PATRIOT Act.[50] But the fact remains that Congress did more than impose upon the solicitation of charitable contributions by for-profit telemarketers prohibitions against misrepresentation and basic disclosure obligations. Indeed, the USA PATRIOT Act amendments alter the scope of the entire TSR by altering the key definition of the statute—''telemarketing''—to encompass charitable solicitation. Moreover, the text of § 1011 expressly directs the Commission to address both deceptive and abusive acts or practices.[51] Thus, there is no textual support for the notion that § 1011 excludes from its grant of authority over charitable solicitations the power to prohibit deceptive or abusive practices.[52]

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[41] Section 6105(b) reinforces the point made in § 6105(a), as follows:

''The Commission shall prevent any person from violating a rule of the Commission under section 6102 of this title in the same manner, by the same means, and *with the same jurisdiction*, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. § 41 *et seq.*) were incorporated into and made a part of this chapter. Any person who violates such rule shall be subject to the penalties and entitled to the same privileges and immunities provided in the Federal Trade Commission Act in the same manner, by the same means, and *with the same jurisdiction*, power, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this chapter.'' (emphasis added).

[42] Section 5(a)(2) of the FTC Act states: ''The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair or deceptive acts or practices in or affecting commerce.'' 15 U.S.C. 45(a)(2). Section 4 of the Act defines ''corporation'' to include: ''any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, *which is organized to carry on business for its own profit or that of its members* . . . .'' 15 U.S.C. 44 (emphasis added).

[43] A fundamental tenet of statutory construction is that ''a statute should be read as a whole, . . . [and that] provisions introduced by the amendatory act should be read together with the provisions of the original section that were . . . left unchanged . . . as if they had been originally enacted as one section.'' 1A NORMAN J. SINGER, SUTHERLAND STATUTES & STAT. CONSTR. § 22:34 (6th ed. 2002), *citing, inter alia, Brothers v. First Leasing*, 724 F.2d 789 (9th Cir. 1984); *Republic Steel Corp. v. Costle*, 581 F.2d 1228 (6th Cir. 1978); *Am. Airlines, Inc. v. Remis Indus., Inc.*, 494 F.2d 196 (2d Cir. 1974); *Kirchner v. Kansas Tpk. Auth.*, 336 F.2d 222 (10th Cir. 1964); *Nat'l Ctr. for Preservation Law v. Landrieu*, 496 F. Supp. 716 (D.S.C. 1980); *Conoco, Inc. v. Hodel*, 626 F. Supp. 287 (D. Del. 1986); *Palardy v. Horner*, 711 F. Supp. 667 (D. Mass. 1989). Thus, in construing a statute and its amendments, ''[e]ffect is to be given to each part, and they are to be int erpreted so that they do not conflict.'' *Id.*

[44] *See, e.g.*, AARP-NPRM at 4; AFP-NPRM at 3 (arguing that the USA PATRIOT Act gives the FTC jurisdiction over for-profit telemarketers soliciting on behalf of non-profits, agreeing that the disclosures required by amended Rule § 310.4(e) are necessary, and noting that the disclosures mirror the disclosures required by AFP's code of ethics); ASTA-NPRM at 1; Make-a-Wish-NPRM, *passim*; MBNA-NPRM at 6 (the Rule amendments to effectuate the USA PATRIOT Act's provisions ''reflect Congress' intent and are limited in scope and impact while providing important consumer benefits.'').

[45] *See, e.g.*, NAAG-NPRM at 50-51; NASCO-NPRM at 3-4.

[46] *See* NAAG-NPRM at 50-51; NASCO-NPRM at 3-4 (the USA PATRIOT Act refers to ''fraudulent charitable solicitations,'' and requires disclosures by ''any person'' engaged in telemarketing; also noting that the USA PATRIOT Act was passed in the wake of September 11, 2001, and in response to misrepresentations by non-profits as well as their for-profit telemarketers.).

[47] DMA-NonProfit-NPRM at 4. *See also* ACE-NPRM at 1-2; ERA-NPRM at 45; IUPA-NPRM at 21-22.

[48] Not-For-Profit Coalition-NPRM at 26. *See also* Community Safety-NPRM at 2.

[49] *See* Not-For-Profit Coalition-NPRM at 27-28; DMA-NonProfit-NPRM at 5.

[50] *See* letter dated June 14, 2002, from Senator Mitch McConnell to FTC Chairman Timothy Muris, commenting on the NPRM and stating:

''In an effort to protect generous citizens and the charitable institutions they support, I was proud to introduce the Crimes Against Charitable Americans Act and secure its inclusion in the USA PATRIOT Act. This legislation strengthens federal laws regulating charitable phone solicitations. The bill also takes important steps to combat deceptive charitable solicitations by requiring telemarketers to make common sense disclosures such as the charity's identity and address at the beginning of the phone call. . . . When Congress enacted this legislation, it did not envision, nor did it call for, the FTC to propose a federal ''do-not-call'' list, and certainly not a list that applied to charitable organizations or their authorized agents.''

[51] Pub. L. 107-56 (Oct. 26, 2001).

[52] It is a tenet of statutory construction that ''an amendatory act is not to be construed to change the original act . . . further than expressly declared or necessarily implied.'' SUTHERLAND STAT. CONSTR., note 43 above, at § 22:30 (citations omitted). The Commission believes the necessary implication of modifying the definition of ''telemarketing'' in the USA PATRIOT Act is to have all provisions of the Rule apply to charitable solicitations.

Some non-profit commenters also argued that the Commission's interpretation of the USA PATRIOT Act produced, in effect, a double standard, regulating charities who outsource their telemarketing, but not those who conduct their own telemarketing campaigns.[53] Others opined that this bifurcated regulatory scheme was not intended by Congress when it passed the USA PATRIOT Act amendments to the Telemarketing Act.[54] These commenters argued that this distinction penalizes charities (by subjecting them to regulation) merely because they choose to outsource an administrative function. Some argued further that the increased costs of regulatory compliance will not be borne by the for-profit telemarketers, but rather by charities themselves, negatively impacting their ability to carry out their primary mission.[55]

Again, the Commission notes that despite its broad mandate to regulate charitable solicitations made via telemarketing, the USA PATRIOT Act amendments did not expand the Commission's jurisdiction under the TSR to make direct regulation of non-profit organizations possible. Nevertheless, reading the amendatory act together with the original language, as it must, the Commission has sought to give full effect to the directive of Congress set forth in the USA PATRIOT Act amendments.

Another argument raised by large numbers of non-profit commenters is that regulating for-profit telemarketers who solicit on behalf of non-profits, and in particular subjecting them to the requirements of the ''do-not-call'' registry provision, is unfair given the other limitations on the Commission's jurisdiction.[56] These commenters suggested that the result of this scheme would be to allow commercial calls that consumers find intrusive, while banning calls from charities, even those with whom a donor has a past relationship.[57] As explained in greater detail in the discussion of the applicability of the ''do-not-call'' provisions to charitable solicitation telemarketing, careful consideration of this argument has led the Commission to exempt solicitations to induce charitable contributions via outbound telephone calls from the ''do-not-call'' registry provision. Only the less restrictive entity-specific ''do-not-call'' provision included in the original Rule will apply to charitable solicitation telemarketing. However, both the entity-specific ''do-not-call'' provisions *and* the ''do-not-call'' registry provisions apply to commercial telemarketing to induce purchases of goods or services. This approach fulfills the Commission's intention that the TSR be consistent with First Amendment principles, whereby a higher degree of protection is extended to charitable solicitation than to commercial solicitation. Moreover, as a practical matter, the Commission believes that this approach will enable charities to continue soliciting support and pursuing their missions.

*Commenters' Proposals.*

Noting the Commission's jurisdictional limitations with respect to banks, MBNA requested that the Rule explicitly state that it is ''inapplicable to entities exempt from coverage under § 5(a)(2) of the [FTC Act].''[58] MBNA also recommended that the Rule extend this exemption to ''entities acting on behalf of banks . . . because such entities are regulated by the Bank Service Company Act, 15 U.S.C. § 45(a)(2), concerning services they provide for banks.''[59] MasterCard challenged the Commission's statement that it can regulate third-party telemarketers who call on behalf of a bank, and urged that the Commission explicitly exempt ''any bank subsidiary or affiliate performing services on behalf of a bank.[60] ABA recommended that the amended Rule clarify that ''non-bank operating subsidiaries of banks as defined by the banking agencies'' are exempt.[61]

The Commission notes that, from the inception of the Rule, the Commission has asserted that parties acting on behalf of exempt organizations are not thereby exempt from the FTC Act, and thus, for example, ''a nonbank company that contracts with a bank to provide telemarketing services on behalf of the bank is covered'' by this Rule.[62] This reading is consistent with the Commission's long-standing interpretation of the scope of its authority under the FTC Act, as well as with judicial precedent.[63] Furthermore, the Commission's authority was clarified in § 133 of the Gramm-Leach-Bliley Act (''GLBA''), which states that ''[a]ny person that . . . is controlled directly or indirectly . . . by . . . any bank . . . ([as] defined in section 3 of the Federal Deposit Insurance Act) and *is not itself a bank . . . shall not be deemed to be a bank . . . for purposes of any provisions applied by*'' the FTC under the FTC Act.[64] Most recently, a federal district court held that, under this language, the Rule applies to telemarketing by a mortgage subsidiary of a national bank. As the court stated, ''the definition of 'bank' identified by Congress simply does not include the subsidiaries of banks.''[65]

The Commission believes it is unnecessary to state in the Rule what is already plain in the Telemarketing Act, *i.e.*, that its jurisdiction for purposes of the TSR is conterminous with its jurisdiction under the FTC Act, and therefore declines to include an express statement of this fact in the Rule. Further, the Commission declines to adopt the interpretation of some commenters that the FTC Act itself exempts non-bank entities based on their affiliation with or provision of services to exempt banks, and the recommendations of those commenters who sought an exemption from the Rule for bank subsidiaries or agents. To do so would be contrary to the Commission's interpretation of its jurisdictional boundaries, and would unnecessarily limit the reach of the Rule.[66]

In a similar argument, SBC asserted that, contrary to the Commission's stated position, the Commission's lack of jurisdiction over common carriers engaged in common carriage activity extends to their affiliates and their agents engaged in telemarketing on their behalf.[67] SBC cites no authority for this proposition, and the Commission is

[53] *See, e.g.*, March of Dimes-NPRM at 2.

[54] *See* IUPA-NPRM at 1.

[55] *See* Reese-NPRM at 2.

[56] *See, e.g.*, FOP-NPRM at 2; HRC-NPRM at 1; Italian American Police-NPRM at 1; Lautman-NPRM at 2; Leukemia Society-NPRM at 1-2; NCLF-NPRM at 1; Angel Food-NPRM at 1; North Carolina FFA-NPRM at 1; SO-CT-NPRM at 1; SO-NJ-NPRM at 1; SO-WA-NPRM at 1; Reese-NPRM at 2; SHARE-NPRM at 3; Stage Door-NPRM at 1.

[57] *See, e.g.*, PAF-NPRM at 1; AOP-Supp. at 1; Chesapeake-Supp. at 1.

[58] MBNA-NPRM at 2. *Accord* Fleet-NPRM at 2 (arguing that the Office of the Comptroller of the Currency already provides significant guidance to banks on managing risks that may arise from their business relationships with third parties); AFSA-NPRM at 3.

[59] MBNA-NPRM at 2. *See also* AFSA-NPRM at 3.

[60] MasterCard-NPRM at 13-14. *Accord* Citigroup-NPRM at 11.

[61] ABA-NPRM at 3.

[62] 60 FR at 43843, *citing, inter alia, Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980) (holding that the air carrier exemption from the FTC Act did not apply to a firm publishing schedules and fares for air carriers, which was not itself an air carrier); FTC/Direct Mktg. Ass'n., *Complying with the Telemarketing Sales Rule* (Apr. 1996) (''TSR Compliance Guide'') at 7.

[63] *See, e.g., Official Airline Guides*, note 62 above; *FTC v. Saja*, 1997-2 CCH (Trade Cas.) P 71,952 (D. Ariz. 1997); *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080 (1994).

[64] GLBA, Pub. L. 106-102, 113 Stat. 1383, Title I, § 133(a), 15 U.S.C. 6801-6810 (2001).

[65] *Minnesota v. Fleet Mortgage Corp.*, 181 F. Supp. 2d 995 (D. Minn. 2001) (noting that the applicable definition under the Federal Deposit Insurance Act (''FDIA'') is ''any national bank, State bank, District Bank, and any Federal branch and insured branch'' *citing* FDIA, 12 U.S.C. 1813(a)(1)(A)).

[66] This approach is consistent with that laid out in the SBP of the original Rule. *See* 60 FR at 43483.

[67] SBC-NPRM at 2, 4–5.

aware of none. SBC claims that the cases cited by the Commission in the NPRM[68] in support of its authority provide no support for Commission jurisdiction over a common carrier's agent assisting in selling common carrier services.[69] In fact, in one of those cases, the publisher of what the court described as ''the primary market tool of . . . virtually every (air) carrier . . . in the United States'' was held not to be exempt under the exemption for air carriers.[70] Accordingly, the Commission declines to revise its position.

Citigroup requested that the amended Rule clarify that certain financial services providers, such as insurance underwriters and registered broker-dealers, are exempt from the Rule.[71] NAIFA requested similar clarification regarding insurance companies, as well as an explicit statement of exemption in the Rule.[72] The Commission believes that the explicit statement of the Commission's jurisdictional limitation over broker-dealers is abundantly clear in the Telemarketing Act itself;[73] thus, it is unnecessary to exempt them in the Rule. Similarly, the Commission believes its jurisdictional limitations regarding the business of insurance are clear, and thus no express exemption for these entities is necessary.[74]

In contrast to these requests to circumscribe or restate the Commission's jurisdiction under the Rule, a number of commenters urged the expansion of the Rule's scope beyond its current boundaries. As NCL put it, ''[b]ecause the Commission's general jurisdiction does not include significant segments of the telemarketing industry, such as common carriers and financial institutions, the Rule does not provide comprehensive protection for consumers or a level playing field for marketers.''[75] Others argued that the Commission should assert jurisdiction over intrastate calls as well as interstate calls.[76]

As the Commission stated in the NPRM, ''the jurisdictional reach of the Rule is set by statute, and the Commission has no authority to expand the Rule beyond those statutory limits.''[77] Thus, absent amendments to the FTC Act or the Telemarketing Act, the Commission is limited with regard to its ability to regulate under the Rule those entities explicitly exempt from the FTC Act. Despite this limitation, the Commission can reach telemarketing activity conducted by non-exempt entities on behalf of exempt entities.[78] Therefore, when an exempt financial institution, telephone company, or non-profit entity conducts its telemarketing campaign using a third-party telemarketer not exempt from the Rule, then that campaign is subject to the provisions of the TSR.[79]

Regarding the suggestion that the Commission regulate intrastate telemarketing calls, the Commission notes that, pursuant to the definition of ''telemarketing'' included in the Telemarketing Act, 15 U.S.C. § 6106(4), the Commission only has authority to regulate ''a plan, program, or campaign which is conducted . . . by use of one or more telephones and which involves *more than one interstate call*.'' (emphasis added).

Finally, one commenter suggested that the Commission expressly state its jurisdiction over prerecorded telephone solicitations and facsimile advertisements.[80] The Commission believes that sales calls using pre-recorded messages may fall within the Rule's definition of ''telemarketing,'' provided the call is not exempt and provided the call meets the other criteria of ''telemarketing.'' Thus, a sales call using a prerecorded message may be ''telemarketing'' if it is part of a plan, program, or campaign for the purpose of inducing the purchase of goods or services or inducing a donation to a charitable organization, is conducted by use of one or more telephones, and involves more than one interstate call. However, the fact that prerecorded sales calls may be ''telemarketing'' does not affect the fact that such calls are already prohibited, except with the consumer's prior express consent, under regulations promulgated by the FCC pursuant to the TCPA.[81] Similarly, FCC regulations already prohibit unsolicited facsimile advertisements,[82] although facsimiles also are a form of direct mail subject to the TSR. The Commission notes in the discussion of § 310.6(b)(6) below that it considers facsimiles to be a form of direct mail solicitation. Thus, under § 310.6(b)(6), a seller using a facsimile advertisement to induce calls from consumers may not claim the direct mail exemption unless the facsimile truthfully discloses the material information listed in § 310.3(a)(1) (or contains no material misrepresentation regarding any item contained in § 310.3(d) if the solicitation is for a charitable contribution).

*B. Section 310.2 — Definitions.*

The amended Rule retains the following definitions from the original Rule unchanged, apart from renumbering: ''acquirer,'' ''Attorney General,'' ''cardholder,'' ''Commission,'' ''credit,'' ''credit card,'' ''credit card sales draft,'' ''credit card system,'' ''customer,''[83] ''investment opportunity,''[84] ''merchant,'' ''merchant agreement,'' ''person,'' ''prize,'' ''prize promotion,'' ''seller,'' and ''State.''

Based on the record developed in this matter, the Commission has determined to retain the following definitions from

[68] 67 FR at 4407 (*citing* 60 FR at 43843, *citing FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977) and *Official Airline Guides*), *see* note 62 above.

[69] SBC-NPRM at 4-5.

[70] *Official Airline Guides*, *see* note 62 above. *See also* cases cited above in note 63, rejecting exemption claims of telemarketers for exempt organizations.

[71] *See* Citigroup-NPRM at 10.

[72] *See* NAIFA-NPRM at 1-2.

[73] 15 U.S.C. 6102(d)(2).

[74] *See* Section 2 of the McCarran-Ferguson Act, 15 U.S.C. 1012(b) (the business of insurance, to the extent that it is regulated by state law, is exempt from the Commission's jurisdiction pursuant to the FTC Act).

[75] NCL-NPRM at 2. *See also* Horick-NPRM at 1; PRC-NPRM at 3-4; Myrick-NPRM at 1.

[76] FCA-NPRM at 2.

[77] 67 FR at 4497.

[78] *Id.*

[79] As the Commission stated when it promulgated the Rule, ''[t]he Final Rule does not include special provisions regarding exemptions of parties acting on behalf of exempt organizations; where such a company would be subject to the FTC Act, it would be subject to the Final Rule as well.'' 60 FR at 43843. Although some commenters, such as SBC (SBC-NPRM at 5-8) and Wells Fargo (Wells Fargo-NPRM at 2), took issue with this proposition, the fact remains that the Telemarketing Act states merely that ''no activity which is outside the jurisdiction of that Act shall be affected by this chapter.'' 15 U.S.C. 6105(a). Thus, when an entity not exempt from the FTC Act engages in telemarketing, that conduct falls within the Commission's jurisdiction under the TSR. *Id.*; TSR Compliance Guide at 12.

[80] *See* Worsham-NPRM at 6.

[81] 47 CFR 64.1200(a)(2).

[82] 47 CFR 64.1200(a)(3).

[83] VISA stated that the definition of ''customer'' is too broad, encompassing not only ''the person who is party to the telemarketing call and who would be liable for the amount of a purchase as the contracting party, but also would include any person who is liable under the terms of the payment device.'' VISA-NPRM at 7. Although the term ''customer,'' defined to mean ''any person who is or may be required to pay for goods or services offered through telemarketing,'' is broad in scope, the Commission believes this breadth is necessary to effect the purposes of the Rule. Further, the Commission believes that the term ''customer,'' taken in context of the various Rule sections in which it is used, is not confusing. Therefore, the Commission makes no change in the amended Rule to the definition of ''customer.''

[84] One commenter recommended that the Commission clarify that an investment vehicle whose main attribute is that it provides tax benefits would be considered an ''investment opportunity'' under the Rule. Thayer-NPRM at 6. The Commission believes that such a tax-advantaged investment would come under the present definition, which is predicated on representations about ''past, present, or future income, profit, or appreciation.'' The Commission believes that any such investment opportunity would only result in a tax advantage because of its ability to produce income or appreciation, regardless of whether that income is positive (and tax-deferred or tax-exempt) or negative (resulting in deductible losses). Thus, the Commission has retained the original definition of ''investment opportunity'' in the amended Rule.

the proposed Rule unchanged, apart from renumbering: ''caller identification service,'' ''donor,'' ''telemarketer,''[85] and ''telemarketing.'' The amended Rule modifies the definitions put forth in the NPRM for the terms ''billing information,'' ''charitable contribution,'' ''material,'' and ''outbound telephone call.'' Finally, the amended Rule adds five definitions that were not included in the NPRM proposal. They are: ''established business relationship,'' ''free-to-pay conversion,'' ''negative option feature,'' ''preacquired account information,'' and ''upselling.'' The Commission discusses each of these definitions below, along with the comments received regarding them, and the Commission's reasoning in making a final determination regarding each of these definitions.[86]

*§ 310.2(c) — Billing information*

The proposed Rule included a definition of the term ''billing information,'' which was used in proposed § 310.3(a)(3), the express verifiable authorization provision, and proposed § 310.4(a)(5), the section that addressed preacquired account telemarketing. Under the definition proposed in the NPRM, the term ''billing information'' encompassed ''any data that provides access to a consumer's or donor's account, such as a credit card, checking, savings, or similar account, utility bill, mortgage loan account, or debit card.''[87]

The Commission received numerous comments regarding this definition as it pertained to the express verifiable authorization and preacquired account provisions of the proposed Rule. The use of the term in the express verifiable authorization provision drew less comment, perhaps because that provision merely required that the customer or donor receive such billing information if express verifiable authorization of payment is to be deemed verifiable.[88] Comments from consumer groups generally favored the ''billing information'' definition, noting that the breadth of the term would prove beneficial to consumers.[89] AARP, for example, stated that the definition, as employed in the proposed preacquired account telemarketing provision, ''is broad enough so as not to leave any doubt in the mind of the telemarketer regarding what can and cannot be shared.''[90] Law enforcement representatives and some consumer groups expressed their concern that, as broad as the definition might seem, it should be further expanded to encompass encrypted data, and other kinds of information that can allow access to a consumer's account.[91] Industry commenters, on the other hand, argued precisely the opposite, requesting that the definition be narrowed and that it specifically exclude encrypted data,[92] or other specified items unique to that commenter's business practices.[93] Instead, industry commenters recommended, ''billing information'' should be limited to account information that ''in and of itself, is sufficient to effect a transaction'' against a consumer's account.[94] Virtually all of these comments were made in the context of the proposed Rule provision regarding preacquired account telemarketing, which would have prohibited the disclosure or receipt of ''billing information'' except when provided by the customer or donor to process payment.

As noted below in the discussions of amended Rule §§ 310.4(a)(5) and (6), the Commission has tailored its approach to preacquired account telemarketing, thereby addressing many of the concerns raised by commenters on both sides regarding the proposed definition of ''billing information.'' The amended Rule's approach to preacquired account telemarketing—which no longer focuses on the sharing of ''billing information'' in anticipation of telemarketing, but instead prohibits ''[c]ausing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor''—obviates the concerns about the breadth of the term, and whether it includes or excludes encrypted account numbers.[95] However,

[85] One commenter expressed concern that ''a company that sells telemarketing services to sellers, but does not maintain any calling facilities itself, instead subcontracting the actual telephoning to individuals'' might not fall within the definition of ''telemarketer.'' Patrick-NPRM at 2. The Commission disagrees, and believes that regardless of whether an entity maintains a physical call center, it would be a ''telemarketer'' for purposes of the Rule if ''in connection with telemarketing, [it] initiates or receives telephone calls to or from a customer or donor.'' Amended Rule § 310.2(bb).

[86] The definitions proposed in the NPRM for ''express verifiable authorization,'' ''Internet services,'' and ''Web services'' have been deleted from the amended Rule because they are no longer necessary in light of certain substantive modifications in the amended Rule.

[87] *See* proposed Rule § 310.2(c), and discussion, 67 FR at 4498-99.

[88] As discussed below, in the section explaining the express verifiable authorization provision (*i.e.*, § 310.3(a)(3)), commenters' concerns regarding billing information in the express verifiable authorization provision focused on the dangers of disclosure of consumers' account numbers.

[89] *See* NCLC-NPRM at 13; LSAP-NPRM at 5 (approved of definition, but also suggested changing ''such as'' to ''including but not limited to'').

[90] AARP-NPRM at 7.

[91] Specifically, NAAG noted: ''[T]he Gramm Leach Bliley Act (''GLBA'') has resulted in the common use of reference numbers and encrypted numbers to identify consumer accounts in preacquired account telemarketing. These types of account access devices definitely should be included in the list of examples. Failure to include encrypted numbers within the scope of the Rule's definition of 'billing information' would render the Rule useless as a device to combat the ills of preacquired account telemarketing.'' NAAG-NPRM at 38. *See also* NACAA-NPRM at 5-6 (''consider providing a non-exclusive list of such information, based upon technologies in place today. Thus, name, account number, telephone number, married and maiden names of parents, social security number, passwords to accounts and PINs, and encrypted versions of this information, with or without the encryption [key], should all be prohibited from use in any trasaction but the immediate one in which the co nsumer is engaged.''); NCLC-NPRM at 13.

[92] Citigroup-NPRM at 7-8; Household Auto-NPRM at 2 (''Although the specific language of the proposed definition does appear to be consistent with the Commission's GLBA interpretation, the explanation of the term in the [NPRM] is broader and creates a conflict with the GLBA interpretation . . . . To avoid such a conflict, we suggest that the Commission clarify that the term . . . includes only account numbers and specifically excludes encrypted account numbers.''). *Accord* ABIA-NPRM at 2; Roundtable-NPRM at 8 (''The Roundtable is concerned that this definition is so broad that it could be construed to restrict the sharing of publicly available identifying information, such as a consumer's name, phone number and address.''). *See also* AFSA-NPRM at 11-12; Advanta-NPRM at 3; ARDA-NPRM at 3; Assurant-NPRM at 3; Capital One-NPRM at 8-9; Cendant-NPRM at 7; Citigroup-NPRM at 7; E-Commerce Coalition-NPRM at 2; ERA-NPRM at 24; IBM-NPRM at 10; MPA-NPRM at 23, n.23; MasterCard-NPRM at 8; Metris-NPRM at 7; VISA-NPRM at 6.

[93] *See, e.g.*, Green Mountain-NPRM at 31 (''If the Commission intends to adopt its proposal to amend the TSR to add a new Section 310.4(a)(5) to ban the use of preacquired billing information obtained from third parties, it should exempt names, addresses, electricity meter identifiers, and electricity usage patterns from its definition of 'billing information.'")

[94] IBM-NPRM at 10. ARDA argued that information that would fall within the definition of ''billing information'' —such as a customer's or donor's date of birth— may be collected during a call for purposes other than to effect a charge. ARDA cited examples including ''eligibility to enter a contest or drawing'' or ''demographic purposes.'' ARDA-NPRM at 3. ARDA then asserted that, while this information may not be gathered during a call in which a billing occurs, or used for billing purposes in the first instance, it could be passed along to other parties for marketing or other purposes. *Id.* While the Commission recognizes that information like date of birth has marketing uses beyond access to consumer accounts for billing purposes, the Commission finds it improbable at best that collection or confirmation of date of birth, or similar piece of information, as a proxy for consent to be charged for a purchase or donation would satisfy the ''express informed consent'' requirements of amended Rule § 310.4(a)(6), discussed below.

[95] During the Rule Review, industry argued the term was so broad it might mean that sellers and telemarketers could not share customer names and telephone numbers for use in telemarketing. *See, e.g.*, Advanta-NPRM at 3; Roundtable-NPRM at 8. Industry also argued that encrypted data should not be included in the definition of ''billing information,'' because such data by itself does not allow a charge to be placed on a consumer's

the amended Rule includes a definition of ''preacquired account information,'' which encompasses both encrypted and unencrypted account information, to address specifically the practice of preacquired account telemarketing.[96]

Consequently, after consideration of the record in this proceeding, and in light of the more focused approach to the provisions in which the term is used, the Commission has decided to retain the proposed definition of ''billing information,'' with a minor modification. The definition now encompasses ''any data that *enables any person to obtain access* to a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.'' (emphasis added). The Commission believes that this syntactical modification, substituting the phrase ''that enables any person to obtain access'' for the phrase ''that provides access,'' makes the definition more precise and somewhat easier to understand. The definition retains the broad scope of its predecessor in order to capture the myriad ways a charge may be placed against a consumer's account,[97] yet has more limited effect in the context of the approach adopted in the amended Rule to address preacquired account telemarketing and express verifiable authorization.

*§ 310.2(d) — Caller identification service*

The definition of ''caller identification service'' comes into play in § 310.4(a)(7) of the amended Rule, discussed below. In the NPRM, the Commission proposed to define ''caller identification service'' to mean ''a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone.'' As the Commission explained in the NPRM, the Commission intends the definition of ''caller identification service'' to be sufficiently broad to encompass any existing or emerging technology that provides for the transmission of calling party information during the course of a telephone call.[98] Those few commenters who addressed the definition supported the Commission's proposal.[99] Therefore, the amended Rule adopts § 310.2(d), the definition of ''caller identification service,'' unchanged from the proposal.

*§ 310.2(e) — Charitable contribution*

The original Rule did not include a definition of ''charitable contribution'' because originally the term ''telemarketing'' in the Telemarketing Act, which determined the scope of the TSR, was defined to reach telephone solicitations only for the purpose of inducing sales of goods or services.[100] The proposed Rule added a definition of the term ''charitable contribution'' because § 1011 of the USA PATRIOT Act amended the Telemarketing Act to specify that ''telemarketing'' now includes not only calls to induce purchases of goods or services but also calls to induce ''*a charitable contribution, donation, or gift of money or any other thing of value.*''[101] The Commission has determined that the term ''charitable contribution,'' defined for the purposes of the Rule to mean ''any donation or gift of money or any other thing of value'' succinctly captures the meaning intended by Congress. Therefore, the Commission has retained this definition from the proposed Rule. It has, however, determined to modify the proposed definition to eliminate the exemptions included in the proposed Rule.

The proposed definition in the NPRM expressly excluded donations or gifts of money or any other thing of value solicited by or on behalf of ''political clubs, committees, or parties, or constituted religious organizations or groups affiliated with and forming an integral part of the organization where no part of the net income inures to the direct benefit of any individual, and which has received a declaration of current tax exempt status from the United States government.''[102] This proposed exemption drew strong comment and criticism. NASCO recommended that a definition of ''constituted religious organizations'' be included in the Rule to set clear boundaries for what kinds of groups were intended to be included.[103] Hudson Bay stated that ''establishing governmentally preferred groups, such as religious organizations or political parties, and providing them with superior access to the public, is in our opinion unquestionably a violation of the Fourteenth Amendment's guarantee of equal protection and of the First Amendment.''[104] Similarly, DMA-Nonprofit stated ''the Commission has no authority to single out agents of religious organizations for exemption . . . . [T]here is no language in the [USA PATRIOT Act] that allows the Commission to make this distinction.''[105]

Based on careful consideration of the record, the Commission is persuaded that no exemptions based upon the type of organization engaged in telemarketing are warranted, and that all telemarketing (as defined in the Telemarketing Act as amended by the USA PATRIOT Act) conducted by any entity within its jurisdiction should be covered by the TSR. This does *not* mean that the Commission believes political fundraising is within the scope of the Rule.[106] It means only that the TSR applies to all calls that are part of any ''plan, program, or campaign'' that is conducted by any entity within the FTC's jurisdiction, involving more than one interstate telephone call for the purpose of inducing a purchase of goods or services *or* a charitable contribution, donation, or gift of money or any other thing of value. Thus, for example, if a for-profit telemarketer on behalf of a

account, and because sharing it is permitted by the GLBA. *See, e.g.*, Cendant-NPRM at 7; E-Commerce Coalition-NPRM at 2; MPA at 23, n.23. These arguments have been addressed by the Commission's revised approach to preacquired account telemarketing, which focuses not on the sharing of account information—except in the very limited area of sale of unencrypted account numbers—but on the harm that results from certain practices in preacquired account telemarketing, *i.e.*, unauthorized charges. Moreover, in those instances where there has been the strongest history of abuse, sellers and telemarketers are required to obtain part or all of the customer's account number directly from the customer.

[96] *See* amended Rule § 310.2(w), and related discussion below.

[97] The record shows that a telemarketer or seller may provide anything from complete account number to mother's maiden name to initiate a charge for a telemarketing transaction, depending on its relationship with another seller, financial institution, or billing entity. *See, e.g.*, Assurant-NPRM at 4.

[98] 67 FR at 4499.

[99] *See, e.g.*, EPIC-NPRM at 11; ARDA-NPRM at 4. ARDA suggested that the definition be expanded to allow transmission of the name and number of ''any party whom the telephone subscriber may contact'' regarding being placed on the company's ''do-not-call'' list. As noted in the subsequent discussion of this provision, § 310.4(a)(7) of the amended Rule permits telemarketers to substitute a customer service number on the caller identification transmission.

[100] 15 U.S.C. 6106(4).

[101] 15 U.S.C. 6106(4) (amended by § 1011(b)(3) of the USA PATRIOT Act, Pub. L. 107-56 (Oct. 26, 2001)).

[102] Proposed Rule § 310.2(f).

[103] NASCO-NPRM at 6.

[104] Hudson Bay-NPRM at 12.

[105] DMA-NonProfit-NPRM at 5-6. *See also* Not-for-Profit Coalition-NPRM at 41.

[106] The USA PATRIOT Act is consistent with a basic common law distinction between charities and political organizations. ''Gifts or trusts for political purposes or the attainment of political objectives generally have been regarded as not charitable in nature. Also . . . a trust to promote the success of a political party is not charitable in nature.'' 15 Am. Jur. 2d *Charities* § 60 (2002). In this regard, it is noteworthy that Congress elsewhere has established a regulatory scheme applicable to political fundraising. 2 U.S.C. §§ 431-455.

(presumably non-profit) political club or constituted religious organization were to engage in a ''plan, program, or campaign'' involving more than one interstate telephone call to induce a purchase of goods or services *or* a charitable contribution, that activity would be within the scope of the TSR. But if such a for-profit telemarketer on behalf of the same client made calls that were not for the purpose of inducing a purchase of goods or services or a charitable contribution, those calls would not be within the scope of the TSR.

Commenters also addressed the scope of the term ''or any thing of value'' in the definition of ''charitable contribution'' in the proposed Rule, suggesting exemptions to limit this definition. Red Cross urged the Commission to exempt blood from the definition of ''charitable contribution'' because, it argued, ''blood donations are not 'a thing of value' in a fiduciary sense.''[107] Blood Centers agreed with this position, arguing that while ''the donor's blood is of great value to the recipient of the blood donation . . . the donor is not being asked to part with anything other than his or her *time*.''[108] Blood Centers also argued that donations of blood are of grave importance to save lives, and so are distinguishable from typical commercial and even charitable telemarketing calls.[109] Another argument raised by Blood Centers in support of its position that a blood donation should be excluded from the definition of ''charitable contribution'' is that blood donation programs are highly regulated by the Food and Drug Administration (''FDA'').[110] March of Dimes also requested that volunteers' time not be considered a ''thing of value'' under the Rule, noting that their organization often uses the telephone to contact volunteers who then solicit contributions from their friends and neighbors.[111]

The Commission believes that the text of the USA PATRIOT Act provision expanding the definition of telemarketing to include calls to induce ''a charitable contribution, donation, or gift of money or any other thing of value'' is broad in scope and plain in meaning. The USA PATRIOT Act specifically uses the term ''or any other thing of value'' in addition to the terms ''charitable contribution, donation, or gift of money,'' ensuring that it will encompass non-money contributions. The Commission believes that, while blood donors are asked for blood and not money, the blood they donate is clearly a ''thing of value.''[112] Similarly, although volunteers are asked to give time rather than money, the Commission believes that a donation of time is a ''thing of value.''[113] Therefore, the Commission cannot exempt from the definition of ''charitable contribution'' either blood or time volunteered. The Commission believes, however, that legitimate concern about inclusion of blood in the definition should be alleviated by the exemption of charitable solicitation telemarketing from the ''do-not-call'' registry provisions. The remaining provisions that will apply to telemarketing to solicit blood donations are neither burdensome nor likely to impede the mission of the non-profit organizations that seek such donations.

NAAG and NASCO suggested that the Commission ''state that the word 'charitable' does not limit the character of the recipient of the contribution.''[114] According to these commenters, it is important to ensure that donations solicited by or on behalf of public safety organizations are considered ''charitable contributions'' for regulatory purposes, and that those contributions solicited by sham charities are still ''charitable contributions'' under the amended Rule.[115] The Commission believes that the current definition, which closely tracks the USA PATRIOT Act definition, is clear as to what is covered.[116] Its focus is on the donation, rather than the solicitor, and it is sufficiently broad in scope to encompass donations solicited on behalf of any organization.

NAAG and NASCO also requested that the Commission explicitly address the situation where a call involves '''percent of purchase' situations, where contributions are sought in the form of the purchase of goods or services, [and] where a portion of the price will, according to the solicitor, be dedicated to a charitable cause.''[117] These commenters urged the Commission to ensure that such hybrid transactions are covered, either as sales of goods or services or as charitable contributions, or both, under the Rule.[118] The Commission believes that when the transaction predominantly is an inducement to make a charitable contribution, such as when an incentive of nominal value is offered in return for a donation, the telemarketer should proceed as if the call were exclusively to induce a charitable contribution. Similarly, if the call is predominantly to induce the purchase of goods or services, but, for example, some portion of the proceeds from this sale will benefit a charitable organization, the telemarketer should adhere to the portions of the Rule relevant to sellers of goods or services. The Commission believes that further elaboration on the differences between these scenarios is unnecessary because, in either case, the requirements are similar, consisting primarily of avoiding misrepresentations, and promptly disclosing information that would likely be disclosed in the ordinary course of a telemarketing call.

*§ 310.2(m) — Donor*

The proposed Rule contained a definition of ''donor'' in order to effectuate the goals of the USA PATRIOT Act amendments. Under that definition, a ''donor'' is ''any person solicited to make a charitable contribution.''[119] Throughout the proposed Rule, wherever the word ''customer'' was used, the Commission added the word ''or donor'' where appropriate, to indicate that the provision was also applicable to the solicitation of charitable contributions. The Commission received very few comments on this definition. The March of Dimes expressed the concern that ''[t]he definition of a 'donor' does not accurately reflect the nomenclature used by the industry.''[120] Rather, the March of Dimes suggested, the term ''donor,'' as used in philanthropic circles, ''connotes an established relationship with the non-profit charitable organization.''[121] The March of Dimes recommended replacing the terms ''customer'' and ''donor'' in the Rule with the term ''consumer.''

The Commission believes that the term ''consumer'' is too broad and non-specific to substitute for the terms

[107] Red Cross-NPRM at 3.

[108] Blood Centers-NPRM at 2.

[109] *Id.*

[110] *Id.* at 2-3.

[111] March of Dimes-NPRM at 2. *See also* AFP-NPRM at 5.

[112] *See* Maryland Health Care, Fall 2000 at 4, http://www.mdhospitals.org/MarylandPubs/MDHlthCr__1100.pdf (noting the blood shortages had driven up the price of blood from $145.24 per unit to $174.10 per unit in a single year).

[113] Presumably, organizations that rely on volunteers would, absent their donations of time, be forced to pay labor costs associated with the work done by volunteers. Therefore, the time donated is a ''thing of value,'' equivalent to the labor cost saved.

[114] NAAG-NPRM at 52; NASCO-NPRM at 5-6.

[115] *Id.*

[116] 15 Am. Jur. 2d *Charities* § 60 (2002).

[117] NAAG-NPRM at 52. *See also* NASCO-NPRM at 5-6.

[118] *Id.*

[119] Proposed Rule § 310.2(m), 67 FR at 4540.

[120] March of Dimes-NPRM at 3.

[121] *Id.* (noting that the term ''prospect'' is used to mean a potential donor).

''customer'' and ''donor.''[122] The Rule uses these more targeted terms to capture the varied nature of transactions between sellers or telemarketers and individuals who are, or may be, required to pay for something as the result of a telemarketing solicitation. Thus, it is the intent of the Commission that the term ''donor'' as used in the Rule encompass not only those who have agreed to make a charitable contribution, but also any person who is solicited to do so, to be consistent with its use of the term ''customer.'' Therefore, the Commission has determined that the term ''donor'' is necessary and appropriate, and has retained the definition of ''donor'' in the amended Rule without modification.

*§ 310.2(n) — Established business relationship*

The Commission has determined to add to the Rule a definition of ''established business relationship.'' This new definition comes into play in § 310.4(b)(1)(iii), which now exempts from the national ''do-not-call'' registry calls from sellers with whom the consumer has an ''established business relationship'' (unless that consumer has asked to be placed on that seller's company-specific ''do-not-call'' list). This definition limits the exemption to relationships formed by the consumer's purchase, rental, or lease of goods or services from, or financial transaction with, the seller within eighteen months of the telephone call (or, in the case of inquiries or applications, within three months of the call).

Industry comments were nearly unanimous in emphasizing that it is essential that sellers be able to call their existing customers.[123] Although the initial comments from consumer groups opposed an exemption for ''established business relationships,''[124] their statements during the June 2002 Forum and in their supplemental comments expressed the view that such an exemption would be acceptable, as long as it was narrowly-tailored and limited to current, ongoing relationships.[125] Moreover, state law enforcement representatives' comments on their experience with state ''do-not-call'' laws that have an exemption for ''established business relationships'' suggest that this type of exemption is consistent with consumer expectations.[126] While the Commission is persuaded that an ''established business relationship'' exemption is necessary and appropriate, it believes that the exemption must be narrowly crafted and clearly defined to avoid a potential loophole that could defeat the purpose of the national ''do-not-call'' registry.

In adopting the ''do-not-call'' provisions of the original Rule, the Commission considered, among other things, the approach taken by Congress and the FCC in the TCPA and its implementing regulations.[127] In crafting an ''established business relationship'' definition, it is useful again to consider the TCPA, which specifically exempts calls ''to any person with whom the caller has an established business relationship.''[128] The House Report on the TCPA's ''established business relationship'' exemption confirms that Congress intended for the reasonable expectation of the consumer to be the touchstone of the exemption:

> In the Committee's view, an ''established business relationship'' also could be based upon any prior transaction, negotiation, or inquiry between the called party and the business entity that has occurred during a reasonable period of time. . . . By requiring this type of relationship, the Committee expects that otherwise objecting consumers would be less annoyed and surprised by this type of unsolicited call since the consumer would have a recently established interest in the specific products or services. . . . In sum, the Committee believes the test to be applied must be grounded in the consumer's expectation of receiving the call.[129]

When it promulgated its rules pursuant to the TCPA, the FCC included the following definition of ''established business relationship'' with regard to its company-specific ''do-not-call'' requirements:

> The term *established business relationship* means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.[130]

Consideration of state approaches to the ''established business relationship''

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[122] The term ''consumer'' is defined generally as ''one that utilizes economic goods.'' Merriam-Webster's Collegiate Dictionary, at: http://www.merriamwebster.com/cgi-bin/dictionary#. This broader term is used in the Rule in the definition of ''established business relationship,'' § 310.2(n), and in the provision banning the transfer of unencrypted account numbers, § 310.4(a)(5). In each of these instances, the Commission has consciously used the broader term ''consumer'' to effect broader Rule coverage.

[123] *See, e.g.*, AFSA-NPRM at 13-14; AmEx-NPRM at 3; ANA-NPRM at 5; ARDA-NPRM at 17; ATA-NPRM at 29; BofA-NPRM at 4; Best Buy-NPRM at 1; DialAmerica-NPRM at 12; DMA-NPRM at 33-34; DSA-NPRM at 7-8; ERA-NPRM at 36-37; Gottschalks-NPRM at 1; NCTA-NPRM at 6; NRF-NPRM at 13; PMA-NPRM at 28; Roundtable-NPRM at 5; SIIA-NPRM at 2-3; Time-NPRM at 6-7; VISA-NPRM at 3. *See also, e.g.*, ARDA-Supp. at 1; ICTA-Supp. at 2.

[124] *See, e.g.*, EPIC-NPRM at 20-21; NCL-NPRM at 10. Among other things, consumer advocates opposed such an exemption because of the difficulty in defining a ''pre-existing business relationship'' without creating significant loopholes in the protections provided by the national ''do-not-call'' registry (described in the discussion of amended Rule § 310.4(b)(1)(iii) below). *See* NCL-NPRM at 10. Furthermore, they did not agree with industry's argument that consumers want to hear from companies with whom they have an existing relationship. NCL stated that the fact that a consumer may have had a relationship with a company does not necessarily mean that he or she wishes to receive calls, or to continue to receive calls, from that company. NCL-NPRM at 10. Consumer advocates believed the FTC had taken the right approach: the burden should lie with the seller to show specific consent to receive calls. NCL-NPRM at 10; EPIC-NPRM at 20-21; PRC-NPRM at 2.

[125] June 2002 Tr. I at 110 (NCL) (''This would have to be . . . really narrowly defined in order to protect consumers so that if somebody had something that was ongoing . . . that would be in a different category.''). *See also* AARP-Supp. at 3 (''AARP recognizes that there may be an expectation by consumers that they will be in contact with businesses with whom they have current, ongoing, voluntary relationship; calls from such businesses are not necessarily unwanted or unsolicited. Calls made from a business with which consumers had a prior relationship are a different matter altogether. In situations where the consumer has chosen not to continue a business relationship, it cannot be presumed they wish to be solicited by that business again. Therefore, AARP believes that any exemption for an existing business relationship must be limited to those situations where the relationship is current, ongoing, voluntary, involves an exchange of consideration, and has not been terminated by either party.'').

[126] June 2002 Tr. I at 110-19. *See also* June 2002 Tr. I at 119-22, in which participants discussed an AARP survey conducted in conjunction with the Missouri Attorney General's Office, which showed that three-fourths of consumers did not feel an established business relationship was justified. However, representatives from the Missouri Attorney General's Office explained that the results were less a measure of consumer condemnation of such an exemption, than an indication that consumers were receiving calls from businesses with whom they did not perceive that they had such a relationship. According to the Missouri representatives, businesses took a broader view of the relationship than did consumers. As noted in more detail below, consumers appear to be comfortable with an exemption for ''established business relationships'' once its parameters are explained to them.

[127] 60 FR at 43855.

[128] 47 U.S.C. 227(a)(3)(B). The legislative history of the TCPA shows that Congress exempted ''established business relationship'' calls ''so as not to foreclose the capacity of businesses to place calls that build upon, follow-up, or renew, within a reasonable period of time, what had once been an existing customer relationship.'' H.R. REP. NO. 102-317 at 13 (1991). Throughout the House Report discussing the exemption for ''established business relationship,'' the point is stressed that the exemption is intended to reach only those relationships that are *current or recent.* The Report consistently refers to an ''established business relationship'' in terms of ''the existence of the relationship *at the time of the solicitation, or within a reasonable time prior to it.*'' *Id.* at 13-15. (emphasis added).

[129] *Id.* at 14, 15.

[130] 47 CFR 64.1200(f)(4).

exemption is also instructive. Most state ''do-not-call'' laws have some form of exemption for ''established business relationships,'' and several of these are modeled on the language of the FCC's exemption.[131] However, there is an important difference between the FCC approach and that of many of the states, in that many state law exemptions circumscribe the scope of an ''established business relationship'' by specifying the amount of time after a particular event (like a purchase) during which such a relationship may be deemed to exist.[132] The Commission believes that this approach is more in keeping with consumer expectations than an open-ended exemption. As discussed in more detail below, many consumers favor an exemption for companies with whom they have an established relationship. Consumers also might reasonably expect sellers with whom they have recently dealt to call them, and they may be willing to accept these calls. A purchase from a seller ten years ago, however, would not likely be a basis for the consumer to expect or welcome solicitation calls from that seller.

In addition, specific time limits for an ''established business relationship'' are particularly appropriate for a general ''do-not-call'' registry such as the one to be maintained by the Commission, as opposed to the company-specific ''do-not-call'' lists for which the FCC definition was crafted. The Commission believes that an ''established business relationship'' exemption in a national list applying to many sellers and telemarketers should be carefully and narrowly crafted to ensure that appropriate companies are covered while excluding those from whom consumers would not expect to receive calls. A specific time limit balances the privacy needs of consumers and the need of businesses to contact their current customers.

Comments received in response to the NPRM stress the importance of extending such an exemption to current, existing relationships and prior relationships that occurred within a reasonable period of time.[133] Throughout the comments from industry stressing the need for an ''established business relationship'' exemption, a consistent theme is that *such an exemption is necessary for ''existing customers'' or someone with whom sellers ''currently do business*,'' and there seems to be a common understanding regarding what constitutes an ''existing'' relationship.[134] There is less consensus when it comes to the issue of how long a business relationship lasts *following* a transaction between a seller and consumer. Many states have attempted to provide some clarity regarding how long after dealings between a consumer and seller have ceased that a residual ''established business relationship'' could be deemed still to exist.

Twelve of the states that have an ''established business relationship'' exemption limit it to a specific time period after a transaction has occurred, ranging from six months to 36 months.[135] Industry commenters suggested various time periods to limit the exemption. Several suggested 24 to 36 months, while others stated that a shorter period (12 months) would be more appropriate.[136] The Commission believes, based on the record evidence and statements from Congress regarding the TCPA's ''established business relationship,'' that a company should be able to claim the exemption only if there has been a relatively recent transaction between the customer and the seller sufficient to support the existence of an ''established business relationship.''

Based on the comments, the Commission finds little support for a 36-month time period. Most of the commenters who suggested that time period did so as part of a joint comment filed by five associations.[137] In the comments the individual associations filed separately, however, they suggested a time period of 24 months.[138] NAA initially suggested 24 months, but expanded that to 36 months in its supplemental comment. Industry commenters who advocate 24 months provide little support for their assertion that it is the appropriate length of time by which to measure ''reasonableness;'' nor did they submit data that would show that a shorter time period would not serve their purposes. Other industry members (such as Bank of America, Consumer Mortgage Coalition, and Federated Department Stores) suggested shorter time periods. The Commission does not believe that a relationship which terminated or lapsed two years ago would constitute a relationship that had recently terminated or lapsed. The Commission believes that if consumers received a call from a company with whom the most recent purchase, rental, lease or financial transaction occurred or lapsed two years ago or longer, consumers would likely be surprised by that call and find it to be unexpected.

The Commission believes that 18 months is an appropriate time frame because it strikes a balance between industry's needs and consumers' privacy rights and reasonable expectations about who may call them and when. By extending beyond a single annual sales cycle, the 18-month period allows sufficient time for businesses to renew contact with prospects who may only purchase once a year. Moreover,

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[131] Fourteen state ''do-not-call'' statutes are open-ended and do not contain a time limit for tolling the established business relationship: Alabama, California, Connecticut, Florida, Georgia, Idaho, Kentucky, Maine, Minnesota, Oregon, Texas, Vermont, Wisconsin, and Wyoming. Three of these ''open-ended'' state statutes incorporate the FCC definition either in whole or in part: California, Texas, and Wyoming. In addition, four other states incorporate the FCC definition in whole or in part, but limit the time period during which a business may claim an ''established business relationship'' once the relationship has lapsed: Colorado, Kansas, Oklahoma, and Pennsylvania. See note 592 below for citations to all state ''do-not-call'' statutes.

[132] *See* discussion and note 135 below.

[133] The comments received on ''established business relationship'' came primarily from the business community. On the other hand, there was little comment from consumer advocates and state regulators on how such an exemption would be formulated because the proposed Rule did not include an ''established business relationship'' exemption. However, the NPRM did ask about the effect on companies and charitable organizations with whom consumers had a pre-existing business or philanthropic relationship of the proposal to allow companies to call consumers on the ''do-not-call'' registry if they had given their express verifiable authorization to call (67 FR at 4539, question 9). As discussed in more detail above in note 124, those few consumer advocates who did mention such an exemption were opposed to it.

[134] *See, e.g.*, ABA-NPRM at 10; Community Bankers-NPRM at 2; AmEx-NPRM at 3; ANA-NPRM at 5; Associations-NPRM at 2; ARDA-NPRM at 17; Bank One-NPRM at 4; BofA-NPRM at 4; Best Buy-NPRM at 1; Cendant-NPRM at 5-6; Citigroup-NPRM at 4; Comcast-NPRM at 3; CMC-NPRM at 6; Cox-NPRM at 2, 4; DMA-NPRM at 33, 34; Eagle Bank-NPRM at 2; Roundtable-NPRM at 5; Gottschalks-NPRM at 1; NCTA-NPRM at 4; NRF-NPRM at 13; SIIA-NPRM at 2-3; Time-NPRM at 6; VISA-NPRM at 3.

[135] Six months (Louisiana, Missouri); 12 months (Pennsylvania, Tennessee); 18 months (Colorado, Illinois); 24 months (Alaska, Massachusetts, Oklahoma); 36 months (Arkansas, Kansas). In addition, New York apparently has adopted an 18-month time period: the New York statute does not contain a time limit; however, at the June 2002 Forum, NYSCPB stated that New York applies an 18-month time limit. June 2002 Tr. I at 115 (''We have two separate exemptions. . . . The second thing is a prior business relationship, which we define as an exchange of goods and services for consideration within the preceding 18 months. . . .''). Indiana's statute does not have an exemption for ''established business relationships.''

[136] Industry commenters generally supported a 24-month time period, but did not submit data that would tend to show that a shorter time period would not serve their purposes. The breakdown of suggested time periods is as follows: ''recently terminated or lapsed'' (New Orleans-NPRM at 14-15); 12 months (BofA-NPRM at 4; CMC-NPRM at 6-7); 24 months (ATA-Supp. at 8; ERA-NPRM at 38; ERA-Supp. at 19; MPA-Supp. at 11; NAA-NPRM at 11; June 2002 Tr. I at 109 (PMA)); 36 months (ARDA-NPRM at 20; Associations-Supp. at 3-4). In a supplement to their comment, FDS supported limiting telemarketing sales calls to customers who have made a purchase in the past 12 months, while allowing strictly informational calls to persons who have had a transaction within the past 36 months. Federated-Supp. at 1-2.

[137] *See* Associations-NPRM at 3-4.

[138] *See* note 136 above.

limiting the ''established business relationship'' to 18 months from the date of the last purchase or transaction would be at least as restrictive as the majority of states that have such an exemption, thus achieving greater consistency for both industry and consumers. The experience of states that have an ''established business relationship'' exemption in their ''do-not-call'' laws indicates that a relatively limited ''established business relationship'' exemption does not conflict with consumers' expectations. At the June 2002 Forum, the representatives from New York and Missouri spoke about consumer expectations in connection with their states' ''do-not-call'' lists.[139] Both noted that consumers appeared to be comfortable with such an exemption because they had received few complaints from consumers regarding companies with whom they had an established relationship.[140] The states' experience is not contradicted by the comments of individual consumers in response to a specific question included on the Commission's website inviting email comments from the public. Although 60 percent of consumers who responded to this question stated that they opposed an exemption for ''established business relationship,'' 40 percent favored such an exemption.[141]

Furthermore, a study conducted in 2002 by the Information Policy Institute found that consumers preferred a ''nuanced approach'' to the ''do-not-call'' issue, wanting to limit some calls to their household, but not all calls.[142] According to the study, 50 percent of consumers surveyed supported regulations that would allow local or community-based organizations to call during specific hours of the day.[143] Furthermore, slightly less than half of the respondents supported legislation that would allow calls, but only from local or community-based organizations with whom they have an existing relationship.[144] The survey showed that consumers were less likely to welcome calls from national companies, although 40 percent indicated that they would allow calls from national organizations with whom they had an existing relationship.[145]

In sum, consumers are split over whether they favor an ''established business relationship'' exemption. Given the difference of opinion among consumers, and industry's convincing arguments regarding the detrimental effects the lack of an exemption would cause, the Commission is persuaded to provide an exemption for ''established business relationships.''

The definition of ''established business relationship'' in the amended Rule would limit the exemption in the case of inquiries and applications to three months after the date of the application or inquiry (except with the consumer's express consent or permission to continue the relationship). The Commission believes that a consumer's reasonable expectations are different in the case of inquiries and applications as compared to purchase, rental, and lease transactions. A simple inquiry or application would reasonably lead to an expectation of a prompt follow-up telephone contact close in time to the initial inquiry or application, not one after an extended period of time. Comments from NYSCPB at the June 2002 Forum also warned of possible abuse in the creation of an ''established business relationship'' based on inquiries from consumers.[146] The Commission believes three months should be a sufficient time frame in which to respond to a consumer's inquiry or application.

The amended Rule allows for an 18-month time limit where there has been a purchase, rental or lease, or other financial transaction between the customer and seller. The 18-month time limit for an ''established business relationship'' based on a purchase, lease, rental, or financial transaction runs from the date of the last payment or transaction, not from the first payment. In instances where consumers pay in advance for future services (*e.g.*, purchase a two-year magazine subscription or health club membership), the seller may claim the exemption for 18 months from the last payment or shipment of the product. For such ongoing relationships, it makes little difference to likely consumer expectations whether the purchase was financed over time or paid for up front. Sellers who provide products or services where the consumer is required to pay in advance can also get the consumer's express agreement to call, as provided in § 310.4(b)(1)(iii)(B)(*i*).

Several financial services industry commenters urged that any ''established business relationship'' exemption should encompass all affiliates of a seller.[147] These commenters noted that regulatory requirements often dictate the corporate structure of financial institutions, which must market products and services across holding company affiliates and subsidiaries.[148] For that reason, they suggested that any exemption for an ''established business relationship'' should extend to all members of a corporate family, including affiliates and subsidiaries, so long as the individual has an ''established business relationship'' with any member of that corporate family.[149] They also suggested that agents of the seller be included within the exemption if the consumer reasonably would expect the agent to be included under the exception.[150]

The Commission believes that such a broad definition of ''established business relationship'' is inappropriate in the context of a ''do-not-call'' registry which is intended to protect consumers' privacy. As stated earlier, the Commission believes that such an exemption must be narrowly crafted to avoid defeating the purpose of the ''do-not-call'' registry. In determining whether affiliates or subsidiaries should

[139] *See* June 2002 Tr. I at 110-21.

[140] *Id.* at 118-19 (New York: ''Well, [consumers are not unhappy], and a lot of times they complain, and you could say they're [sic] prima facie evidence they're unhappy. We call them back and say, gee, did you have a transaction with these folks? They claim you did on X, Y and Z, and they furnished us this paperwork. And then they say, oh, yeah. They don't seem to be mad.'') (Missouri: ''Most people when you call them back are delighted that 70 to 80 percent of their phone calls have been caused to not come in, so when we explain to them that you had a relationship or you explain to them that some of these calls are exempt, they understand when you explain that to them, and they're delighted, because our anecdotal information shows that 70 to 80 percent of the calls people had been receiving, they're not receiving now.'').

[141] Analysis of consumer email comments in the Commission's TSR comment database indicates that about 860 favored an exemption for calls from firms with whom they already have an established relationship, while about 1,080 opposed such an exemption. Furthermore, over 13,000 of the 14,971 comments submitted by Gottschalks' customers supported allowing Gottschalks to call them even if they signed up on a ''do-not-call'' registry to block other calls.

[142] Michael A. Turner, ''Consumers, Citizens, Charity and Content: Attitudes Toward Teleservices'' (Information Policy Institute, June 2002) at 4, 8 (hereinafter ''Turner study'').

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] [146]: June 2002 Tr. I at 116 (NYSCPB) (''[D]oes a mere inquiry constitute a business relationship? And our answer to that is no, because we have had some what I would say are really sleazy operators. They will call up and leave a message on your phone. They won't even identify who they are. They will simply say 'Call us back, it's very important.' You call back out of curiosity or whatever, okay, and then all of a sudden they feel free to bombard you for the next few years with calls.''). The Commission intends that such a practice would not entitle a seller or telemarketer to make calls to consumers by claiming to have an ''established business relationship.''

[147] *See, e.g.*, BofA-NPRM at 4; Bank One-NPRM at 4; Eagle Bank-NPRM at 2; Roundtable-NPRM at 5; Fleet-NPRM at 4; VISA-NPRM at 3-4.

[148] *See* Bank One-NPRM at 4; Fleet-NPRM at 4.

[149] *See* Eagle Bank-NPRM at 2; HSBC-NPRM at 2; Roundtable-NPRM at 5.

[150] *See* Roundtable-NPRM at 5.

be encompassed within an ''established business relationship,'' the Commission looks to consumer expectations: If consumers received a call from a company that is an affiliate or subsidiary of a company with whom they have a relationship, would consumers likely be surprised by that call and find it inconsistent with having placed their telephone number on the national ''do-not-call'' registry?

The Commission used similar reasoning in resolving this issue in connection with the definition of ''seller'' in the original Rule. In the discussion on the definition of ''seller,'' the Commission stated that there were several factors that it would consider in determining how it would view the Rule's application to diversified companies or divisions within one parent organization. Among those factors was ''whether the nature and type of goods or services offered by the division are substantially different from those offered by other divisions of the corporation or the corporate organization as a whole.''[151] This distinction looks to consumer expectations and whether a consumer would perceive the division to be the same as or different from other divisions or from the corporate organization as a whole. For example, a consumer who had purchased aluminum siding from Company A's aluminum and vinyl siding subsidiary would likely not be surprised to receive a call from kitchen remodeling service also owned by, and operating under the name of, Company A.

Thus, under the amended Rule, some but not all affiliates will be able to take advantage of the ''established business relationship'' exemption to the national ''do-not-call'' registry. The Commission intends that the affiliates that fall within the exemption will only be those that the consumer would reasonably expect to be included given the nature and type of goods or services offered and the identity of the affiliate. The consumer's expectations of receiving the call are the measure against which the breadth of the exemption must be judged.

*§ 310.2(o) — Free-to-pay conversion*

Section 310.2(o) of the amended Rule sets out a new definition:—''free-to-pay conversion.'' In connection with an offer or agreement to sell or provide goods or services, a ''free-to-pay conversion'' is ''a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.'' The term ''free-to-pay conversion'' is the terminology commonly used in the telemarketing industry to describe what was referred to throughout the Rule Review proceeding as a ''free trial offer.''[152]

A ''free-to-pay conversion'' is a form of ''negative option feature''—a term that is also newly defined in the amended Rule and is discussed below. The term ''free-to-pay conversion'' comes into play in the amended Rule in three provisions. First, as a form of negative option feature, any ''free-to-pay conversion'' is subject to the newly-added disclosure requirements in § 310.3(a)(1)(vii). Second, where a telemarketing offer involves a ''free-to-pay conversion,'' and is accepted by a consumer using a payment method subject to the express verifiable authorization requirements of § 310.3(a)(3), the seller or telemarketer may not use the written confirmation form of authorization generally available under § 310.3(a)(3)(iii). Third, under the new unauthorized billing provision at § 310.4(a)(6), the amended Rule sets forth specific requirements to obtain express informed consent in any transaction involving preacquired account information and a ''free-to-pay conversion.'' Each of these provisions is discussed in detail below.

*§ 310.2(q)—Material*

The amended Rule retains unchanged the definition of ''material'' from the original Rule, except for extending it to charitable contributions pursuant to the mandate of the USA PATRIOT Act. The Commission received no comments on this definition in response to the NPRM. The amended Rule has deleted the designations for subsections (a) and (b) that had been proposed in the NPRM. This is merely a formatting change and does not alter the substantive content of the definition. The amended Rule's definition of ''material,'' therefore, reads: ''likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution.''

*§ 310.2(t)—Negative option feature*

The amended Rule includes new requirements in § 310.3(a)(1)(vii) for specific material disclosures necessary to avoid misleading consumers with respect to offers that entail incurring an obligation to pay a seller due to the consumers' non-action. To describe the circumstances when these disclosures must be made, the amended Rule employs the term ''negative option feature'' and, accordingly, provides a definition of that term in § 310.2(t). A ''negative option feature'' is any provision under which the consumer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer. This provision includes, but is not limited to, ''free-to-pay conversions,'' (which are discussed above), as well as negative option plans[153] and continuity plans.[154] Section 310.3(a)(1)(vii) below provides a detailed discussion of the definition of ''negative option feature'' and the disclosures necessary when such a provision is a part of an offer to sell goods or services.

*§ 310.2(u)—Outbound telephone call*

Based on a review of the record, the Commission has decided to retain the definition of ''outbound telephone call'' that was in the original Rule, and not to expand the definition to include ''upsell'' transactions, as proposed in the NPRM. Many commenters noted that, by including upselling in the proposed Rule's definition of ''outbound telephone call,'' the proposal brought upselling transactions within all of the provisions relating to outbound calls,

[151] 60 FR at 43844.

[152] *See, e.g.*, Electronic Retailing Association, GUIDELINES FOR ADVANCE CONSENT MARKETING, http://www.retailing.org/regulatory/publicpolicy__consent.html; Magazine Publishers of America, Resources - Research: ''Advance Consent Subscription Plans,'' http://www.magazine.org/resources/advance__consent.html.

[153] Under a ''negative option plan,'' the customer agrees to purchase a specific number of items in a specified period of time. The customer receives periodic announcements of the selections; each announcement describes the selection, which will be sent automatically and billed to the customer unless the customer tells the company not to send it. *See* the Commission's Rule governing ''Use of Negative Option Plans by Sellers in Commerce,'' 16 CFR 425.

[154] A ''continuity plan'' consists of a subscription to a collection or series of goods. Customers are offered an introductory selection and agree to receive additional selections on a regular basis until they cancel their subscription. Unlike negative option plans, customers do not agree to buy a specified number of additional items in a specified time period, but may cancel their subscriptions at any time. Continuity plans resemble negative option plans in that customers are sent announcements of selections and those selections are shipped automatically to the customer unless the customer advises the company not to send them. Unlike negative option plans, however, customers are not billed for the selection when it is shipped, but only if they do not return the selection within the time specified for the free examination period. *See, e.g.*, FTC Facts for Consumers, ''Continuity Plans: Coming to You Like Clockwork,'' (June 2002), http://www.ftc.gov/bcp/online/pubs/products/continue.htm. *See also* FTC, ''Pre-Notification Negative Option Plans'' (May 2001) (distinguishing these plans from continuity plans), http://www.ftc.gov/bcp/online/pubs/products/negative.htm); and FTC, ''Facts for Business: Complying with the Telemarketing Sales Rule,'' http://www.ftc.gov/bcp/online/pubs/buspubs/tsr.htm.

which led to unintended and undesirable consequences, such as subjecting upsells to the calling time restrictions and national ''do-not-call'' registry provisions.[155] The amended Rule addresses upselling transactions separately, rather than attempting to sweep them within the definition of ''outbound telephone call.''[156] The amended Rule reinstates the original definition of ''outbound telephone call,'' with only a modification to reflect the expanded reach of the Rule to charitable contributions pursuant to the USA PATRIOT Act. In the amended Rule, then, an '''[o]utbound telephone call' means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.''

*§ 310.2(w)—Preacquired account information*

The amended Rule adds a definition of ''preacquired account information'' to address the problems that have been associated with telemarketing transactions where the telemarketer already has access to the customer's billing information at the time the outbound call is placed.[157] The NPRM discussed these problems at length. The Commission used the term ''preacquired account telemarketing'' in the NPRM during its discussion of the proposed ban on disclosing or receiving billing information for use in telemarketing, but did not use the term itself in the proposed Rule, and so did not define it.[158] In response, several industry commenters asked for more specificity as to what the Commission intends the term to mean.[159] Thus, the definition of ''preacquired account information'' also serves to address these commenters' concerns about clarifying the concept of preacquired account telemarketing.

As explained in detail in the discussion of § 310.4(a)(6) below, the amended Rule sets forth specific requirements for obtaining express informed consent in any telemarketing transaction that involves ''preacquired account information.'' To clarify the situations where these requirements come into play, the amended Rule defines ''preacquired account information'' as:

> any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged.

The Commission intends this definition to be construed broadly. The definition includes any type of billing information, encrypted or unencrypted,[160] that enables a seller or telemarketer to cause a charge to be placed on any customer's or donor's account without obtaining the account number directly from the customer or donor. It obviously covers instances where the seller or telemarketer is in actual possession of account information, whether by virtue of some prior relationship with the consumer or otherwise. It also is intended specifically to address affinity marketing campaigns where, for example, through a joint marketing arrangement, Seller A provides access to its customer base and those customers' accounts or account numbers to Seller B in exchange for a percentage of the proceeds from each sale.[161]

Some industry members expressed their belief that this second class of transactions does not involve preacquired account information at all because, in such affinity marketing campaigns, Seller B may possess only encrypted account numbers, or no account numbers at all prior to initiating the call to the consumer.[162] The Commission intends to clarify that such an arrangement *does* involve ''preacquired account information,'' since the seller or telemarketer does not have to obtain the account number from the customer or donor in order to cause a charge to be placed on the customer's or donor's account.

Finally, this definition would apply to upsell transactions, because the seller or telemarketer in the upsell transaction may either already possess the account information from the initial transaction, or would, by virtue of a joint marketing or other arrangement, have access to that information, so as to be able to charge the customer without getting the account number directly from the customer in the upsell transaction.

*§ 310.2 (cc) — Telemarketing*

The Commission received very few comments on its proposed definition of ''telemarketing,''[163] but those it did receive expressed agreement that the definition should continue to include the phrase ''by use of one or more telephones,'' to ensure that large and small telemarketing operations are covered by the Rule.[164] Based on the Commission's review of the record in this proceeding, the amended Rule retains unchanged the definition of ''telemarketing'' that was proposed in the NPRM. This definition is virtually the same as that in the original Rule, except that it now includes the phrase ''or a charitable contribution'' following ''goods or services,'' pursuant to the mandate of the USA PATRIOT Act.

*§ 310.2(dd) — Upselling*

As described above in § 310.2(u), the Commission proposed in the NPRM to modify the Rule's definition of ''outbound telephone call'' to include most upsell transactions.[165] The majority of commenters who addressed this issue, including both industry members and consumer groups,

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[155] *See, e.g.,* ABA-NPRM at 4; AmEx-NPRM at 6; AFSA-NPRM at 16; Associations-NPRM at 3; Cendant-NPRM at 2; CCC-NPRM at 13; Cox-NPRM at 6; KeyCorp-NPRM at 6; Metris-NPRM at 9; MBA-NPRM at 4; NBCECP-NPRM at 2; NCTA-NPRM at 13-14; PCIC-NPRM at 1; PMA-NPRM at 10-11; Time-NPRM at 10; VISA-NPRM at 8; Wells Fargo-NPRM at 5-6.

[156] *See* § 310.2(dd), defining the term ''upselling'' in the amended Rule.

[157] *See* discussions of amended Rule §§ 310.4(a)(5) and (6) below.

[158] *See* 67 FR at 4512-14.

[159] *See, e.g.,* June 2002 Tr. II at 123-24 (CCC), 133-34 (ERA) and 173 (ATA); PMA-NPRM at 13-14; MPA-Supp. at 5; PRA-NPRM at 13-14.

[160] By ''unencrypted,'' the Commission means both unencrypted readable account information, and encrypted information in combination with a decryption key. *See* discussion of amended Rule § 310.4(a)(5) below.

[161] *See* 67 FR at 4513.

[162] ERA/PMA-Supp. at 14; June 2002 Tr. II at 134 (ERA). ERA described such a scenario during the June 2002 Forum:

> ''What typically might occur is L.L. Bean might enter into some type of [affinity] agreement with Timberland to say, We would like you to sell your boots . . . to our customers. . . . So L.L. Bean would provide the name and telephone number . . . and they might provide some unique identifier, it could be a four digit code. It might be an encrypted code that's used solely for the purpose of matching back, but the account billing number or any information that would provide access to the account is not transmitted to the telemarketer when you make that call. They make the call to the consumer. They ask the consumer if they want to order the boots. If the customer says yes, that information is then transferred to Timberland. Timberland would go back to L.L. Bean and say, This customer has accepted our offer. We would now like to get the account information to bill the consumer for something that they've authorized.''

June 2002 Tr. II at 136-37.

[163] Although few commenters directly addressed this definition, many who commented on the USA PATRIOT Act amendments discussed the expansion of the Rule to cover the solicitation of charitable contributions. These comments are addressed above, in the discussion of amended Rule § 310.1 relating to the scope of the Rule.

[164] DOJ-NPRM at 1 (noting its experience with fraudulent telemarketers operating using only one or two telephones); Patrick-NPRM at 2 (urging that the practice of subcontracting telemarketing to individual sales agents who work from their homes using their home phones continue to be captured by the Rule).

[165] Specifically, the Commission proposed amending the definition to mean ''any telephone call to induce the purchase of goods or services or to solicit a charitable contribution, when such telephone call: (1) is initiated by a telemarketer; (2) is transferred to a telemarketer other than the original telemarketer; or (3) involves a single telemarketer soliciting on behalf of more than one seller or charitable organization.'' Proposed Rule § 310.2(t), 67 FR at 4541.

supported the proposition that upsells should be expressly included in the Rule.[166] Most of these commenters, however, suggested that the Commission's proposal to address the problem by expanding the definition of ''outbound telephone call'' to include upselling was not the most effective way to achieve this goal.[167] Instead, many commenters recommended treating upsells as a distinct type of transaction by adding a definition of ''upselling'' to the Rule and specifying a unique set of disclosures required in upsell transactions.[168] Others suggested retaining the expanded definition of ''outbound telephone call'' but amending it to avoid application of certain provisions unnecessary or inappropriate to the upselling context,[169] such as application of the ''do-not-call'' and calling time provisions of the Rule, to upsells.[170] The Commission does not intend for upselling to be subject to the ''do-not-call'' requirements or the calling time restrictions in the Rule.[171] The goal of the initial proposal,[172] and the focus of the current amendments, is to ensure that consumers in upselling transactions receive the same information and protections as consumers in other telemarketing transactions subject to the Rule.

Based upon the comments received during the rulemaking period and the Commission's law enforcement experience, the Commission has taken a two-fold approach to upselling in the amended Rule. The Commission has added a definition of ''upselling,'' which, in combination with certain amendments to §§ 310.4(d) and 310.6 of the Rule,[173] provides important protections to consumers who, after completing one transaction, are offered goods or services in an additional telemarketing transaction during the same telephone call.[174] By including the definition, the Commission intends to clarify that upsells are subject to all of the Rule's requirements except the ''do-not-call'' and calling time restrictions in §§ 310.4(b)(1)(iii) and 310.4(c).[175] With this definitional shift, the ''do-not-call'' regime no longer applies to upsells, since the ''do-not-call'' provisions specifically prohibit ''initiating outbound telephone calls'' to anyone who has placed their telephone numbers on a company-specific ''do-not-call'' list or on the FTC's ''do-not-call'' registry.[176] Second, the amended Rule expressly excludes upsell transactions from the exemptions in §§ 310.6(b)(4), (5) and (6)—*i.e.*, where the initial transaction is exempted from the Rule because the call was initiated by the consumer unilaterally or because it was initiated in response to a direct mail solicitation or general media advertisement.[177]

The definition of ''upselling'' encompasses any solicitation for goods or services that follows an initial transaction of any sort in a single telephone call. Thus, both solicitations made by or on behalf of the same seller involved in the initial transaction, and those made by or on behalf of a different seller are considered upsells, and both types of transactions are covered by the Rule.[178] The term ''initial transaction'' is intended to describe any sort of exchange between a consumer and a seller or telemarketer, including but not limited to sales offers, customer service calls initiated by either the seller or telemarketer or the consumer, consumer inquiries, or responses to general media advertisements or direct mail solicitations. The upsell is defined as a ''separate telemarketing transaction, not a continuation of the initial transaction'' to emphasize that an upsell is to be treated as a new telemarketing call, independently requiring adherence to all relevant provisions of the Rule.[179]

Upselling occurs in a wide variety of circumstances—as an addendum to a customer service call, or after an initial

[166] *See, e.g.*, AmEx-NPRM at 6 (''We agree with the Commission that the disclosure requirements of the TSR should apply whenever a new offer is made to the consumer, whether by the original telemarketer or a telemarketer to whom a call is transferred. Consumers should always be informed of material terms and conditions before they purchase a product.''); ERA-NPRM at 8, 11 (''The ERA is cognizant of the fact that the practice of upselling has increased dramatically since the Rule was originally promulgated in 1995. . . . The ERA acknowledges the Commission's desire to include upsells within the ambit of the Rule and supports the position that, in instances where solicitations are made during a single telephone call on behalf of multiple unaffiliated entities, there should be a clear disclosure. . . .''); ERA-Supp. at 6; LSAP-NPRM at 6; NAAG-NPRM at 36; NCL-NPRM at 3; PMA-NPRM at 4, 8 (''PMA acknowledges that the practice of marketing products and services via upsell offers has increased in recent years and that the existing TSR does not provide express guidance regarding responsible marketing practices via the upsell channel.''); June 2002 Tr. II at 213-15, 249-50. *But see* CCC-NPRM at 15-16; CMC-NPRM at 7; Household Auto-NPRM at 3; Keycorp-NPRM at 5-6; Noble-NPRM at 3; NATN-NPRM at 3-4; NSDI-NPRM at 4; PCIC-NPRM at 1-2; Technion-NPRM at 5.

[167] AmEx-NPRM at 6; ARDA-NPRM at 4; DMA-NPRM at 38; ERA-NPRM at 8, 12; Household Auto-NPRM at 3; ICT-NPRM at 2; E-Commerce Coalition-NPRM at 2; NCTA-NPRM at 14; PMA-NPRM at 8-10; SIIA-NPRM at 3; Time-NPRM at 9; June 2002 Tr. II at 213-14.

[168] *See, e.g.*, ERA-NPRM at 14-15; ERA-Supp. at 6; PMA-NPRM at 8-10.

[169] ARDA-NPRM at 4; Cox-NPRM at 36; Discover-NPRM at 5; Eagle Bank-NPRM AT 4; NCL-NPRM at 3.

[170] ABA-NPRM at 4-5; AFSA-NPRM at 15; ARDA-NPRM at 4; CCC-NPRM at 13; DMA-NPRM at 38; Eagle Bank-NPRM at 4; NCTA-NPRM at 14; PMA-NPRM at 10; SIIA-NPRM at 3; Time-NPRM at 10. The ''do-not-call'' provision is found at proposed and amended Rules § 310.4(b)(1)(iii), while the calling time restrictions are at proposed and amended Rules § 310.4(c).

[171] June 2002 Tr. II at 213-15.

[172] *See* 67 FR at 4500.

[173] Section 310.4(d) now includes the phrase ''or internal or external upsell'' after ''outbound telephone call'' to clearly state that the basic disclosure requirements of that provision—the identity of the seller, that the purpose of the call is to sell goods or services, the nature of the goods or services, and disclosures related to prize promotions—must be made in any upsell associated with an initial telephone transaction. Sections 310.6(b)(4), (5) and (6) have been amended to expressly exclude upsells from these exemptions.

[174] The provisions relating to ''upselling'' address the practices which the Commission had proposed to address in the NPRM through modification of the definition of ''outbound telephone call.'' Because the amended Rule addresses the practice of ''upselling'' in a different manner, the amended Rule retains unchanged the wording in the original Rule for the definition of ''outbound telephone call'' (now expanded to cover calls to induce charitable contributions, pursuant to the USA PATRIOT Act). *See* § 310.2(u) of the amended Rule.

[175] In the NPRM, the Commission noted that in addition to the disclosure requirements of § 310.4(d) (and the proposed disclosures of § 310.4(e)), the disclosures in § 310.3(a)(1):

''would, of course, also have to be made by each telemarketer. In fact . . . the Commission believes that [in any upsell] it is necessary for this transaction to be treated as separate for the purposes of complying with the TSR. Therefore, in such an instance, the telemarketer should take care to ensure that the customer/donor is provided with the necessary disclosures for the primary solicitation, as well as any further solicitation. Similarly, express verifiable authorization for each solicitation, when required, would be necessary. Of course, even absent the Rule's requirement to obtain express verifiable authorization, telemarketers must always take care to ensure that the consumer's or donor's explicit consent to the purchase or contribution is obtained.''

67 FR at 4500, n.71.

[176] *See* § 310.4(b)(1)(iii).

[177] Treating upsells as ''outbound telephone calls'' meant that they were implicitly not covered by any of these exemptions (which all involve inbound telephone calls of one sort or another). Creating a separate definition for ''upselling'' requires that the Commission explicitly address which of the exemptions in § 310.6 of the Rule do *not* apply to upselling.

[178] In the NPRM, the Commission focused its analysis of upselling on whether there were one or two telemarketers or sellers involved in the upsell transaction. After reviewing the record in this matter, the Commission believes that the salient distinction is whether a separate offer is made in the course of a single telephone call.

[179] This definition also addresses the concerns of some telemarketers that simply transferring a consumer-initiated call to the individual most qualified to address the consumer's inquiry would trigger the application of the Rule to that otherwise exempt transaction. *See, e.g.*, CMC-NPRM at 7-8; Cox-NPRM at 35; Eagle Bank-NPRM at 4; HSBC-NPRM at 2. Instead of focusing on the transfer of a call, the definition of ''upselling'' centers on the instigation of an offer for sale of goods or services subsequent to an initial transaction. Thus, where a consumer calls a company, makes an inquiry, and is *immediately* transferred in direct response to that inquiry, that transfer would not fall within the definition of ''upselling'' and would not be subject to the Rule.

offer of goods or services via an inbound or outbound telephone call, for example.[180] The upsell can be made by or on behalf of the same seller involved in the initial transaction (''internal upsell''), or a different seller (''external upsell'').[181] Commenters argue that upsell transactions provide benefits to both sellers and consumers. According to some industry commenters, sellers can reduce costs associated with telemarketing by linking transactions together in a single call,[182] and are more likely to make successful sales to consumers already predisposed to the transaction.[183] Consumers can benefit from the convenience of such transactions, and from receiving more targeted marketing offers.[184] Industry commenters also suggested that sellers' reduced costs in such transactions are passed along as savings to consumers.[185]

Despite these benefits, upsells are no less vulnerable to abuse than other telemarketing practices, and provide the potential for harm to consumers. Some industry commenters argued that this is not the case, suggesting that, particularly when the call is initiated by the consumer: ''The consumer calling a business voluntarily puts herself in a business environment and knows that she is doing so. It should come as no surprise to the consumer if, once in that environment, she is solicited for products and services provided by affiliates or partners of the business . . . .''[186]

According to NCL, however, ''[c]omplaints to the NFIC [National Fraud Information Center] indicate that abuses can occur when consumers who respond to an advertisement for one thing are then solicited for something else, especially if the new offer is significantly different than the original one or is from another vendor. In these situations, the only information that consumers have on which to decide whether to make a purchase or donation is that which is provided during the call.''[187] In other words, in any upsell, the seller or telemarketer initiates the offer; it is not the consumer who solicits or requests the transaction. This means that the consumer is hearing the terms of that upsell offer for the first time on the telephone. The consumer has not had an opportunity to review and consider the terms of the offer in a direct mail piece, or to view an advertisement and gather information on pricing or quality of the particular good or service before determining to make the purchase. This makes an upsell very much akin to an outbound telephone call from the consumer's perspective, even when the seller is someone with whom the consumer is familiar. Thus, as NCL noted, every consumer needs ''the same basic disclosures about who they're dealing with, what they're buying and the terms and conditions [of the offer]'' regardless of the nature of the telephone sale.[188] The disclosure provisions of §§ 310.3(a) and 310.4(d) were designed to ensure that consumers know they are being offered goods or services for sale, and receive all information material to their decision to accept an offer before they pay for the purchase.

Moreover, it should be noted that the introductory paragraphs of §§ 310.3(a), 310.4(a) and 310.5 do not distinguish between types of telemarketing transactions.[189] The Rule is clear that its requirements and prohibitions apply to *all sellers and telemarketers* that are subject to the Commission's jurisdiction. Thus, a seller or telemarketer subject to the Rule must abide by the requirements of these sections, regardless of whether they are engaged in an initial telemarketing transaction or in an upsell transaction. Indeed, the Commission assumes that, where the initial transaction is subject to the Rule, most sellers and telemarketers treat the upsell as subject to the Rule as well, and comply with the Rule's requirements in both segments of the telephone call.[190]

The Commission also finds that consumers should have the Rule's billing protections in each of these transactions. CCC suggested that, at least in inbound calls that include upsells, consumers have ''the highest level of consumer protection because the consumer is specifically asked and consents to the additional goods or services being charged to the same billing source the consumer provided and/or accessed just moments before.''[191] However, the Commission's and states' law enforcement experience does not support CCC's assertion that, by giving consent to the use of an account number in an initial transaction, the consumer in an upsell is afforded protection from deception or unauthorized billing.[192]

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[180] *See, e.g.*, NAAG-NPRM at 33 (''The upsell can follow either a sales call or a call related to customer service, such as a call about an account payment or product repair. . . . Some examples are the upsell of membership programs, magazines and the like or a television solicitation to buy an inexpensive lighting product that includes an upsell of a costly membership program, consumers sold a membership program when attempting to purchase United States flags following the September 11, 2001, tragedy, or tickets to entertainment events.'') (citations omitted). Industry commenters emphasized the prevalence of upselling in the inbound call context generally. *See, e.g.*, CCC-NPRM at 12; ERA-NPRM at 11-12; PMA-NPRM at 9-10.

[181] The NPRM described these forms of upselling as ''internal'' and ''external.'' 67 FR at 4496. Some commenters, such as ERA, noted that the industry refers to multiple offers by a single seller—what the Commission calls an ''internal upsell''—as a ''cross sell,'' and to multiple offers by separate sellers—what the Commission calls an ''external upsell''—as an ''upsell.'' ERA-NPRM at 9, n.3. The Commission's approach, however, does not appear to have caused any confusion in the industry, or on the consumer side. So, for the sake of consistency both within the rulemaking process and with existing law enforcement cases, the Commission has decided to retain these terms as originally proposed.

[182] *See, e.g.*, PMA-NPRM at 9.

[183] CCC determined that 14 billion inbound calls are made per year, of which 40 percent have an upsell associated with them. June 2002 Tr. II at 218. ERA estimated, based on a 12 percent conversion rate, that approximately $1.5 billion in sales are generated through inbound upsells alone each year. ERA-NPRM at 11. Aegis estimated the conversion rate for consumers accepting upsell offers at between 25 and 30 percent. Aegis-NPRM at 4.

[184] DMA-NPRM at 40; PMA-NPRM at 10; SIIA-NPRM at 3.

[185] ERA-NPRM at 12; PMA-NPRM at 10; SIIA-NPRM at 3.

[186] CMC-NPRM at 9. *See also* Citigroup-NPRM at 6-7; Fleet-NPRM at 5; Household Auto-NPRM at 4.

[187] NCL-NPRM at 3. *Accord* ERA-NPRM at 11 (''The ERA is . . . aware of the fact that there have been some marketers who have engaged in unscrupulous marketing practices in soliciting purchases via upsells, particularly when such upsells involve a free trial offer and/or other advance consent marketing technique.'').

[188] June 2002 Tr. II at 221-22.

[189] Section 310.3(a) states ''it is a deceptive telemarketing act or practice and a violation of this Rule *for any seller or telemarketer to engage in the following conduct.*'' (emphasis added). Similarly, § 310.4(a) states ''it is an abusive telemarketing act or practice and a violation of this Rule f*or any seller or telemarketer to engage in the following conduct.*'' (emphasis added). Section 310.5(a) states ''any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities.''

[190] The record suggests, however, that the opposite is true when upsells are appended to calls that are otherwise exempt from the Rule. In these instances, the upsells have been treated as part of the exempt telemarketing transaction and, thus, consumers are not receiving the protections the Rule requires when a consumer receives an outbound telephone call, despite the fact that upsells are similar to outbound calls from the consumer's perspective. *See, e.g.*, PCIC-NPRM at 1-2. The Commission believes that the protections provided a consumer in an upsell should be the same as the protections accorded to consumers receiving an outbound telephone call, regardless of whether the upsell is appended to an exempt telemarketing transaction or to a transaction subject to the Rule. As noted above, consumer advocates and the FTC's law enforcement experience confirm that upselling can be equally or more problematic, and thus sellers and telemarketers engaged in upselling should be required to provide the basic disclosures mandated by the Rule. In addition, there is no evidence to suggest that upsells should not be subject to any other part of the Rule (other than the ''do-not-call'' and calling time restrictions).

[191] CCC-NPRM at 12.

[192] Indeed, law enforcement experience indicates that the fact that the consumer has already provided or authorized use of his or her billing information

Continued

*Other recommendations*

*Limitations to the definition of ''upselling.''* Some commenters suggested that the definition of ''upselling'' be limited to ''external upselling'' transactions (*i.e.*, where there are two different sellers in the two transactions).[193] They argued that any requirements that the Commission might apply to ''upselling'' should not include upsells made by or on behalf of the same seller.[194] However, the Commission believes that law enforcement experience indicates that ''internal upsells'' (where both transactions are by or on behalf of the same seller) have as much potential for deception and abuse as other types of telemarketing transactions that are subject to the Rule's requirements.[195] Therefore, the Commission has not adopted this suggestion.

Other commenters argued that the definition of ''upselling'' should not include upsells by ''affiliates.''[196] Still others made more specific requests to exempt banks, their affiliates and non-affiliated third parties who provide services on the banks' behalf or with whom the banks have joint marketing relationships;[197] to exempt agents or affiliates of common carriers;[198] and to exempt affiliates of insurance companies.[199] However, once again, there is scant support justifying such an approach. On the contrary, the record as a whole and law enforcement experience indicate that upsells by affiliates and non-affiliated third parties with whom there is a joint marketing relationship have as much potential for deception and abuse as other types of telemarketing transactions that are subject to the Rule's requirements.[200]

The Commission has made it very clear that the Rule does not apply to entities or activities that fall outside the Commission's authority under the FTC Act, such as banks, savings associations and federal credit unions; regulated common carriers, and the business of insurance. However, the Commission has also made it very clear that the exemption enjoyed by those entities does not extend to any third-party telemarketers who may make or receive calls on behalf of those exempt entities. As the Commission stated in the SBP for the original Rule:

> The Commission is not aware of any reason why the Final Rule should create a special exemption for such companies where the FTC Act does not do so. Accordingly, the Final Rule does not include special provisions regarding exemptions of parties acting on behalf of exempt organizations; where such a company would be subject to the FTC Act, it would be subject to the Final Rule as well.[201]

*Clarification of ''seller'' in an upsell transaction.* ERA and PMA recommended that the Commission clarify what is meant by ''seller'' in the context of upselling.[202] First, ERA and PMA suggested that ''seller'' be construed as the marketer who will submit the charge for payment against the consumer's account.[203] As ERA stated:

> [A] marketer might offer (and bill) a consumer for a product that it obtains on a wholesale basis from a manufacturer (in many instances, the marketer may not even take possession of the product, but rather have the manufacturer ship directly to the purchaser). Both the marketer and the manufacturer receive consideration in exchange for providing, or arranging for the other to provide, the product to the consumer. Thus, both entities are arguably 'sellers.' However, only the marketer will bill the consumer for the sale. As such, there should be no need to identify both entities to the consumer. In fact it would likely be confusing to the consumer to do so.[204]

The Commission has retained in the amended Rule the definition of ''seller,'' which states that a ''seller'' is ''any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.''[205] The Commission believes that this definition makes clear that, for purposes of the Rule, a ''seller'' is not necessarily the manufacturer of a product, nor the sole financial beneficiary from its sale. Rather, the definition of ''seller'' is predicated upon a person's provision of goods or services—whether consummated, merely offered, or even simply ''arranged for''— to the customer. Therefore, in the case of an upselling transaction, or, indeed, any telemarketing transaction, the marketer or other entity who provides, offers to provide, or arranges for the provision of the goods or services that are the subject of the offer would be the ''seller'' for purposes of the Rule.

Second, both ERA and PMA, as well as a number of other commenters, suggested that the Commission ''clarify that affiliated entities do not constitute separate sellers.''[206] To this end, ERA recommended looking to the Commission's Privacy of Consumer Financial Information Rule,[207] while PMA and NRF suggested using the standard laid out by the FCC for ''do-not-call'' purposes.[208] NCL and AARP disagreed. NCL stated:

> We believe affiliates have to be treated as second sellers. They may be selling totally different products with different terms and conditions. Consumers don't have any way of knowing what is an affiliate of that company and what isn't, and ultimately it doesn't really matter to them because they need the same basic disclosures about who they're dealing with, what they're buying and the terms and conditions, whether it's entirely a different seller or an affiliate of the original one.[209]

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in an initial transaction may actually result in greater risk of abuse during the second transaction. For example, in actions by the FTC and several states against Triad Discount Buying Service, Inc., and related entities, the Commission and the states alleged that the defendants crafted a marketing campaign designed to lure consumers to call solely for the purpose of upselling them. *See FTC v. Smolev*, No. 01-8922-CIV ZLOCH (S.D. Fla. 2001). Specifically, the Commission and states alleged that the defendants ran an advertising campaign for a free product, inviting consumers to call a toll-free number. When they called, consumers were asked to provide account information to pay for shipping and handling for the free product, and then were upsold a ''free trial'' in a membership club or buyers club, that was then charged, without the consumer's knowledge or consent, to the account provided by the consumer to pay for the shipping of the first product. *See also* NAAG-NPRM at 30, n.73 (*citing*, among others such cases, *Illinois v. Blitz Media, Inc.* (Sangamon County, No. 2001-CH-592) and *New York v. Ticketmaster and Time, Inc.*, (Assurance of Discontinuance)).

[193] ERA-NPRM at 9; NCTA-NPRM at 14.

[194] *Id.*

[195] *See* NAAG-NPRM at 30, n.73, citing cases involving internal upsells, including but not limited to *Illinois v. Blitz Media, Inc.* (Sangamon County, Case No. 2001-CH-592); *Triad Discount Buying Serv., Inc.* [a/k/a *Smolev*] and related entities; and *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001).

[196] ABIA-NPRM at 5; AFSA-NPRM at 15; NFC-NPRM at 6.

[197] ABIA-NPRM at 5; MBA-NPRM at 3.

[198] SBC-NPRM at 2, 5, 8.

[199] PCIC-NPRM at 1-2.

[200] *See* NAAG-NPRM at 30, n.73 (''States have taken actions against companies using preacquired information as part of an upsell of membership programs or magazines. *See* note 188. *See also New York v. Ticketmaster and Time, Inc.* (Assurance of Discontinuance)'').

[201] 60 FR at 43843.

[202] ERA-NPRM at 9-10; PMA-NPRM at 12-13. *See also* VISA-NPRM at 9 (requesting clarification of the term in all transactions, not just those involving upselling).

[203] ERA-NPRM at 10; PMA-NPRM at 13.

[204] ERA-NPRM at 11.

[205] Amended Rule § 310.2(z).

[206] ERA-NPRM at 10. *See also* June 2002 Tr. II at 222 (ATA); PMA-NPRM at 13; SBC-NPRM at 9.

[207] The Privacy of Consumer Financial Information Rule, 16 CFR 313.3(a), defines an affiliate as ''any company that controls, is controlled by or is under common control with another company.'' (quoted in ERA-NPRM at 11).

[208] The applicable definition in the FCC's regulations is found at 47 CFR 64.1200(e)(2)(v). PMA-NPRM at 13 (''Thus, we suggest that corporate affiliates be exempt in those situations where the consumer would reasonably expect such affiliates to be related to the original seller.''). *See also* June 2002 Tr. II at 217-18; and at 226-28 (NRF).

[209] June 2002 Tr. II at 221-22; and at 228 (AARP).

The Commission shares this viewpoint. As discussed above, the record in this matter, as well as law enforcement experience, indicate that upsells by affiliates and non-affiliated third parties with whom there is a joint marketing relationship have as much potential for deception and abuse as other types of telemarketing transactions that are subject to the Rule's requirements. For that reason, the Commission believes that affiliates should be treated as separate sellers for purposes of upsell transactions.

*C. Section 310.3 — Deceptive Telemarketing Acts or Practices.*

Section 310.3 of the original Rule sets forth required disclosures that must be made in every telemarketing call; prohibits misrepresentations of material information; requires that a telemarketer obtain a customer's express verifiable authorization before obtaining or submitting for payment a demand draft; prohibits false and misleading statements to induce the purchase of goods or services; holds liable anyone who provides substantial assistance to another in violating the Rule; and prohibits credit card laundering in telemarketing transactions.

In the NPRM, the Commission proposed amendments to require that disclosures made pursuant to this section be made ''truthfully;'' require additional disclosures regarding prize promotions and in the sale of credit card loss protection plans; prohibit misrepresentations in the sale of credit card loss protection plans; expand the reach of the express verifiable authorization provision to include all methods of payment lacking certain key consumer protections; and make certain changes pursuant to the USA PATRIOT Act, which extends the coverage of the Rule to include the inducement of a charitable solicitation.

Based on the record in this proceeding, the Commission has determined to make additional modifications in the amended Rule. These changes, and the reasoning supporting the Commission's decisions, are set forth below.

*§ 310.3(a)(1) — Required disclosures*

Section 310.3(a)(1) of the original Rule requires the seller or telemarketer to disclose, in a clear and conspicuous manner, certain material information before a customer pays for goods or services offered.[210] The NPRM proposed to make a minor modification to the wording, by adding the word ''truthfully'' to clarify that it is not enough that the disclosures be made; the disclosures must also be true. The Commission received no comment on this proposed change, and therefore has determined to retain this additional wording in amended § 310.3(a)(1).

The few comments that the Commission received on § 310.3(a)(1) in response to the NPRM focused primarily on the timing of the required disclosures. AARP argued that, to be meaningful, the disclosures required by this section must be given before payment is *requested*, not merely before it is ''collected.''[211] According to AARP, ''[s]uch information is key to making truly informed buying decisions,'' and so all the necessary disclosures should be given before a consumer is requested to pay for goods and services.[212] DOJ commented that the use of money-transmission services, rather than couriers, is increasingly popular in fraudulent telemarketing schemes, and recommended that the Commission amend the current footnote addressing the meaning of ''before the customer pays'' to state: ''Similarly, when a seller or telemarketer directs a customer to use a money-transmission service to wire payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before directing the customer to take money to an office or agent of a money-transmission service to wire payment.''[213]

In the SBP for the original Rule, the Commission noted that for a telemarketer to make the required disclosures ''before a customer pays,'' the disclosures must be made ''*before* the consumer sends funds to a seller or telemarketer or divulges to a telemarketer or seller credit card or bank account information.''[214] In the original Rule's TSR Compliance Guide, the Commission further clarified that the disclosures required by § 310.3(a)(1) must be made ''[b]efore a seller or telemarketer obtains a consumer's consent to purchase, or persuades a consumer to send any full or partial payment. . . .''[215] The Guide goes on to say that ''[a] seller or telemarketer also must provide the required information before requesting any credit card, bank account, or other information that a seller or telemarketer will or could use to obtain payment.''[216] The Commission believes that its statements to date on the meaning of the term ''before the customer pays'' are sufficiently clear and declines to modify this provision.

*§ 310.3(a)(1)(i) — Disclosure of total costs*

Section 310.3(a)(1)(i) of the original Rule requires a seller or telemarketer to disclose the total costs to purchase, receive, or use the goods or services. As noted in the TSR Compliance Guide, ''[i]t is sufficient to disclose the total number of installment payments, and the amount of each payment, to satisfy this requirement.''[217] Some commenters in the Rule Review urged the Commission to require, in sales involving monthly installment payments, the disclosure of the total cost of the entire contract, not just the amount of the periodic installment.[218] In the NPRM, the Commission declined to modify the provision, but clarified that ''the disclosure of the number of installment payments and the amount of each must correlate to the billing schedule that will actually be implemented. Therefore, to comply with the Rule's total cost disclosure provision, it would be inadequate to state the cost per week if the installments are to be paid monthly or quarterly.''[219] The NPRM further noted that the best practice to ensure compliance with the clear and conspicuous standard governing all the § 310.3(a)(1) disclosures is to ''do the math'' for the consumer, stating the total cost of the contract whenever possible.[220] The Commission acknowledged that such a statement might not be possible in an open-ended installment contract, and stated that in such contracts, ''particular care must be taken to ensure that the cost disclosure is easy for the consumer to understand.''[221]

In response to the NPRM, the Commission again received some comments urging that the Commission affirmatively mandate that, in installment sales contracts, the total cost of the contract be disclosed, rather than the number and amount of payments.[222] For example, LSAP opined that ''it is illogical to maintain a provision that demands a subjective determination of whether or not a disclosure meets a 'clear and conspicuous' standard when an objective and unambiguous standard

[210] *See* ARDA-NPRM at 5 (noting that ARDA members support the current disclosures required by this section).

[211] AARP-NPRM at 8.

[212] *Id.*

[213] DOJ-NPRM at 2.

[214] 60 FR at 4384.

[215] TSR Compliance Guide at 11.

[216] *Id.*

[217] *Id.* at 12.

[218] *See* 67 FR at 4502.

[219] *Id.*

[220] *Id.*

[221] *Id.* at n.92.

[222] *See, e.g.*, LSAP-NPRM at 6-8; NACAA-NPRM at 7-8; NCL-NPRM at 3-4; NCLC-NPRM at 13.

can be adopted.''[223] NACAA suggested that the Commission require disclosure of the total cost of the contract, noting that consumers do not always have the time or ability to ''do the math'' during a telemarketing call.[224] NCL concurred with LSAP and NACAA, and noted that since the seller or telemarketer would know the total contract price in an installment offer, it would impose no undue burden on industry members to mandate disclosure of the total contract price.[225]

The Commission declines to adopt the recommendations to modify the total cost disclosure provision. The Commission believes that its interpretation, set forth in the NPRM, allows sellers and telemarketers the flexibility necessary to make a truthful and meaningful disclosure when goods or services are offered in conjunction with an open-ended installment agreement. The Commission's interpretation makes clear, however, that, at a minimum, the total number of payments and the amount of each must be clearly and conspicuously disclosed in order to satisfy the requirements of § 310.3(a)(1)(i). Although the Commission continues to believe that the best practice is for the telemarketer or seller to disclose the full amount of payments under of the contract whenever possible, it declines to impose such a requirement, which would be unworkable in the context of open-ended contracts, such as negative option plans.[226]

The Commission also declines to adopt the recommendation that the Commission explicitly state that for electricity sales, it is permissible to disclose the price per kilowatt hour.[227] The Commission recognizes that a vast number of goods and services can be sold through telemarketing, and believes it unnecessary to specify, for each, the specific terms that must be disclosed. Rather, the Commission believes that the language of § 310.3(a)(1)(i), which requires that the disclosure of total costs (among others) be made ''truthfully, and in a clear and conspicuous manner,'' provides sufficient guidance for sellers who must make these disclosures, without necessitating explicit approval from the Commission for each of the myriad variations of ''total cost'' disclosures for the many kinds of goods and services sold through telemarketing. Therefore, § 310.3(a)(1)(i) is retained unchanged in the amended Rule.

*§ 310.3(a)(1)(ii) — Disclosure of material restrictions*

Section 310.3(a)(1)(ii) requires the disclosure of ''[a]ll material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer.'' In response to the Rule Review, NAAG recommended that this provision explicitly state that the illegality of the goods or services offered is a material term. NAAG's concern arose out of the numerous cross-border foreign lottery scams in which U.S. citizens are offered the sale of foreign lottery chances.[228] The Commission declined to modify the Rule, stating its position that the term ''material'' is ''sufficiently clear and broad enough to encompass the illegality of goods or services offered.''[229]

In response to the NPRM, DOJ supported NAAG's reasoning, and recommended that the Commission add to § 310.3(a)(1)(ii) ''a specific and unambiguous reference to the illegality of goods and services that the seller or telemarketer is offering,'' noting that such an amendment would enhance law enforcement and consumer education efforts regarding foreign lottery scams.[230] The Commission remains confident that the breadth of the term ''material,'' as used in the Rule, would necessarily encompass the underlying illegality of goods or services offered in telemarketing.[231] Therefore, the Commission declines to modify the language in this provision and the amended Rule retains unchanged the original text of § 310.3(a)(1)(ii).

*§ 310.3(a)(1)(iv) — Disclosures regarding prize promotions*

Section 310.3(a)(1)(iv) requires that, in any prize promotion, a telemarketer must disclose, before a customer pays, the odds of being able to receive the prize, that no purchase or payment is required to win a prize or participate in a prize promotion, and the no-purchase/no-payment method of participating in the prize promotion. In the NPRM, the Commission proposed adding a disclosure that making a purchase will not improve a customer's chances of winning,[232] which would make the TSR's disclosure provision consistent with the requirements for direct mail solicitations under the Deceptive Mail Prevention and Enforcement Act of 1999 (''DMPEA'').[233] After reviewing the record in this matter, the Commission has determined to amend the Rule by adding this disclosure requirement to two provisions: in § 310.3(a)(1) (governing all telemarketing calls), and in § 310.4(d) (governing outbound telemarketing).[234]

As noted in the NPRM, the Commission believes that this disclosure will prevent consumer deception. The legislative history of the DMPEA suggests that without such a disclosure, many consumers reasonably interpret the overall presentation of many prize promotions to convey the message that making a purchase will enhance their chances of winning the touted prize.[235] Such a message is likely

[223] LSAP-NPRM at 7.

[224] NACAA-NPRM at 7-8 (citing, as an example of the harm that would persist absent such a provision, the sale of purportedly ''free'' magazines, for which consumers are billed exorbitant ''shipping and handling'' fees).

[225] NCL-NPRM at 3-4.

[226] *See* 60 FR at 43846 (noting that the total cost of a contract cannot be ascertained in negative option or continuity plans).

[227] *See* Green Mountain-NPRM at 7.

[228] 67 FR at 4502-03.

[229] *Id.* at 4503.

[230] DOJ-NPRM at 3.

[231] As the Commission noted in the NPRM, the definition of ''material'' under the Rule comports with the Commission's Deception Statement and established Commission precedent. *See* 67 FR at 4503.

[232] 67 FR at 4503. Although NCL originally made this suggestion with respect to § 310.4(d), which governs oral disclosures required in outbound telemarketing calls, the rationale and purpose of the proposed disclosure applies with equal force to all telemarketing, as covered by § 310.3(a). See NCL-RR at 9. *See also* the discussion below in the section on sweepstakes disclosures within the analysis of § 310.4(d).

[233] 67 FR at 4503. The DMPEA is codified at 39 U.S.C. 3001(k)(3)(A)(II). *See also* ''The DMA Guidelines for Ethical Business Practice,'' revised Aug. 1999, at http://www.the-dma.org/library/guidelines/dotherightthing.shtml#23 (Article #23, Chances of Winning). In this regard, it is noteworthy that the DMA's Code of Ethics advises that ''[n]o sweepstakes promotion, or any of its parts, should represent . . . that any entry stands a greater chance of winning a prize than any other entry when this is not the case.''

[234] *See* discussion below regarding the disclosure in § 310.4(d).

[235] *See* SEN. REP. NO. 106-102 (1999); and H. REP. NO. 106-431 (1999). Law enforcement actions since enactment of DMPEA further support this conclusion. For example, Publishers Clearing House (''PCH'') agreed to settle an action brought by 24 states and the District of Columbia alleging, among other things, that the PCH sweepstakes mailings deceived consumers into believing that their chances of winning the sweepstakes would be improved by buying magazines from PCH. As part of the settlement, PCH agreed to include disclaimers in its mailings stating that buying does not increase the consumer's chances of winning, and pay $18.4 million in redress. In 2001, PCH agreed to pay $34 million in a settlement with the remaining 26 states. *See, e.g., Missouri ex rel. Nixon v. Publishers Clearing House*, Boone County Circuit Ct., No. 99 CC 084409 (2002); *Ohio ex rel. Montgomery v. Publishers Clearing House*, Franklin County Ct. of Common Pleas, No. 00CVH-01-635 (2001 ). Similarly, in 1999, American Family Publishers (''AFP'') settled several multi-state class actions that alleged the AFP sweepstakes mailings induced consumers to buy magazines to better their chances of winning a sweepstakes. The original suit, filed by 27 states, was settled in March 1998 for $1.5 million, but was reopened and expanded to 48 states and the District of Columbia after claims that AFP had violated its agreement. The state action was finally settled in August 2000 with AFP agreeing to pay an additional $8.1 million in

to influence these consumers' purchasing decisions, inducing them to purchase a product or service they otherwise would not purchase just so they can increase their chances of winning. For this reason, the Commission believes that entities using these promotions must disclose that a purchase will not enhance the chance of winning, to ensure that consumers are not deceived.

Commenters who addressed this proposal generally were supportive of adding the disclosure.[236] NAAG supported the additional disclosure, but asked the Commission to go further. First, NAAG suggested that any telemarketer using a prize promotion should be required to disclose the actual or estimated odds—not simply how the odds might be calculated.[237] Second, NAAG recommended that the original Rule's definition of ''prize''[238] be made consistent with state laws and regulations, and the several multi-state settlements with large promotional sweepstakes companies.[239] Third, they recommended that the Commission track provisions in the recent settlements between the states and PCH, which would ensure that the means by which a consumer might enter a sweepstakes without making a purchase is not more difficult than if a purchase were made.[240] Each of these suggestions is discussed below.

As noted in the SBP for the original Rule, the Commission continues to believe that, in many instances, actual odds cannot be calculated in advance. In such circumstances, the Commission believes that requiring prize promoters to disclose ''estimated'' odds has greater potential for abuse than a disclosure of the method used to calculate those odds.[241] Furthermore, in many instances, such a requirement to disclose odds would reveal that virtually every entrant gets a ''prize.'' The Commission believes that the better course is to require prize promoters to disclose the method by which odds are calculated. With regard to the suggestions to revise the definition of ''prize'' and the ease of entry for non-purchasers, the record provides no evidence on why the difference between a ''prize'' and a ''free gift'' would be material to consumers. The Commission believes that its authority to reach deceptive or unfair acts or practices under the FTC Act has been sufficient to address any deceptive prize promotions that have not been reachable under the Rule.[242] The Commission's requirements regarding prize promotion disclosures are not inconsistent and do not conflict with the more restrictive state laws. Therefore, the Commission declines to adopt NAAG's recommendations.

PMA maintained that the disclosure that making a purchase would not improve a customer's chances of winning was unnecessary and that there was no evidence on the record to support its addition to the Rule.[243] They suggested that the disclosure makes sense in the context of direct mail, but not in the types of representations more often found in telemarketing.[244] Nonetheless, the PMA stated that, as a gesture of good faith, they would not oppose the change.[245]

Therefore, the Commission has determined that it is a deceptive telemarketing act or practice to fail to disclose before the customer pays, in any prize promotion, the odds of being able to receive the prize, that no purchase or payment is required to win a prize or participate in a prize promotion, that any purchase or payment will not increase the person's chances of winning, and the no-purchase/no-payment method of participating in the prize promotion.

*§ 310.3(a)(1)(v) — Required disclosure of material costs in prize promotions*

NACAA expressed concern that original and proposed Rule § 310.3(a)(1)(v) requires that a prize promoter disclose to consumers all ''material costs or conditions to receive or redeem a prize that is the subject of the prize promotion'' when there should be *no* costs to receive a prize.[246] NACAA suggests removing the ''material costs'' portion of subsection (v). The Commission agrees that there should be no costs to receive or redeem a prize. In fact, § 310.3(a)(1)(iv) requires a disclosure that ''no purchase or payment is required to win a prize or to participate in a prize promotion.'' Moreover, § 310.3(a)(2)(v) prohibits misrepresentations ''that a purchase or payment is required to win a prize or participate in a prize promotion.'' Thus the Rule is unequivocal in forbidding conditioning a ''prize'' on a payment or purchase. Section 310.3(a)(1)(v) is intended to further clarify that *any* incidental cost that a consumer must incur— not merely a purchase or payment—must be disclosed in advance to avoid deception and to comply with the Rule. Despite NACAA's comment, the Commission does not believe there is any confusion regarding the role of this provision. Therefore, the Commission has determined to retain the original wording of this provision.

*§ 310.3(a)(1)(vi) — Required disclosures in the sale of credit card loss protection*

The telemarketing of credit card loss protection plans has been a persistent source of a significant number of complaints about fraud.[247] Telemarketers of credit card loss protection plans represent to consumers that these plans will limit the consumer's liability if his credit card is lost or stolen.[248] These telemarketers frequently misrepresent themselves as being affiliated with the consumer's credit card issuer, or misrepresent either affirmatively or by omission that the consumer is not currently protected against credit card fraud, or that the consumer has greater potential legal liability for unauthorized use of his or her credit cards than he or she actually

damages. *See, e.g., Washington v. Am. Family Publishers*, King County Super. Ct., No. 99-09354-2 SEA (2000).

[236] ARDA-NPRM at 5; NAAG-NPRM at 54-55; NACAA-NPRM at 6-7; NCL-NPRM at 4; DOJ-NPRM at 3-4. *See also* June 2002 Tr. II at 105-15.

[237] NAAG-NPRM at 54. NACAA also recommended that the Commission require more specificity in the disclosure regarding the odds. NACAA-NPRM at 6-7; and discussion regarding the disclosure of odds, June 2002 Tr. II at 113-15. DOJ recommended that the Commission include a brief explanation in the Rule or in a footnote of what is meant by the phrase ''the odds of being able to receive a prize,'' and clarify that the disclosure must give the odds for each prize. DOJ-NPRM at 3-4.

[238] Original Rule § 310.2(v).

[239] NAAG-NPRM at 54. NAAG recommended that ''prize'' be defined to be an item of value and that it not be an item that substantially all entrants in the promotion will receive.

[240] *Id.* at 54-55.

[241] Ironically, requiring accurate disclosure of the odds of winning also is likely to subject some sellers and telemarketers to liability under the Rule for activity that does not cause consumer injury, since it is hard to imagine what harm is caused to consumers by *underestimating* the odds of winning.

[242] *See, e.g.*, *FTC v. Landers*, No. 100-CV-1582 (N.D. Ga. filed June 22, 2000); *New World Bank Servs., Inc.*, No. CV-00-07225-GHK (C.D. Cal. filed July 5, 2001); *Global Network Enters., Inc.*, No. 00-625 (GET) (ANX) (C.D. Cal. 2001).

[243] PMA-NPRM at 4-8.

[244] *Id. See also* June 2002 Tr. II at 104-05.

[245] PMA-NPRM at 5, 7. *See also* June 2002 Tr. II at 106, 108 (PMA and ARDA, each stating that they do not oppose the disclosure). ARDA stated in its comment that, while it is inconvenient to include additional verbiage in a telephone call, it did not find the additional disclosure unduly burdensome. ARDA-NPRM at 5.

[246] NACAA-NPRM at 6-7 (pointing out that, if there are costs, then the ''prize offer'' becomes a sales pitch for add-ons, not a prize).

[247] *See, e.g.*, NCL-NPRM at 6.

[248] Credit card loss protection plans are distinguished from credit card registration plans, in which consumers pay a fee to register their credit cards with a central party, who agrees to contact the consumers' credit card companies if the consumers' cards are lost or stolen.

does under the law.[249] In fact, federal law limits this liability to no more than $50.[250]

In the NPRM, the Commission proposed two new provisions to address this practice. The first provision—§ 310.3(a)(1)(vi)—requires the seller or telemarketer of credit card loss protection plans to disclose, before the customer pays, the limit, pursuant to 15 U.S.C. § 1643, on a cardholder's liability for unauthorized use of a credit card. Since many consumers appear to be unaware of the protection they have, the Commission reasoned that a disclosure of the limits of their liability would deter many consumers from paying for protection that duplicates the free protection they already have under federal law. The second provision—§ 310.3(a)(2)(viii)—prohibits sellers or telemarketers from misrepresenting that any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. § 1643.[251]

The Commission received little comment on these proposed provisions. Those commenters who addressed the disclosure provision strongly supported it, noting that complaints about the fraudulent sale of credit card loss protection plans have continued unabated since the original Rule became effective.[252] In its NPRM comment, NCL reported that fraudulent solicitations for credit card loss protection plans ranked eighth among the most numerous complaints to the NFIC in 2001.[253] The Commission's complaint-handling experience is consistent with that of NCL, with credit card loss protection plans continuing to be a source of consumer complaints. In its comment, NCL pointed out that fraud in the sale of credit card protection plans is particularly pernicious because it usually involves blatant misrepresentations and scare tactics about consumers' liability for lost or stolen credit cards.[254] Furthermore, the fraud is especially egregious because these schemes appear disproportionately to affect older consumers: in 2001, NCL reported, 55 percent of the victims of credit card loss protection plans were age 60 or older, while that age group accounted for only 26 percent of telemarketing fraud victims overall.[255] As noted in the NPRM, large numbers of complaints have prompted both the Commission and the state Attorneys General to devote substantial resources to bringing cases that challenge the deceptive marketing of credit card loss protection plans.[256]

NCL supported the Commission's decision to require disclosures and prohibit misrepresentations in the sale of credit card loss protection plans. However, NCL also recommended that the Commission go further and mandate requirements similar to those under the Credit Repair Organizations Act[257]—*i.e.*, written disclosures regarding the consumer's rights, coupled with a written agreement or an agreement signed by the buyer who has three days to cancel.[258] The Commission believes that disclosures coupled with the prohibition against misrepresentation are appropriate and sufficient remedies to cure the problems associated with deceptive sales of credit card loss protection plans. The likely outcome of enforcement of these remedies is that consumers will decline to purchase such plans once they know that they duplicate free protection the law already provides them. The Commission will continue to monitor complaints regarding the sale of these plans to ensure that these provisions are adequate to remedy this problem.

Therefore, the Commission has determined that it is a deceptive telemarketing act or practice to fail to disclose the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. § 1643, and has adopted § 310.3(a)(1)(vi), to require that this information be disclosed.

*§ 310.3(a)(1)(vii) — Disclosures regarding negative option features*

The amended Rule adds a new provision, § 310.3(a)(1)(vii), which requires sellers and telemarketers to disclose certain material information any time a seller or telemarketer makes an offer including any ''negative option feature'' as that term is defined under new § 310.2(t) of the amended Rule. This disclosure, like all of those listed in § 310.3(a)(1), must be made before a customer pays for goods or services. This new provision requires disclosure of all material terms and conditions of the negative option feature.

During the Rule Review, several commenters recommended that the Commission specifically address the problems associated with ''free'' or ''trial'' offers that include a negative option feature, particularly when the telemarketer already possesses the consumer's billing information.[259] These offers frequently are presented to consumers as ''low involvement marketing decisions''[260] in which they are simply ''previewing'' the product or service. However, the Rule Review record, as well as federal and state law enforcement experience, show that consumers frequently are confused about their obligations in these transactions, mistakenly believing that, because they did not provide any billing information to the telemarketer, they are under no obligation unless they take some additional affirmative step to consent to the purchase.[261] As a result,

[249] NCL-RR at 10. *See, e.g., FTC v. Universal Mktg. Servs., Inc.*, No. CIV-00-1084L (W.D. Okla. filed June 20, 2000); *FTC v. NCCP Ltd.*, No. 99 CV-0501 A(Sc) (W.D.N.Y. filed July 22, 1999); *S. Fla. Bus. Ventures*, No. 99-1196-CIV-T-17F (M.D. Fla. filed May 24, 1999); *Tracker Corp. of Am.*, No. 1:97-CV-2654-JEC (N.D. Ga. filed Sept. 11, 1997).

[250] Under § 133 of the Consumer Credit Protection Act, the consumer's liability for unauthorized charges is limited to $50 when there is a signature involved. For transactions where no signature was involved (*e.g.*, where the transaction did not take place face-to-face), the consumer has zero liability for unauthorized charges. 15 U.S.C. 1643.

[251] This approach parallels the Rule's treatment of cost and quantity of goods (§§ 310.3(a)(1)(i) and 310.3(a)(2)(i)), material restrictions, limitations, or conditions (§§ 310.3(a)(1)(ii) and 310.3(a)(2)(ii)), refund policy (§§ 310.3(a)(1)(iii) and 310.3(a)(2)(iv)), and prize promotions (§§ 310.3(a)(1)(iv) & (v) and 310.3(a)(2)(v)). In each case, material facts must be disclosed, and misrepresentations of those facts are prohibited. *See* additional discussion below regarding § 310.3(a)(2)(viii).

[252] DOJ-NPRM at 4; LSAP-NPRM at 7-8; NAAG-NPRM at 55; NCL-NPRM at 6. *See also* June 2002 Tr. II at 104.

[253] NCL-NPRM at 6.

[254] *Id.*

[255] *Id.* In its Rule Review comment, NCL reported that in 1999, over 71 percent of the complaints about these schemes were from consumers over 50 years of age. NCL-RR at 10.

[256] *See, e.g., FTC v. Consumer Repair Servs., Inc.*, No. 00-11218 (C.D. Cal. filed Oct. 23, 2000); *FTC v. Forum Mktg. Servs., Inc.*, No. 00 CV 0905C(F) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. 1306506 Ontario, Ltd.*, No. 00 CV 0906A (SR) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. Advanced Consumer Servs.*, No. 6-00-CV-1410-ORL-28-B (M.D. Fla. filed Oct. 23, 2000); *Capital Card Servs., Inc.* No. CIV 00 1993 PHX ECH (D. Ariz. filed Oct. 23, 2000); .*FTC v. First Capital Consumer Membership Servs., Inc.*, No. 00-CV- 0905C(F) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. Universal Mktg. Servs., Inc.*, No. CIV-00-1084L (W.D. Okla. filed June 20, 2000); *FTC v. Liberty Direct, Inc.*, No. 99-1637 (D. Ariz. filed Sept. 13, 1999); *FTC v. Source One Publ'ns, Inc.*, No. 99-1636 PHX RCP (D. Ariz. filed Sept. 14, 1999); *FTC v. Creditmart Fin. Strategies, Inc.*, No. C99-1461 (W.D. Wash. filed Sept. 13, 1999); *FTC v. NCCP Ltd.*, No. 99 CV-0501 A(Sc) (W.D.N.Y. filed July 22, 1999); *FTC v. S. Fla. Bus. Ventures*, No. 99-1196-CIV-T-17F (M.D. Fla. filed May 24, 1999); *FTC v. Bank Card Sec. Ctr., Inc.*, No. 99-212-Civ-Orl-18C (M.D. Fla. filed Feb. 26, 1999); F*TC v. Tracker Corp. of Am.*, No. 1:97-CV-2654-JEC (N.D. Ga. filed Sept. 11, 1997).

[257] 15 U.S.C. 1679.

[258] NCL-NPRM at 6.

[259] *See, e.g.* NACAA-RR at 2; NAAG-RR at 11-12, 16-17; NCL-RR at 5-6.

[260] NAAG-RR at 11.

[261] 67 FR at 4501, *citing FTC v. Triad Disc. Buying Serv., Inc.*, No. 01-8922 CIV ZLOCH (S.D. Fla. 2001); *New York v. MemberWorks, Inc.*, Assurance of Discontinuance (Aug. 2000); *Minnesota v. MemberWorks, Inc.*, No. MC99-010056 (4th Dist. Minn. June 1999); *Minnesota v. Damark Int'l, Inc.*, Assurance of Discontinuance (Ramsey County Dist. Ct. Dec. 3, 1999); *FTC v. S.J.A. Soc'y, Inc.*, No. 2:97 CM 472 (E.D. Va. filed May 31, 1997). To this list may be added several more law enforcement actions, including but not limited to actions by state

such scenarios have resulted in significant abuse as consumers discover they have been charged for something they did not realize they had been deemed to have consented to purchase.[262]

In the NPRM, the Commission proposed a broad prohibition on the receipt or disclosure of a consumer's billing information from any source other than the consumer herself. This expansive approach would have obviated the need for a more narrowly-tailored remedy specifically addressing negative options.[263] The Commission believed that without preacquired account information, telemarketers' ability to exploit the negative option scenario to bill charges to consumers' accounts without their knowledge or consent would have been eliminated. The seller or telemarketer would have been required to obtain the account information directly from the consumer, thus putting the consumer on notice that he is agreeing to purchase something.[264]

Based on the entire record in this proceeding, however, the Commission has determined that a blanket prohibition on preacquired account telemarketing sweeps too broadly, curtailing much activity that has not generated a record of consumer harm. As explained in detail below in § 310.4(a)(6) of this SBP, the Commission has refocused this aspect of the amended Rule on the core problem of preacquired account telemarketing, which is to ensure that a customer's consent is obtained before charges are billed to the customer's account, regardless of the source from which the seller or telemarketer obtained the customer's billing information. Therefore, the amended Rule contains a new provision, § 310.4(a)(6), that prohibits charging a customer's account without the customer's express informed consent. As a result of the more narrowly-tailored approach to the problems associated with preacquired account telemarketing, a new solution to the problems associated with negative option features is also required.

The amended Rule now takes a two-pronged approach to remedying the harms associated with offers involving negative option features, either alone or in combination with preacquired account telemarketing. Although the record shows that the greatest consumer injury occurs when these two practices occur together,[265] each practice can, and often does, occur without the other,[266] and both, alone or in combination, can be problematic for consumers. Thus, the amended Rule sets forth separate requirements specific to each practice—disclosure requirements for offers with a negative option feature, in § 310.3(a)(1)(vii); and, separately, consent requirements for offers where the telemarketer possesses preacquired account information, in § 310.4(a)(6). The application of these two separate provisions depends on the details of the transaction, thus addressing with greater precision different potential telemarketing scenarios.

Commenters stressed one issue: the need for consumers to clearly understand and consent to the precise terms of the negative option feature of an offer.[267] The problematic aspect of an offer with a negative option feature is that the consumer's inaction—not an affirmative action taken by the consumer—is deemed to signal acceptance (or continuing acceptance) of an offer for goods or services. By accepting the initial offer (*e.g.*, to *try* a membership in a buying club service for 30 days, or to receive a daily newspaper for six months) and doing nothing further, the consumer actually contracts to pay for something more (*e.g.*, an automatic annual membership fee or long-term newspaper subscription renewal). In these circumstances, it is crucial that consumers clearly understand the precise terms of such a negative option feature before they agree to accept the initial ''free offer'' or purchase, since this agreement subjects them to continuing charges, often long-term, if they fail to understand that they must take action to decline the offer or terminate the agreement.

Therefore, new § 310.3(a)(1)(vii) requires that the following disclosures must be made if an offer includes any negative option feature, as that term is defined under § 310.2(t): (1) the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s); (2) the date(s) the charge(s) will be submitted for payment; and (3) the specific steps the customer must take to avoid the charge(s).[268] As noted above in the discussion of § 310.2(t) defining ''negative option feature,'' that term is intended to reach any provision under which a consumer's failure to take affirmative action to reject the goods or services will be deemed by the seller to constitute acceptance (or continuing acceptance) of goods or services. Thus, the term includes, but is not limited to, ''free-to-pay conversions,'' automatic renewal offers, and continuity plans.[269]

The required material disclosures must be made truthfully, and in a clear and conspicuous manner, before a customer pays.[270] Under the amended Rule's treatment of preacquired account telemarketing,[271] ''before a customer pays'' shall be construed as meaning before a customer provides express informed consent to be charged for the goods or services offered, and to be charged using a specifically identified account.[272] Thus, § 310.3(a)(1)(vii), and indeed, all of § 310.3(a)(1), must be read in conjunction with new § 310.4(a)(6), which prohibits any seller or telemarketer from causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer.

Attorneys General against BrandDirect Marketing Corp. (Assurances of Discontinuance with the States of Connecticut and Washington); Cendant Membership Services (Consent Judgment with State of Wisconsin); Signature Fin. Mktg. (Assurance of Discontinuance with State of New York); *Illinois v. Blitz Media, Inc.* (Sangamon County, No. 2001-CH-592); *New York v. Ticketmaster and Time, Inc.* (Assurance of Discontinuance), and additional actions by New York and California against MemberWorks, and by New York against Damark Int'l. *See* NAAG-NPRM at 30, n.73.

[262] *See* 67 FR 4513-14, *citing* NAAG-RR at 11-12.

[263] *Id.* at 4514.

[264] *Id.* at 4512-14.

[265] *See* discussion of § 310.4(a)(6) below.

[266] For example, the seller or telemarketer of a magazine or newspaper subscription, who does not have preacquired account information, may make an offer for a subscription that includes an automatic annual renewal by obtaining account information or payment directly from the consumer in the initial transaction. Or, as noted in the NPRM, a customer may have an ongoing relationship with a particular contact lens retailer, in which he expects the retailer to retain account information for future similar purchases, none of which involve a negative option feature. *See* 67 FR 4513, n.196.

[267] NACAA-RR at 2; NAAG-RR at 11-12; NCL-RR at 5-6; NAAG-NPRM at 32-33. *See also* ERA-NPRM at 2-3, 16; June 2002 Tr. II at 209-10 (ERA).

[268] These disclosures are similar to those required in the Commission's Rule concerning ''Prenotification Negative Option Plans.'' *See* 16 CFR 425.2(a)(1).

[269] Each of these terms describes a form of negative option feature, as discussed in this SBP at § 310.2(t), regarding the definition of ''negative option feature,'' and § 310.2(o), regarding the definition of ''free-to-pay conversion.''

[270] 16 CFR 310.3(a)(1).

[271] The Commission has determined to include provisions prohibiting the disclosure, for consideration, of unencrypted account information for use in telemarketing in § 310.4(a)(5), and prohibiting unauthorized billing in § 310.4(a)(6) of the amended Rule. As explained below in the discussion of these new provisions, these provisions address the harm caused by sellers or telemarketers who possess preacquired account information, as well as the broader abuse of charging a consumer's account without the consumer's express informed consent, regardless of the nature of the telemarketing transaction.

[272] *See* discussion of § 310.4(a)(6) below.

*§ 310.3(a)(2) — Prohibited misrepresentations in the sale of goods or services*

Section 310.3(a)(2) in the original Rule prohibits a seller or telemarketer from misrepresenting certain material information in a telemarketing transaction, including: total cost; any material restrictions; any material aspect of the performance, efficacy, nature, or central characteristics of the goods or services offered; any material aspect of the seller's refund policy; any material aspect of a prize promotion; any material aspect of an investment opportunity; and a seller's or telemarketer's affiliation with, or endorsement by, any governmental or third-party organization.[273]

In the NPRM, the Commission proposed three changes to the provision. First, the phrase ''in the sale of goods or services'' was added to the section to clarify that these prohibited misrepresentations apply only in that context. This change was made because, pursuant to the mandate of the USA PATRIOT Act, the Commission proposed adding to the Rule § 310.3(d), which delineates misrepresentations prohibited in the specific context of charitable solicitations. Second, § 310.3(a)(2)(vii) was modified slightly to conform with proposed § 310.3(d)(7) which is an almost identical provision, but in the charitable solicitation context. Finally, the Commission proposed an additional prohibited misrepresentation regarding credit card loss protection plans.[274]

The Commission received no comments regarding the first two changes, and thus retains these in the amended Rule.

*§ 310.3(a)(2)(viii) — Misrepresentations regarding credit card loss protection plans*

As discussed in detail above, the telemarketing of credit card loss protection plans has been a persistent source of a significant number of complaints about fraud and, as a result, has been the target of numerous law enforcement actions by both the Commission and the state Attorneys General.[275] In the NPRM, the Commission proposed two new provisions to address this practice. The first provision, in § 310.3(a)(1)(vi), discussed above, requires that sellers or telemarketers of such plans disclose, before the customer pays, the limit, pursuant to 15 U.S.C. § 1643, on a cardholder's liability for unauthorized use of a credit card. This provision is retained unchanged in the amended Rule.

In addition to advising consumers of their rights, the Commission also believes that additional protection is needed to curb the misrepresentations that are prevalent in the sale of credit card loss protection plans. Telemarketers often misrepresent various aspects of the credit card loss protection plan to consumers, especially the existing legal limits on consumer liability if their cards are lost or stolen.[276] Therefore, the Commission proposed to add a second provision —§ 310.3(a)(2)(viii)—which prohibits sellers or telemarketers from misrepresenting that any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. § 1643, which limits a cardholder's liability for unauthorized charges.[277]

The Commission received little comment on this proposed provision. Those commenters who addressed the Commission's proposal strongly supported the provision's method of addressing problems with these plans, noting that complaints about the fraudulent sale of credit card loss protection plans have continued unabated since the original Rule became effective.[278] Therefore, the Commission has determined that it is a deceptive telemarketing act or practice to misrepresent that any customer needs particular goods or services in order to have protections provided pursuant to 15 U.S.C. § 1643, and has adopted § 310.3(a)(2)(viii), which prohibits a seller or telemarketer from misrepresenting that any consumer needs to purchase protections that they already have under 15 U.S.C. § 1643.

*§ 310.3(a)(2)(ix) — Misrepresentations regarding negative option feature offers*

The original Rule did not specifically require disclosures or prohibit misrepresentations regarding negative option features in telemarketing offers. However, as noted above, in the discussion of § 310.3(a)(1)(vii), as a result of the more narrowly-tailored approach to the problems associated with preacquired account telemarketing, a newly focused approach to the problems related to negative option features is also required. This includes specific disclosure requirements, which are set forth in § 310.3(a)(1)(vii) and explained above. Consistent with the structure of the Rule to date, and to ensure that the disclosures are not only made, but made truthfully, the amended Rule includes a mirroring provision to these disclosure requirements, at § 310.3(a)(2)(ix), which prohibits misrepresentations regarding ''[a]ny material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).''

*§ 310.3(a)(3) — Express verifiable authorization*

Section 310.3(a)(3) of the original Rule requires that a seller or telemarketer obtain express verifiable authorization in sales involving payment by demand drafts or similar negotiable paper.[279] The Rule also provides that authorization is deemed verifiable if any of three specified means are employed to obtain it: (1) express written authorization by the customer, including signature; (2) express oral authorization that is tape recorded and made available upon request to the customer's bank; or (3) written confirmation of the transaction, sent to the customer before submission of the draft for payment. If the telemarketer chooses to use the taped oral authorization method, the Rule requires the telemarketer to provide, upon request, tapes evidencing the customer's oral authorization, including the customer's receipt of the following information: the number, date(s) and amount(s) of payments to be made; date of authorization; and a telephone number for customer inquiry that is answered during normal business hours.[280]

In the NPRM, the Commission proposed to amend the express verifiable authorization provision to

[273] *See* 16 CFR 310.3(a)(2).

[274] Proposed Rule § 310.3(a)(2)(viii).

[275] *See* note 256 above.

[276] *See* discussion of § 310.3(a)(1)(vi) above, and notes 249 and 253.

[277] As noted above, this approach parallels the TSR's treatment of cost and quantity of goods (§§ 310.3(a)(1)(i) and 310.3(a)(2)(i)), material restrictions, limitations, or conditions (§§ 310.3(a)(1)(ii) and 310.3(a)(2)(ii)), refund policy (§§ 310.3(a)(1)(iii) and 310.3(a)(2)(iv)), and prize promotions (§§ 310.3(a)(1)(iv) & (v) and 310.3(a)(2)(v)). In each case, material facts must be disclosed, and misrepresentations of those facts are prohibited.

[278] DOJ-NPRM at 4; LSAP-NPRM at 7-8; NAAG-NPRM at 55; NCL-NPRM at 6. *See also* June 2002 Tr. II at 104; and discussion of § 310.3(a)(1)(vi) above.

[279] The use of demand drafts, or ''phone checks,'' enables a merchant to obtain funds from a person's bank account without that person's signature on a negotiable instrument.

[280] *See* original Rule § 310.3(a)(3). Section 310.3(a)(3)(iii)(A) of the original Rule requires that all information required to be included in a taped oral authorization be included in any written confirmation of the transaction.

require that the seller or telemarketer obtain the customer's express verifiable authorization in any telemarketing transaction where the method of payment lacks the protections provided by, or comparable to those available under, the Fair Credit Billing Act (''FCBA'') and the Truth in Lending Act (''TILA''). In addition, the proposed amendment would have required that the customer receive two additional pieces of information in order for authorization to be deemed verifiable: the name of the account to be charged and the account number, which would have been required to have been recited by either the customer or donor, or the telemarketer. The Commission also proposed to delete § 310.3(a)(3)(iii), which allowed a seller or telemarketer to obtain express verifiable authorization by confirming a transaction in writing, provided the confirmation was sent to the customer prior to the submission of the customer's billing information for payment. Finally, the Commission proposed in the NPRM, pursuant to the USA PATRIOT Act, to bring charitable contributions within the coverage of the express verifiable authorization provision.[281]

Based on the record in this proceeding, the Commission has decided to modify the proposed express verifiable authorization provision. The amended Rule prohibits ''[c]ausing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the TILA and Regulation Z,[282] or a debit card subject to the protections of the Electronic Fund Transfer Act (''EFTA'') and Regulation E.''[283] This modified language draws a ''bright line'' to simplify compliance. The amended Rule retains the express written authorization and oral authorization provisions (§§ 310.3(a)(3)(i) and (ii) of the original and proposed Rules), with slight modifications, and has reinstated the provision of the original Rule allowing written confirmation, with certain additional requirements and limitations.

In addition, certain modifications to this express verifiable authorization provision have been adopted in the amended Rule pursuant to the mandate of the USA PATRIOT Act. First, where the term ''customer'' appeared in the original Rule, that term has been replaced in the amended Rule with the phrase ''customer or donor'' (including, where applicable, the plural form). Similarly, where the phrase ''goods or services'' had been used in the Rule, it has been replaced with the phrase ''goods or services or charitable contribution'' to reflect the expansion of the Rule to cover charitable solicitations. And, the term ''telemarketing transaction'' has been substituted for the term ''sales offer,'' again to reflect the expansion of the provision to cover authorization in the context of a charitable solicitation.

The Commission received numerous comments addressing the proposed amendments to § 310.3(a)(3). In addition, the topic was the subject of extensive discussion at the June 2002 Forum.[284] The major themes that emerged from the record are summarized below.

*Express verifiable authorization for novel payment methods.* In the NPRM, the Commission noted two separate rationales in support of the requirement that a customer's express verifiable authorization be obtained any time the payment method used lacks certain protections against unauthorized charges and fails to provide dispute resolution rights. First, the Commission stated its belief that the use of novel payment methods may lead to unauthorized billing.[285] If consumers fail to understand that a telemarketer has the ability to place a charge using a novel payment method (such as utility or mortgage account billing), based on this misperception, they may be induced to divulge billing information that enables such charges. Second, the Commission noted that many emerging payment methods lack both dispute resolution rights and protection against unlimited liability for unauthorized charges.[286] These two facts—that consumers can be charged unwittingly by means of novel payment methods and that the resulting injury due to unauthorized charges is magnified when dispute resolution procedures and liability limits are absent—persuaded the Commission that it was appropriate to require express verifiable authorization when protections pursuant or comparable to TILA and FCBA are absent.[287]

Comments on the requirement for express verifiable authorization in novel payment method scenarios were many and varied. Some industry commenters—with the notable exception of DialAmerica—rejected the notion that novel payment methods should be subject to more stringent requirements under the Rule, arguing that, as long as the consumer has a clear understanding that he or she is purchasing a particular product or service and that the purchase will be charged to a particular account, nothing further should be required of the telemarketer.[288] NACHA advocated scaling back the proposed express verifiable authorization requirement, which it argued was ''overly broad'' in its coverage of payment methods, such as debit cards, with protections comparable to TILA and FCBA.[289] EFSC noted its concern that emerging payment methods would be disadvantaged because they would be subject to the express verifiable authorization provision.[290]

NAAG, on the other hand, supported the Commission's proposed approach.[291] Some consumer groups urged the Commission to take an even more stringent approach than it did in the NPRM, and require express verifiable authorization in *all* telemarketing transactions. For example, NCL argued that since most telemarketers use audio recordings to verify authorizations anyway, it would hardly be burdensome to require express verifiable authorization, which

[281] Proposed Rule § 310.(3)(a)(3), 67 FR at 4542.

[282] TILA, 15 U.S.C. 1601 *et seq.* (including the FCBA amendments, at 15 U.S.C. 1637 *et seq.*), and Regulation Z, 12 CFR part 226.

[283] EFTA, 15 U.S.C. 1693 *et seq.*, and Regulation E, 12 CFR part 205.

[284] *See* June 2002 Tr. III at 4-52.

[285] *See* 67 FR at 4507. This concern was also articulated by the Commission in the original rulemaking in connection with the use of demand drafts as a payment method. 60 FR at 43850-51.

[286] *See* 67 FR at 4507.

[287] *Id.*

[288] See, e.g., Aegis-NPRM at 4; Green Mountain-NPRM at 27 (''there is little danger that consumers will give their [debit card] account numbers to telemarketers without knowing that their accounts will be debited''); ITC-NPRM at 5; NATN-NPRM at 4; Noble-NPRM at 4; NSDI-NPRM at 4; and Technion-NPRM at 5. *But see* June 2002 Tr. III at 22 (DialAmerica representative noting that his company declines to use novel payment methods because it ''had experience with charging people's bank accounts and [ ] also [with] LEC billing, and they have not been good experiences.'').

[289] NACHA-NPRM at 2.

[290] EFSC-NPRM at 7. *See also* NATN-NPRM at 4; June 2002 Tr. III at 39. The Commission notes that it was in part because of this concern that the original Rule did not require written authorization in every instance for demand drafts. *See* 60 FR at 43850-51. The amended Rule's allowance for obtaining express verifiable authorization by any of three means, including written confirmation, should obviate concerns about the burden imposed on sellers who choose to accept novel payment methods. Further, the Commission believes, for the reasons stated above, that it is precisely when such novel methods—unfamiliar to the consumer and devoid of legally-mandated consumer protections—are used that express verifiable authorization of a consumer's acquiescence to the transaction is critical.

[291] See NAAG-NPRM at 48.

can be evidenced by such a recording, in every instance.[292] In support of this position, NCL offered statistics showing that complaints to the NFIC for 2001 show that 60 percent of the payments for fraudulent buyers club offers—a ''category in which nearly all of the consumers said they never agreed to purchase the service''—were made by credit card.[293] According to NCL, even when the payment method used by consumers may be subject to legal protections, ''all consumers whose accounts will be billed should have the basic protections that such [express verifiable authorization] provides.[294] LSAP concurred, suggesting that the Rule would better serve all consumers if express verifiable authorization were required in every purchase.[295] Similarly, NCLC urged the Commission to extend the express verifiable authorization requirements to cover all transactions, or at least those not subject to the protection of FCBA and TILA.[296]

The Commission declines to require in every transaction that a seller or telemarketer obtain the express verifiable authorization of a customer or donor prior to submitting billing information for payment. As it made clear in the original rulemaking, the Commission believes that the burden of requiring express verifiable authorization is justified in limited circumstances; namely, when consumers are unaware that they may be billed via a particular method, when that method lacks legal protection against unlimited unauthorized charges, and when the method fails to provide dispute resolution rights.[297] However, the Commission agrees that consumers could benefit from a more explicit Rule provision mandating what should be obvious: a transaction is valid only when the telemarketer has obtained the consumer's express informed consent to be charged, and to be charged using a particular account. Therefore, as is discussed in detail below, new § 310.4(a)(6) of the Rule explicitly requires, in every telemarketing transaction, that the seller or telemarketer obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution that is the subject of the transaction. This more explicit treatment will achieve the goals of consumer groups without unduly burdening industry members with the recordkeeping required by the express verifiable authorization provision.

The comments from consumer groups addressing the express verifiable authorization issue opposed the ''comparability'' standard set out in the proposed amended Rule, *i.e.*, the provision which would have exempted from the requirement to obtain express verifiable authorization any payment method with protections comparable to those available under FCBA and TILA. Some commenters stated that it would be too difficult for merchants to determine, during the course of each telemarketing transaction, whether a given payment method had protections comparable to those available under TILA.[298] NCL and NCLC argued that the impermanent nature of voluntary policies, such as the ''zero liability'' guarantees made by MasterCard and VISA, makes them a poor substitute for legal protection.[299] NCLC further argued that such an amendment would ''invite sham internal review procedures,''[300] thereby making it deleterious to consumers, by placing the power of determining which transactions required express verifiable authorization in the hands of the merchant.[301]

Industry commenters, on the other hand, urged the Commission to clarify that ''comparable protection,'' whether in the form of a business rule or private contract, should be sufficient to relieve sellers and telemarketers of requirement to obtain express verifiable authorization.[302] In this regard, some industry commenters noted the ''zero liability'' protection for unauthorized charges provided by the two main issuers of debit cards, VISA and MasterCard, as a voluntary initiative.[303] MasterCard and VISA noted that their respective ''zero liability policies'' provided greater protection to cardholders than is provided by federal law.[304] Similarly, Fleet urged the Commission to take note of the unauthorized use liability provisions that VISA and MasterCard offer for debit cards.[305] Other commenters requested that the Commission explicitly state that certain other protections are ''comparable.''[306]

Based on the record evidence, the Commission has decided to eliminate the ''comparability'' language from the express verifiable authorization provision. The comments made clear that it is far more desirable to

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[292] NCL-NPRM at 5.

[293] *Id.*

[294] *Id.* (noting that even when legal protections exist to protect consumers from unauthorized charges, consumers must still bear the burden to ''contest the charges in the required manner and time frame to assert their rights''); *see also* LSAP at 10.

[295] LSAP-NPRM at 9-11.

[296] NCLC-NPRM at 8.

[297] *See* 60 FR at 43850-51. The Commission notes that despite its request for detailed evidence regarding the cost of obtaining express verifiable authorization and the prevalence of each of the three methods allowed by the original Rule, *see, e.g.*, 67 FR 4537; June Tr. III at 32, there remains a dearth of specific record evidence regarding such costs. Industry commenters who did address the cost merely stated that creating and maintaining audio recordings of express verifiable authorization was ''expensive.'' *See, e.g.*, Capital One-NPRM at 7; June Tr. III at 38 (CCC).

[298] *See* NCLC-NPRM at 2, 4 (noting the exemption from express verifiable authorization for methods of payment with protections comparable to TILA and FCBA ''essentially sanctions an on-the-spot judgment made by telemarketers regarding a complex and much disputed legal issue. . .''). Some industry members also noted that the comparability standard was too vague to be useful. *See, e.g.*, CMC-NPRM at 12; EFSC-NPRM at 4 (noting that the vagueness could inhibit the use of novel payment methods).

[299] *See* NCL-NPRM at 5; NCLC-NPRM at 8.

[300] NCLC-NPRM at 7.

[301] *See* NCLC-NPRM at 4-5.

[302] *See, e.g.*, ABA-NPRM at 7-8; BofA-NPRM at 6; Capital One-NPRM at 7; Citigroup-NPRM at 10; DMA-NPRM at 56-57.

[303] *Id.*

[304] *See* MasterCard-NPRM at 4; VISA-NPRM at 5. The Commission notes, however, that the ''zero liability'' protection offered by MasterCard and VISA does not come into play in all circumstances. For example, MasterCard extends this protection only to a consumer whose account is in good standing and who has not reported two or more instances of unauthorized use in the past year. *See* http://www.mastercard.com/general/zero__liability.html. VISA offers its coverage only for ''VISA credit and debit card transactions processed over the VISA network,'' and allows the financial institution that issued the card to determine liability for transactions processed over other networks. *See* http://www.usa.visa.com/personal/secure__with__visa/zero__liability.html?it=f2__/personal/secure__with__visa/.

[305] *See* Fleet-NPRM at 5. *See also* KeyCorp-NPRM at 5; June Tr. III at 11 (DMA) (endorsing voluntary protections).

[306] *See* Capital One-NPRM at 7 (exempt transactions subject to the UCC); CMC-NPRM at 12 (state that protections under the Real Estate Settlement Procedures Act (''RESPA'') and EFTA are comparable to those under the FCBA and TILA); Fleet-NPRM at 5 (exempt transactions where the goods or services are subject to a ''liberal refund policy''); KeyCorp-NPRM at 5 (exempt transactions subject to the UCC); NACHA-NPRM at 2 (exempt transactions subject to the NACHA Rules); VISA-NPRM at 5 (exempt transactions subject to UCC when the revisions to Article 4 are complete). The Commission declines, at this time, to exclude from the express verifiable authorization requirement transactions subject to RESPA. While the Commission recognizes that RESPA provides important protections for consumers, it does not believe that most real estate transactions would be subject to the TSR at all. And, in instances of mortgage billing, which *would* be subject to the Rule, the Commission believes that consumers, unfamiliar with this method of billing for anything other than their mortgage payment, need the protections of the express verifiable authorization provision. The Commission also declines to exclude transactions subject to the UCC from the requirements of express verifiable authorization, but may revisit this issue when modifications to the UCC are completed. The Commission also declines to exempt transactions subject to the NACHA Rules or for which the seller provides a liberal refund policy, believing that it is preferable to limit exemptions and thus maintain a ''bright line'' rule to simplify compliance.

implement a ''bright line'' rule in this instance to avoid the costs to businesses and consumers of requiring a telemarketer to make a real-time determination of whether a payment method provides adequate protection while on the telephone with a consumer. Moreover, the Commission is persuaded that the impermanent nature of voluntary consumer protections makes them ill-suited as a predicate for circumventing the express verifiable authorization provision.[307] Therefore, the amended Rule requires express verifiable authorization in all transactions where payment is made by a method other than a debit card subject to Regulation E, or a credit card subject to Regulation Z.

Several industry commenters specifically urged the Commission to ensure that express verifiable authorization not be required when a consumer uses a debit card to pay for goods and services offered, or a charitable contribution solicited, through telemarketing. Commenters raised several arguments in support of this position. First, commenters noted that debit cards are not ''novel'' payment methods.[308] Commenters contended that, on the contrary, debit cards are widely accepted and used by consumers, who understand that by providing their debit card number in a telemarketing transaction, the account with which the card is associated will be debited.[309] Second, commenters argued that debit cards are subject to the protections of the EFTA and its implementing regulation, Regulation E, which provide similar, although not identical, protection to that available under TILA.[310] Third, commenters argued that distant sellers cannot distinguish between a debit and credit card until, in the best case scenario, the consumer reads the entire number.[311] Finally, commenters noted that VISA has an ''honor all cards'' policy that would prohibit a merchant from declining to accept VISA-branded debit cards if it accepted VISA-branded credit cards.[312] These commenters contended that the practical result of requiring express verifiable authorization for debit cards would be that express verifiable authorization would have to be obtained in all transactions—whether payment was made by credit or debit card, demand draft, or any other method.[313]

Based on the extensive record on this issue, and on the Commission's law enforcement experience, the Commission has determined to modify the express verifiable authorization provision in the amended Rule. The Commission is persuaded that debit cards should not be subject to the express verifiable authorization provision, based on their wide consumer acceptance and the fact that they are subject to the protections of the EFTA and Regulation E. The Commission believes that debit cards are so commonly used that it cannot persuasively be argued that consumers do not understand that when they provide their debit card account number to a telemarketer, their account can be debited by using that number.[314] Moreover, the Commission is persuaded that the practical result of requiring express verifiable authorization when a consumer pays using a debit card would be to require it in all instances when a debit *or* credit card is used, because it is not currently possible to distinguish these methods in a distance transaction.[315]

Regulation E provides protections that are similar, though not identical, to those provided under TILA. Some commenters argued that express verifiable authorization should be required for debit cards because Regulation E's three-tiered liability scheme for unauthorized use, with increasing liability when the unauthorized use is reported after two business days, is less advantageous for consumers than the TILA protections, which cap a consumer's losses, in all instances, at $50.[316] The Commission believes that this disparity will not disadvantage consumers who face unauthorized charges pursuant to a telemarketing transaction. Both Regulation Z and Regulation E provide that, in a situation where the consumer retains control of the card, no liability shall attach; Regulation Z does so unconditionally,[317] while Regulation E provides such protection on condition that the consumer reports the unauthorized charge within 60 days of transmittal of the consumer's statement.[318] The Commission believes that, despite the reporting requirement imposed by Regulation E, consumers who face unauthorized charges due to telemarketing fraud have important fundamental protections whether they use a debit or credit card. The Commission will continue its campaign to educate consumers about their varying obligations in reporting unauthorized charges involving both debit and credit cards, and will monitor the effectiveness of this provision from

[307] *See* June 2002 Tr. III at 29 (NCL) (noting receipt of complaints about the enforceability of these voluntary protections).

[308] *See, e.g.*, ABA-NPRM at 6; DMA-NPRM at 57; and ERA-NPRM at 47.

[309] *See, e.g.*, Collier Shannon-NPRM at 16; Green Mountain-NPRM at 27; June 2002 Tr. III at 24 (ERA).

[310] *See, e.g.*, ABA-NPRM at 2-7; AFSA-NPRM at 18-19; BofA-NPRM at 5-6; Citigroup-NPRM at 10; Collier Shannon-NPRM at 11; KeyCorp-NPRM at 5; MasterCard-NPRM at 4; NACHA-NPRM at 2. Some commenters suggested that any method of payment subject to Regulation E be exempted from the express verifiable authorization requirements. *See* Citigroup-NPRM at 10 (exempt all electronic fund transfers, including wire transfers); EFSC (exempt automated clearinghouse (''ACH'') transactions, as well as other novel payments, such as prepaid smart cards). The Commission declines to exempt all electronic fund transfers subject to Regulation E. The record does not support exclusion of other methods of payment subject to Regulation E; and the Commission believes that, despite any consumer protections available, many emerging payment methods covered by Regulation E are still relatively unknown to consumers who will thus benefit from express verifiable authorization when these payment methods are used.

[311] BofA-NPRM at 6; Collier Shannon-NPRM at 6 (''Merchants who process credit and debit card transactions over the phone do not have the ability to differentiate between credit cards and debit cards.''); ERA-NPRM at 48; June 2002 Tr. III at 11 (DMA) (noting that ''it is impossible for a marketer to know whether it's a debit card or a credit card, in the best instance, until after the entire number has been given''); June 2002 Tr. III at 18 (NRF) (stating that ''remote sellers cannot distinguish a debit card from the credit card with any great degree of reliability pre-purchase'').

[312] June 2002 Tr. III at 19-20 (NRF) (noting that VISA and MasterCard ''have what's called an Honor-All-Cards rule'' that requires that merchants accept any card branded with these issuers' logos as a condition of being able to accept the VISA and MasterCard branded credit cards).

[313] Collier Shannon-NPRM at 6-7; June 2002 Tr. III at 11 (DMA) (noting that ''[i]n some instances you don't even know [whether a number provided by a consumer is for a debit or credit card] when the number is given, which would force marketers to have express verifiable authorization for everything. . .''). Some commenters argued that such a provision would have the effect of eliminating or reducing the use of debit cards as a form of payment. *See* Gannett-NPRM at 1-2; Intuit-NPRM at 19.

[314] This is not to say, of course, that an unscrupulous telemarketer could not misrepresent the purpose for which it needed such an account number, leading to consumer injury. Section 310.3(a)(4) of the Rule, which prohibits making a false or misleading statement to induce any person to pay for goods or services, would come into play in such situations. Moreover, the record and the Commission's consumer protection experience suggest that, while consumers do understand that their debit cards can be used as a method of payment, it is not clear that consumers understand the varying degrees of consumer protection afforded by credit versus debit cards. *See* June 2002 Tr. III at 24-25. The Commission has issued consumer education materials to reinforce the material differences in protection under federal law for debit and credit cards. *See, e.g.*, FTC Facts for Consumers, Credit, ATM and Debit Cards: What to do if They're Lost or Stolen, http://www.ftc.gov/bcp/conline/pubs/credit/atmcard.htm.

[315] *See* note 311 above.

[316] Compare Regulation E, 12 CFR 205.6(b) to Regulation Z, 12 CFR 226.12(b).

[317] *See* Regulation Z, 12 CFR 226.12(b)(2)(iii), Official Staff Interpretation, Suppl. I.

[318] *See* Regulation E, 12 CFR 205.6(b)(3). The 60-day notification period is somewhat flexible. Section 205.6(b)(4) notes that ''[i]f the consumer's delay in notifying the financial institution was due to extenuating circumstances, the institution shall extend the [time limit] to a reasonable period.''

the implementation of the amended Rule through the next Rule Review, making any modifications as necessary.

The record reflects a variety of viewpoints on whether dispute resolution rights are essential to the determination of whether a payment method should be excluded from the requirement of obtaining express verifiable authorization.[319] The Commission continues to believe that dispute resolution protection is a key predicate for excluding a payment method from coverage under the express verifiable authorization provision, to ensure that consumers are not unduly burdened during the investigation of any claim of unauthorized billing. The Commission believes that, although the substantive dispute resolution protections of Regulation E are somewhat less extensive than those of Regulation Z,[320] the core protections provided by Regulation E—allowing a consumer to report an unauthorized electronic fund transfer and to receive a provisional credit of the disputed amount within ten business days of the financial institution's receipt of such notice—will afford sufficient basic protection to consumers who choose to use debit cards to pay for goods or services or charitable contributions in telemarketing transactions.

Furthermore, the Commission notes that its decision not to require express verifiable authorization for payments made by debit card is based in part on the practical reality that it is currently impossible for merchants to distinguish credit cards from debit cards, particularly in distance transactions. The Commission believes that the appropriate balance of protecting consumers without unduly burdening industry is best met by excluding debit cards from the requirements of the express verifiable authorization provision, for to do otherwise would result in requiring express verifiable authorization for all credit card payments, an unnecessary and costly burden.[321] The core dispute resolution protection provided by Regulation E, in conjunction with its critical protection against unauthorized charges, will provide a vital safety net for consumers who choose to pay by debit card. Thus, the Commission has determined that express verifiable authorization will be required only in instances when the payment method is not a credit card subject to the protections of Regulation Z or a debit card subject to the protections of Regulation E.[322]

*Express written authorization.* Section 310.3(a)(3)(i) of the proposed Rule states that authorization will be deemed verifiable if it is by ''express written authorization . . . which includes the customer's or donor's signature.'' The footnote to this section of the Rule notes that ''the term 'signature' shall include a verifiable electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.''

The Commission received few comments on this provision overall. AARP reiterated its long-standing position that all express verifiable authorizations should be in writing.[323] The Commission maintains its position that to require written authorization in every instance would unduly burden sellers and telemarketers, potentially impede the growth of new payment mechanisms, and not provide meaningful benefits to consumers above and beyond those ensured by the other two means of obtaining authorization under the Rule. Therefore, the Commission declines to require written authorization of a transaction in every instance. Another commenter requested clarification that a signed check would meet the requirements of § 310.3(a)(3)(i) of the amended Rule.[324] The original Rule's express verifiable authorization only pertained to demand drafts; and, as the Commission noted in the TSR Compliance Guide, ''[a]ny form of written authorization from a consumer is acceptable,'' including ''a 'voided' signed check.''[325] While the language of the amended Rule is arguably broad enough to cover payment methods such as check and money order, the customer's or donor's signed check or money order would, in every instance, be sufficient to serve as written authorization pursuant to 310.3(a)(3)(i).

A handful of commenters addressed the interplay between the E-SIGN Act[326] and the Rule. One industry commenter urged that the Commission explicitly state that the E-SIGN Act governs transactions under the TSR,[327] and another requested the amended Rule expressly adopt the definitions of ''electronic record'' and ''electronic signature'' used in the E-SIGN Act.[328] In particular, commenters expressed concern over the Commission's use of the term ''verifiable''[329] as a modifier in discussing what would constitute a valid signature under the Rule. While the Commission declines at this time to expressly incorporate the E-SIGN Act's definitions into the Rule, it has determined that deleting the term ''verifiable'' from the amended Rule will alleviate the concerns expressed by industry, without compromising the protections afforded to consumers.[330]

NCLC suggested that the Rule incorporate the procedures set forth in § 101(c) of the E-SIGN Act for using electronic records to provide a consumer with written disclosures

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[319] *See* ABA-NPRM at 5, 7 (encouraging the Commission to delete from the express verifiable authorization provision the requirement that any exempt payment mechanism include dispute resolution procedures); Collier Shannon-NPRM at 11-15 (noting that the dispute resolution protections under Regulations E and Z are similar).

[320] For example, unlike Regulation Z, Regulation E does not provide that a consumer may assert against a financial institution all claims (other than tort) and defenses arising out of the transaction and relating to the failure to resolve the dispute. *See* Regulation Z, 12 CFR 226.12(c). However, Collier Shannon argued that, in some instances, Regulation E provides greater consumer dispute resolution rights. For example, Collier Shannon noted that investigations under Regulation E must be completed within ten days of the financial institution's receipt of the consumer's complaint, or a provisional credit must be issued. Collier Shannon also noted that the coverage of the regulations diverges in some instances because some of the dispute resolution protections available under Regulation Z only make sense in the context of a credit transaction, such as the provision that a creditor may not seek to collect funds or issue a negative statement on a consumer's credit report). *See* Collier Shannon-NPRM at Appendix F. The Commission notes, in regard to the argument made by Collier Shannon regarding the shorter time period allowed for investigations under Regulation E, that a shorter time frame is entirely appropriate because the funds at issue are the consumer's, not the funds of a credit card lender.

[321] *See* June 2002 Tr. III at 11 (DMA) (noting that requiring express verifiable authorization in all instances would be ''highly expensive.'').

[322] Cendant requested that the Commission explicitly note in the Rule that the marketer can rely upon the statement by the consumer identifying the type of billing mechanism that the customer is using to pay. Cendant-NPRM at 9. The Commission believes that its modified approach, exempting from the express verifiable authorization provision both credit *and* debit cards, obviates the need for such a statement to be included in the Rule.

[323] AARP-NPRM at 7.

[324] Tribune at 7.

[325] TSR Compliance Guide at 19.

[326] Electronic Signatures in Global and National Commerce Act (''E-SIGN Act''), Pub. L. No. 106-229, 106th Cong. 2d Sess., 114 Stat. 464 (2000), codified at 15 U.S.C. § 7001 *et seq.*

[327] EFSC-NPRM at 9-10.

[328] Intuit-NPRM at 22.

[329] 67 FR 4542. In the NPRM, the Commission noted, in a footnote to § 310.3(a)(3)(i), that ''[f]or purposes of this Rule, the term 'signature' shall include a *verifiable* electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.'' (emphasis added).

[330] The Commission believes that the remaining language regarding signatures makes plain that sellers and telemarketers who choose to obtain express verifiable authorization using the express written authorization method, and who wish to use digital or electronic signatures, will need to comply with applicable federal law and state contract law. The Commission believes, by way of example, that a seller or telemarketer who obtained a signature that would be valid under the E-SIGN Act's standards would meet its burden under this provision of the Rule.

required by the Rule.[331] Under § 101(c), the consumer must, among other things, affirmatively consent to such use of electronic records and acknowledge that he or she has the hardware and software necessary to access the requisite information electronically. The Commission is deferring any determination at this time as to the specific manner in which the Rule should incorporate these statutory procedures until it has clearer evidence or experience from which to develop an appropriate and effective regulatory interpretation, consistent with the E-SIGN Act, to ensure that written disclosures required under the Rule are provided clearly and conspicuously to consumers if and when a seller or telemarketer uses electronic means to provide such disclosures.[332]

Finally, NCLC suggested that the Commission require that the information set forth in § 310.3(a)(3)(ii)(A)-(G), be required when the written method of express verifiable authorization is used.[333] The Commission declines to adopt this suggestion because the record does not support the argument that such a requirement is necessary in instances when the consumer controls the method of payment, and provides written authorization, including a signature, to the seller or telemarketer prior to the submission for payment of the consumer's billing information.

*Oral authorization.* The proposed Rule modified and expanded the list of information that must be recited in order for oral authorization to be deemed verifiable. In particular, the proposed Rule added the requirement that the specific billing information of the customer or donor, including the name of the account and the account number that will be used to collect payment for the transaction, must be identified as part of the express verifiable authorization process. Finally, certain wording changes were proposed to address the expansion of the express verifiable authorization provision to cover not just demand drafts, but all methods of payment that lacked specific protections under TILA and FCBA. In addition, the information was reorganized.[334]

In § 310.3(a)(3)(ii) of the amended Rule, the Commission has retained the proposed oral authorization provision, with three minor wording changes. First, the broader term ''other billing entity'' replaces the term ''credit card company,'' which was included in the proposed Rule as an example of an entity to whom a seller or telemarketer would need to make available a recording of a customer's or donor's express oral authorization. Second, the phrase ''authorization of payment for goods or services or charitable contribution'' is inserted to reflect the expansion of this provision to reach charitable solicitations. Third, the term ''sales offer'' has been replaced with ''telemarketing transaction.'' These last two changes are intended to conform this provision to the mandate of the USA PATRIOT Act.

Few comments were prompted by this section generally, or by any of the specific proposed disclosures required to satisfy the oral authorization provision. One commenter noted that the audio recording method of obtaining express verifiable authorization may require the consent of the customer or donor in states that require two-party consent to record telephone calls.[335] The Commission notes that determining compliance with state law taping requirements has been and will continue to be the responsibility of those sellers and telemarketers who choose to use this method of authorization. Another commenter asked the Commission to state explicitly that ''a telemarketer cannot circumvent a writing requirement [such as required by EFTA for recurring drafts] by holding up the express oral authorization in the [TSR].''[336] Clearly, compliance with the EFTA and compliance with the TSR are separate obligations, and to the extent that an entity is subject to both regulations, it must determine how best to comply with both. Therefore, the Commission declines to modify the Rule to include such guidance.

Another commenter, ARDA, requested that § 310.3(a)(3)(ii)(A), which requires disclosure of the number of debits, charges or payments, be modified. ARDA requested that the parenthetical phrase ''if more than one'' be reinstated in the Rule to ensure that this disclosure is only made in instances where there will be multiple debits, charges, or payments; to do otherwise, ARDA argued, would be a burden on industry to state what would likely be presumed by consumers—that is, that only a single payment will be required.[337] The Commission agrees that the benefit to consumers of disclosing that there will only be a single payment does not outweigh the burden on sellers and telemarketers to have to make such a disclosure. Therefore, the Commission has reinstated the phrase ''(if more than one)'' at the end of § 310.3(a)(3)(ii)(A). No comments in the record suggest modification of proposed § 310.3(a)(3)(ii)(C) (requiring disclosure of the amount of the debit(s), charge(s), or payment(s)); (D) (disclosure of the customer's or donor's name); (F) (the disclosure of a telephone number for customer or donor inquiry); or (G) (the date of the customer's or donor's oral authorization). Therefore, these sections are retained in the amended Rule without alteration.

Proposed § 310.3(a)(3)(ii)(B) required that ''the date of the debit(s), charge(s), or payment(s)'' be recited for oral authorization to be deemed verifiable. This proposal drew criticism from members of industry, including MasterCard and KeyCorp, who noted that, in many instances, telemarketers would not possess this information, and suggested that the frequency of the payment could be recited instead.[338] The Commission agrees that in at least some instances the exact date of payment—that is, the date on which the charge will appear on a customer's or donor's billing statement or be debited from a customer's or donor's account—may be unknown at the time of the transaction. Therefore, the amended Rule provision requires instead that the seller or telemarketer recite the date on which the debit(s), charge(s), or payment(s) will be submitted for payment. The Commission believes that this piece of information is, or without much burden can be, known to a seller or telemarketer, and that providing this date to the customer or donor will supply a means for determining approximately when such debit(s), charge(s), or payment(s) will be posted to the customer's or donor's account.

Several commenters also expressed concern about the requirement, in § 310.3(a)(3)(ii)(E), that, as part of oral authorization, a customer or donor

[331] NCLC-NPRM at 3.

[332] *See generally* FTC and Dept. of Commerce, *Report to Congress on the Electronic Signatures in Global and National Commerce Act: The Consumer Consent Provision in Section 101(c)(1)(C)(ii),* June 2001 (noting that nearly all participants in a workshop held to discuss the provision agreed that further study of the provision and its role in the marketplace was necessary). *See also* E-SIGN Act § 104 (preserving agency authority to interpret § 101).

[333] NCLC-NPRM at 10-11.

[334] *See* Proposed Rule § 310.3(a)(3)(ii)(A)-(D), (F)-(G). For example, the term ''draft,'' used in the original provision, was replaced with the phrase ''debit(s), charge(s), or payment(s)'' in the proposed version, to reflect that methods of payment other than demand draft would now be covered by the Rule. For the same reason, and because of the mandate of the USA PATRIOT Act, the term ''payor's'' was replaced by the phrase ''customer's or donor's.''

[335] Worsham-NPRM at 6.

[336] NCLC-NPRM at 11.

[337] ARDA-NPRM at 5-6.

[338] MasterCard-NPRM at 6-7; KeyCorp-NPRM at 5.

receive his or her specific billing information, including the name of the account and the account number to be charged.[339] These commenters stated that there are dangers inherent in having a telemarketing sales representative recite or receive from the consumer the consumer's full account number over the telephone.[340]

On the other hand, comments from consumer groups were generally supportive of the expanded disclosures required as a predicate for oral authorization to be deemed verifiable. NCL noted that billing disputes are prevalent in connection with deceptive or abusive telemarketing, and complaints about such disputes often arise when a consumer has been duped into providing his or her billing information for some bogus purpose, such as ''verification,'' or to enable the seller purportedly to deposit sweepstakes winnings to the consumer's account.[341] NCL also noted that consumers may provide their account information in conjunction with a payment for a particular item, but then be billed for additional goods or services that they did not authorize.[342] Based on its experience, NCL ''believes that it is important to verify both the account that will be billed and the fact that the consumer is agreeing to purchase specific products or services using that account.''[343] NAAG concurred, stating that the proposed Rule's express requirements to recite the account name and number would be beneficial to consumers who, as law enforcement experience demonstrates, may otherwise be unaware of this critical information.[344]

Based on the record, the Commission has decided to modify the proposed provision to limit the required amount of information about an account that must be received by a customer or donor to comply with the express verifiable authorization provision. The amended Rule requires that the customer or donor receive ''billing information, identified with sufficient specificity that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution.''[345] This more flexible standard takes into account concern about identity theft, but still mandates that the customer receive information sufficient to understand what account is being used to process payment for the transaction. It will allow telemarketers the option to state, for example, the name and the last four digits of the account to be charged, rather than the full account number.

*Written confirmation.* The Commission received several comments regarding its proposal to delete § 310.3(a)(3)(iii) from the Rule. This section of the original Rule allows a seller or telemarketer to obtain express verifiable authorization by sending written confirmation of the transaction to the customer prior to submitting the customer's billing information to be charged. In general, industry commenters opposed the Commission's proposal to delete this provision from the Rule, arguing that, contrary to the evidence presented during the Rule Review, this method of authorization is commonly used in telemarketing.[346] Aegis noted that there is nothing ''inherently fraudulent, abusive, or problematic'' with this method of obtaining express verifiable authorization, and urged the Commission to retain it.[347] Industry commenters urged the Commission to retain this provision, especially because it provides a low-cost alternative to recording a customer's oral authorization.[348]

Consumer groups and law enforcement officials expressed their support for deleting this provision from the Rule, or modifying it to ensure that consumers are better protected when this method is used.[349] NAAG, for example, noted the potential danger inherent in the written confirmation provision as it is worded in the original Rule. Specifically, NAAG opined that consumers are likely to overlook a confirmation that appears to be yet

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[339] *See, e.g.*, AFSA-NPRM at 17-18; CCC-NPRM at 12 (recommending § 310.3(a)(3)(ii)(E) be deleted entirely); DialAmerica-NPRM at 27 (noting its support for the disclosure of the account name); Fleet-NPRM at 6; KeyCorp-NPRM at 5; MasterCard-NPRM at 5 (noting that if the provision is not deleted, the amended Rule should at least exempt from compliance entities subject to the privacy provisions of the GLBA); Wells Fargo-NPRM at 3.

[340] *See, e.g.*, KeyCorp-NPRM at 5; MasterCard-NPRM at 5. These commenters expressed concern about identity theft and unauthorized charges occurring as a result of the express disclosure of this information. Several commenters noted that consumers are disinclined to provide their account numbers in telemarketing, in part due to the success of consumer protection education campaigns that have stressed that a consumer should only provide his or her account number in telemarketing if the consumer knows the seller with whom he or she is dealing. *See, e.g.*, Bank One-NPRM at 4; Cendant-NPRM at 7; Household Auto-NPRM at 2-3; VISA-NPRM at 6-7. Some commenters noted that marketers will not have such account numbers in some instances, such as in preacquired account telemarketing involving a joint marketing program, and thus will be unable to ensure the customer's ''receipt'' of this information. *See, e.g.*, Household Auto-NPRM at 4; NEMA-NPRM at 8-10 (noting that the '' receipt'' language directly contradicts the NEMA's guidelines to ensure that the customer ''disclose'' such information before processing a charge, and will result in duplicative information being exchanged); Green Mountain-NPRM at 26 (requesting an exemption because the energy industry is highly regulated). As discussed below, the Commission decided to delete the requirement that the account number be disclosed, and therefore the Commission anticipates that this will ameliorate the concern about preacquired account telemarketing. In every instance, the seller or telemarketer should be able to tell the customer or donor the name of the billing vehicle and enough other information to ensure that the customer or donor knows what account will be used to collect payment. As to NEMA's and, to some extent, Green Mountain's concern about redundancy, it is true that in a non-preacquired account call, some information, such as the customer's or donor's billing information, will initially be unknown to the telemarketer. It is equally true that some of the information a customer must receive under § 310.3(a)(3)(ii) is known only to the telemarketer, such as the date a charge will be submitted for payment and a customer or donor service number. The Commission believes that, for payment methods that are novel and lacking in certain consumer protections, it is critical for the customer to authorize the payment. If a seller or telemarketer chooses the express oral authorization method, then it is incumbent upon them to ensure that a consumer receives this information, even if redundant, as part of the recorded authorization.

[341] NCL-NPRM at 4.

[342] *Id.*

[343] *Id.*

[344] NAAG-NPRM at 48-49.

[345] Amended Rule § 310.3(a)(3)(ii)(E). The requirement that the account be identified with sufficient specificity that the customer or donor understands what account will be used to collect payment mirrors the provision in amended Rule § 310.4(a)(6)(ii)(A), requiring that, in telemarketing transactions involving preacquired account information, a seller or telemarketer obtain express informed consent by identifying the account to be charged with specificity such that the customer or donor understands what account will be charged.

[346] *See, e.g.*, ARDA-NPRM at 5 (noting that the written confirmation method may actually increase in popularity if the additional requirements during oral authorization are adopted in a final Rule); ARDA-Supp. at 1 (noting that the Rule should allow for flexibility given the rapid technological changes in payment methods); CCC-NPRM at 14 (asserting that ''this method is readily available, straightforward, reliable and is currently used by many marketers.''); CNHI-NPRM at 1 (noting that eliminating this method would place newspapers at ''an unfair competitive disadvantage''); EFSC-NPRM at 8; NAA-NPRM at 16 (''many newspapers regularly and legitimately used this method'' and would incur considerable expense using the written or oral authorization methods instead).

[347] Aegis-NPRM at 4. *Accord* Noble-NPRM at 4 (arguing there is nothing inherently fraudulent about this method of authorization); PMA-NPRM at 20 (suggesting that the record does not support elimination of this method of authorization); Technion-NPRM at 5 (arguing there is nothing ''wrong with'' this method of authorization).

[348] *See, e.g.*, Capital One-NPRM at 8; Gannett-NPRM at 1; Intuit-NPRM at 19-20; MPA-NPRM at 27; PMA-NPRM at 20 (urging that this method be retained in part to reduce costs for inbound call centers who, under proposed revisions to address upselling, would need to conduct express verifiable authorization and may not be equipped to do so by taping); June 2002 Tr. III at 40-42 (CCC, noting that written confirmation ''is the cheapest way of effectuating a transaction;'' ERA, stating that reinstating the written confirmation method will ''help balance the additional costs'' incurred due to the expansion of the express verifiable authorization requirement).

[349] *See, e.g.*, NAAG-NPRM at 49.

another piece of ''junk mail,''[350] and recommended that the Rule be amended to specifically require that any confirmation document sent pursuant to this method of authorization be clearly and conspicuously labeled as such.[351] NAAG also suggested that, if reinstated, the written confirmation method should not be considered a ''verifiable'' means of obtaining consumers' authorization in circumstances when the consumer is already vulnerable, such as when the goods or services to be paid for are offered in conjunction with a ''free-to-pay conversion'' or ''negative option feature,'' or when the seller or telemarketer has preacquired account information prior to the initiation of the call.[352] MPA suggested that perhaps this method could be reinstated if used in the sale of goods or services for which a liberal refund policy exists.[353] NAAG raised the concern that there might exist a material inconsistency between the disclosures made in the sales portion of the call and those sent as part of a post-call confirmation.[354]

In response to this range of comment, the Commission has decided to reinstate the written confirmation method of obtaining express verifiable authorization, with certain modifications. After balancing the concerns enunciated by consumer groups against industry's strongly-stated desire to reinstate this economical means of obtaining express verifiable authorization, the Commission has determined to modify the provision to enhance the likelihood that consumers will receive these written confirmations in a timely manner and will recognize the confirmations as important documents that should not be thrown away unopened. The amended Rule continues to require that the written confirmation disclose all of the information contained in § 310.3(a)(3)(ii)(A)-(G), as well as a statement of the procedures by which the customer can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate. However, the amended Rule requires that the written confirmation be ''clearly and conspicuously labeled'' as such, on the outside of the envelope in which it is sent, and that it be sent to the customer by first class mail[355] prior to the submission for payment of the customer's or donor's billing information.[356] The Commission will continue to monitor the use of the post-sale written confirmation method of express verifiable authorization and may revisit this issue in a subsequent Rule Review should circumstances warrant.

The amended Rule also proscribes the use of the post-sale method of authorization when the goods or services that are the subject of the transaction are offered in conjunction with a ''free-to-pay conversion'' feature and preacquired account information. The record is replete with evidence, detailed in the section below discussing new § 310.4(a)(6), that ''free-to-pay conversion'' offers, particularly when coupled with the use of preacquired account information, have often resulted in unauthorized charges to consumers.[357] Given this evidence, coupled with NAAG's observation that ''[a] consumer who does not believe they entered into a transaction would be less likely to even open mail from a company whose offer he or she had recently 'declined,'''[358] the Commission will require that authorization in such situations must be obtained pursuant to either § 310.3(a)(3)(i) or (ii).

*§ 310.3(a)(4) — Prohibition of false and misleading statements to induce the purchase of goods or services or a charitable contribution*

The only proposed modification of this provision in the NPRM was to expand it, pursuant to the mandate of the USA PATRIOT Act, to encompass misrepresentations made to induce a charitable contribution.[359] The Commission received few comments on this section, and none opposing this proposed expansion.[360] Therefore, the Commission adopts the wording of proposed § 310.3(a)(4) unchanged in the amended Rule.

*§ 310.3(b) — Assisting and facilitating*

Section 310.3(b) of the original Rule prohibits a person from providing substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is violating certain provisions of the Rule. During the Rule Review, the Commission received comments from consumer protection and law enforcement groups who argued that the ''conscious avoidance'' standard adopted in the original Rule should be modified to a ''knew or should have known standard.''[361] The Commission noted that it continued to support the ''conscious avoidance'' standard, believing that such a standard is appropriate ''in a situation where a person's liability to pay redress or civil penalties for a violation of this Rule depends on the wrongdoing of another person.''[362] Although the provision was retained in the proposed Rule without amendment, its coverage was expanded to cover assisting and facilitating in the solicitation of charitable contributions pursuant to the USA PATRIOT Act. The Commission invited additional comment on, and proposed alternatives to, the assisting and facilitating standard.[363]

In response to the NPRM, VISA noted that although this provision was retained unchanged in the proposed Rule, ''the expanded scope of the Proposed Rule, including provisions that conflict with the GLBA privacy rules, could require financial institutions to police the activities of third parties, many of whom are themselves regulated entities.''[364] The Commission believes that the modifications to the preacquired account telemarketing provisions in the amended Rule obviate the concerns expressed by VISA.[365]

ARDA expressed its support for retaining the ''conscious avoidance'' standard, endorsing the rationale

[350] *Id.* (noting that such confirmations ''tend to go unnoticed or unrecognized by consumers, thereby failing in their function of 'authorizing' a payment'').

[351] *Id.*

[352] *See* June 2002 Tr. III at 42-43 (NAAG).

[353] *Id.* at 44 (MPA).

[354] *Id.* at 48-49 (NAAG).

[355] The requirement that such confirmations be sent via first class mail should cause industry to incur no additional expense. According to the DMA representative at the June 2002 Forum, federal postal regulations require that such confirmations be sent via first class mail. *See* June 2002 Tr. III at 45; *see also* June 2002 Tr. III at 47 (CCC) (noting that company practice is to ensure that written confirmations are clearly and conspicuously labeled). This change to the Rule, then, will merely echo the postal regulations, which require that personalized business correspondence be sent via first class mail. *See* 39 CFR 3001.68, App. A.

[356] The Commission has declined, at this time, to follow the suggestion by Capital One that the written confirmation method should be reinstated, ''provided that the confirmation is delivered 30 days prior to submission for payment, and the customer is permitted to repudiate the sale within that time by calling a toll-free number,'' because the record provides too little evidence to suggest that these additional protections are necessary to prevent consumer injury. *See* Capital One-NPRM at 8.

[357] *See* discussion of amended Rule § 310.4(a)(6), below. *See also* June 2002 Tr. III at 42-43 (NAAG).

[358] NAAG-NPRM at 49.

[359] Proposed Rule § 310.3(a)(4). *See* 67 FR 4508.

[360] *See, e.g.*, Make-A-Wish-NPRM, *passim* (detailing complaints received by Make-A-Wish, which does not solicit donations by telephone, regarding fraudulent telemarketers claiming or implying that they are calling from or affiliated with Make-A-Wish).

[361] *See* 67 FR at 4508-09.

[362] *Id.* at 4509.

[363] *Id.*

[364] VISA-NPRM at 12.

[365] *See* discussion of amended Rule §§ 310.4(a)(5) and (6) below.

enunciated by the Commission in the NPRM for the heightened knowledge requirement.[366] But AARP reiterated its concern that the conscious avoidance standard places too high a burden on law enforcement, and urged the Commission to substitute a ''knew or should have known'' standard for the assisting and facilitating provision.[367] NACAA also urged the Commission to adopt a ''knew or should have known'' standard in the amended Rule.[368] NAAG made a similar recommendation, noting that the current standard results in ''both federal and state authorities [being] unduly hampered in trying to reduce telemarketing fraud.''[369] NAAG also noted that this provision is critical in addressing the participation of those United States-based entities, such as sellers of victim lists, fulfillment house operators, and credit card launderers, who provide necessary assistance to fraudulent telemarketers, many of whom have begun operating from outside the country.[370]

The Commission declines, on the record evidence, to lower the standard for assisting and facilitating under the Rule. The Commission continues to believe the ''conscious avoidance'' standard is the appropriate one in instances when liability to pay redress or civil penalties rests on another person's violation of the Rule. Further, the Commission believes the ''conscious avoidance'' standard is one that can be met in situations where third parties provide substantial assistance to fraudulent telemarketers. As stated in the original SBP, this standard ''is intended to capture the situation where actual knowledge cannot be proven, but there are facts and evidence that support an inference of deliberate ignorance.''[371] In the hypothetical situations posed in NAAG's comment, the Commission believes it would be possible to demonstrate such ''deliberate ignorance'' on the part of, for example, a fulfillment house that ships only inexpensive prizes on behalf of a telemarketer about whom it receives numerous complaints. The Commission itself has brought several cases successfully using the assisting and facilitating provision, and has found the provision to be a useful tool in combating fraudulent telemarketing.[372]

*§ 310.3(c) — Credit card laundering*

In the NPRM, the Commission retained the original Rule provision addressing credit card laundering, but noted that the coverage of the provision in the proposed Rule would expand to cover credit card laundering in the solicitation of charitable contributions, pursuant to the mandate of the USA PATRIOT Act.[373] Although the proposed Rule was issued with this provision unmodified, the Commission expressed concern that the provision's ''usefulness may be unduly restricted by the phrases '[e]xcept as expressly permitted by the applicable credit card system,' in the preamble to § 310.3(c), and 'when such access is not authorized by the merchant agreement or the applicable credit card system,' in § 310.3(c)(3).''[374]

Having received no comment regarding the credit card laundering provision generally, or regarding the Commission's specific concerns, the Commission has determined to retain this provision in its original form. The Commission will continue to monitor its effectiveness, however, and may reconsider modifications at the next Rule Review.

*§ 310.3(d) — Prohibited deceptive acts or practices in the solicitation of charitable contributions*

Pursuant to § 1011(b)(1) of the USA PATRIOT Act, the Commission proposed in the NPRM to include in the Rule new prohibited misrepresentations in the solicitation of charitable contributions.[375] The amended Rule retains § 310.3(d) unchanged, with the following exceptions. First, the phrase ''after any administrative or fundraising expenses are deducted'' has been deleted from § 310.3(d)(4). The Commission believes that the provision is clearer absent this qualifying phrase, and thus has stricken it in the amended Rule. Second, § 310.3(d)(6), the prohibited misrepresentation regarding advertising sales has been deleted. As discussed below, in the section addressing § 310.6(b)(7), the Commission has determined to exempt from the Rule's coverage business-to-business calls to induce a charitable solicitation. As a result, the prohibition against misrepresentations regarding the sale of advertising, which would occur in a business-to-business context, is no longer necessary. Finally, proposed § 310.3(d)(7), prohibiting misrepresentations regarding a charitable organization's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity, is renumbered in the amended Rule as § 310.3(d)(6).

Section 310.3(d) prohibits misrepresentations regarding certain material information that a telemarketer might choose to convey to a donor to induce a charitable contribution.[376] The goal of the prohibition on these misrepresentations is to ensure that donors solicited for charitable contributions are not deceived, a purpose squarely in line with the mandate of the USA PATRIOT Act, which directed the Commission to include ''fraudulent charitable solicitations'' in the deceptive practices prohibited by the TSR.[377] Deception occurs if there is a representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances, and the representation, omission, or practice is material.[378] As set forth in the NPRM, the Commission believes that if any of the items listed in this section are misrepresented, donors are likely to be misled, as false representations of material facts are likely to mislead.[379] Moreover, the Commission's enforcement experience shows that often such representations are express, and therefore presumptively material. If implied, such representations are still likely to influence a donor's decision whether to contribute. Therefore, ''misrepresentation of any of these [] categories of material information is deceptive, in violation of section 5 of the FTC Act.''[380]

In response to the NPRM, some commenters expressed their general support for the USA PATRIOT Act amendments, which extended the Rule's coverage to for-profit telemarketers soliciting charitable donations. AARP, for example, noted its support for the general purposes of the USA PATRIOT Act, stating that the amendments would

[366] ARDA-NPRM at 6.

[367] AARP-NPRM at 8.

[368] NACAA-NPRM at 8.

[369] NAAG-NPRM at 56.

[370] *Id.* (suggesting that liability for those who assist and facilitate is particularly important when the fraudulent telemarketer holds no assets in the United States).

[371] 60 FR at 43852.

[372] *See* 67 FR at 4509, n.155. *See also FTC v. Allstate Bus. Distrib'n. Ctr., Inc.*, No. 00-10335AHM (CTX) (C.D. Cal. 2001); *FTC v. Sweet Song Corp.*, No. CV-97-4544 LGB (Jgx) (C.D. Cal. 1997); *FTC v. Walton* (d/b/a Pinnacle Fin. Servs.), No. CIV98-0018 PCT SMM (D. Ariz. Jan. 1998).

[373] *See* 67 FR at 4509.

[374] *Id.*

[375] *Id.* at 4509-10 (discussing the reasoning behind the prohibited misrepresentations included in proposed Rule § 310.3(d)).

[376] Amended Rule § 310.3(d)(1)-(7).

[377] USA PATRIOT Act § 1011(b)(1).

[378] *See Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165, *appeal dismissed sub nom., Koven v. FTC*, No. 84-5337 (11th Cir. 1984).

[379] *See Thompson Med. Co.*, 104 F.T.C. 648, 818 (1984), *aff'd* 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

[380] 67 FR at 4510.

prevent fraudulent charitable solicitations while still allowing ''legitimate fundraising appeals.''[381] Similarly, NCL noted that the new provisions in the TSR regarding for-profit fundraisers will be ''very helpful in curbing deceptive and abusive practices.''[382]

Very few comments were received specifically on § 310.3(d) of the proposed Rule. One such comment, from NCL, noted that ''[t]he proposed list of prohibited practices covers most of the common abuses that are reported by consumers and businesses.''[383] NCL did suggest adding an additional prohibited misrepresentation on ''sound-alikes,'' or the use of a name similar or identical to that of a legitimate charity in an attempt to benefit from that charity's good will.[384] Similarly, Make-A-Wish proposed prohibiting misrepresentations of the ''identity'' of the entity on whose behalf the charitable solicitation is being sought.[385] NAAG and NASCO suggested that the Commission clarify that proposed § 310.3(d)(7), which prohibits misrepresentations regarding ''[a] seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity,'' would prohibit misrepresentations of a seller's or telemarketer's affiliation with any charity.[386] The Commission believes that proposed § 310.3(d)(7), renumbered as § 310.3(d)(6) in the amended Rule, is broad enough to prohibit the ''sound-alike'' misrepresentation NCL raised, as well as to prohibit a misrepresentation regarding one's affiliation with any charity. Therefore, the Commission declines to add a further misrepresentation to specifically address the ''sound-alike'' scenario, or add the ''identity'' of the charity to the prohibited misrepresentations.

NAAG and NASCO also proposed one further modification: the addition of a prohibited misrepresentation of ''[t]he address or location of the charitable organization, and where the organization conducts its activities.''[387] NAAG stated that the addition of such a provision would ensure that telemarketers do not misrepresent that the charities on whose behalf they are soliciting are ''local'' or that their activities are local, since the local character of a charity or its programs often is material to prospective donors. According to NAAG, because many prospective donors prefer to support organizations that will benefit their own community, fundraisers sometimes take advantage of that sentiment by using a local post office box or other local address as their return address, to make it seem as if the charity is based close to the donors.[388]

The Commission believes that any misrepresentation of the charitable organization's location, or the location where the funds are to be used, would likely violate § 310.3(d)(3), which prohibits misrepresentation of the ''purpose for which any charitable contribution will be used.'' Therefore, the Commission declines to include a specific prohibited misrepresentation regarding the address or location of a charity.

*D. Section 310.4 — Abusive Telemarketing Acts or Practices.*

The Telemarketing Act authorizes the Commission to prescribe rules ''prohibiting deceptive telemarketing acts or practices *and other abusive telemarketing acts or practices.*''[389] The Act does not define the term ''abusive telemarketing act or practice.'' It directs the Commission to include in the TSR provisions prohibiting three specific ''abusive'' telemarketing practices, namely, for any telemarketer to: 1) ''undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy;'' 2) make unsolicited phone calls to consumers during certain hours of the day or night; and 3) fail to ''promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services.''[390] The Act does not limit the Commission's authority to address abusive practices beyond these three practices legislatively determined to be abusive.[391] Accordingly, the Commission adopted a Rule that addresses the three specific practices mentioned in the statute, and, additionally, five other practices that the Commission determined to be abusive under the Act.

Each of the three abusive practices enumerated in the Act implicates consumers' privacy. In fact, with respect to the first of these practices, the explicit language of the statute directs the FTC to regulate ''calls which the reasonable consumer would consider coercive or abusive of such consumer's *right to privacy*.''[392] Similarly, by directing that the Commission regulate the times when telemarketers could make unsolicited calls to consumers in the second enumerated item,[393] Congress recognized that telemarketers' right to free speech is in tension with consumers' right to privacy within the sanctity of their homes, but that a balance must be struck between the two that meshes with consumers' expectations while not unduly burdening industry. The calling times limitation protects consumers from telemarketing intrusions during the late night and early morning, when the toll on their privacy from such calls would likely be greatest. The third enumerated practice[394] also relates to privacy, in that it requires the consumer be given information promptly that will enable him to decide whether to allow the infringement on his time and privacy to go beyond the initial invasion. Congress provided authority for the Commission to curtail these practices that impinge on consumers' right to privacy but are not likely deceptive under FTC jurisprudence. This recognition by Congress, that even non-deceptive telemarketing business practices can seriously impair consumers' right to be free from harassment and abuse, and its directive to the Commission to rein in these tactics lie at the heart of § 310.4 of the TSR.

The practices not specified as abusive in the Act, but determined by the Commission to be abusive and thus prohibited in the original rulemaking are: (1) threatening or intimidating a consumer, or using profane or obscene language; (2) ''causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person;'' (3) requesting or receiving payment for credit repair services prior to delivery and proof that such services have been rendered; (4) requesting or receiving payment for recovery services prior to delivery and proof that such services

[381] AARP-NPRM at 4.

[382] NCL-NPRM at 2.

[383] *Id.* at 5.

[384] *Id.*

[385] Make-A-Wish-NPRM at 5.

[386] NAAG-NPRM at 53. *See also* NASCO-NPRM at 7.

[387] NAAG-NPRM at 53.

[388] *Id.*

[389] 15 U.S.C. 6102(a)(1) (emphasis added).

[390] 15 U.S.C. 6102(a)(3).

[391] *See* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.2 (3d ed. 1994) (noting that agencies have the power to ''fill any gaps'' that Congress either expressly or implicitly left to the agency to decide pursuant to the decision in *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). It is, therefore, permissible for agencies to engage in statutory construction to resolve ambiguities in laws directing them to act, and courts must defer to this administrative policy decision.

[392] 15 U.S.C. 6102(a)(3)(A) (emphasis added).

[393] 15 U.S.C. 6102(a)(3)(B).

[394] 15 U.S.C. 6102(a)(3)(C).

have been rendered; and (5) ''requesting or receiving payment for an advance fee loan when a seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit.''

The first two of these are directly consistent with the Act's emphasis on privacy protection, and with the intent, made explicit in the legislative history, that the TSR address these particular practices.[395] In the SBP for the original Rule, the Commission stated, with respect to the prohibition on threats, intimidation, profane and obscene language, that these tactics ''are clearly abusive in telemarketing transactions.''[396] The Commission also noted that the commenters supported this view, and specifically cited the fact that ''threats are a means of perpetrating a fraud on vulnerable victims, and [that] many older people can be particularly vulnerable . . . .''[397]

The remaining three abusive practices identified in the Rule—relating to credit repair services, recovery services, and advance fee loan services—were included in the Rule under the Telemarketing Act's grant of authority for the Commission to prescribe rules prohibiting other unspecified abusive telemarketing acts or practices. The Act gives the Commission broad authority to identify and prohibit additional abusive telemarketing practices beyond the specified practices that implicate privacy concerns,[398] and gives the Commission discretion in exercising this authority.[399]

As noted above, some of the practices prohibited as abusive under the Act flow directly from the Telemarketing Act's emphasis on protecting consumers' privacy. When the Commission seeks to identify practices as abusive that are less distinctly within that parameter, the Commission now thinks it appropriate and prudent to do so within the purview of its traditional unfairness analysis, as developed in Commission jurisprudence[400] and codified in the FTC Act.[401] This approach constitutes a reasonable exercise of authority under the Telemarketing Act, and provides an appropriate framework for several provisions of the original Rule. Whether privacy-related intrusions or concerns might independently give rise to a Section 5 violation outside of the Telemarketing Act's purview is not addressed or affected by this analysis.

The abusive practices relating to credit repair services, recovery services, and advance fee loan services each meet the criteria for unfairness. An act or practice is unfair under Section 5 of the FTC Act if it causes substantial injury to consumers, if the harm is not outweighed by any countervailing benefits, and if the harm is not reasonably avoidable.[402] An important characteristic common to credit repair services, recovery services, and advance fee loan services is that in each case the offered service is fundamentally bogus. It is the essence of these schemes to take consumers' money for services that the seller has no intention of providing and in fact does not provide. Each of these schemes had been the subject of large numbers of consumer complaints and enforcement actions,[403] and in each case caused substantial injury to consumers. Amounting to nothing more than outright theft, these practices conferred no potentially countervailing benefits. Finally, having no way to know these offered services were illusory, consumers had no reasonable means to avoid the harm that resulted from accepting the offer. Thus, these practices meet the statutory criteria for unfairness, and accordingly, the remedy imposed by the Rule to correct them is to prohibit requesting or receiving payment for these services until after performance of the services is completed.

*§ 310.4(a) — Abusive conduct generally*

Section 310.4(a) of the original Rule sets forth specific conduct that is considered to be an ''abusive telemarketing act or practice'' under the Rule. None of the comments in the Rule Review recommended that changes be made to the original wording of §§ 310.4(a)(1)-(3); nor had the Commission's enforcement experience revealed any difficulty with these provisions that would warrant amendment.[404] Although one

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[395] ''With respect to the bill's reference to 'other abusive telemarketing activities' . . . the Committee intends that the Commission's rulemaking will include proscriptions on such inappropriate practices as threats or intimidation, obscene or profane language, refusal to identify the calling party, continuous or repeated ringing of the telephone, or engagement of the called party in conversation with an intent to annoy, harass, or oppress any person at the called number. The Committee also intends that the FTC will identify other such abusive practices that would be considered by the reasonable consumer to be abusive and thus violate such consumer's right to privacy.'' H.R. REP. NO. 103-20 at 8 (1993).

[396] 60 FR at 30415.

[397] *Id.*

[398] 15 U.S.C. 6102(a)(1). The ordinary meaning of ''abusive'' is (1) ''wrongly used; perverted; misapplied; catachrestic;'' (2) ''given to or tending to abuse,''(which is in turn defined as ''improper treatment or use; application to a wrong or bad purpose''). Webster's International Dictionary, Unabridged 1949.

[399] 15 U.S.C. 6102(a)(1).

[400] *See* Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, appended to *Int'l Harvester Co.*, 104 F.T.C. 949, 1064 (1984); Letter from the FTC to Hon. Bob Packwood and Hon. Bob Kasten, Committee on Commerce, Science and Transportation, United States Senate, reprinted in FTC Antitrust & Trade Reg. Rep. (BNA) No. 1055, at 568-70 (Mar. 5, 1982); *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1363-68, *reh'g denied*, 859 F.2d 928 (11th Cir. 1988), *cert. denied*, 488 U.S. 1041 (1989).

[401] 15 U.S.C. 45(n).

[402] *Id.*

[403] During 1995 and 1996, the Commission brought or settled lawsuits against numerous individuals and companies involved in nearly a dozen recovery room operations. *See, e.g., FTC v. Meridian Capital Mgmt.*, No. CV-S-96-63-PMP (RLH) (D. Nev. filed Nov. 20, 1996). The Commission's efforts against recovery rooms have borne fruit. The volume of consumer complaints concerning recovery rooms logged into the FTC Telemarketing Complaint System in 1996 plummeted to 153—less than one-fifth the record high volume of 869 complaints recorded in 1995. *See* ''1995-1996 Staff Summary of FTC Activities Affecting Older Americans'' (Mar. 1998). Complaints about ''recovery'' schemes have continued to decline dramatically, from a number three ranking in 1995 to a number twenty-five ranking in 1999, while complaints about credit repair have remained at a relatively low level since 1995 (steadily ranking about number twenty-three or twenty-four in terms of number of complaints received by the NFIC). NCL-RR at 11. The Commission continues to take action against fraudulent credit repair schemes; for example, in August 2000, the FTC, the Department of Justice and forty-seven other federal, state and local law enforcement and consumer protection agencies surfed the Web looking for illegal scams that promise consumers that they can restore their creditworthiness for a fee. Over 180 websites were put on notice that their credit repair claims may violate state and federal laws. *See* ''Surf's Up for Crack Down on ''Credit Repair'' Scams,'' FTC press release dated Aug. 21, 2000). Unfortunately, complaints about advance fee loan schemes rose from a number fifteen ranking in 1995 to the number two ranking in 1998, with about 80 percent of the advance fee loan companies reported to the NFIC located in Canada. NCL-RR at 12. RR Tr. at 378. The Commission and the state Attorneys General continue to launch law enforcement ''sweeps'' targeting corporations and ind ividuals that promise loans or credit cards for an advance fee, but never deliver them. A sweep was announced June 20, 2000, involving five cases filed by the FTC, 13 actions taken by state officials, and three cases filed by Canadian law enforcement authorities. *See* ''FTC, States and Canadian Provinces Launch Crackdown on Outfits Falsely Promising Credit Cards and Loans for an Advance Fee,'' FTC press release dated June 20, 2000. Among the most recent FTC cases targeting advance fee loans, four involved advance fee credit card schemes: *FTC v. Fin. Servs. of N. Am.*, No. 00-792 (GEB) (D.N.J. filed June 9, 2000); *FTC v. Home Life Credit*, No. CV00-06154 CM (Ex) (C.D. Cal. filed June 8, 2000); *FTC v. First Credit Alliance*, No. 300 CV 1049 (D. Conn. filed June 8, 2000); and *FTC v. Credit Approval Serv.*, No. G-00-324 (S.D. Tex. filed June 7, 2000). In addition, another case against a fraudulent credit card loss protection seller also included elements of illegal advance fee credit card fees. *FTC v. First Capital Consumer Membership Servs., Inc.*, Civil No. 00-CV-0905C(F) (W.D.N.Y. filed Oct. 23, 2000).

[404] Section 310.4(a)(1) prohibits as an abusive practice ''threats, intimidation, or the use of profane

commenter suggested amendments to § 310.4(a)(4), the Commission determined that no amendment was needed to the language of that provision.[405] Therefore, the language in these provisions was unchanged in the proposed Rule.

As noted in the NPRM, however, the Rule amendments mandated by the USA PATRIOT Act expand the reach of § 310.4(a) to encompass the solicitation of charitable contributions. The section begins with the statement ''It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in [the conduct specified in subsections (1) through (6) of this provision of the Rule].''[406] The proposed Rule modified the definitions of ''telemarketing,'' and, by association, ''telemarketer,'' to encompass the solicitation of charitable contributions. Consequently § 310.4(a) of the proposed Rule would have applied to all telemarketers, including those engaged in the solicitation of charitable contributions. Each of the prohibitions in § 310.4(a) will therefore now apply to those telemarketers soliciting on behalf of either sellers or charitable organizations. As noted in the NPRM, the Commission believes it unlikely that §§ 310.4(a)(2)-(4) will have any significant impact on telemarketers engaged in the solicitation of charitable contributions, since those sections all deal with practices that are commercial in nature and not associated with charitable solicitations. Sections 310.4(a)(1), (5), (6), (7) and (8) of the proposed Rule, however, addressed practices that are not necessarily confined to telemarketing to induce purchases of goods or services. They therefore may have had an impact upon telemarketers engaged in the solicitation of charitable contributions.

The Commission received many comments discussing the proposed modifications to § 310.4(a), and significant time was devoted to these issues at the June 2002 Forum. A summary of the major points on the record regarding the proposed amendments is provided below.

*§ 310.4(a)(1) — Threats and intimidation*

Section 310.4(a)(1), unchanged in the proposed Rule, specifies that it is an abusive telemarketing practice to engage in threats, intimidation, or the use of profane or obscene language. None of the comments in response to the NPRM recommended that changes be made to the wording of § 310.4(a)(1), although ICFA did request clarification of the term ''intimidation,'' arguing that ''a person could potentially claim to have been 'intimidated' simply because a pre-need caller suggested meeting to discuss funeral arrangements.''[407] The Commission believes that under the language of the Rule, which focuses on the telemarketer's behavior, to ''engage in . . . intimidation'' could not reasonably be extended to cover the situation where a telemarketer merely invites a consumer to discuss funeral arrangements, even if the person called finds the prospect of funeral planning an ''intimidating'' one. Rather, as the Commission noted in the TSR Compliance Guide, this provision is meant to prohibit ''intimidation, including acts which put undue pressure on a consumer, or which call into question a person's intelligence, honesty, reliability or concern for family.''[408] The Commission believes further clarification is unnecessary, and thus declines to include in the amended Rule a definition of ''intimidation.'' Therefore, the language in this provision remains unchanged in the amended Rule. However, the USA PATRIOT Act expansion of the TSR brings within the ambit of this provision telemarketers soliciting charitable contributions.

*§ 310.4(a)(2) — Credit repair*

Section 310.4(a)(2) prohibits requesting or receiving a fee or consideration for goods or services represented to improve a person's creditworthiness until: 1) the time frame within which the seller has represented that the promised services will be provided has expired; and 2) the seller has provided the consumer with evidence that the services were successful—that is, that the consumer's creditworthiness has improved. No change to this section was incorporated in the proposed Rule, except to note its expanded coverage as a result of the USA PATRIOT Act.[409] The only comment received in response to the NPRM was from DBA, which requested that debt collectors be specifically exempted from compliance with this section.[410] As DBA itself noted, debt collection activities do not fall within the Rule's ambit in any event because they are outside the definition of ''telemarketing.''[411] Therefore, it is unnecessary to exempt debt collectors from compliance with this provision.

*§ 310.4(a)(5) — Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing*

The Commission has added a new provision, § 310.4(a)(5), which specifies that it is an abusive practice and a violation of the Rule to disclose or receive, for consideration, unencrypted consumer account numbers for use in telemarketing.

As mentioned above, since the original Rule was promulgated, consumer concern over encroachments on their privacy has become widespread. One response to privacy concerns was passage of the GLBA[412] and its related regulations,[413] under which financial institutions, and the third parties with which they do business, may provide consumer account information to other third parties only in encrypted form for marketing purposes. To do otherwise is not only a violation of the GLBA and its related regulations,[414] but is construed by consumers as a breach of the financial institution's promise to consumers to keep the consumer's account information confidential and secure.[415]

or obscene language.'' Section 310.4(a)(2) prohibits requesting advance payment for so-called ''credit repair'' services. Section 310.4(a)(3) prohibits requesting advance payment for the recovery of money lost by a consumer in a previous telemarketing transaction.

[405] Section 310.4(a)(4) prohibits requesting advance payment for obtaining a loan or other extension of credit when the seller or telemarketer has represented a high likelihood that the consumer will receive the loan or credit. NCL reported in its Rule Review comment that the number of complaints it received about such advance fee loan schemes had risen steeply in the five years since the Rule was promulgated. NCL also speculated that consumers may be confused about whether and under what circumstances fees are legitimately required for different types of loans, as evidenced by the numerous complaints about advance fee credit cards. NCL-RR at 11. The Commission noted in the NPRM its belief that the language of § 310.4(a)(4) already prohibits such advance fee credit card offers via telemarketing and that numerous federal and state law enforcement efforts have been directed at such offers. *See* discussion at 67 FR at 4510.

[406] Original and amended Rule § 310.4(a).

[407] ICFA-NPRM at 3.

[408] TSR Compliance Guide at 23 (noting that ''[r]epeated calls to an individual who has declined to accept an offer may also be an act of intimidation'').

[409] 67 FR at 4512 (noting that ''[i]t is unlikely that [this section] will have any significant impact on telemarketers engaged in the solicitation of charitable contributions. . .'').

[410] DBA-NPRM at 2-4.

[411] *Id.*

[412] Gramm-Leach-Bliley Act, see note 64 above.

[413] *See* 16 CFR 313.65 (2000) (FTC's Privacy Regulation). *See also* 17 CFR 160; 12 CFR 332; 12 CFR 715; 12 CFR 40; 12 CFR 573; and 17 CFR 248.

[414] *See, e.g.*, 12 CFR 313.12.

[415] *See* AARP-Supp. at 2 (describing the results of a survey AARP conducted in which the majority of consumers reported that they did not believe telemarketers could or should freely share their account information). *See also* Dave Finlayson (Msg. 491) (''I will cease doing business with any firm which gives out my personal private information.''); BL (Msg. 1175) (''I also agree that

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Indeed, trading in unencrypted consumer account numbers has been uniformly condemned by virtually all parties who participated in this rulemaking proceeding. Although there was substantial debate regarding the Commission's proposal for a blanket prohibition on the transfer or receipt of consumers' billing information (*i.e.*, ''preacquired account information''),[416] there was no disagreement among commenters and forum participants about the notion that trafficking in lists of consumer account numbers was improper, in many cases illegal, and should be a violation of the Rule.[417] As ERA explained during the forum:

> [I]f there is a transfer of consumer information without knowledge of and prior to the consumers' consent, which would encompass, for example, your scenario where a list is compiled and a marketer [sold] its list with its credit card numbers to another marketer without telling the consumers on that list that they sold the list of account numbers, I think everyone at this table would agree . . . that this is a violation. . . . We've said in our comments that we would agree to a ban on that. Legitimate marketers don't do that. They don't sell consumer credit card numbers for money.[418]

Given that there is no legitimate reason to purchase unencrypted credit card numbers, the Commission believes there is a strong likelihood that telemarketers who engage in this practice will misuse the information in a manner that results in unauthorized charges to consumers. This conclusion is consistent with the Commission's law enforcement experience.[419] Consumers cannot avoid the injury because they likely are unaware that their credit card numbers have been purchased and that a telemarketer possesses that information when they receive a telemarketing call. In addition, there is no evidence on the record of any countervailing benefits to consumers or competition by trafficking in lists of account numbers. As a result, the Commission concludes that the practice of selling unencrypted lists of credit card numbers is likely to cause substantial and unavoidable consumer injury in the form of unauthorized charges without any countervailing benefits. Thus, the Commission has determined to add Section 310.4(a)(5). This provision is consistent with the basic prohibition in the GLBA, and in essence, extends the ban on this practice beyond financial institutions and ensures that all sellers and telemarketers subject to the TSR are prohibited from this practice.

The prohibition in § 310.4(a)(5) is not limited to compilation and disclosure of lists of account numbers. Rather, any disclosure (or receipt) of unencrypted account information violates the Rule, unless the disclosure is for purposes of processing a payment for a transaction to which the consumer has consented after receiving all disclosures and other protections of the Rule. A seller or telemarketer could not, for example, provide or receive account numbers one at a time in order to circumvent this provision. Nor could a telemarketer obtain account information from consumers on behalf of one seller, and then retain it for sale or disclosure to another seller in another telemarketing campaign.[420]

By ''unencrypted,'' the Commission means the actual account number, or lists of actual account numbers, or encrypted information with a key to unencrypt the data.[421] ''Consideration'' is not limited to cash payment for a list of account numbers. ''Consideration'' can take a variety of forms, including receiving a percentage of every ''sale'' using the unencrypted account information.

This provision allows processing a properly obtained payment for goods or services pursuant to a transaction. In addition, pursuant to the USA PATRIOT Act's expansion of the TSR to cover charitable solicitations, the provision also allows for the disclosure or receipt of a donor's account number to process a payment for a charitable contribution pursuant to a transaction. By ''transaction,'' the Commission means a telemarketing transaction that complies with all applicable sections of the Rule, including new § 310.4(a)(6), discussed below, which prohibits any seller or telemarketer from causing a charge to be placed against a customer's or donor's account without that customer's or donor's express informed consent to the charge.[422]

*§ 310.4(a)(6) — Causing a charge to be submitted for payment without the consumer's express informed consent*

In the NPRM, the Commission proposed a prohibition on ''receiving from any person other than the consumer or donor for use in telemarketing any consumer's or donor's billing information, or disclosing any consumer's or donor's billing information to any person for use in telemarketing.''[423] This proposed provision was prompted by extensive comments during the Rule Review concerning the severity and the scope of harm to consumers related to

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they should not get a credit card or other account number except from the consumer who chooses to deal with them. . . . This should include not SELLING (not just sharing as stated in our newspaper article) these numbers.''); Anonymous (Msg. 3457) (''This is not what any reasonable person would consider ''public information.'. . . Why would ANYONE consider this information that they can ''share'' without the customer's express permission?'').

[416] Over 50 of the major organizational commenters addressed the issue of preacquired account telemarketing, as did over 200 consumer commenters. In addition, a session of the June 2002 Forum was dedicated to the topic, and generated extensive discussion. *See* June 2002 Tr. II at 116-212.

[417] *See, e.g.*, ERA/PMA-Supp. at 14-15; PMA-NPRM at 14; June 2002 Tr. II at 183 (ERA). *See also* ATA-Supp. at 6; NCTA-NPRM at 12 (''[T]he trafficking of customer account information by unscrupulous telemarketers is a legitimate concern.''). Also, the GLBA prohibits this practice on the part of financial institutions. 15 U.S.C. 6802(d); and *see, e.g.* 12 CFR 313.12.

[418] June 2002 Tr. II at 183.

[419] *See, e.g., FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176 (C.D. Cal. 2000) (in which, outside the telemarketing context, defendant purchased unencrypted lists of consumer account numbers, which it used to charge consumers, purportedly for visits to adult websites, despite the fact that many of those charged did not even own computers). In addition, given the evidence that preacquired account telemarketing involving encrypted account information can result in unauthorized charges (as discussed in more detail below), the Commission believes that there is an even greater likelihood of consumer injury when telemarketers have purchased consumers' actual credit card numbers before contacting consumers about an offer.

[420] *See, e.g., FTC v. Capital Club*, No. 94-6335 (D.N.J. 1994). According to the FTC complaint in that case, two companies, National Media and Media Arts, which marketed products through infomercials, allegedly sold or rented their customer lists to third-party service companies that sold products and services such as memberships in shopping and travel clubs. The lists contained customers' names, addresses, and telephone numbers, as well as their credit-card types, account numbers and expiration dates. The lists were provided to the service companies without the customers' knowledge or authorization. Some of the Capital Club defendants' roles included maintaining the lists, marketing them to the service companies, and conducting telemarketing calls on behalf of the service companies, according to the complaint. Industry representatives at the June 2002 Forum registered agreement that the Capital Club scenario would run afoul of a ban on trafficking in consumer account information. *See* June 2002 Tr. II at 193 (ERA) (''[T]hat's exactly the scenario that we're talking about that would be prohibited because when that third-party telemarketer retained that account information, it did so as an agent for the seller, so it was not that telemarketer's account information to begin with. They were capturing that for the seller on whose behalf that call was made, so if that telemarketer were then to call a consumer without knowledge and prior consent and use that credit card information again, that would be the kind of a transfer prior to and without consumer consent that we're talking about.'')

[421] This, too, is consistent with the financial privacy regulations issued pursuant to the GLBA. *See* 12 CFR 313.12(c)(1) (''An account number, or similar form of access number or access code, does not include a number or code in an encrypted form, *as long as you do not provide the recipient with a means to decode the number or code*.'') (emphasis added).

[422] *See* amended Rule § 310.4(a)(6) and discussion of that provision, below.

[423] Proposed Rule § 310.4(a)(5), 67 FR at 4543.

preacquired account telemarketing.[424] The proposal also arose from the Commission's law enforcement experience in this area, as well as that of the states, which demonstrates the consumer harm that can result from this practice.[425] The comments received in response to the NPRM, however, demonstrate that much preacquired account telemarketing does not necessarily give rise to consumer injury—specifically, unauthorized charges—and in fact may benefit consumers. With this in mind, the Commission has focused more narrowly on the tangible harm, and has crafted precise solutions to the specific abuses evident in instances involving preacquired account information.

Section 310.4(a)(6) of the amended Rule is one of a number of provisions that collectively address the harm caused by certain forms of preacquired account telemarketing. The scope of this section, however, extends beyond the context of preacquired account telemarketing to any instance where the seller or telemarketer causes a charge to be submitted for payment without first obtaining the express informed consent of the customer or donor to be charged, and to be charged using a particular account or payment mechanism. This provision, along with several new definitions (amended Rule § 310.2(o) ''free-to-pay conversion,'' § 310.2(t) ''negative option feature,'' and § 310.2(w) ''preacquired account information''), a new provision requiring specific disclosures of material information in any telemarketing transaction involving a negative option feature (amended Rule § 310.3(a)(1)(vii)), and a new provision prohibiting misrepresentations regarding any material aspect of a negative option feature (amended Rule § 310.3(a)(2)(ix)), together are designed to address in a more narrowly-tailored manner the problem originally targeted by the blanket prohibition against receiving account information from any person other than the consumer or disclosing that information for use in telemarketing.

The blanket prohibition proposed in the NPRM, and the issue of preacquired account telemarketing generally, received substantial comment. Consumer groups and law enforcement agencies strongly supported the proposal, citing continued evidence of substantial consumer injury resulting from abusive preacquired account telemarketing practices.[426] Their comments strongly criticized a distinctive feature of preacquired account telemarketing—that is, that it fundamentally changes the customary bargaining relationship between seller and consumer by giving the seller the means to bill charges to the consumer's account without the consumer divulging his or her account number to evidence consent to the transaction.[427]

Industry commenters opposed the proposed provision, making a number of legal and factual arguments. Several industry members suggested that without specific legislative authority, the Commission could not prohibit the transfer of account information under the TSR.[428] A few commenters argued that the Commission lacked record evidence sufficient to support the proposed prohibition.[429] It bears noting that, although business and industry representatives acknowledged during the Rule Review that the practice of preacquired account telemarketing was quite common, maintaining that it was ''very important'' to them, they provided scant information that would help to quantify the benefits conferred by this practice or better explain how these benefits might outweigh the substantial consumer harm it can cause.[430] By contrast, the record of consumer injury arising from preacquired account telemarketing scenarios was extensive at the time of the Rule Review.[431]

Three arguments echoed throughout virtually all industry comments received in response to the NPRM. First, financial institutions, as well as other industry members, argued that the proposal was unnecessary or improper in light of the enactment of the GLBA and the various regulations thereunder.[432] Specifically, these commenters argued that the issue of releasing account information for marketing purposes already has been dispositively addressed in the GLBA and its implementing regulations, with a different result from that proposed by the Commission in the TSR.[433]

[424] *See* 67 FR at 4512-14.

[425] *See, e.g., FTC v. Smolev*, No. 01-8922 CIV ZLOCH (S.D. Fla. 2001); *FTC v. Technobrands, Inc.*, No. 3:02 cv 00086 (E.D. Va. 2002); NAAG-NPRM at 30, n.73; Illinois-Supp. *passim*.

[426] AARP-NPRM at 6-7; AARP-Supp. at 4; EPIC-NPRM at 9; Horick-NPRM at 1 (endorsing EPIC's NPRM comment); NAAG-NPRM at 30-41; NCLC-NPRM at 12-13. *See also* Covington-Supp. at 2-5; and NCL-NPRM at 6 (''Checks and money orders are no longer the most common methods of payment in telemarketing complaints made to the NFIC. As NCL noted earlier, demand drafts, credit cards, debit cards, utility bills, and other types of accounts are increasingly used for payments. Sometimes consumers contend that they never provided their account numbers to the telemarketers; many of these complaints say they never even heard of the companies before they received their bills or bank statements.'').

[427] NAAG-NPRM at 30; NCL-NPRM at 7. *See also* Covington-Supp. at 2-5.

[428] ATA-NPRM at 18 (arguing that, because the Telemarketing Act made no reference to preacquired account telemarketing, the Commission cannot regulate it); Cendant-NPRM at 6 (similar argument to ATA); CCC-NPRM at 8; DMA-NPRM at 41-42 (arguing that the Commission lacks authority under Telemarketing Act to establish a law violation based on unfairness standard); ERA-NPRM at 20 (same argument as DMA); Green Mountain-NPRM at 29-31; Household Auto-NPRM at 5; PMA-NPRM at 16 (same argument as DMA and ERA). Contrary to these assertions, the Commission has the authority to define and restrict deceptive and abusive telemarketing acts or practices, pursuant to the Telemarketing Act. Moreover, the Commission has analyzed proposed Rule provisions addressing abusive practices under the FTC Act's unfairness standard to narrow, not expand, the scope of activities brought under the purview of the statute. 67 FR at 4511. The unfairness standard requires that several specific elements be met before an act or practice may be deemed ''unfair'' under the FTC Act. *See* 15 U.S.C. 45(n) and discussion of § 310.4(a) above. If anything, the Commission is taking a more conservative approach in analyzing what constitutes an ''abusive practice'' than is required under the Telemarketing Act.

[429] DMA-NPRM at 39, 41; Household Auto-NPRM at 5; MPA-NPRM at 21-22.

[430] *See* 67 FR at 4512-14; and June 2002 Tr. II at 211-12 (E. Harrington) (''One of the reasons that the Commission has proposed a prohibition is because it looked very carefully at the record of the request for justification for the practice and found it is sorely wanting. Why this needs to happen, in other words, has been a real mystery to us, why it is that companies should be permitted to get account information from third parties and have it at the time that they call a prospective customer, charge that account information and oftentimes not obtain consent for that.'').

[431] *See* 67 FR at 4512-14. Moreover, the evidence continues to mount as the Commission and states continue to bring law enforcement actions involving these practices. *See, e.g.*, NAAG-NPRM at 30, n.73; Minnesota-Supp. *passim*; Illinois-Supp. *passim*.

[432] Advanta-NPRM at 3; Allstate-Supp. at 2; ABA-NPRM at 8; ABIA-NPRM at 1; AFSA-NPRM at 11-12; AmEx-NPRM at 4-5; ATA-Supp. at 5; Assurant-NPRM at 6; BofA-NPRM at 7; Bank One-NPRM at 2-3; Capitol One-NPRM at 8; Cendant-NPRM at 6-7; CBA-NPRM at 9; Citigroup-NPRM at 8-9; CCC-NPRM at 9; CMC-NPRM at 13; Discover-NPRM at 5-6; E-Commerce Coalition-NPRM at 2; Eagle Bank-NPRM at 4; FSR-NPRM at 7-8; Fleet-NPRM at 4-5; Household Auto-NPRM at 5; Household Bank-NPRM at 2, 7-9; Household Finance-NPRM at 2, 5; HSBC-NPRM at 3; KeyCorp-NPRM at 4; MasterCard-NPRM at 7; MBA-NPRM at 3; MBNA-NPRM at 5; Metris-NPRM at 2-4; NRF-NPRM at 21; PCIC-NPRM at 2; VISA-NPRM at 6; Wells Fargo-NPRM at 3; Letter from Reps. Ney, Sandlin, Jones, Cantor, and Shows to Chairman Timothy Muris, dated Apr. 15, 2002; Letter from Sens. Hagel, Johnson, and Carper to Chairman Timothy Muris, dated Apr. 17, 2002. *See also* Letter from Rep. Manzullo to Chairman Timothy Muris, dated Apr. 12, 2002 (suggesting that the blanket prohibition on transferring or receiving billing information ''seems excessive''); and Letter from Sen. Inhofe to Chairman Timothy Muris, dated Mar. 22, 2002 (same).

[433] ABA-NPRM at 8; BofA-NPRM at 7; Bank One-NPRM at 2-3; CBA-NPRM at 9; Discover-NPRM at 5. *See also* CMC-NPRM at 14 ( ''We see no reason why financial institutions should be subject to any more stringent rules in connection with the use of consumer information for telemarketing purposes than for other purposes, and for this reason, we think the Rule should impose no more stringent limits on the sharing of billing information than the

Continued

Commenters noted that the various privacy regulations under the GLBA prohibit sharing account numbers with telemarketers, but provide exceptions for encrypted information, sale of an entity's own product through an agent, and co-branding and affinity programs. Thus, they argued, ''since the proposed Rule fails to include these exceptions, it is inconsistent with the GLBA regulations, rendering the regulations irrelevant.''[434] NAAG challenged these arguments, pointing out that the goals of the GLBA and the TSR are very different. NAAG expressed the view that the GLBA did not address the economic injury to consumers caused by preacquired account telemarketing, as it was focused on the privacy of account information; thus there is no conflict between the regulations, as they are aimed at different consumer harms.[435] According to NAAG:

> The essential characteristic of [preacquired account telemarketing] is the ability of the telemarketer to charge the consumer's account without traditional forms of consent. . . . The key is how the agreement between a company controlling access to a consumer's account and the telemarketer who preacquired the ability to charge a consumer's account affects the bargaining power between the telemarketer and the consumer. GLBA and implementing regulations do not address this relationship. . . . [Indeed as] a result of the [GLBA and implementing regulations] . . . vendors . . . can still send through charges to consumers' accounts without consumers giving their credit card numbers. . . . This allows the same [preacquired account telemarketing] process to continue. . . .[436]

Another common theme in industry comments on this issue was that the use of preacquired account information in telemarketing provides protection for consumers from identity theft perpetrated by individual telemarketing agents, and assuages consumers' concerns about divulging their account information.[437] According to one such commenter, having consumers provide billing information over the telephone:

> will actually operate to introduce account numbers into broader circulation. As customers provide account numbers, employees of telemarketers, processors and others in the distribution chain may have access to them. This practice will actually increase the chances for unauthorized use. . . . Sophisticated encryption processes keep account numbers out of circulation, and out of the hands of potential unauthorized users.[438]

A number of commenters pointed out that the GLBA implementing regulations assume the confidentiality benefits of transferring encrypted account information so that consumers would not have to provide such information during the marketing transaction.[439] Other commenters noted some contradiction in industry's identity theft argument, suggesting it is illogical to assert that a telemarketer cannot be trusted with a consumer's account information, but that same telemarketer can be trusted to tell the seller truthfully that the consumer has provided express informed consent to the purchase, absent obtaining any part of the account number from the consumer.[440] One such commenter further suggested that the best protection against individual telemarketers perpetrating identity theft is proper screening, training, monitoring and supervision of salespeople.[441] In addition, the vast majority of non-cash transactions in both telemarketing and face-to-face retail situations entail the consumer's disclosure of his or her account number to the seller's representative.[442] The record does not reveal any reason to support the notion that the risk of identity theft is any different in these transactions than in transactions where the seller has opted to make use of preacquired account information.

The third recurring theme in industry comments on this issue was the existence of a variety of efficiencies for both sellers and consumers. Among the most common examples cited was avoiding error in the transmission of account numbers from consumer to telemarketer, as either the consumer misstates or the telemarketer miskeys the account number.[443] Another benefit cited by numerous industry commenters was the reduction of time on the telephone to complete the transaction in the initial call,[444] particularly in

GLBA and the Commission's privacy rule impose.'').

[434] ABA-NPRM at 8. *See also* ABIA-NPRM at 2 (arguing that the proposed provision ''would . . . disrupt a coordinated body of federal and state privacy laws and regulations enacted since passage of GLBA''); AFSA-NPRM at 11; AmEx-NPRM at 4; BofA-NPRM at 7; Bank One-NPRM at 3; Cendant-NPRM at 6-7; CMC-NPRM at 13.

[435] NAAG-NPRM at 41-43.

[436] *Id.* at 43. *Accord* Covington-Supp. at 2-5.

[437] ABA-NPRM at 8; AmEx-NPRM at 5; Assurant-NPRM at 4; BofA-NPRM at 7; Bank One-NPRM at 3-4; Capital One-NPRM at 9; Cendant-NPRM at 7; Household Auto-NPRM at 2, 5; Household Bank-NPRM at 2, 7; Household Finance-NPRM at 2, 7; MasterCard-NPRM at 7; MPA-NPRM at 24; Metris-NPRM at 2, 5-7; NRF-NPRM at 20; Time-NPRM at 8-9; VISA-NPRM at 6-7; Wells Fargo-NPRM at 3. *See also* June 2002 Tr. II at 124-25 (CCC); *Id.* at 133 (PMA) and 194-95 (DialAmerica).

[438] AmEx-NPRM at 8. *Accord* Assurant-NPRM at 5; Bank One-NPRM at 3-4. Additionally, several commenters suggested that the blanket prohibition was ''inconsistent with the longstanding and well considered advice [of the Commission and other consumer protection groups and law enforcement agencies] that they not release their account numbers to telemarketers. . . .'' MasterCard-NPRM at 7. *Accord* BofA-NPRM at 7; Bank One-NPRM at 3. *See also* ABA-NPRM at 8; Metris-NPRM at 6. In fact, the Commission's advice has not been to refuse to divulge account information in any telemarketing transaction, but rather only to divulge such information when the seller is known to the consumer. *See, e.g.*, ''Facts for Consumers: Are You a Target of ... Telephone Scams,'' http://www.ftc.gov/bcp/confine/pubs/tmarkg/target.htm; and ''Consumer Alert: Customized Cons Calling,'' http://www.ftc.gov/bcp/confine/pubs/alerts/consalrt.htm. Moreover, the reason for this advice is not to avoid identity theft, but to protect consumers from fraudulent telemarketers selling bogus goods or services. *Id.* In the identity theft context, the danger identified by the Commission and discussed in its publications is not the potential misuse of account information that a consumer has provided in the course of a sale of goods or services, but rather ''pretexting''—*i.e.*, the practice of eliciting a consumer's personal information under false pretenses, such as claiming to be from the consumer's bank, calling to confirm the consumer's account information. *See* ''Pretexting: Your Personal Information Revealed,'' http://www.ftc.gov/bcp/confine/pubs/credit/pretext.htm.

[439] Bank One-NPRM at 4; Cendant-NPRM at 7; Household Auto-NPRM at 2-3; Metris-NPRM at 5; E-Commerce Coalition-NPRM at 3; VISA-NPRM at 6-7.

[440] June 2002 Tr. II at 130-31 (AARP), 143 (NAAG), and 205 (NCL). Indeed, in both their Rule Review and NPRM comments, NAAG provided several examples of instances where obviously confused elderly consumers were charged for products or services using preacquired account information, despite no clear evidence of consent during the telemarketing call. NAAG-RR at 11 and Exs. 2 - 4 attached thereto; NAAG-NPRM at 32, and Ex. B attached thereto. *See also* Synergy Global-NPRM at 1-2 (comments from a former teleservices agent stating that he was encouraged by his superiors to ''falsify sales in an attempt to artificially inflate the statistics compiled nightly'').

[441] NCL-NPRM at 7.

[442] NAAG-RR at 10. Indeed, NEMA described its own current procedures, under the Uniform Business Practices guidelines created for the retail energy market, whereby it obtains complete billing information directly from each customer as proof of the customer's intent to switch utility providers. NEMA-NPRM at 8-9.

[443] ABA-NPRM at 8; Assurant-NPRM at 3-4; BofA-NPRM at 7; Cendant-NPRM at 7; Cox-NPRM at 33; Metris-NPRM at 7.

[444] *See, e.g.*, MPA-NPRM at 24 (''The Commission must also not underestimate the economic efficiencies such practices afford to businesses. . . . It is estimated that requiring consumers to retrieve and repeat their entire account number and verifying this information will increase the length of the call substantially, with one provider estimating an increase of 35 seconds and additional evidence suggesting that increase could be 60 seconds or more.'') *See also* Cox-NPRM at 33; Metris-NPRM at 6-7; NCTA-NPRM at 12; Tribune-NPRM at 8. MPA's argument on this point is somewhat contradicted by its recommended alternative to the prohibition, express verifiable authorization, which involves additional expense, regardless of the method of express verifiable authorization selected. *See* MPA-NPRM at 26-29. NCL challenged this proposition, suggesting that, on the contrary, ''[r]equiring telemarketers to ask for [the consumer's account number] would benefit both parties by helping to confirm a consumer's intention to make the purchase and the correct account that will be used for that purchase, reducing the potential for billing disputes later.'' NCL-NPRM at 7.

upsells.[445] As DMA noted, ''it is a significant benefit to consumers for second businesses in an upsell to obtain and use information such as address and credit card information. This eliminates the need for a consumer to have to restate the information just provided. Transfer of information in such scenarios with informed consent is inherently efficient for both the merchant and the consumer.''[446] The final benefit cited in several comments was that preacquired account telemarketing helped consumers by enabling them to avoid the inconvenience of having to pull out their wallets in order to make a purchase.[447] This alleged benefit was sharply questioned by consumer advocates, who argued that whatever time savings or convenience may accrue from the use of preacquired account information does not offset the potential harm from its use.[448] The record makes clear, in fact, that it is the very act of pulling out a wallet and providing an account number that consumers generally equate with consenting to make a purchase, and that this is the most reliable means of ensuring that a consumer has indeed consented to a transaction.[449]

As it stated in the NPRM, the Commission still believes that whenever preacquired account information enables a seller or telemarketer to cause charges to be billed to a consumer's account without the necessity of persuading the consumer to demonstrate his or her consent by divulging his or her account number, the customary dynamic of offer and acceptance is inverted. In such a case, what is customarily under the sole control of the consumer—whether to divulge one's account number, thereby determining whether to accept the offer and how to pay for it—is now in the hands of the seller or telemarketer.[450] This reversal in the traditional paradigm is not one that is generally expected or favored by consumers, who consistently state that, as a general proposition, they do not believe it is or should be possible for them to be charged if they do not provide their account number in a transaction.[451] The Commission understands this to mean that, generally speaking, consumers believe they ordinarily signal their consent to an offer by providing their account information to the seller or telemarketer.

Although some commenters argue that this shift in the normal paradigm of offer and acceptance is, in and of itself, inherently unfair,[452] the record overall suggests that, in general, it is not preacquired account telemarketing *per se* that is harmful, but rather the abuse of preacquired account information that causes the harm.[453] Commenters persuasively note that there are many transactions involving preacquired account information that are beneficial to, indeed sometimes expected by, consumers. For example, as noted in the NPRM, ''a customer who places

[445] Associations-Supp. at 5-6; DMA-NPRM at 40. *See also* PMA-NPRM at 18-19; Time-NPRM at 8.

[446] DMA-NPRM at 40. *See also* Time-NPRM at 8.

[447] Assurant-NPRM at 6; June 2002 Tr. II at 125 (CCC).

[448] *See, e.g.,* June 2002 Tr. II at 131 (AARP) (''To imply that . . . it's more inconvenient for the consumer to get their credit card than to have an unknown source debit their account without their knowledge, I don't think any consumer would ever agree with that statement.'')

[449] Covington-Supp. at 2-5:

''The Commission is also correct that the best way to be certain that a consumer really wants to make a purchase is to see if the consumer is willing to reach into a purse or pocket, open a wallet, take out a credit card, and read from it. When that happens, there is nothing ambiguous about what's taking place; there can be no misunderstanding. . . . Even during a chaotic dinner hour, a consumer cannot open a wallet, pull out a credit card, and read from it without knowing that he or she is making some kind of purchase. . . . This short-hand method for consumers to signal assent to a deal leaves complete control of the transaction in the hands of the consumer while preventing the industry burden from being any greater than necessary.''

Indeed, this conclusion derives from the actual experience of a telemarketing firm that engages in preacquired account telemarketing. *See* Letter from Stephen Calkins to the FTC, dated October 28, 2002 (''Calkins Letter''). This firm attempted to cure the high customer return rates generated by this practice in several ways, including adjusting the disclosures and reading at least four digits of the account number to the consumers during the call. *Id.* at 2. The firm found that none of these attempted cures ensured that consumers ''knowingly consented'' to the purchase while maintaining a competitive level of sales. *Id.* at 1-2. Only when the firm began requesting a portion of the account number from the consumer herself did complaint rates drop significantly, without an unacceptable drop in sales. According to the commenter, ''Sales were about 25% lower than when the telemarketer read those digits to the consumer, but consumers really understood that they were making purchases . . . . My client believes that consumer complaints pertaining to their intent to purchase dropped, and that his seller clients now experience an acceptable level of product returns.'' *Id.* at 2-3. *See also* June 2002 Tr. II at 139-44 (NAAG); NACAA-NPRM at 6 (''That the consumer has to provide this information to the seller provides a check on the transaction, and an assurance that the consumer does indeed wish to enter the transaction.''); Vermont-Supp. *passim* and attachment. AARP commissioned a survey by telephone on June 14-19, 2002, among a nationally representative sample of 1,240 respondents 18 years of age and older. Participants were asked a handful of questions, such as, ''Often telemarketers ask you to buy something with a credit card or debit card. Do you think telemarketers are able to cause charges to your credit card or debit card without getting your credit or debit card numbers directly from you?'' Only 30 percent of respondents stated that they were aware that telemarketers have the ability to cause a charge to their credit or debit card accounts without getting the account numbers from them. AARP-Supp. at 2. That number was higher in the instance of upsells, but still less than half of the respondents understood that it was possible to be charged without providing account information to a seller or telemarketer. *Id.* Additionally, the majority (80 percent) of respondents stated that they thought telemarketers should only be able to cause charges to their credit or debit card accounts if the consumers expressly provide their account numbers to the seller or telemarketer. *Id.* at 4; Vermont-Supp. at 2-3. The survey addresses a fairly complex issue in broad terms. For example, it does not tease out the specific instances where a consumer might actually have an expectation that the seller will retain and reuse the consumer's account information, such as the contact lens seller who, with the consumer's permission, retains the consumer's account information to facilitate quarterly lens purchases. The results do, however, provide insight into the general expectations of consumers when engaging in telemarketing transactions.

[450] State law enforcers, consumers and consumer groups, as well as some industry members, consistently voiced concerns over the shift of control over a transaction from the consumer to the seller or telemarketer, and noted consumer disbelief that purchases could actually be made without their ever disclosing payment information. *See* 67 FR at 4513; June 2002 Tr. II at 130-32 (AARP); Covington-Supp. at 2, 5; EPIC-NPRM at 9; NAAG-RR at 10-11; NAAG-NPRM 30-31; June 2002 Tr. II at 139-44 (NAAG). *But see* CMC-NPRM at 13 (questioning this proposition).

[451] *See* 67 FR at 4513; AARP-Supp. at 4 (*see* note 449 above, describing survey showing that the majority of consumers do not believe their accounts can, or should, be charged by telemarketers without obtaining the account number directly from the consumers); June 2002 Tr. II at 131-32 (AARP); EPIC-NPRM at 9; NAAG-RR at 10-11; NAAG-NPRM 30-31; Vermont-Supp. at 2-3. As Minnesota explained during the June 2002 Forum:

''In a preacquired situation, the consumer doesn't have that control because we have shorthand ways of signaling consent in our society. We aren't many lawyers out there. Josh, who . . . has a trade school degree and comes home from a job and Esther is sitting on the couch at 85 years old doesn't understand all this. . . . They just get a call from somebody. What they know is I've got to sign my name, I've got to give somebody my credit card or in the context of a telemarketing transaction, I have to read my account number to the person or I have to pay cash, and what this does is by circumventing those forms of consent, it makes it impossible for consumers to control the transactions.''

June 2002 Tr. II at 140. *See also* James Andris (Msg. 171) (''Our mortgage company has been deducting a monthly premium, via our mortgage payment, to a 3rd party insurance policy. I have written a letter demanding refunds for the payments for 16 months. We, my wife and I, never gave written or verbal permission for such payments to either parties [sic].''); Albert Bruce Crutcher (Msg. 229) (''I also favor not allowing my credit card and account numbers to be given out by anyone other than ME!!''); Harold D. Howlett (Msg. 300) (''Do not allow telemarketers to obtain and use credit card or other account information from anyone except the consumer. . . .''); Carole & Cory Walker (Msg. 810) (''Every year we have at least one unauthorized charge to our card and we are extremely cautious with our information.'').

[452] *See, e.g.,* EPIC-NPRM at 9; NAAG-NPRM at 30; NCL-NPRM at 6-7.

[453] ERA-NPRM at 16; Household Auto-NPRM at 5; PMA-NPRM at 17. Other commenters asserted that using preacquired account information is not inherently fraudulent. *See* Allstate-Supp. at 2; Associations-NPRM at 4; ATA-NPRM at 19; ATA-Supp. at 5-6; ERA/PMA-Supp. at 10; ITC-NPRM at 5; NCTA-NPRM at 11; Noble-NPRM at 3; NATN-NPRM at 3; NSDI-NPRM at 3; PMA-NPRM at 13-16; Technion-NPRM at 4; TRC-NPRM at 3; Time-NPRM at 7.

quarterly orders for contact lenses by calling a particular lens retailer may provide her billing information in an initial call, with the understanding and intention that the telemarketer will retain it so that, in any subsequent call, the retailer has access to this billing information.''[454] Similarly, a customer who provides his account number to make a purchase in an initial telemarketing transaction may be frustrated to have to repeat that account information to consummate certain upsell transactions, particularly when the upsell is offered by the same telemarketer. In that case, there may be an expectation that the telemarketer will have retained, and be able to reuse, the account information the customer provided only moments ago.[455] As another commenter pointed out during the Rule Review, the key to such transactions is the fact that the consumer makes the decision to supply the billing information to the seller, and understands and expects that the information will be retained and reused for an additional purchase, should the consumer consent to that purchase.[456]

The record shows that the specific harm resulting from the use of preacquired account telemarketing is manifested in unauthorized charges.[457] These may appear not only on consumers' credit card or checking accounts, but also on mortgage statements and other account sources not traditionally used to pay for purchases.[458] Of course, unauthorized charges are not exclusively associated with preacquired account telemarketing. The Commission has brought numerous law enforcement actions against sellers and telemarketers alleging violations of the FTC Act for the unfair practice of billing unauthorized charges to consumers' accounts in a variety of contexts not involving preacquired account information, including but not limited to: advanced fee credit card offers,[459] sweepstakes,[460] vacation or travel packages,[461] credit card loss protection offers,[462] and magazine subscriptions.[463] Thus, in essence, preacquired account telemarketing has proven in certain circumstances to be an additional, but not the only, vehicle for imposing unauthorized charges on consumers in telemarketing transactions.

One of the problems, therefore, with the proposed prohibition on receiving billing information from a source other than the consumer or sharing it with others for the purposes of telemarketing is that it fails to remedy patterns of unauthorized billing that occur even though preacquired account information is not used. As our cases amply demonstrate, the practice unequivocally meets the criteria for unfairness, and therefore violates Section 5 of the FTC Act.[464] Yet until now, the Rule has not specified that unauthorized billing is an abusive practice and a Rule violation.[465] The Commission therefore has decided to add § 310.4(a)(6) to correct that deficiency. The new provision specifies that it is an abusive practice and a violation of the Rule to cause a charge to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. This prohibition is not limited to instances of unauthorized charges resulting from preacquired account telemarketing. Rather, this provision is applicable whenever a seller or telemarketer subject to the Rule causes a charge to be submitted against a customer's or donor's account without obtaining the customer's or donor's express informed consent to do so. This broader prohibition on unauthorized billing is supported by the Commission's extensive law enforcement record of instances of unauthorized billing in telemarketing transactions.

Section 310.4(a)(6) also specifies that, in every transaction, the seller or telemarketer must obtain the consumer's express informed consent to be charged for the goods or services or charitable contribution, and to be charged using the identified account. ''Express'' consent means that consumers must affirmatively and unambiguously articulate their consent. Silence is not tantamount to consent; nor does an ambiguous response from a consumer equal consent.[466] Consent is ''informed'' only when customers or donors have received all required material disclosures under the Rule, and can thereby gain a clear understanding that they will be charged, and of the payment mechanism that will be used to effect the charge. Of course, the best evidence of ''consent'' is consumers' affirmatively stating that they do agree to purchase the goods or services (or make the donation), identifying the account they have selected to make the purchase, and providing part or all of that account number to the seller or

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[454] 67 FR at 4513.

[455] *See, e.g.,* June 2002 Tr. II at 196 (Time) (''[T]he catalog clients that we deal with that are . . . selling our magazines on our behalf . . . tell us that the cost would be loss of sales of the catalog products because the customers would just be so annoyed about having to give the credit card number again that they just gave.'')

[456] 67 FR at 4513, n.196.

[457] In its supplemental comment, Minnesota argued that evidence gathered in its law enforcement actions showed that consumers consistently stated that they had not authorized charges arising out of preacquired account telemarketing, particularly when the offers involved ''free-to-pay conversion'' features:

''The data we have reviewed in our investigations uniformly supports our impression that underlying the high cancellation rates with preacquired account telemarketing is consumer sentiment that the charges were unauthorized. In addition to the survey of Fleet Mortgage Corporation customer service representatives presented in the prior NAAG Comments [see NAAG-NPRM at 31-32], an investigation of a subsidiary of another of the nation's largest banks revealed a similar pattern. During a thirteen month period, this bank processed 173,543 cancellations of membership clubs and insurance policies sold by preacquired account sellers. Of this number of cancellations, 95,573, or 55 percent, of the consumers stated unauthorized billing as the reason for the request to remove the charge. The other primary reason given for canceling (by 56,794 customers, or 32% of the total) was a general ''request to cancel'' code that may have also included many consumers claiming unauthorized charges.''

Minnesota-Supp. at 4.

[458] NAAG-NPRM at 31 (''Fleet Mortgage Corporation, for instance, entered into contracts in which it agreed to charge its customer-homeowners for membership programs and insurance policies sold using preacquired account information. If the telemarketer told Fleet that the homeowner had consented to the deal, Fleet added the payment to the homeowner's mortgage account.'')

[459] *See, e.g., FTC v. Corporate Mktg. Solutions*, No. CIV-02 1256 PHX RCB (D. Ariz. filed July 8, 2002); *FTC v. Capital Choice*, No. 02-21050-CIV-Ungaro-Benages (S.D. Fla. filed Apr. 15, 2002); *FTC v. Fin. Servs. of N. Am.*, No. 00792 (GEB) (D.N.J. filed June 9, 2000); *FTC v. SureCheK Sys., Inc.*, No. 1:97-CV-2015-JTC (N.D. Ga. filed July 9, 1997); *FTC v. Thornton Communications, Inc.*, No. 1 97-CV-2047 (N.D. Ga. filed July 14, 1997).

[460] *See, e.g., FTC v. New World Servs., Inc.*, No. CV-00-625 (GLT) (C.D. Cal. filed July 5, 2000); *FTC v. Hold Billing*, Ltd., No. SA-98-CA-0629-FB (W.D. Tex. filed July 15, 1998).

[461] *See, e.g., FTC v. Lubell*, No. 3-96-CV-80200 (S.D. Iowa filed Dec. 1996); *FTC v. Disc. Travel*, No. 88-113-CIV-FtM-15C (M.D. Fla. filed Aug. 8, 1988); *Citicorp Credit Servs.*, 116 F.T.C. 87 (1993).

[462] *See, e.g., FTC v. Andrews*, No. 6:00-CV-1410-ORL-28-B (M.D. Fla. filed Oct. 2000); *FTC v. First Capital Consumer Membership Servs.*, No. 00 CV 0905C(F) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. Consumer Repair Servs., Inc.*, No. 00-11218 CM(RZx) (C.D. Cal. filed Oct. 23, 2000); *FTC v. Capital Card Servs.*, No. CV 00 1993 PHX EHC (D. Ariz. filed Oct. 23, 2000); *FTC v. Forum Mktg. Servs.*, No. 00CV0905C(F) (W.D.N.Y. filed Oct. 26, 2000); *FTC v. 1306506 Ontario, Ltd.*, No. 00-CV-906 (W.D.N.Y filed Oct. 23, 2000); *FTC v. OPCO Int'l Agencies, Inc.*, No. CO1-2053R (W.D. Wash. filed Feb. 2001).

[463] *See, e.g., FTC v. Diversified Mktg. Servs. Corp.*, No. 1:96-CV-615-FM. (W.D. Okla. filed Mar. 12, 1996); *FTC v. Windward Mktg.*, No. 1:9 6-CV-615-FM. (N.D. Ga. filed May 26, 1996); *FTC v. S.J.A. Soc'y*, No. X97 0061 (E.D. Va. filed May 1997).

[464] *See* discussion and note 400 above of § 310.4 generally, and 67 FR at 4511, regarding the Commission's determination that, in specifying practices as abusive when they do not directly implicate the privacy concerns embodied in the Telemarketing Act, it will demand that the practice meet the criteria for unfairness codified in § 5(n) of the FTC Act, 15 U.S.C. 45(n).

[465] Section 310.3(a)(4) specifies that it is a deceptive practice to make ''a false or misleading statement to induce any person to pay for goods or services.''

[466] *See* Electronic Retailing Association, GUIDELINES FOR ADVANCE CONSENT MARKETING, http://www.retailing.org/regulatory/publicpolicy_consent.html (''ERA Guidelines'').

telemarketer for payment purposes (not for purposes of ''identification,'' or to prove ''eligibility'' for a prize or offer, for example). But in most instances, the Commission leaves it up to sellers to determine what procedures to employ in order to meet the requirement for obtaining express informed consent. As explained below, however, in certain particularly problematic scenarios, the Commission does impose specific procedures.

Having treated the overall problem of unauthorized billing in new § 310.4(a)(6), the Commission has included additional subsections to address problems particularly associated with preacquired account telemarketing. As noted in the NPRM, evidence shows that, at least to date, unquestionably the greatest risk of harm (*i.e.*, unauthorized charges) to consumers is associated with telemarketing involving the combination of preacquired account information with an offer involving a ''free-to-pay conversion.''[467] NAAG describes the ''free-to-pay conversion'' offer (which it refers to as an ''opt-out free trial'' offer) as the ''constant companion'' of the preacquired account telemarketer in state law enforcement efforts to date.[468] Indeed, as of the date of this notice, all of the law enforcement actions taken by the Commission and by the states that involved telemarketing using preacquired account information also involved an offer with a ''free-to-pay conversion'' feature.[469]

It is noteworthy that the coupling of preacquired account information with a ''free-to-pay conversion'' offer is not limited to outbound telephone calls. In *FTC v. Smolev*,[470] for example, the defendants were alleged to have lured consumers to call by offering an inexpensive lighting product in general media advertisements, obtaining account information from the consumer in the initial transaction, and then upselling a ''free-to-pay conversion'' buyers club membership.[471] In fact, the majority of companies that have been targeted by state or FTC law enforcement action market their ''free-to-pay conversion'' products or services via upsells, sometimes exclusively, and other times also using outbound telephone calls.[472]

Consequently, the Commission has determined that in any transaction involving both preacquired account information and a ''free-to-pay conversion,'' the evidence of abuse is so clear and abundant that comprehensive requirements for obtaining express informed consent in such transactions are warranted.[473] Specifically, § 310.4(a)(6)(i) provides that a seller or telemarketer making an offer involving both preacquired account information and a ''free-to-pay conversion'' must (1) obtain from the customer, at a minimum, the last four digits of the account number to be charged; (2) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account for which the consumer provided the four digits; and (3) make and maintain an audio recording of the *entire* telemarketing transaction. Thus, in every instance where the combination of preacquired account information and ''free-to-pay conversion'' is involved in a telemarketing transaction, the customer must be required to reach into his or her wallet, and provide at least a portion of the account number to be charged.[474] It

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[467] The Commission has inserted a definition of ''free-to-pay conversion'' at § 310.2(o) of the amended Rule, which states that ''free-to-pay conversion'' means: ''in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.'' *See* discussion of § 310.2(o) above.

[468] NAAG-NPRM at 32. *Accord* AARP-NPRM at 6. CCC attempted to counter this finding by presenting the results of a survey, conducted on behalf of MemberWorks, in April of 2001 by the Luntz Research Companies (the ''Luntz Survey''). CCC-NPRM at 10; June 2002 Tr. II at 127; MemberWorks-Supp. *passim*. In the survey, the caller told the consumer that the caller would read an offer, and would ask for the consumer's reaction. So, it was clear to the consumer that he or she was not buying anything, and instead that the consumer should listen carefully to the terms of the offer so that he or she could answer the caller's questions. Then, the caller read a script involving a ''free-to-pay conversion'' feature (the script was not submitted with the survey results for the public record). The caller then asked several questions about what the consumer just heard. CCC argued that the results of this survey showed that 85 percent of the respondents said the billing methods were understandable, and that the seller was acting fairly. CCC-NPRM at 10. Examination of the Luntz survey in greater detail suggests that the survey does little to support these assertions. First, in fact, none of the respondents said that the billing methods were understandable. According to the survey, 52 percent of the respondents said the billing methods were ''mostly'' understandable, while 33 percent said they were ''somewhat'' understandable, and 13 percent said they were not understandable. This means that at least 46 percent of the respondents did not even ''mostly'' understand the way in which they would be billed after listening carefully to a sales offer involving preacquired account information and a ''free-to-pay conversion'' feature. *See* MemberWorks-Supp. at 1. In addition, after asking whether the billing methods were understandable, the callers asked two questions structured in ways that strongly suggested the desired result: first they asked, ''And if you *agree to join*, and receive a welcome kit with all of the rules in writing, who is responsible *if you forget to cancel* and are billed,'' then ''*If the company tells you three times on the telephone call and then tells you twice in writing that you can cancel* your program membership anytime, but if you don't cancel, you will be charged, is the company acting fairly or not.'' *Id.* (emphasis added). Moreover, regardless of the merits of the survey results, they do little to offset the extensive evidence of consumer injury from this practice, the continuing flow of complaints into the offices of consumer groups and law enforcement officials at both the state and federal levels, and the AARP survey evidence of consumer perceptions and opinions about preacquired account telemarketing. *See* notes 424-25 and 449 above.

[469] For example, MemberWorks, Inc. (Assurances of Discontinuance with the States of Nebraska and New York; Consent Judgments with the States of California and Minnesota) (primarily ''free-to-pay conversion'' membership clubs); BrandDirect Mktg. Corp. (Assurances of Discontinuance with the States of Connecticut and Washington) (''free-to-pay conversion'' membership clubs); Cendant Membership Servs. (Consent Judgment with State of Wisconsin) (same); Signature Fin. Mktg. (Assurance of Discontinuance with State of New York) (same); Damark Int'l, Inc. (Assurances of Discontinuance with States of Minnesota and New York) (''free-to-pay conversion'' buyers club); *Illinois v. Blitz Media, Inc.*, No. 2001-CH-592(Sangamon County) (''free-to-pay conversion'' membership club); *New York v. Ticketmaster and Time, Inc.* (Assurance of Discontinuance) (''free-to-pay conversion'' magazine subscription); Triad Discount Buying Service (sued by 29 states and the Commission) (''free-to-pay conversion'' membership clubs); *Minnesota v. U.S. Bancorp, Inc.*, No. 99-872 (Consent Judgment, D. Minn) (account information provider to seller/telemarketer of ''free-to-pay conversion'' membership/buyers clubs); *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001) (same, plus insurance packages); *FTC v. Technobrands, Inc.*; No. 3:02-cv-00086 (E.D. Va. 2002) (''free-to-pay conversion'' membership clubs); *U.S. v. Prochnow*, No. 1:02-cv-917-JLF (N.D. Ga. 2002) (inbound calls from direct mail solicitations, upsold ''free-to-pay conversion'' membership clubs).

[470] (a/k/a Triad Disc. Buying Serv.) No. 01-8922 CIV ZLOCH (S.D. Fla. 2001).

[471] Thus, the assertion of some commenters that ''the potential for abuse or confusion as to where the [account] information was obtained does not exist in upsells,'' *see, e.g.*, ANA-NPRM at 6, is not supported by the record, at least in the context of offers with a ''free-to-pay conversion'' feature, as was the case in *Smolev*.

[472] Unfortunately, the argument made by several commenters that the abusive use of preacquired account information is limited to a discrete number of bad actors (*see* ATA-NPRM at 19; ERA-NPRM at 16; MPA-NPRM at 23-24) is not supported by the record. Law enforcement actions alleging injuries caused by abuses of preacquired account telemarketing have been brought against well-known, national companies and financial institutions, including but not limited to: U.S. Bancorp, Fleet Mortgage Corporation, MemberWorks, Ticketmaster, and Time. *See* NAAG-NPRM at 30, n.73.

[473] NAAG recommended prohibiting the use of preacquired account information, even if that information was previously obtained by the same seller or telemarketer from the consumer, in solicitations involving a ''free-to-pay conversion'' feature. NAAG-NPRM at 39. The Commission declines to adopt this recommendation at this time, and is confident that the solution adopted will provide consumers the information and command over these transactions they need to protect themselves from unauthorized charges.

[474] *See* note 449 above. Moreover, industry's argument that there is no evidence of problems where there is a transfer of account information

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must be clear that the customer is providing that account number to authorize a purchase. This means that, at a minimum, the disclosures required in § 310.3(a)(1) in general, and also § 310.3(a)(1)(vii) in particular, must be provided to the customer before the customer provides express informed consent—which, in the case of preacquired account telemarketing and a ''free-to-pay conversion'' feature, means before the customer provides account information and express agreement to be charged for the goods or services on the account provided. It must also be clear that the customer agrees that the charge be placed on the account whose digits the customer provided. The Commission expects that, to comply with this requirement, the seller or telemarketer shall expressly identify the account to be charged, and inform the customer that it possesses the customer's account number already, or has the ability to charge that account without obtaining the full account number from the customer.

Finally, the Commission is requiring that the entire sales transaction be recorded. The record evidence shows that it is not adequate in offers involving both preacquired account information and ''free-to-pay conversions'' to record a portion of the call that allegedly includes some or all of the required disclosures regarding cost and payment.[475] Often, what law enforcement efforts have gleaned is that the necessary disclosures are grouped together during the ''verification'' process, at the end of a lengthy telemarketing pitch during which consumers are led to reasonably believe that they are not committing to a purchase. As one commenter explained:

> [C]onsumers are led to believe that they are agreeing to accept materials in the mail, preview a program along with a free gift, or the like. As one telemarketer explicitly stated in its scripts: 'we're sending you the information through the mail, so you don't have to make a decision over the phone.' Only at the tail end of a lengthy call does the telemarketer obliquely disclose that the consumer's preacquired account will be charged. By this time, many consumers have already concluded that they understood the deal to require their consent only after they review the mailed materials. . . . Preacquired account telemarketing verification taping typically is preceded by statements suggesting that the taping is 'to prevent clerical error' and critical information is revealed in ways that many consumers will not grasp at the end of a conversation.[476]

Thus, not only the material terms provided the consumer, but also the context and manner in which the offer is presented are vital to determining that the consumer's consent is both express and informed. Moreover, consumers' confusion about the nature of ''free-to-pay conversion'' offers—particularly in the context of preacquired account telemarketing—is evidenced by the steady stream of complaints, as well as evidence uncovered in law enforcement actions by the states.[477] Further, the record contains compelling evidence of cancellation patterns for membership programs offered on a ''free-to-pay conversion'' basis in preacquired account telemarketing transactions. As explained by the Minnesota Attorney General,

> [c]onsumers canceling within the 30-day free trial period likely indicate that [they] understood (either during the phone call or with the follow-up material or both) the terms of the deal. If all consumers understood the free trial offer, one would expect to see a significant cancellation rate within the 30 day free trial offer period followed by a scattered pattern of later cancellations. The data we have reviewed [from two financial institutions of cancellation dates relative to date of enrollment for Minnesota consumers charged by the institutions as a result of preacquired account telemarketing transactions involving a ''free-to-pay conversion''] suggest this is not the typical pattern. . . . The overall pattern of [the data from each institution] is strikingly similar. The largest concentration of cancellations occurs immediately after the free trial period but coincident with the first account charge for the service. The cancellation rate in the free trial period is less than half the cancellation rate in the 31-90 day period, when consumers have been billed for the service. This result is consistent with the pattern of consumer complaints alleging unauthorized charges received by Attorneys General and with the data suggesting that most consumers cancel these charges because they believe they are unauthorized.[478]

Consequently, to ensure that the consent provided by the consumer is not only ''express'' but is also ''informed'' in this limited, but problematic, context of ''free-to-pay conversion'' features in preacquired account telemarketing offers, the amended Rule requires that an audio recording of the entire transaction, from start to finish, be created and maintained. A handful of commenters argued that such audio recording would be prohibitively expensive, particularly in the inbound context, where some sellers and telemarketers have not traditionally recorded the telemarketing calls.[479] Given the narrow category of calls to which this requirement applies, and the rapidly growing use of inexpensive and efficient digital audio recording technology,[480] the Commission believes that this requirement will not pose a significant burden to sellers and telemarketers who freely choose to market their goods or services using a ''free-to-pay conversion'' feature and preacquired account information. Moreover, the record is compelling that any incremental costs to industry of these requirements are likely outweighed by the benefit to consumers of curtailing the practice as it is currently employed in the marketplace.

In addition to the requirements noted above, in any telemarketing transaction involving preacquired account information (but not a ''free-to-pay conversion'' feature), § 310.4(a)(6)(ii) specifically requires that the seller or telemarketer (1) at a *minimum*, identify the account to be charged with

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''after consent'' is belied by the record of law enforcement actions in this area. *See, e.g., FTC v. Smolev*, No. 01-8922 CIV ZLOCH (S.D. Fla. 2001). In fact, in virtually all of the state and federal law enforcement actions in this area, consumers stated that they did not recognize the billing entity or understand how that seller obtained their account information. *See* notes 450-51 above.

[475] NAAG-NPRM at 32-33 (discussing ineffectiveness of verification).

[476] *Id.*

[477] *See* Illinois-NPRM at 2 (In Illinois' lawsuit against Blitz Media, Inc., the attorney general initially received 146 consumer complaints. After initiating the litigation, the Illinois attorney general found that approximately 45,000 Illinois consumers had been enrolled in Blitz Media's buyers club, but only about 8,000 of them remain ''active'' members of the buyers club, since the rest had discovered these charges and cancelled the membership, or initiated a chargeback, claiming the charge was unauthorized.).

[478] Minnesota-Supp. at 4-5. One industry commenter submitted the results of a telephone survey, which it asserted showed that consumers do, in fact, understand the terms of these ''free-to-pay conversion'' features. *See* note 469 above. The data received in litigation from the institutions participating in these telemarketing campaigns, however, belies the purported conclusions of this survey. *See* note 457 above.

[479] ERA/PMA-Supp. at 3, 7 (''We understand from certain of our members that imposing the record keeping requirement[s] on inbound [upsells] may require substantial investments of money and resources to develop the systems necessary to comply with these requirements.'').

[480] *See generally* Contract Digital Recorder, by Data-Tel Info Solutions, at http://www.datatel-info.com/digicorder.html (describing affordable digital recording system for telemarketing operations); Veritape Call Centre-Case Study 2, at http://www.veritape.com/veritape/vtcccase.htm (describing a US call center that saved $70,000 annually by switching from analog taping process to digital recording); Ron Elwell, *Streamlining Call Center Operations*, Teleprofessional, Sept. 1998, at 130-34 (discussing ''how CTI-enabled digital recording technology is helping call centers of all types be more productive and profitable''); Teleprofessional, Inc., *CCPN's System Owner Shootout*, CALL CENTER PRODUCT NEWS, Fall 1998, at 52-54, 56 (explanations by several telemarketers' systems professionals of savings and efficiencies experienced using improved digital recording and monitoring systems); Michael Binder, *The Evolution of Digital Recording in the Call Center*, TELEMARKETING & CALL CENTER SOLUTIONS, Nov. 1997, at 38. *Cf.* Duncan Furness, *Choosing a Tape Technology*, COMPUTER TECHNOLOGY REVIEW, Nov. 2000, at 40.

sufficient specificity for the customer or donor to understand what account will be charged, and (2) obtain from the customer or donor his or her express agreement to be charged for the goods or services *and* to be charged using the account number identified during the transaction. Again, the Commission intends this to mean that the telemarketer expressly inform the customer that the seller or telemarketer already has the number of the customer's specifically identified account or has the ability to charge that account without getting the account number from the customer.

The Commission has taken a targeted approach in the amended Rule, focusing on the tangible harm caused by the practices identified as problematic in the rulemaking proceeding. It bears noting, however, that the Commission recognizes preacquired account telemarketing as an emerging practice, one that will receive close attention from the Commission, and, no doubt, the state Attorneys General. The Commission wishes to emphasize that, particularly in transactions involving ''free-to-pay conversion'' offers, so long as preacquired account information is involved, there exists that fundamental shift in the bargaining relationship discussed above, and therefore potential for abuse.[481] While the Commission is confident that the majority of industry members will abide by the new provisions, and that doing so will provide consumers the information and control needed to shield them from the abuses encountered in the past with these transactions, it also notes that the best practice in such circumstances is to ensure that the seller or telemarketer does not have the ability to cause a charge to a consumer's account without getting the account number from the consumer herself. This practice would, in effect, be self-enforcing, as the control over the transaction (absent misrepresentations by the telemarketer) would truly be with the consumer, where it belongs. Should it become apparent that the remedies imposed by the amended Rule are insufficient, or that preacquired account telemarketing practices have evolved further in such a way as to cause additional harm to consumers, the Commission will not hesitate to revisit its approach to the practice and revise the Rule accordingly.

*Other Recommendations*

Other than those commenters who suggested deleting the prohibition entirely,[482] industry commenters' primary recommendation was to substitute the express verifiable authorization provision of § 310.3(a)(3), or some variation on a disclosure and ''consent'' requirement,[483] for the proposed blanket prohibition on the transfer of billing information.[484] The general theme was that disclosures and ''consent'' were sufficient to remedy the harm being caused consumers by the misuse of preacquired account information. It is unclear what these commenters mean by ''consent'' in this context, as they also recommended that sellers and telemarketers be permitted to use any of the three existing avenues for achieving express verifiable authorization, including providing consumers a written confirmation after terminating the telephone call. In the context of ''free-to-pay conversions,'' the record shows, in no uncertain terms, that disclosures are not sufficient to prevent widespread consumer injury.[485] Most sellers and telemarketers have been telling consumers at some point in the conversation, in greater or lesser detail, that they will be charged at some point for the goods or services being offered on a ''free-to-pay conversion'' basis; but, as noted above, these disclosures come late in the conversation, and do not resonate with consumers who understand ''free'' to mean ''free'' and that to obligate oneself to purchase something, the buyer must provide a payment mechanism to the seller.[486] Often, these disclosures come in writing in a ''membership package'' sent to the consumer some time after the call. Law enforcement experience has shown that these disclosures are meaningless to consumers—who either never receive the packets, or assume they are junk mail and discard them.[487] Moreover, in any telemarketing transaction, but most especially in preacquired account telemarketing, it is imperative that the seller or telemarketer ensure that the consumer actively, and unequivocally, provides his or her consent to be charged, and to be charged using a particular payment mechanism. The Commission has determined, therefore, that prohibiting unauthorized charges, and laying out what is required to obtain express informed consent in certain circumstances, is the most appropriate solution not only to the harm caused by preacquired account telemarketing abuses, but also by other exploitative billing methods in telemarketing.

*§ 310.4(a)(7) — Failing to transmit caller identification information*

Section 310.4(a)(7) of the amended Rule addresses transmission of caller identification (''Caller ID'') information. This section prohibits any seller or telemarketer from ''failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call.'' A proviso to this section states that it is not a violation to substitute the actual name of the seller or charitable organization on whose behalf the call is placed for the telemarketer's name, or to substitute the seller's customer service number or the charitable organization's donor service number that is answered during regular business hours for the number the telemarketer is calling from or the number billed for making the call. Full compliance with the Caller ID provision will be required by January 29, 2004.

The record includes several key principles supporting the Commission's decision to adopt this approach to Caller ID information. First, transmission of Caller ID information is not a technical impossibility, as some commenters had argued or implied. Second, telemarketers are able to transmit this information at no extra cost, or minimal cost. Third, consumers will receive substantial privacy protection as a result of this provision.[488] Fourth, consumers and telemarketers will both benefit from the increased accountability in telemarketing that will result from this

[481] NAAG-NPRM at 30; Covington-Supp. at 4-5.

[482] ABA-NPRM at 8-9; ABIA-NPRM at 4; CMC-NPRM at 9-10; MBNA-NPRM at 6.

[483] *See, e.g.*, DMA-NPRM at 39-40 (specific to upselling) (the Commission ''should instead require that notice of transfer of billing information be disclosed to the consumer and that consent be given by the consumer prior to the transfer'').

[484] *See* ATA-NPRM at 20; ATA-Supp. at 5-6; CCC-NPRM at 11-12; ERA-NPRM at 24-25; ERA/PMA-Supp. at 11-15; ITC-NPRM at 5; MPA-NPRM at 26-29; MPA-Supp. at 5-6; NATN-NPRM at 3 (Supporting ERA Guidelines and recommendation); Noble-NPRM at 3 (same); NSDI-NPRM at 3 (same); PMA-NPRM at 19 (same). *See also* Associations-Supp. at 6.

[485] Review of taped verifications obtained as evidence in the Commission's law enforcement actions and in similar state actions convincingly demonstrates the inadequacy of disclosures in this context.

[486] *See* NCL-NPRM at 7 (''Merely requiring telemarketers to disclose that they have already obtained the billing account information from another source or that they may share that information with other marketers would not provide consumers with adequate protection from abuse. Express verifiable authorization to use the billing account information is not enough in these instances because it comes into play *after the fact*; it does not give consumers prior knowledge of or control over who has their account information.'').

[487] *See* discussion of § 310.3(a)(3)(iii) above.

[488] EPIC-NPRM at 11-12.

provision.[489] Fifth, law enforcement groups will benefit from a vital new resource from the required transmission of Caller ID information in telemarketing.[490]

*Background.* The original Rule did not address the issue of Caller ID, or the feasibility or desirability of requiring telemarketers to transmit Caller ID information. During the Rule Review, however, the Commission received numerous comments from consumers and others expressing frustration about telemarketers' routine failure to transmit Caller ID information.[491] Commenters complained that when telemarketers called, consumers' Caller ID devices would show a phrase like ''unknown,'' ''out of area,'' or ''unavailable,'' instead of displaying the name and telephone number of the telemarketer or seller on whose behalf the call was made.[492] Based on the Rule Review record, the Commission proposed in the NPRM to prohibit blocking, circumventing, or altering the transmission of Caller ID information.[493]

In support of this proposal, the Commission discussed in the NPRM the benefits that accrue to consumers from transmission of Caller ID information and the technical considerations implicated by transmission of this information.[494] Consumers benefit because Caller ID information allows them to screen out unwanted callers and identify companies that have contacted them so that they can place ''do not call'' requests to those companies. These features of Caller ID enable consumers to protect their privacy and are clearly within the ambit of the Telemarketing Act's mandate, set forth in 15 U.S.C. § 6302(a)(3)(A), to prohibit telemarketers from undertaking a pattern of unsolicited telephone calls which a reasonable consumer would consider coercive or abusive of their right to privacy.[495] The fact that consumers greatly value the privacy protection provided by receipt of Caller ID information is evidenced by the fact that, as of the year 2000, nearly half of all Americans subscribed to a Caller ID service.[496]

The Commission noted in the NPRM the conflict in opinion during the Rule Review regarding the feasibility of requiring Caller ID transmission by telemarketers.[497] Based on its assessment of the information on the record at the close of the Rule Review, the Commission expressed its uncertainty that telemarketers using ''T-1'' trunk lines could transmit Caller ID information, and the Commission therefore did not at that time propose to mandate such transmission.[498] The NPRM also acknowledged telemarketers' argument that, even if they could transmit Caller ID information, they would still face the challenge of transmitting a number that would be useful to consumers.[499]

The Commission received numerous comments in response to the NPRM's discussion of Caller ID. Some industry representatives simply posited that transmission of Caller ID information was not possible, or argued that it was possible to transmit a telephone number, but that it was impossible or prohibitively expensive to transmit a telephone number that consumers could use to call the telemarketer that had called them.[500] Consumer groups and law enforcement representatives urged the Commission not to accept telemarketers' claims that mandatory Caller ID transmission is impossible or prohibitively expensive without carefully examining the technical considerations involved.[501] A number of consumers expressed frustration with telemarketers who fail to transmit Caller ID information.[502]

Industry commenters generally supported the proposed prohibition on blocking Caller ID, but urged the Commission not to *require* Caller ID transmission,[503] although one telemarketer very strongly advocated that the Commission do so in order to remove the cloak of anonymity from telemarketers and thus promote accountability for the greater benefit of the industry as a whole.[504] A number of industry commenters wanted to make sure that ''the prohibited practice is the deliberate manipulation of the Caller-ID signal'' and that ''[a]s long as no overt actions are taken to disrupt the information, there is no violation.''[505] Several commenters expressly urged that purchasing or using telephone equipment that lacks Caller ID functionality should not be a violation of the Rule.[506]

*Technical feasibility of mandatory transmission of Caller ID information.* The rulemaking record as a whole shows that telemarketers' failure to transmit Caller ID information need not be the result of their blocking its transmission or some other affirmative measure on their part.[507] Rather, the record indicates that non-transmission

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[489] Make-A-Wish-NPRM at 6; Associations-Supp. at 7; DialAmerica-Supp. at 2.

[490] Make-A-Wish-NPRM at 6; McClure-NPRM at 2; NACAA-NPRM at 9; NYSCPB-NPRM at 4; Patrick-NPRM at 2-3; TRA-NPRM at 11.

[491] *See, e.g.*, Baressi-RR at 1; Bell Atlantic-RR at 8; Blake-RR at 1; Collison-RR at 1; Lee-RR at 1; LeQuang-RR at 1; Mack-RR at 1; Sanford-RR at 1.

[492] *See, e.g.*, Baressi-RR at 1; Blake-RR at 1; Collison-RR at 1; Lee-RR at 1; LeQuang-RR at 1; Mack-RR at 1; Sanford-RR at 1.

[493] The Caller ID provision is found at § 310.4(a)(7) of the proposed Rule; discussion of the proposed Rule provision is found at 67 FR at 4514-16.

[494] 67 FR at 4514-16. The Commission also asked whether trends in telecommunications might one day permit the transmission of full Caller ID information when the caller uses a trunk line or PBX system. *Id.* at 4538.

[495] 67 FR at 4514. DMA argued that the Commission lacks authority to require Caller ID transmission. DMA-NPRM at 48-49. However, the NPRM clearly explains that the harm to consumers that arises from failure to transmit Caller ID information falls within the areas of abuse that the Telemarketing Act explicitly aimed to address. 67 FR at 4514-16. The Commission therefore rejects DMA's ''lack of authority'' argument.

[496] Dina ElBoghdady, *Ears Wide Shut: Researchers Get Punished for Telemarketers' Crimes*, WASH. POST, Sept. 8, 2002, at H 2.

[497] 67 FR at 4515.

[498] *Id.*

[499] *Id.* Some telemarketers asserted that the telephone number that would likely be displayed on consumers' Caller ID services would be the telemarketer's central switchboard or trunk exchange, rather than a customer service number or a number where consumers could submit a ''do not call'' request.

[500] ANA-NPRM at 6; Associations-NPRM at 3; DMA-NPRM at 49; NAA-NPRM at 17; Nextel-NPRM at 25; Synergy Solutions-NPRM at 3-4; Teledirect-NPRM at 3; Associations-Supp. at 7. *See also* AFSA-NPRM at 19; Assurant-NPRM at 6. *But see* EPIC-NPRM at 11, 13; NAAG-NPRM at 45.

[501] EPIC-NPRM at 11-12; NAAG-NPRM at 45; AARP-NPRM at 5-6.

[502] *See, e.g.*, Robert Hawrylak (Msg. 3382); Carl Wallander (Msg. 861); George Kapnas (Msg. 2243); Tom Kaufmann (Msg. 2433); Bob Schmitt (Msg. 3494); Bradley Davis (Msg. 3890); Toryface (Msg. 19744). In all, more than 200 consumers stated that the Commission's proposed approach in the NPRM was not adequate to protect consumers' right to privacy.

[503] ABA-NPRM at 9; ARDA-NPRM at 6; ANA-NPRM at 6; Associations-NPRM at 3; BofA-NPRM at 7; CBA-NPRM at 10; Comcast-NPRM at 4; DMA-NPRM at 48; ERA-NPRM at 48-49; Green Mountain-NPRM at 27; ITC-NPRM at 3; Lenox-NPRM at 6; MPA-NPRM at 49; NAA-NPRM at 17; Nextel-NPRM at 24-25; Synergy Solutions-NPRM at 3-4; Tribune-NPRM at 10; VISA-NPRM at 13. In the NPRM, the Commission specifically asked, among other things, whether it would ''be desirable to propose a date in the future by which all telemarketers would be required to transmit Caller ID information.'' 67 FR at 4538.

[504] DialAmerica-NPRM at 24; DialAmerica-Supp. at 10; June 2002 Tr. II at 83 (DialAmerica).

[505] Synergy Solutions-NPRM at 3. *See also* Nextel-NPRM at 25; Noble-NPRM at 4; NATN-NPRM at 4; NSDI-NPRM at 4; ITC-NPRM at 3.

[506] AFSA-NPRM at 19; Comcast-NPRM at 4; CBA-NPRM at 10; Cox-NPRM at 37; Household Bank-NPRM at 16; Nextel-NPRM at 25; Thayer-NPRM at 5; Wells Fargo-NPRM at 3. *But see* EPIC-NPRM at 11, 13-14; McClure-NPRM at 1; Patrick-NPRM at 2-3; Thayer-NPRM at 5 (Commenter raises issue of whether Internet telephony users could transmit Caller ID information. There is nothing in the record indicating that telemarketers use Internet telephony. If they do use such technology, they are reminded that all telemarketers subject to the Rule must transmit Caller ID information. The FTC's own telephone system uses IP telephones, which do provide Caller ID information.).

[507] ATA-Supp. at 16-17; Chicago ADM-NPRM at 1; Lenox-NPRM at 6; NRF-NPRM at 19.

of Caller ID information may be a by-product of purchasing or using telephone equipment that lacks Caller ID transmission functionality.[508]

In concluding that required transmission of Caller ID information is technically feasible and not costly for telemarketers, the Commission was persuaded in part by the example provided by DialAmerica. In its written comments and at the June 2002 Forum, DialAmerica explained how it transmits Caller ID information to the consumers it calls.[509] DialAmerica's carrier assigns a telephone number to each of DialAmerica's call centers. When a sales representative from a particular call center calls a consumer, that call center's assigned telephone number is transmitted to the consumer's Caller ID service. SBC, a large provider of common carriage services, provided support for the availability of DialAmerica's model.[510] DialAmerica stated at the June 2002 Forum that it does not pay its carrier any extra amount to transmit this assigned telephone number to consumers.[511]

The Commission believes the argument by telemarketers that required transmission of Caller ID information would be impossible or prohibitively expensive is based substantially on an erroneous supposition that telemarketers would be required to transmit the specific telephone number from which a sales representative placed a given call. The Commission's citation to DialAmerica's approach should make it clear that the Commission is not requiring this level of specificity. Under the amended Rule's Caller ID provision, telemarketers may transmit any number associated with the telemarketer that allows the called consumer to identify the caller. This includes a number assigned to the telemarketer by its carrier, the specific number from which a sales representative placed a call, or a number used by the telemarketer's carrier to bill the telemarketer for a given call. In the alternative, a telemarketer may transmit the seller's customer service number or the charitable organization's donor service number, provided that this number is answered during regular business hours.

Not every telemarketer will need to follow DialAmerica's approach for transmission of Caller ID information. The record reflects various options in calling equipment used by telemarketers.[512] A telemarketer's choice of calling equipment is determined in part by the telemarketer's size. The smallest telemarketers, most likely placing calls from home, may contact consumers using a ''plain old telephone service'' (''POTS'') line. A telemarketer calling consumers with a POTS line will have no difficulty transmitting Caller ID information.[513] This is also true if, to call consumers, the telemarketer uses Integrated Services Digital Network-Basic Rate Interface (''ISDN-BRI'') technology, which, like POTS lines, is likely to be utilized only by the smallest telemarketers.[514]

Larger telemarketers commonly use a ''private branch exchange'' switch (''PBX''), which enables them to place large volumes of calls more efficiently.[515] For telemarketers using a PBX, the primary determinant in transmitting Caller ID information is the telemarketer's connection to its telephone company. A telemarketer using a PBX connects to its telephone company through a ''trunk.''[516] The more modern type of trunk used in telemarketing is an ''Integrated Services Digital Network-Primary Rate Interface'' (''ISDN-PRI'') trunk.[517] It is clear from the record that a telemarketer using such an ''ISDN-PRI'' trunk has no difficulty in transmitting Caller ID information to a consumer.[518]

The older kind of trunk used in telemarketing is a ''T-1'' trunk.[519] Telemarketers using a ''T-1'' trunk are perhaps most likely to follow DialAmerica's model by having their carriers assign a telephone number to the trunk for transmission to consumers' Caller ID services. This is true because, in contrast to ''ISDN-PRI'' trunks, ''T-1'' trunks do not routinely transmit the caller's telephone number to Caller ID devices.[520] Some telemarketers stated that it may be technically feasible (but costly) for them to upgrade, reconfigure, or replace their PBX switches or their ''T-1'' trunks in order to transmit a specific sales representative's telephone number.[521] However, the Commission's approach does not require this level of precision. Consequently, telemarketers will not have to absorb the expense associated with achievement of this level of precision.

Regardless of telemarketers' calling systems and carriers' ability to assign a telephone number to a telemarketer's call center, there are occasions in which Caller ID information does not reach the called consumer even when telemarketers arrange for the transmission of that information.[522] Two situations would seem to be outside the control of the telemarketer. First, the route traveled by a call could pass through a switch that lacks Caller ID functionality, essentially dropping

[508] EPIC-NPRM at 11; TRA-NPRM at 11. As is discussed below, non-transmission may also result from errors in telephone companies' equipment.

[509] DialAmerica-Supp., Att. A at 1-2. *See also* June 2002 Tr. II at 81-83. According to one of DialAmerica's written comments: ''Caller ID information can be delivered over T-1's today. We have been doing it for over two years. If the Commission does not mandate the delivery of Caller ID information, those who would want the Commission to believe that it cannot be done will have been successful.'' DialAmerica-Supp. at 10. *See also* DialAmerica-NPRM at 25 (''The conclusion stated in the NPRM . . . that trunk or T-1 lines will only display a term like ''unavailable'' is not correct.'') and NAAG-NPRM at 45 (''We have been advised that all trunk lines . . . should be capable of supporting Caller ID.'')

[510] *See* SBC-Supp. at 8-10; June 2002 Tr. II at 80-83. *See also* Cox-NPRM at 37; DMA-NPRM at 49; Green Mountain-NPRM at 28; Associations-Supp. at 7.

[511] June 2002 Tr. II at 83 (DialAmerica). Moreover, other moderate-sized telemarketers reported that they currently transmit Caller ID information. Because they are not compelled to do this, the Commission believes that doing so is not cost-prohibitive. *See* Aegis-NPRM at 5; Lenox-NPRM at 6. *See also* ANA-NPRM at 6; ARDA-NPRM at 6. *But see* ATA-Supp. at 18.

[512] *See, e.g.*, Nextel-NPRM at 25 (proprietary dialers); DialAmerica-Supp., Att. A at 1 (regular trunk groups provisioned by carrier); Fiber Clean-NPRM at 1 (telemarketers working from home).

[513] SBC-Supp. at 8.

[514] http://www.bell-labs.com/technology/access/ISDN-BRI.html. ISDN-BRI essentially uses a caller's existing wiring to transmit calls digitally. As such, its capability to transmit Caller ID information is akin to a POTS line's capability.

[515] SBC-Supp. at 8-9. This is also true of telemarketers using predictive dialers. Predictive dialers used by many telemarketers contain features similar to a PBX, and the capacity of such a predictive dialer to transmit Caller ID information is essentially the same as the capacity of a PBX to do so. *See, e.g.*, Sytel-NPRM at 8 (arguing that telemarketers using predictive dialers should transmit Caller ID information. This comment suggests that predictive dialers are capable of transmitting Caller ID information). *See also* http://www.pbxinfo.com/portal/modules.php?op=modload&name=Sections&file=index&req=viewarticle&artid=8.

[516] SBC-Supp. at 8-9. An alternative to PBX available to telemarketers (but not widely used) is called ''Centrex.'' Telemarketers using Centrex connect to their telephone company using a telephone line; telemarketers using a PBX connect to their telephone company using a trunk. Because Centrex users use a line rather than a trunk, telemarketers using Centrex (like telemarketers using a POTS line or ISDN-BRI) should not find it difficult to transmit Caller ID information. *See* http://www.granitestatetelephone.com/sfb_centrex.html.

[517] June 2002 Tr. II at 76-77 (SBC).

[518] EPIC-NPRM at 12; SBC-Supp. at 8-9; June 2002 Tr. II at 80-81 (SBC).

[519] Some telemarketers may use a ''T3'' or ''DS3'' trunk. This kind of trunk is essentially a collection of ''T-1'' trunks; as such, it operates in a manner similar to a T-1 for purposes of Caller ID functionality. *See* http://www.hal-pc.org/~ascend/MaxTNT/hwinst/tntt3.htm.

[520] SBC-Supp. at 8-9.

[521] Synergy Solutions-NPRM at 4; TeleDirect-NPRM at 3. *But see* EPIC-NPRM at 11-12.

[522] *See, e.g.*, ABA-NPRM at 9; Chicago ADM-NPRM at 1; IMC-NPRM at 9; Lenox-NPRM at 6; Teledirect-NPRM at 3; Associations-Supp. at 7; ATA-Supp. at 17.

the Caller ID data but forwarding the rest of the call transmission.[523] Second, a malfunction within a carrier's system could result in the failure to transmit Caller ID information in a given call.[524] Because these phenomena are outside the control of the telemarketer, the telemarketer would not be held liable for violating this provision of the Rule when the failure to transmit Caller ID information results from such an occurrence. However, to avoid liability in such a case, a telemarketer must be able to establish that it has taken all available steps to ''transmit or cause the transmission of'' identifying information. This includes employing technical means within the telemarketer's operation, ensuring that the telemarketer's telephone company is equipped to transmit Caller ID information, and not using any means to block Caller ID transmission.

A very small number of telemarketers may be located in areas of the country that are served only by telephone companies that are not capable of transmitting Caller ID information or assigning a telephone number to the telemarketer that can be transmitted to a called consumer.[525] The Commission does not intend to require such telemarketers to relocate to areas of the country that are served by telephone companies that do provide Caller ID capability. Nonetheless, in enforcing this provision, the Commission would take into account any telemarketer's relocation from an area where it can transmit Caller ID information to a location where it cannot. However, the Commission believes it is unlikely that a telemarketer would go to such lengths in order to avoid compliance with this new requirement.

The Commission recognizes that transmission of Caller ID information does not depend on technical capability alone. Telemarketers who currently possess Caller ID capability may deliberately decline to transmit this information to the consumers they solicit. There is record evidence to support legitimate explanations for deliberate blocking of Caller ID transmission.[526] Fiber Clean, for example, uses telemarketers working from home; it advocates Caller ID blocking to protect its employees' privacy.[527] Other telemarketers may block Caller ID transmission because they are unable to transmit a telephone number which would be useful to consumers.[528]

The Commission has concluded that some flexibility regarding what telephone number and name the telemarketer may transmit best accommodates the current state of telemarketing.[529] A telemarketing service bureau calling on behalf of more than one seller, for example, may benefit from the option of transmitting the seller's name and telephone number rather than its own.[530] Under § 310.4(a)(7), telemarketers have the option of transmitting a telephone number associated with them that enables the consumer to identify who called, or, in the alternative, the seller's customer service number or the charitable organization's donor service number. If the telemarketer transmits its own number, that number ideally should enable the consumer to communicate with the caller to assert a company-specific ''do not call'' request. Alternatively, telemarketers can forward consumers' return calls to a customer service line.[531] At-home callers with a POTS line cannot alter, but they can acquire a second line for business calls, which would allay privacy concerns associated with transmission of the caller's residential number.

*Consumers benefit from transmission of Caller ID information.* The record, taken as a whole, establishes that it is neither technically nor economically infeasible for telemarketers to transmit Caller ID information. On the other side of the equation, consumers derive substantial benefit from receiving Caller ID information. Moreover, as the Commission explained in the NPRM, the transmission of Caller ID information is necessary to protect consumers' privacy under the Telemarketing Act.[532] Consumers in large numbers subscribe to, and pay for, Caller ID services offered by their telephone companies.[533] Many of these consumers subscribe to Caller ID specifically to identify incoming calls from telemarketers and screen out unwanted telemarketing calls.[534] Indeed, according to Private Citizen, consumers spend an aggregate of $1.4 billion annually on Caller ID services to limit unwanted telemarketing calls.[535] Consumers who commented on the record expressed frustration at the failure of telemarketers to provide Caller ID information.[536] These consumers have, over time, come to the conclusion that an incoming call that fails to provide Caller ID information is commonly a telemarketing call.[537] As a result, some consumers decline to answer these calls.[538] In an attempt to protect their privacy from incoming calls with no Caller ID information provided, other consumers have gone beyond call screening with services such as Caller Intercept and Privacy Manager, both of which are offered by telephone companies for a fee, that intercept incoming calls with no Caller ID information and require such callers to identify themselves before their call will be connected.[539] At present, Caller ID services are an ineffective solution from consumers' perspective: many

[523] ATA-Supp. at 16; SBC-Supp. at 13.

[524] SBC-Supp. at 13.

[525] The record reflects that with the exception of some small interexchange carriers (''IXCs''), competitive local exchange carriers (''CLECs''), and some incumbent local exchange carriers (''ILECs'') serving rural pockets of the country, all telephone companies can pass along Caller ID information. *See* June 2002 Tr. II at 78-79; FCC First Report and Order in the Matter of Access Charge Reform, CC Docket No. 96-262 (May 7, 1997), para. 137; http://www.ss7.net: Carriers connected to the Signaling System 7 (''SS7'') network can transmit Caller ID information. SS7 is the predominant signaling system, and its use is increasing. *But see* Green Mountain-NPRM at 28.

[526] Fiber Clean-NPRM at 1; Cox-NPRM at 37-38; NRF-NPRM at 19. *But see* ERA-NPRM at 48; Teledirect-NPRM at 3; ATA-Supp. at 16.

[527] Fiber Clean-NPRM at 1.

[528] Cox-NPRM at 37-38; NRF-NPRM at 19.

[529] ARDA-NPRM at 6; Assurant-NPRM at 6; ATA-Supp. at 16; DMA-NPRM at 50; ERA-NPRM at 49; IMC-NPRM at 8; MPA-NPRM at 9, 49-50. *See also* Assurant-NPRM at 6 (Commenter asked that the Rule do more to prevent transmission of misleading Caller ID information. The Commission believes that the amended Rule addresses this concern.). *But see* AARP-NPRM at 6; NCL-NPRM at 8; Patrick-NPRM at 10 (telemarketer should be required to transmit the seller's name whenever possible). *See also* EPIC-NPRM at 12; Make-A-Wish-NPRM at 5-6; Worsham-NPRM at 4 (telemarketer should identify itself rather than the seller). *See also* BellSouth-NPRM at 4-5 (no flexibility in transmitted number should be permitted).

[530] MPA-NPRM at 9; DMA-NPRM at 50. *See also* Green Mountain at 28; ATA-Supp. at 16.

[531] DialAmerica provides a model for the use of call forwarding in this context. *See* DialAmerica-Supp., Att. A at 2.

[532] 67 FR at 4514.

[533] Dina ElBoghdady, *Ears Wide Shut: Researchers Get Punished for Telemarketers' Crimes*, WASH. POST, Sept. 8, 2002, at H2 (Noting that, according to a survey conducted in 2000, nearly half of all Americans subscribe to caller ID); ACUTA-NPRM at 2.

[534] McClure-NPRM at 3; Private Citizen-NPRM at 2, Susannah Fox (Msg. 3624), CN Rhodine (Msg. 480), Gautham Achar (Msg. 596), Brenda Hall (Msg. 825), Carl Wallander (Msg. 861). *See also* 67 FR at 4515, n.223 (citing Bell Atlantic survey finding that three out of four residential customers buy Caller ID to help stop abusive telephone calls).

[535] Private Citizen-NPRM at 2. *See also* Associated Press, *Phone Companies Act as Double Agents in Telemarketing War*, CHI. TRIB., Oct. 27, 2002, at C4.

[536] *See, e.g.*, Robert Hawrylak (Msg. 3382), Patricia Frank (Msg. 223), Jo Ann Kilmer (Msg. 530), Jim Kelly (Msg. 541), Carl Wallander (Msg. 861), John G. Talafous (Msg. 1236), Louis Sarvary (Msg. 1319), George M. Kapnas (Msg. 2243), Bob Greene (Msg. 2716), FarmGirl16F3 (Msg. 14015).

[537] *See, e.g.*, Karen Peters (Msg. 3814), Chuck Jackson (Msg. 209).

[538] *See, e.g.*, E Pereira (Msg. 214), Brenda Hall (Msg. 825), Victoria Brigman (Msg. 3889).

[539] *See, e.g.*, http://www22.verizon.com/ForYourHome/SAS/res__fam__identify.asp; Private Citizen-NPRM at 2; DC-NPRM at 5; EPIC-NPRM at 11; McClure-NPRM at 2.

consumers pay added costs simply to find out who is calling them, yet this investment is useless when the identifying information is not made available.[540]

With the exception of Fiber Clean, which argued in favor of allowing at-home telemarketers to block Caller ID transmission, comments from industry members on the whole did not argue that telemarketers have a reason to block Caller ID transmission which might override the substantial privacy protection afforded to consumers when their Caller ID service shows them who is calling.[541] To the contrary, comments from industry members *supported* the privacy principle behind the Rule's Caller ID provision, but took issue with the proposition that they should be required to transmit or cause transmission of Caller ID information.[542] Therefore, there is strong support for the Commission's position that requiring Caller ID transmission in telemarketing calls will help promote consumers' privacy by allowing them to know who is calling them at home.

Transmission of Caller ID information will also promote accountability throughout the industry—a goal championed by consumers[543] and industry members[544] alike. The Commission is persuaded by the argument DialAmerica presented in favor of requiring transmission of Caller ID in telemarketing calls. According to DialAmerica: ''[d]elivery of Caller ID information, that will be displayed on a consumer's Caller ID device or that can be accessed through such services as *69, is essential to create accountability in the outbound telemarketing industry.''[545]

Commenters noted that the increase in accountability that would accrue from requiring transmission of Caller ID information in telemarketing would provide particular benefit in addressing abandoned calls.[546] Consumers whose privacy has been abused by dead air and call abandonment find it difficult, if not impossible, to ascribe those practices to a particular telemarketer unless Caller ID information is provided.[547] As explained by DialAmerica, mandatory transmission of Caller ID information will provide ''a strong incentive for companies to keep abandonment rates low and eliminate 'dead air,''' as these companies do not want to engage in practices that might encourage consumers to invoke their company-specific ''do-not-call'' rights.[548]

The enhanced accountability provided by Caller ID transmission extends beyond complaints about call abandonment and dead air. Caller ID information provides a record of identification that endures beyond the telemarketing call. The prompt disclosures required by 310.4(d) provide consumers with a needed introduction to a solicitation call, but do not provide an enduring record of identifying information, as most consumers do not answer the phone with pen and paper at the ready to write down the name of the calling party. Moreover, just as industry comments did not dispute the privacy protections provided by Caller ID transmission, neither did they present a rebuttal to the argument that such transmission will promote accountability in telemarketing. Indeed, the large majority of telemarketers—entities built upon good business practices and compliance with the Rule—will benefit from a provision designed to respond to deceptive and abusive practices aided by anonymity in telemarketing.[549]

By eliminating anonymity in telemarketing, the Caller ID provision will serve a third, equally important goal: it will provide law enforcement with a significant new resource.[550] In the years following promulgation of the original Rule, the Commission and the states have created a substantial record of enforcement.[551] However, enforcement efforts concerning some Rule provisions have been frustrated because of difficulty in identifying violators.[552] Sellers and telemarketers that have failed to honor ''do-not-call'' requests have been particularly hard to identify.[553] A number of comments in the record noted the need for greater ability to identify possible violators, and the advantages of Caller ID information in filling that need.[554] AARP noted that required transmission of Caller ID information will also enable consumers to contact government agencies and the Better Business Bureau to verify the legitimacy of the telemarketer, which will help to prevent fraud before it occurs.[555] Therefore, the transmission of Caller ID information likely will aid law enforcement's ability to enforce the TSR, and increase the Rule's effectiveness.

*Consistency with FCC regulations.* FCC regulations require carriers using SS7[556] to provide a mechanism by which a line subscriber can block the display of his or her telephone number on a Caller ID device.[557] SBC referenced the FCC's approach to Caller ID blocking to argue that calling parties' interest in privacy ''outweighs the general usefulness of Caller ID service.''[558] As the NPRM made clear, the FCC's requirement that common carriers be able to allow Caller ID blocking is meant to address specific calling situations in which protecting the calling party's privacy takes on particular urgency.[559] Cited examples include undercover law enforcement operations and calls placed from battered women's shelters.[560] No such privacy justification suggests itself in the case of telemarketers. Moreover, there is no conflict between the amended Rule's Caller ID provision and FCC regulations. The FTC's provision requires sellers and telemarketers to transmit Caller ID information; it does not create an obligation or a prohibition for common carriers. FCC regulations require certain carriers to provide a mechanism for blocking display of Caller ID information; they do not grant

[540] AARP-NPRM at 5; EPIC-NPRM at 11; McClure-NPRM at 3. *But see* Lynn Gaubatz (Msg. 2769) (Consumer prefers current state of affairs where ''most'' telemarketers block transmission of Caller ID information because her Caller ID is programmed to refuse calls from parties who block such transmission. Using this arrangement, the consumer reports receiving few telemarketing calls.).

[541] Several comments from industry groups asserted that the Commission should yield to the FCC's standard on Caller ID blocking, under which the calling party's ability to block Caller ID transmission is preserved. *See, e.g.*, DMA-NPRM at 48-49; SBC Supp. at 10-11. As is discussed below, however, the concerns at stake in the FCC's regulation—law enforcement and safety—are not implicated by telemarketing calls.

[542] DMA-NPRM at 48; IMC-NPRM at 8.

[543] *See, e.g.*, Teresa Vargas (Msg. 1292) (''I think telemarketers should NOT be able to block their phone numbers on Caller ID screens or *69. This will make the telemarketers more accountable, particularly if their tactics are in violation of a ''do-not-call'' request or if, [sic] the telemarketers successfully scam consumers.''); Lisa Bellanca (Msg. 2007).

[544] *See, e.g.*, DialAmerica-Supp. at 2; June 2002 Tr. II at 91-92 (ERA).

[545] DialAmerica-Supp. at 2.

[546] DialAmerica-NPRM at 25; Sytel-NPRM at 8; AARP-NPRM at 9; ARDA-NPRM at 15.

[547] http://www.opc-marketing.com/predictive.htm (''[I]t is assumed that abandoned calls to anonymous consumers do not harm the call center's business.'').

[548] DialAmerica-Supp. at 3.

[549] *See, e.g.*, AARP-NPRM at 6.

[550] TRA-NPRM at 11; EPIC-NPRM at 11-12.

[551] FTC law enforcement actions alone total over 139 cases, resulting in total judgments of over $200 million since the Rule's inception.

[552] June 2002 Tr. II at 21.

[553] Donald Munson (Msg. 25516); EPIC-NPRM at 11; NYSCPB-NPRM Att. A at 4-5.

[554] DialAmerica-NPRM at 25-26; EPIC-NPRM at 11-12; Patrick-NPRM at 2-3; TRA-NPRM at 11; CN Rhodine (Msg. 480); Charles Goodwin (Msg. 2079); Donald Munson (Msg. 25516).

[555] AARP-NPRM at 6.

[556] *See* note 526 above for more on SS7 technology.

[557] 47 CFR 64.1601.

[558] SBC-Supp. at 10-11.

[559] 67 FR at 4515, n.228. *See also* ATA-Supp. at 16; EPIC-NPRM at 14.

[560] *Id.*

sellers and telemarketers the right to block transmission of that information.

*§ 310.4(b) — Pattern of calls*

Section 310.4(b)(1) of the original Rule specifies that ''[i]t is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in,'' several practices deemed to be abusive of consumers. The proposed Rule contained some modifications to various subsections of this provision. The responses received in response to the NPRM, and the discussion at the June 2002 Forum, are set forth below.

*§ 310.4(b)(1)(i) — Calling repeatedly or continuously*

Section 310.4(b)(1)(i) specifies that it is an abusive telemarketing act or practice to cause any telephone to ring, or to engage any person in telephone conversation, repeatedly or continuously, with intent to annoy, abuse, or harass any person at the called number. None of the comments recommended that changes be made to the current wording of § 310.4(b)(1)(i).[561] Therefore, the language in that provision remains unchanged in the amended Rule.[562] However, the expansion in the scope of the Rule effectuated by the USA PATRIOT Act brings within the ambit of this provision telemarketers soliciting charitable contributions.

*§ 310.4(b)(1)(ii) — Denying or interfering with ''do-not-call'' rights*

In the NPRM, the Commission proposed to prohibit a telemarketer from denying or interfering in any way with a person's right to be placed on a ''do-not-call'' list, including hanging up the telephone when a consumer initiates a request that he or she be placed on the seller's list of consumers who do not wish to receive calls made by or on behalf of that seller.[563] In setting out the proposed prohibition, the Commission noted that during the Rule Review, numerous individual consumers had complained about being hung up on when they asked to be placed on a ''do-not-call'' list. In other instances, consumers complained that the telemarketer had used other means to hamper or impede these consumers' attempts to be placed on a ''do-not-call'' list. Participants in both the ''Do-Not-Call'' Forum and the Rule Review Forum echoed these complaints.[564]

A seller or telemarketer has an affirmative duty under the Rule to accept a ''do-not-call'' request, and to process that request. Failure to do so by impeding, denying, or otherwise interfering with an attempt to make such a request clearly would defeat the purpose of the ''do-not-call'' provision, and would frustrate the intent of the Telemarketing Act to curtail telemarketers from undertaking unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of the consumer's right to privacy.[565]

Those commenters who addressed this provision strongly supported the prohibition.[566] For example, NAAG stated that an express prohibition against denying or interfering with a consumer's right to be added to a company-specific ''do-not-call'' list clarifies the seriousness of the telemarketer's obligation to process the consumer's request and will raise confidence in the system.[567]

NAAG noted that the consumer who receives the telemarketing call generally must rely exclusively on the telemarketer's truthful disclosure of his or her identity and the nature of the call, and that consumers are often confused because many company names are very similar.[568] In this respect, the Commission's determination to require telemarketers to transmit Caller ID information, discussed above, will provide a valuable tool to both consumers and law enforcement agencies in identifying those telemarketers who fail to comply with their obligation to process the consumer's request.

Therefore, the Commission has determined that it is an abusive telemarketing act or practice to deny or interfere in any way with a person's right to be placed on a ''do-not-call'' list, including hanging up on the individual when he or she initiates such a request. Section 310.4(b)(1)(ii) of the amended Rule prohibits this practice, and encompasses both telemarketers soliciting the purchase of goods or services and those soliciting charitable contributions in accordance with the USA PATRIOT Act amendments.[569] In addition, § 310.4(b)(1)(ii) prohibits anyone from directing another person to deny or interfere with a person's right to be placed on a ''do-not-call'' list. This aspect of the provision is intended to ensure that sellers who use third-party telemarketers cannot shield themselves from liability under this provision by suggesting that the violation was a single act by a ''rogue'' telemarketer where there is evidence that the seller caused the telemarketer to deny or defeat ''do-not-call'' requests.[570]

*§ 310.4(b)(1)(iii) — ''Do-not-call''*

The original Rule prohibited a seller or telemarketer from calling a person who had previously asked not to be called by or on behalf of the seller whose goods or services were offered.[571] The proposed Rule added a second ''do-not-call'' provision that would prohibit a seller or telemarketer from calling a consumer who had placed his or her name and/or telephone number on a centralized registry maintained by the Commission, unless the consumer had provided express authorization for the seller to call him or her.[572] To effectuate the USA PATRIOT Act amendments, the Commission also proposed that for-profit telemarketers who solicit charitable donations be subject to the proposed national registry.[573]

The national ''do-not-call'' registry proposal generated extensive comment.[574] Consumer and privacy advocates, as well as individual consumers, overwhelmingly supported the creation of such a registry.[575]

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[561] In its comments in the Rule Review, NASAA stated that this provision strikes directly at one of the manipulative techniques used in high-pressure sales to coerce consumers to purchase a product, and noted that the organization advises consumers that one of the ''warning signs of trouble'' is the ''three-call'' technique used by fraudulent sellers of securities. NASAA-RR at 2.

[562] Section 310.4(b)(1)(i) of the amended Rule prohibits as an abusive practice ''causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.''

[563] 67 FR at 4516.

[564] *Id.*

[565] 15 U.S.C. 6102(a)(3)(A).

[566] *See, e.g.*, ARDA-NPRM at 6; Assurant-NPRM at 7; NAAG-NPRM at 44; NCL-NPRM at 8; NYSCPB-NPRM at 5-6; Proctor-NPRM at 4.

[567] NAAG-NPRM at 44. *See also* NCL-NPRM at 8.

[568] NAAG-NPRM at 44.

[569] Moreover, the Rule Review yielded evidence that, in some instances, telemarketers soliciting charitable contributions are unwilling to honor donors' ''do-not-call'' requests, even when threatened with withdrawal of future support. *See* Peters-RR at 1.

[570] Because the USA PATRIOT Act amendments do not give the Commission jurisdiction over non-profit organizations, the prohibition against causing a telemarketer to deny or defeat ''do-not-call'' requests applies only to sellers of goods or services, not to non-profit organizations.

[571] 16 CFR 310.4(b)(1)(ii). This is termed a ''company-specific'' approach to eliminating unwanted telephone solicitations.

[572] Proposed Rule §§ 310.4(b)(1)(iii)(B) and 310.4(b)(1)(iii)(B)(1) and (2).

[573] 67 FR at 4516, 4519.

[574] As discussed above, the Commission received about 64,000 written and electronic comments in response to the NPRM, including over 45 supplemental comments from organizations and individuals and almost 15,000 comments from Gottschalks' customers that were submitted by Gottschalks as its supplemental comment. The vast majority of comments touched, at least in part, on the proposed national ''do-not-call'' registry.

[575] *See, e.g.*, DOJ-NPRM at 4-5; EPIC-NPRM at 2-3; LSAP-NPRM at 12; NAAG-NPRM at 4, 6, 12, 29; NACAA-NPRM at 2; NCLC-NPRM at 13; NCL-

Indeed, many recommended that the Commission take a more restrictive ''opt-in'' approach, and prohibit telemarketing except to those consumers who expressly agree in advance to accept sales calls.[576] State regulators also supported a national registry, provided it did not preempt the ''do-not-call'' legislation already passed in many states or preclude the states from enforcing these laws.[577]

A number of industry commenters supported the general concept of a national ''do-not-call'' registry that would preempt state ''do-not-call'' laws, provided an exemption for ''existing business relationships'' were added to the Rule. The need for an established business relationship exemption was the most emphatic and consistent theme of industry comments, but other points were raised as well. Some questioned whether the Commission had the statutory authority to establish such a registry.[578] Others argued that a national ''do-not-call'' registry would impose an unconstitutional restriction on commercial speech.[579] Still others felt that an FTC registry was not necessary because the current system was sufficient to protect consumer privacy.[580] These commenters supported increased enforcement of existing federal and state ''do-not-call'' laws. Charitable organizations and the telemarketers who serve them uniformly opposed the national ''do-not-call'' registry proposal if applicable to charitable solicitations by for-profit telemarketers. They argued that such a registry would violate the First Amendment and that it would have a devastating impact on the level of contributions that non-profit organizations depend upon to fulfill their missions.[581]

Based on the entire record in this proceeding, the Commission has determined to retain the provision in the original Rule that prohibits a seller or telemarketer from calling a consumer who has previously asked not to be called by or on behalf of that seller. The Commission has also determined to supplement that provision by amending the Rule to establish a national ''do-not-call'' registry. For the reasons set forth herein, the Commission has decided to limit coverage of the national registry to telemarketing calls made by or on behalf of sellers of goods or services, thus exempting telemarketing calls on behalf of charitable organizations. Calls on behalf of charitable organizations will be subject to the company-specific ''do-not-call'' provision. In addition, the Commission has decided to retain the provision that allows consumers who sign up on the national ''do-not-call'' registry to provide express agreement to specific sellers to call them, but has modified that provision to require that evidence of such agreements be written, not oral. Furthermore, the Commission has decided to supplement that express agreement provision with a narrowly-defined exemption for ''established business relationships.'' The Commission is persuaded that these provisions will work in a complementary fashion to effectuate the appropriate balance between protecting consumer privacy and enabling sellers to have access to their existing customers. Of course, even a seller who is exempt from the prohibition against calling a consumer based on the existence of an ''established business relationship'' with that consumer must honor that consumer's direct request not to be called under the company-specific ''do-not-call'' provision.

*Background.* The original Rule's company-specific approach, which prohibited a seller or telemarketer from calling a person who had previously asked not to be called, was intended to prohibit abusive patterns of calls from a seller or telemarketer to a person. During the Rule Review, industry representatives generally supported the Rule's current company-specific approach, stating that it provides consumer choice and satisfies the consumer protection mandate of the Telemarketing Act while not imposing an undue burden on industry.[582] The vast majority of individual commenters, however, joined by consumer groups and state law enforcement representatives, claimed that the TSR's company-specific ''do-not-call'' provision is inadequate to prevent the abusive patterns of calls it was intended to prohibit.[583] They cited several problems with the current ''do-not-call'' scheme as set out in the FTC and FCC regulations:[584] the company-specific approach is extremely burdensome to consumers, who must repeat their ''do-not-call'' request with every telemarketer that calls;[585] consumers' repeated requests to be placed on a ''do-not-call'' list are ignored;[586] consumers have no way to verify that their names have been taken off of a company's calling list;[587] consumers find that using the TCPA's private right of action[588] is very complex and time-consuming, and places an evidentiary burden on the consumer who must keep detailed lists of who called and when;[589] and finally, even if the consumer wins a lawsuit against a company, it is difficult for the consumer to enforce the judgment.[590]

In addition to the fact that it has proven ineffective, there is another problem that is not even addressed by the company-specific provision. In particular, because a great many telemarketers are now placing huge patterns of unsolicited telemarketing calls,[591] many consumers find even an

NPRM at 8; NFPPA-NPRM at 1; Pelland-NPRM *passim*; Proctor-NPRM *passim*; PRC-NPRM at 2; Private Citizen-NPRM at 1; TDI-NPRM at 4-5; Worsham-NPRM at 1. Of the approximately 49,000 comments, about 33,000 supported the creation of a national registry, while about 13,700 opposed it. Of the 14,700 comments from Gottschalks'' customers, almost 11,500 supported the creation of a ''do-not-call'' registry, while only about 1800 opposed the idea of a registry.

[576] *See, e.g.*, EPIC-NPRM at 4; NCL-NPRM at 8.

[577] *See, e.g.*, Connecticut-NPRM at 1-2, 3; DC-NPRM at 4; Kansas-NPRM at 2; NAAG-NPRM at 4-29; NYSCPB-NPRM at 1; Tennessee-NPRM at 2, 9-10; Texas PUC-NPRM at 1, 2; Virginia-NPRM at 1-2. *See also* AARP-NPRM at 1; NCL-NPRM at 9-10; NCLC-NPRM at 13; PRC-NPRM at 4; Private Citizen-NPRM at 2; TDI-NPRM at 4-5.

[578] *See, e.g.*, Discover-NPRM at 2; ERA-NPRM at 26; NRF-NPRM at 2-3; NAA-NPRM at 2; Paramount-NPRM at 1; PMA-NPRM at 6, 24-26.

[579] *See, e.g.*, NAA-NPRM at 2; Paramount-NPRM at 2; PBP-NPRM *passim*; Redish-NPRM *passim*.

[580] *See, e.g.*, Craftmatic-NPRM at 3; ERA-NPRM at 5, 28; PMA-NPRM at 6; TeleStar-NPRM at 2; Weber-NPRM at 2.

[581] *See, e.g.*, DMA-NonProfit-NPRM *passim*; Not-for-Profit Coalition-NPRM *passim*; Hudson Bay-NPRM *passim. See also* June 2002 Tr. III at 110, 205-10.

[582] ARDA-RR at 2; ATA-RR at 8-10; Bell Atlantic-RR at 4; DMA-RR at 2; ERA-RR at 6; MPA-RR at 16; NAA-RR at 2; NASAA-RR at 4; PLP-RR at 1. *See also* DNC Tr. at 132-80.

[583] *See* NAAG-RR at 17-19; NCL-RR at 13-14; DNC Tr. at 132-80. *See also, e.g.*, Anderson-RR at 1; Bennett-RR at 1; Card-RR at 1; Conway-RR at 1; Garbin-RR at 1; A. Gardner-RR at 1; Gilchrist-RR at 1; Gindin-RR at 1; Harper-RR at 1; Heagy-RR at 1; Johnson-RR at 1; McCurdy-RR at 1; Menefee-RR at 1; Mey-RR *passim*; Mitchelp-RR at 1; Nova53-RR at 1; Peters-RR at 1; Rothman-RR at 1; Vanderburg-RR at 1; Ver Steegt-RR at 1; Worsham-RR at 1.

[584] The FCC's ''do-not-call'' regulations under the TCPA are at 47 CFR 64.1201.

[585] Garbin-RR at 1; NAAG-RR at 17; Ver Steeg-RR at 1.

[586] Harper-RR at 1; Heagy-RR at 1; Holloway-RR at 1; Johnson-RR at 1; Menefee-RR at 1; Mey-RR *passim*; Nova53-RR at 1; Nurik-RR at 1; Peters-RR at 1; Rothman-RR at 1; Runnels-RR at 1; Schiber-RR at 1; Schmied-RR at 1; Vanderburg-RR at 1.

[587] McCurdy-RR at 1; Schiber-RR at 1.

[588] The TCPA permits a person who receives more than one telephone call in violation of the FCC's ''do-not-call'' regulations to bring an action in an appropriate state court to enjoin the practice, to receive money damages, or both. 47 U.S.C. 227(b)(3). The consumer may recover actual monetary loss from the violation or receive $500 in damages for each violation, whichever is greater. *Id.* If the court finds that a company willfully or knowingly violated the FCC's ''do-not-call'' rules, it can award treble damages. *Id.*

[589] Kelly-RR at 1; NAAG-RR at 17-19; NACAA-RR at 2; NCL-RR at 13-14.

[590] Kelly-RR at 1.

[591] Based on figures provided by the telemarketing industry, a study prepared for CCC

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initial call from a telemarketer or seller to be abusive and invasive of privacy. Several states responded to the growing consumer frustration with unsolicited telemarketing calls and the ineffectiveness of the company-specific approach by passing legislation to establish statewide ''do-not-call'' lists. To date, 27 states have passed such legislation, and numerous other states have considered similar bills.[592]

The comments received in response to the NPRM show that frustration with unsolicited telemarketing calls continues despite the efforts of the DMA, the states, and the TCPA/TSR company-specific approaches to the problem. Individual commenters overwhelmingly supported the establishment of a national ''do-not-call'' registry.[593] This was true even of those individuals who were already signed up on their state's ''do-not-call'' registry or on the DMA's TPS.[594] Although many of these individuals stated that they had found their state registry to be effective in reducing the number of unwanted calls, they thought that a national registry would be a beneficial addition to their state registry because, among other things, a central registry would eliminate some of the loopholes in the state laws, thus increasing coverage, and would provide the convenience of a one-stop method of reducing unwanted calls.[595] Similarly, individuals who were signed up on the DMA's TPS list also said that the list had been effective in reducing the number of unwanted calls, yet they felt that a national registry was needed because they were still receiving unwanted calls.[596]

Consumer groups supported the creation of a national ''do-not-call'' registry,[597] and some privacy advocates urged the Commission to take an even more restrictive ''opt-in'' approach by banning telemarketing to any consumer who has not expressly agreed to receive telephone solicitations.[598] With certain caveats, state regulators also supported the proposal for a national ''do-not-call'' registry.[599] Some states that already have a state ''do-not-call'' list in place indicated that a national list would complement the current regime of state legislation and could be an effective addition to the arsenal of tools available to consumers in reducing unwanted calls.[600] However, states and consumer advocates cautioned that such a system should be implemented in close coordination with the states and should not supplant more restrictive state laws.[601]

Industry commenters generally believed that the current system is working and that a national ''do-not-call'' registry is unnecessary.[602] They expressed the view that the DMA's Telephone Preference Service (''TPS'') is tantamount to a national ''do-not-call'' registry. In fact, according to their comments, the TPS has greater coverage than the FTC registry would have because it covers certain entities such as common carriers, banks, and charitable organizations beyond FTC jurisdiction.[603] They argued that these

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estimates that the annual number of outbound calls that are answered by a consumer is 16,129,411,765 (*i.e.,* 16 billion calls). James C. Miller, III, Jonathan S. Bowater, Richard S. Higgins, and Robert Budd, ''An Economic Assessment of Proposed Amendments to the Telemarketing Sales Rule,'' June 5, 2002, (hereinafter ''Miller Study'') at 28, Att. 1. This figure does not include those calls that are abandoned.

[592] DNC Tr. at 16, 137, 157-58. As of August, 2002, 27 states had passed ''do-not-call'' statutes. Florida established the first state ''do-not-call'' list in 1987. (Fla. Stat. Ann. § 501.059). Oregon and Alaska followed with ''do-not-call'' statutes in 1989. Instead of a central registry, these two states opted to require telephone companies to place a black dot in the telephone directory by the names of consumers who do not wish to receive telemarketing calls. (1999 Or. Laws 564; Alaska Stat. Ann. § 45.50.475). In 1999, Oregon replaced its ''black dot'' law with a ''no-call'' central registry program. (Or. Rev. Stat. § 464.567). *See also* article regarding Oregon law in 78 *BNA Antitrust & Trade Reg. Report* 97 (Feb. 4, 2000). After those three states adopted their statutes, there was little activity at the state level for about a decade. Then, in 1999, a new burst of legislation occurred as five more states passed ''do-not-call'' legislation—Alabama (Ala. Code § 8-19C); Arkansas (Ark. Code Ann. § 4-99-401); Georgia (Ga. Code Ann. § 46-5-27; *see also* rules at Ga. Comp. R. & Regs. 515-14-1); Kentucky (Ky. Rev. Stat. Ann. § 367.46955(15)); and Tennessee (Tenn. Code Ann. § 65-4-401; *see also* rules at Tenn. Comp. R. & Regs. Chap. 1220-4-11). During 2000, six more states enacted ''do-not-call'' statutes—Connecticut (Conn. Gen. Stat. Ann. § 42-288a); Idaho (Idaho Code § 48-1003); Maine (Me. Rev. Stat. § 4690-A); Missouri (Mo. Rev. Stat. § 407.1095); New York (N.Y. General Business Law § 399-z; *see also* rules at NY Comp. R. & Regs. tit. 12 § 4602); and Wyoming (Wyo. Stat. Ann. § 40-12-301). As of August, 2002, another eleven states had joined the ranks—California (S.B. 771, to be codified at Cal. Bus. & Prof. Code § 17590); Colorado (H.B. 1405, to be codified at Colo. Rev. Stat. § 6-1-901); Illinois (S.B. 1830, signed Aug. 9, 2002); Indiana (H.B. 1222, to be codified at Ind. Code Ann. § 24.4.7); Kansas (S.B. 296, to be codified at Kan . Stat. Ann. 2001 Supp. § 50-670, signed May 29, 2002); Louisiana (H.B. 175, to be codified at La. Rev. Stat. 45:844.11); Massachusetts (H.B. 5225, signed Aug. 10, 2002); Minnesota (S.B. 3246, to be codified at Minn. Stat. § 325E.311, signed May 15, 2002); Oklahoma (S.B. 950, to be codified at Okla. Stat. tit. 15 § 775B.1, signed Apr. 15, 2002); Pennsylvania (H.B. 1469, to be codified as amendment to Pa. Cons. Stat. § 2241; Texas (H.B. 472, to be codified at Tex. Bus. & Com. Code Ann. § 43.001); Vermont (S. 62, Pub. Act 120, to be codified at Vt. Stat. Ann. tit. 9 § 2464a, signed June 5, 2002); and Wisconsin (Section 2435 of 2001 Wisconsin Act 16, 2001 S.B. 55, to be codified at Wis. Stat. 100.52). In addition, numerous states are considering or recently have considered laws that would create state-run ''do-not-call'' lists, including Arizona, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maryland, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, and West Virginia. *See* CallCompliance table of state ''do-not-call'' laws and proposed legislation, http://www.callcompliance.com/pages/STATElist.html (accessed July 24, 2002). The ''do-not-call'' issue has also drawn the attention of federal legislators, who have introduced several bills aimed at addressing consumers' concerns. For example, in the 106th Congress, H.R. 3180 (introduced by Rep. Salmon) would have required telemarketers to tell consumers that they have a right to be placed on either the DMA's ''do-not-call'' list or on their state's ''do-not-call'' list. This proposal also would have required all telemarketers to obtain and reconcile the DMA and state ''do-not-call'' lists with their call lists. Similar legislation was introduced in the 107th Congress by Rep. King (H.R. 232, the ''Telemarketing Victim Protection Act''). In addition, on December 20, 2001, Sen. Dodd introduced S. 1881, the ''Telemarketing Intrusive Practices Act of 2001,'' which would require the FTC to establish a national ''do-not-call'' registry.

[593] The Commission received approximately 64,000 email and written comments. Of those, approximately 44,000 supported the proposed national ''do-not-call'' registry, while only about 15,000 opposed the creation of such a registry. (The remaining 5,000 comments did not address this issue.)

[594] The Commission received approximately 7,500 comments from consumers who live in states that have ''do-not-call'' statutes. *See, e.g.*, Dan Seaman (AL) (Msg. 1127); Shawn Baumgartner (FL) (Msg. 2771); Edwin Rodriguez (CO) (Msg. 4573); Michelle Crouch (GA) (Msg. 4973); and Rona Owen (TX) (Msg. 6247).

[595] *See, e.g.*, Michelle Crouch (GA) (Msg. 4973); Dan Seaman (AL) (Msg. 1127) (state registry has too many exemptions); Clive and Jane Romig (FL) (Msg. 19125) (current remedies are inadequate).

[596] *See, e.g.*, Robert Winters (Msg. 18984) (resurgence of calls after a while); Gregory Stahmer (Feb. 21, Part 6, Msg. 150) (continues to get unwanted calls); Robert Baly (Feb. 27, Part 1, Msg. 551).

[597] AARP-NPRM at 1; CCA-NPRM at 1; ConsumerPrivacyGuide.com-NPRM at 1; EPIC-NPRM at 2-3; LSAP-NPRM at 12-15; NAAG-NPRM at 4; NACAA-NPRM at 2; NARUC-NPRM at 1, 3; NASUCA-NPRM at 2; NCL-NPRM at 8; NCLC-NPRM at 13; PRC-NPRM at 1; Worsham-NPRM at 1. The U.S. Department of Justice also supported the creation of a national ''do-not-call'' list maintained by the FTC. DOJ-NPRM at 4-5.

[598] *See, e.g.*, EPIC-NPRM at 3; Worsham-NPRM at 5.

[599] *See, e.g.*, CCA-NPRM at 1; Connecticut-NPRM at 1-2, 3; DC-NPRM at 4; Kansas-NPRM at 2; NAAG-NPRM at 4-29; NYSCPB-NPRM at 1-2; Tennessee-NPRM at 2; Texas PUC-NPRM at 1, 2; Virginia-NPRM at 1-2.

[600] CCA-NPRM at 1; Connecticut-NPRM at 1; Kansas-NPRM at 1; NAAG-NPRM at 6, 12, 29; NYSCPB-NPRM at 1-2; Tennessee-NPRM at 2.

[601] Connecticut-NPRM at 1-2, 3; Kansas-NPRM at 1; NAAG-NPRM at 6-13; NACAA-NPRM at 4-5; NCL-NPRM at 9; NYSCPB-NPRM at 2-4, 13-17; Private Citizen-NPRM at 2; Tennessee-NPRM at 2, 9-10; Texas PUC-NPRM at 3-4. *See also* June 2002 Tr. I at 19-40.

[602] *See, e.g.*, ATA-NPRM at 21-25; Craftmatic-NPRM at 3; DMA-NPRM at 7-8; ERA-NPRM at 5, 28; Fleet-NPRM at 2; Green Mountain-NPRM at 21-23; Lenox-NPRM at 4-5; MPA-NPRM at 34-35; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM at 3; Pacesetter-NPRM at 2-3; PMA-NPRM at 6; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TeleStar-NPRM at 2; TRC-NPRM at 2; Weber-NPRM at 2.

[603] *See, e.g.*, ATA-NPRM at 24-25; DMA-NPRM at 8-11; ERA-NPRM at 27-28; MPA-NPRM at 34-35; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM

gaps in the national registry's coverage due to the FTC's limited jurisdiction would make a national ''do-not-call'' list more confusing than helpful to consumers.[604] Some industry members suggested that the states are the more appropriate forum for creation of ''do-not-call'' lists.[605] Some of these commenters argued that, unlike a national list, that must be ''one size fits all,'' states can be more responsive to the needs of their citizens and tailor their lists to those differing needs.[606]

The record in this matter overwhelmingly shows the contrary—as detailed earlier, it shows that the company-specific approach is seriously inadequate to protect consumers' privacy from an abusive pattern of calls placed by a seller or telemarketer. The comments also show that consumers continue to be angered by and frustrated with the pattern of unsolicited telemarketing calls they receive from the multitude of sellers and telemarketers. A national ''do-not-call'' registry addresses both types of abuse. It provides a mechanism that a consumer may use to indicate that he or she finds unsolicited telemarketing calls abusive and an invasion of privacy. It will also protect a consumer from repeated abusive calls from a seller or telemarketer. These problems cannot be fully addressed by state lists. While state ''do-not-call'' lists may be effective in reducing calls for the citizens in those states, about half the states do not have such legislation. A federal list would protect those consumers who are not currently protected. In addition, as EPIC pointed out in its comment, the state ''do-not-call'' lists vary with regard to exempt entities, with some containing so many exemptions that virtually all telemarketers are exempt.[607] A federal list would provide uniformity with regard to those entities within the FTC's jurisdiction. Finally, although industry touts the state lists as the appropriate approach to ''do-not-call,'' they also challenge the states' authority to regulate interstate calls under the state ''do-not-call'' laws.[608] The Telemarketing Act grants the states the authority to enforce the TSR in federal court.[609] Therefore, a national ''do-not-call'' registry maintained by the FTC pursuant to the TSR (and enforceable by the states) would quell any challenges to state ''do-not-call'' enforcement with respect to interstate telemarketing.

Some industry members would have the FTC forget about a national registry and continue to let consumers use the current national self-regulatory system set up through DMA's TPS.[610] DMA has provided an important public service by administering the TPS, and the Commission applauds the efforts of the industry to regulate itself. However, the self-regulatory model has two serious shortcomings which limit its use as an effective national ''do-not-call'' registry: a self-regulatory system is voluntary; and to the extent that sanctions exist for non-compliance, DMA may apply those sanctions only against its members, not non-members.[611] On the other hand, lists established pursuant to the FTC Act and the Telemarketing Act, as well as those established pursuant to state law, have the force of law, and violators are subject to civil penalties. This type of sanction makes it more likely that companies will take their ''do-not-call'' obligations seriously.

The Commission recognizes that its jurisdictional limitations will impact the effectiveness of a national ''do-not-call'' registry. However, the Commission notes that while certain specific entities are exempt from coverage, the telemarketing companies that solicit on their behalf are nonetheless covered by the TSR.[612] Moreover, many consumers have signed up for state ''do-not-call'' lists,[613] all of which include various exemptions. Consumers in those states have accepted the limitations of the state ''do-not-call'' lists and have been satisfied at the prospect of at least *reducing* the number of unwanted telephone solicitations that they receive.[614] Indeed, an FTC registry may be more inclusive than some state ''do-not-call'' lists.[615] The Commission believes that consumer education will minimize consumer confusion over what calls will and will not be allowed under a national ''do-not-call'' registry.

Industry pointed to the economic importance of outbound telemarketing, which accounted for $274.2 billion in 2001,[616] and warned that a national ''do-not-call'' registry would have dire economic consequences.[617] In its supplemental comments, DMA submitted a study showing ''the face of the telemarketing industry.''[618] According to DMA predictions, job losses would impact most seriously on women, minorities, and rural areas—the groups and regions from which most telemarketers are drawn.[619] Individual sellers and telemarketing firms estimated that they might have to lay off up to 50 percent of their employees if such a registry were to go into effect.[620] Numerous individual telemarketers submitted comments in which they talked about the pride they have in their work and their fear of losing their livelihood.[621]

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at 3; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TRC-NPRM at 2.

[604] *See, e.g.*, ERA-NPRM at 28, 36; MPA-NPRM at 34-35; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM at 3; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TRC-NPRM at 2.

[605] *See, e.g.*, ATA-NPRM at 23-25; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM at 3; possibleNOW.com-NPRM at 1; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TRC-NPRM at 2. *See also* Tennessee-NPRM at 6-7.

[606] *See, e.g.*, ATA-NPRM at 23-25; Noble-NPRM at 2; NATN-NPRM at 2; NEMA-NPRM at 4; NSDI-NPRM at 3; possibleNOW.com-NPRM at 1; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 3; Teleperformance-NPRM at 2; TRC-NPRM at 2. *See also* Tennessee-NPRM at 6-7.

[607] EPIC-NPRM at 19.

[608] *See, e.g.*, ATA-NPRM at 24.

[609] 15 U.S.C. 6108.

[610] *See, e.g.*, ATA-NPRM at 21-25; Craftmatic-NPRM at 3; DMA-NPRM at 7-8; ERA-NPRM at 5, 28; Fleet-NPRM at 2; Green Mountain-NPRM at 21-23; Lenox-NPRM at 4-5; MPA-NPRM at 34-35; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM at 3; Pacesetter-NPRM at 2-3; PMA-NPRM at 6; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TeleStar-NPRM at 2; TRC-NPRM at 2; Weber-NPRM at 2.

[611] DMA has about 5,000 members. DMA-NPRM at 1.

[612] 67 FR at 4497.

[613] For example, Missouri and Indiana each have more than 1 million telephone numbers on their lists; New York's list contains more than 2 million numbers. *See Missouri No Call Tops 1 Million Three Days Before One-Year Anniversary of Law*, Office of Missouri Attorney General, June 28, 2002, http://www.ago.state.mo.us/062802.htm; and David Wessel, *On Hold: Gagging the Telemarketers*, WALL ST. J., Apr. 11, 2002, at A2. *See also* NAAG-NPRM at 4, n.3.

[614] *See generally* June 2002 Tr. I at 110-21.

[615] *See* EPIC-NPRM at 19 (noting that some state laws are ineffective due to the number of exempted entities).

[616] DMA, ''The Faces and Places of Outbound Telemarketing in the United States,'' (June 2002) (''DMA study'') at 1.

[617] *See id. See also* NATN-NPRM at 1; NSDI-NPRM at 2; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 1.

[618] DMA study, *see* note 616 above.

[619] The DMA study indicates that teleservices workers are overwhelmingly female, high-school educated, and African-American or Hispanic. Almost 62 percent of all females working as teleservices agents are working mothers, and 30 percent are part of a welfare-to-work program or were recently on public assistance. DMA study at 2. The study also indicates that outbound telemarketing call centers can be found in every state, often in rural areas or small towns and cities that are economically distressed. *Id.* at 4. *See also* NATN-NPRM at 1; NSDI-NPRM at 2; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 1.

[620] *See* NATN-NPRM at 1; NSDI-NPRM at 2; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 1; Teleperformance-NPRM at 2; TRC-NPRM at 2-3. However, the Commission notes that these companies offered no analysis to substantiate their claims regarding the impact of the national registry.

[621] *See, e.g.*, Alhafez (Mar. 22, part 1, Msg. 1712); Cameron (Mar. 6, part 1, Msg. 951); Dillon (Mar. 21, part 2, Msg. 1622). *See also, e.g.*, ACI Telecentrics-

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The Commission recognizes that telemarketing is a legitimate method of selling goods and services. It is important to remember that the ''do-not-call'' registry will impact only outbound telemarketing, and will have no effect whatsoever on the greater portion of the industry devoted to inbound calls from consumers.[622] The Commission also recognizes the importance of outbound telemarketing to federal, state, and local economies. Telemarketing provides needed jobs to rural areas and small towns that often face high unemployment, and to people who often face difficulties in obtaining other employment, such as individuals moving off of welfare.

Although industry fears the economic impact a national registry might have, ironically, an FTC ''do-not-call'' registry may actually benefit rather than harm industry. For example, the federal framework, with its exemptions, would provide greater consistency of coverage, at least with regard to interstate calls. In addition, industry would benefit because telemarketers would reduce time spent calling consumers who do not want to receive telemarketing calls and would be able to focus their calls only on those who do not object to such calls.[623]

Industry emphasized the importance of harmonizing federal and state laws. To the extent that industry members supported creation of a national ''do-not-call'' list, they conditioned their support on preemption of state laws.[624] These commenters argued that the major, if not only, benefit to industry from a national ''do-not-call'' registry would be to eliminate the costs of purchasing multiple lists and complying with a patchwork of potentially 50 different state laws.[625] Absent preemption, industry believed that a national registry would only add another layer of bureaucracy and one more list that they must purchase.[626] The June 2002 Forum discussed in depth the interplay between the national ''do-not-call'' registry and state laws. Participants agreed that the Commission should seek comity with state laws, and that a single list would provide substantial benefits to both industry and consumers.[627]

For example, Dr. James Miller, testifying on behalf of CCC, estimated that if the Commission's ''do-not-call'' proposal were enacted as proposed, it would cost all firms that sell their products via outbound telemarketing combined a total of $6.6 million to purchase access to the FTC's ''do-not-call'' registry and to check their calling lists against the ''do-not-call'' list to ensure that they do not call consumers who have asked not to be called.[628] If companies could comply with both FTC and state regulations by purchasing access to the FTC's list and not calling consumers whose numbers appeared on that list, this would represent the total burden on firms to avoid calling consumers who did not wish to be called. However, Dr. Miller testified that the total cost to comply with the state regulations as well as the FTC requirements, should firms still have to purchase separate lists from each state having its own do-not-call provisions, could approximate $100 million.[629]

Finally, commenters raised various issues and offered suggestions relating to the implementation of a national ''do-not-call'' registry. For example, various commenters questioned the accuracy of automatic number identification (''ANI'') verification, the length of time a consumer's telephone number should remain on the list, who should be able to sign up for the list, whether the Commission should allow third parties to submit telephone numbers, the type of information that should be collected, and the accuracy of the Commission's cost estimates.[630] These issues are discussed in the section below addressing implementation.

*Coverage of the ''do-not-call'' provisions.* A number of commenters asked the Commission to clarify coverage of its ''do-not-call'' provisions. Some queried whether calls to home businesses would be subject to the ''do-not-call'' requirements.[631] The Rule exempts telemarketing calls to businesses (except for sellers or telemarketers of nondurable office or cleaning supplies). Therefore, calls to home businesses would not be subject to the amended Rule's ''do-not-call'' requirements.

Some commenters asked whether the ''do-not-call'' requirements would cover calls to cellular or wireless telephones and pagers. The Commission intends that § 310.4(b)(1)(iii) apply to any call placed to a consumer, whether to a residential telephone number or to the consumer's cellular telephone or pager. Consumers are increasingly using cellular telephones in place of regular telephone service,[632] which is borne out by the dramatic increase in cellular phone usage.[633] The Commission believes that it is particularly important to allow consumers an option to reduce unwanted telemarketing calls to cellular telephones or to pagers because some cellular services charge the consumer for incoming calls, thus adding insult to injury when the consumer is charged for

Levie (Msg. 19322); InfoCision Management-Davis (Msg. 23968); HFC-Beneficial-Darst (Msg. 33709); Household-Alioto (Msg. 27876); LTD Direct-Rockwood (Msg. 27601); and TCIM Services Inc.-Davis (Msg. 22871).

[622] In 2001, inbound telemarketing accounted for 55 percent of total teleservice expenditures and was expected to grow to 62 percent by 2004. Winterberry Group, ''Industry Map: Teleservice Industry—Multi-Channel Marketing Drives Universal Call Centers'' at 9 (Jan. 2001).

[623] Industry representatives also have indicated that they do not wish to call consumers who do not want to receive telemarketing calls. *See* DNC Tr. at 41, 51, 53-56, 61, 71.

[624] *See, e.g.*, AFSA-NPRM at 3-5; Craftmatic-NPRM at 3; Discover-NPRM at 2; HSBC-NPRM at 1; MBA-NPRM at 2; NCTA-NPRM at 15-16; NRF-NPRM at 7-8; Nextel-NPRM at 3-4, 26-27; PMA-NPRM at 28; SIIA-NPRM at 3; Time-NPRM at 3-4; Community Bankers-Supp. at 4; ARDA-Supp. at 1; ICTA-Supp. at 1. *See also* June 2002 Tr. at 19-40.

[625] See, e.g., AFSA-NPRM at 3-5; Craftmatic-NPRM at 3; Discover-NPRM at 2; HSBC-NPRM at 1; MBA-NPRM at 2; NCTA-NPRM at 15-16; NRF-NPRM at 7-8; Nextel-NPRM at 3-4, 26-27; PMA-NPRM at 28; SIIA-NPRM at 3; Time-NPRM at 3-4.

[626] *Id.*

[627] *See* June 2002 Tr. I at 19-40.

[628] *See* June 2002 Tr. I at 209. Dr. Miller's testimony drew from the Miller Study (*see* note 591 above). As the study explains, the $6.6 million figure assumes that 3,000 firms will pay $1,000 each on average to obtain access to the list and that it will take the average firm approximately two hours of effort at a cost of $50 per hour each time it is necessary to compare the firm's calling list against the ''do-not-call'' registry. As proposed in the NPRM, firms would have been required to do this comparison 12 times each year so that the average firm would have incurred a total expense of $2,200. Miller Study at 11-12. Because the amended Rule does not require firms to compare their calling lists to the FTC's ''do-not-call'' registry monthly as did the NPRM proposal, the estimated cost using Dr. Miller's methodology would now be around $4.5 million.

[629] *See* June 2002 Tr. I at 209.

[630] *See, e.g.*, AFSA-NPRM at 4-10; Craftmatic-NPRM at 3; DC-NPRM at 5; DialAmerica-NPRM at 13; Discover-NPRM at 3; EPIC-NPRM at 14; ERA-NPRM at 29-32; HSBC-NPRM at 2; MBA-NPRM at 2; NYSCPB-NPRM at 7-13. *See also* June 2002 Tr. I at 138-271.

[631] *See, e.g.*, IBM-NPRM at 11-12; Pelland-NPRM at 3.

[632] *See* FCC Notice of Proposed Rulemaking and Memorandum Opinion and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, CC Docket No. 92-90 (Sept. 18, 2002) (hereinafter ''FCC TCPA 2002'') at 27, para. 42 (citing a USA Today/CNN/Gallop poll showing that one in five mobile telephone users use their wireless phone as their primary phone, Michelle Kessler, *18 % See Cellphones as Their Main Phone*, USA TODAY, Feb. 1, 2002). *See also* Wendy Ruenzel, *More Cell Phone Users Dispense with Traditional Phone Line*, POST CRESCENT, Aug. 6, 2001; Simon Romero, W*hen the Cellphone Is the Home Phone*, N.Y. TIMES, Aug. 29, 2002; Joelle Tessler, *Small But Growing Number of Cell Phone Users Abandon Land Lines*, SAN JOSE MERCURY NEWS, Aug. 15, 2002.

[633] *See* FCC TCPA 2002 at 26-27, para. 42, n.160 (noting that, in the ten-year period between 1991 and 2001, the number of wireless subscribers increased from about 7.5 million to approximately 128 million. From 1993 to 2001, the average minutes of use per subscriber per month increased from 140 minutes to 385 minutes.) (citations omitted).

the unwanted telemarketing call to the consumer's cellular telephone.[634]

*Established business relationship.* Industry commenters overwhelmingly opposed as unworkable the Commission's proposal to allow consumers to give their express authorization to companies from which they wished to receive calls. Industry stated that it would be cost prohibitive for them to contact their customers to obtain authorization (although they provided no detailed support for this argument) and that consumer inertia would keep consumers from independently providing that type of affirmative authorization.[635] They also argued that consumers may not know in advance which companies they want to hear from.[636]

Industry commenters noted that, without an exemption permitting calls to existing customers, companies would be unable to conduct normal servicing of customers' accounts, since such customer service calls frequently are multiple purpose calls that also include attempts to sell additional goods or services to the customer.[637] Additionally, magazines and newspapers would be unable to contact consumers whose subscriptions had expired to offer them a new subscription.[638] Commenters from financial institutions pointed out that, if not permitted to call current customers, they may run afoul of their fiduciary relationship with those customers.[639] Sellers argued that it would be cost prohibitive for them to use direct mail or other means to contact their customers to obtain authorization to call.[640]

Industry commenters also pointed out that, in failing to include an exemption for existing business relationships, the proposed Rule was at odds with the approach taken by the states with regard to ''do-not-call'' registries. All state ''do-not-call'' laws, except Indiana's, include such an exemption.[641] State regulators noted that there have been few complaints from consumers about calls from companies with whom they have an existing business relationship.[642] In addition, FCC regulations under the TCPA exempt ''established business relationships'' from the company-specific ''do-not-call'' regulations.[643] Individual commenters who expressed an opinion on this issue were divided on whether there should be such an exemption. Analysis of individual consumer comments that touched on this issue indicates that about 860 favored an exemption for calls from firms with whom they already have an established relationship, while about 1080 opposed such an exemption.[644] Furthermore, over 13,000 of the nearly 15,000 comments submitted by Gottschalks' customers supported allowing Gottschalks to call them even if they signed up on a ''do-not-call'' registry to block other calls.

Finally, industry commenters suggested that the Commission's rationale for not including an exemption for ''established business relationships'' was faulty.[645] In adopting the original Rule, the Commission had expressed the view that such an exemption was inappropriate because it was not workable in the context of fraud.[646] These commenters pointed out that the ''do-not-call'' registry was driven by privacy concerns, not concerns about fraud. Therefore, they argued, the Commission's stated rationale was inapplicable in the ''do-not-call'' context.[647] However, these commenters misunderstood the Commission's rationale in not including an exemption for ''established business relationship'' in the proposed ''do-not-call'' provision. In fact, the Commission's rationale for not including such an exemption in its proposal was driven not by concerns about fraud, but by the same privacy concerns that those commenters noted. The Commission believed that the national registry should contain few exemptions in order to provide consumers with the most comprehensive privacy protection possible.

Because the proposed Rule did not contain any ''established business relationship'' exemption, it is not surprising that few commenters raised this issue unless they were advocating that such an exemption be added. In response to industry's strong advocacy in favor of an ''established business relationship'' exemption, however, the June 2002 Forum elicited comment on whether such an exemption would be appropriate. Privacy advocates opposed any exemptions to the registry, stating that exemptions erode the effectiveness of a ''do-not-call'' registry.[648] These commenters feared that, because of the difficulty in crafting such an exemption narrowly, an ''established business relationship'' exemption would provide too great a loophole, and would severely hamper the effectiveness of a national ''do-not-call'' registry.[649] One consumer spoke at the June 2002 Forum about the dangers inherent in such an exemption.[650] AARP noted in its supplemental comments that an exemption appeared to be necessary, but

[634] *See, e.g.*, Andy Vuong, *Telemarketers tap cellphone: Complaints on rise as solicitors dial into no-call exemption*, DENVER POST, July 30, 2002; Jennifer Bayot, *Now, That Ringing Cellphone May Be a Telemarketer's Call*, N.Y. TIMES, July 5, 2002.

[635] *See, e.g.*, AFSA-NPRM at 8; BofA-NPRM at 9; Cox-NPRM at 6; MBA-NPRM at 5.

[636] *See, e.g.*, DialAmerica-NPRM at 14; Roundtable-NPRM at 4-5.

[637] *See, e.g.*, ACA-NPRM at 2; ARDA-NPRM at 17; Associations-NPRM at 2; Cendant-NPRM at 5; Comcast-NPRM at 2; DMA-NPRM at 34; HSBC-NPRM at 1; MBA-NPRM at 1-2.

[638] *See* NAA-NPRM at 12, June 28-Supp. at 1, and July 31-Supp. at 1; NNA-NPRM at 3.

[639] *See, e.g.*, ABA-NPRM at 10; ABIA-NPRM at 4; AFSA-NPRM at 13-14; AmEx-NPRM at 3; BofA-NPRM at 3; Bank One-NPRM at 4-5; VISA-NPRM at 13; Wells Fargo-NPRM at 4. However, unless such a customer service call includes an inducement to purchase additional goods or services, it would fall outside the definition of ''telemarketing'' and, therefore, beyond the scope of the Rule's coverage.

[640] *See, e.g.*, Comcast-NPRM at 2; CAP-Supp. at 1-2.

[641] *See, e.g.*, Ark. Code Ann. § 4-99-403(2)(A); Colo. Rev. Stat. § 6-1-903(10)(B)(II); Conn. Gen. Stat. Ann. § 42-288a(a)(9); Fla. Stat. Ann. § 501.059(1)(c); Ga. Code Ann. § 46-5-27(b)(3)(B); Mo. Rev. Stat. § 407.1095(3)(b); and Tenn. Code Ann. § 65-4-401(6)(B)(iii).

[642] *See* June 2002 Tr. I at 118 (New York: ''Well, [consumers are not unhappy], and a lot of times they complain, and you could say that's prima facie evidence they're unhappy. We call them back and say, gee, did you have a transaction with these folks? They claim you did on X, Y and Z, and they furnished us this paperwork. And then they say, oh, yeah. They don't seem to be mad.''); June 2002 Tr. I at 118-19 (Missouri: ''Most people when you call them back are delighted that 70 to 80 percent of their phone calls have been caused to not come in, so when we explain to them that you had a relationship or you explain to them that some of these calls are exempt, they understand when you explain that to them, and they're delighted, because our anecdotal information shows that 70 to 80 percent of the calls people had been receiving, they're not receiving now.''); and *see generally*, June 2002 Tr. I at 110-21.

[643] 47 CFR 64.1200(c)(3). The TCPA requires such an exemption. 47 U.S.C. 227(a)(3).

[644] *See, e.g.*, GBELois (Msg. 44) (''If a person is a member, subscriber, current customer, etc., of a company and the company is calling regarding the status of that relationship then the company should not be obligated to conform to the do not call registry.''); Jerry Warnke (Msg. 371) (''Have to be a way to exempt businesses or organizations when they are returning your phone calls or they have a need to call you with an ongoing relationship.''). *But see, e.g.*, Karl Engelberger (Msg. 331) (''All pre-existing agreements and relationships should be voided and can, at the line subscribers discretion be re-established.''); Don Price (Msg. 483) (''Sometimes pre-existing relationships are those hardest to communicate with regarding the fact that the individual wants to end the relationship with the telemarketer business—once you give or buy something, many telemarketers expect you to continue what you started and make it a monthly habit—even if that was never your intent.'').

[645] *See, e.g.*, DMA-NPRM at 34-36; NCTA-NPRM at 8; Nextel-NPRM at 13-15; Wells Fargo-NPRM at 4.

[646] *See* 60 FR at 43859.

[647] *See, e.g.*, DMA-NPRM at 34-36; NCTA-NPRM at 8; Nextel-NPRM at 13-15; Wells Fargo-NPRM at 4.

[648] *See, e.g.*, EPIC-NPRM at 20-21; NCL-NPRM at 10.

[649] NCL-NPRM at 10.

[650] June 2002 Tr. I at 278-82 (Diana Mey).

urged that the Commission keep the exemption very narrow and limit it to existing relationships only, as opposed to prior relationships.[651]

Based on the record as a whole, the Commission is persuaded that the benefits of including an exemption for established business relationships outweigh the costs of such an exemption. Therefore, the Commission has decided to provide an exemption for ''established business relationships'' from the national ''do-not-call'' registry, as long as the consumer has not asked to be placed on the seller's company-specific ''do-not-call'' list. Once the consumer asks to be placed on the seller's ''do-not-call'' list, the seller may not call the consumer again regardless of whether the consumer continues to do business with the seller. If the consumer continues to do business with the seller after asking not to be called, the consumer *cannot* be deemed to have waived his or her company-specific ''do-not-call'' request.[652]

The amended Rule limits the ''established business relationship'' exemption to relationships formed by the consumer's purchase, rental or lease of goods or services from, or financial transaction with, the seller within 18 months of the telephone call or, in the case of inquiries or applications, to three months from the inquiry or application. As indicated in the discussion of the definition of ''established business relationship'' in § 310.2(n), this time frame is consistent with most state laws that include a time limit.[653] The exemption is terminated by the consumer's request to be placed on the company's ''do-not-call'' list, which is consistent with the FCC's regulations and those of many of the states.[654] As explained above in the discussion of § 310.2(n), the definition of ''established business relationship'' encompasses those affiliates of the seller that the consumer would reasonably expect to be included given the nature and type of goods or services offered and the identity of the affiliate.

In addition to an exemption for ''established business relationships,'' the Commission has decided to retain the provision that allows sellers to obtain the express agreement of consumers who wish to receive telephone calls from that seller, but has modified the provision to require that such express agreement may be evidenced only by a signed, written agreement. The Commission believes that it is important to limit the established business relationship to those where there is ongoing contact or where the relationship has recently lapsed or terminated. However, the Commission recognizes that consumers may have ongoing relationships with sellers where the contacts may be infrequent. Therefore, the Commission has decided to retain the provision that would allow sellers to obtain the consumer's express agreement to call, regardless of whether there has been contact during the prior 18 months. In order to minimize the potential for abuse, the amended Rule does not permit sellers or telemarketers to obtain the consumer's oral authorization. Rather, the amended Rule requires that the express agreement meet the same standards as written authorization in § 310.3(a)(3)(i)—*i.e.*, that the express agreement be in writing, signed by the consumer—and must also include the telephone number to which the calls may be placed. Because the express agreement requires the consumer's signature, the Rule makes it more difficult for sellers and telemarketers to bury the consent in the fine print of a document where the consumer might not notice it. The Commission intends that the consent be clear and conspicuous. This express agreement is effective as long as the consumer has not asked to be placed on the seller's company-specific ''do-not-call'' list. Once the consumer asks to be placed on the seller's ''do-not-call'' list, the seller may not call the consumer again regardless of whether the consumer continues to do business with the seller.

*First Amendment and related considerations applicable to ''do-not-call'' provisions.* As noted above, the proposal to include charitable solicitation telemarketing by for-profit telemarketers within the scope of a national ''do-not-call'' registry requirement drew extensive negative comment from non-profit organizations and their representatives. These commenters advanced a number of criticisms of the proposal based upon the practical effects it would foreseeably produce if adopted. They also argued that the proposal was fatally flawed from the standpoint of First Amendment analysis. Each of the major points made by these commenters is discussed below.

Because of the central role of the telephone and of professional fundraisers in the non-profit arena, non-profit organizations and their representatives uniformly predicted financial disaster for the non-profit sector if such a proposal were adopted.[655] According to DMA-NonProfit, a quarter of all charitable contributions raised in 2001 came from telephone solicitation,[656] and an estimated 60 to 70 percent of that solicitation was performed by professional fundraisers.[657] These commenters feared the detrimental impact of a national ''do-not-call'' registry on this important element of the non-profit world's financial support system.[658] One commenter opined that the proposed ''do-not-call'' registry requirement would reduce the potential donor pool by between 40 to 50 percent, and based on sign-up rates in some states, possibly by as much as 70 or 80 percent.[659]

The proposed registry's impact on non-profit organizations' ability to solicit previous donors was of particular concern. According to a number of commenters, it is axiomatic that persons who have already contributed to a non-profit or charitable organization are much more likely to contribute than are persons who have never done so.[660] In

[651] AARP-Supp. at 3.

[652] *See* June 2002 Tr. I at 278-82 (Consumer recounted that a telemarketer from a retailer telephoned her, notwithstanding the fact that she was on the retailer's ''do-not-call'' list. When she questioned them about this apparent error, the telemarketer said that she had recently made a purchase at the retailer, which re-created an ''established business relationship,'' which exempted them from complying with her ''do-not-call'' request.).

[653] *See* discussion of § 310.2(n) and note 135, above.

[654] *See* 47 CFR 64.1200(f)(4), and discussion in FCC TCPA 2002 (see note 633 above) at 8765, para. 23, and at 8770, para. 34, n.63. In addition, several state ''do-not-call'' statutes contain a similar provision in their exemption for ''established business relationships'' which terminates the exemption if the consumer has asked not to be called. *See, e.g.*, Alaska, California, Colorado, Connecticut, Illinois, Kansas, New York, Oklahoma, Texas, and Wyoming. *See* note 592, above, for citations to each state's ''no-call'' laws and/or regulations.

[655] *See, e.g.*, DMA-NonProfit-NPRM at 16; Not-for-Profit Coalition-NPRM at 7. *See also* Red Cross-NPRM at 3; APTS-NPRM at 2-3; Childhood Leukemia-NPRM at 1; FireCo-NPRM at 1; California FFA-NPRM at 2; Edwardsville FFA-NPRM at 1; HRC-NPRM at 1-2; Leukemia Society-NRPM at 1-2; March of Dimes-NPRM at 1; Michigan Nonprofit-NPRM at 1; Purple Heart-NPRM at 2; NC Zoo-NPRM at 1; NPR-NPRM at 2; AAST-NPRM at 5; FOP-NPRM at 2; Southern Poverty-NPRM at 2.

[656] DMA-NonProfit-NPRM at 2 (citing the Turner Study, *see* note 142 above).

[657] DMA-NonProfit-NPRM at 2. *See also* Not-for-Profit Coalition-NPRM at 6.

[658] *See, e.g.*, ACE-NPRM at 1; ADA-NPRM at 1; Red Cross-NPRM at 3; Blood Centers-NPRM at 2; Childhood Leukemia-NPRM at 1; LifeShare-NPRM at 1; March of Dimes-NPRM at 2; NPR-NPRM at 4-5; FOP-NPRM at 3, 4; Project Angel Food-NPRM at 1.

[659] Not-for-Profit Coalition-NPRM at 9.

[660] AFP-NPRM at 4 (''For nearly all nonprofit organizations, pre-existing donors and volunteers constitute the source of a majority of all gifts and volunteer time. These individuals are most committed to a cause and best understand the organization. Donors should not lose the opportunity to hear from organizations they supported in the past.''); March of Dimes-NPRM at 3 (''The most generous donors and volunteers are

this regard, Not-for-Profit Coalition stated that ''[c]ompounding the harm is the fact that the registry would apply equally to donors with a long history of supporting bona fide non-profit and charitable organizations as well as new prospective donors. Depriving charities and non-profits of the ability to contact prior supporters will be financially devastating.''[661]

Not-for-Profit Coalition also argued that the effect of the ''do-not-call'' registry requirement would be to drive non-profit organizations away from efficient use of professional telefunders, and toward inefficient in-house operations.[662] According to commenters, the efficiency benefits of using professional telefunders may be substantial. For example, Hudson Bay stated:

> HBC's phone canvass is mostly for smaller non-profit organizations (and the state chapters of large ones). Instead of renting space, buying computers and phone equipment, hiring supervisors and so on, HBC's clients find it cheaper to contact their members and donors by sharing these resources. Even after paying HBC's fee, which ranges from 4 to 7%, it is much cheaper for these non-profits to centralize these services. The savings achieved by phone company volume discounts alone pays more than half of HBC's fee.[663]

Several representatives of non-profit organizations argued that under relevant First Amendment precedent, charitable fundraising is fully protected speech, and that attempts by the government to regulate it are subject to the highest level of scrutiny.[664] These commenters also noted that under the relevant precedents, no distinction between the speech of the non-profit organization and that of the professional telefunder actually making the calls is recognized—both are equally protected. Several criticized the proposal's exemptions for solicitations by ''political clubs, committees, or parties'' and ''constituted religious organizations'' as making distinctions based on the type of speech or speaker that are impermissible under the First Amendment.[665]

The Commission believes that, with respect to telemarketing that solicits sales of goods or services, the ''do-not-call'' registry provisions are consistent with the relevant First Amendment cases. In *Central Hudson Gas & Elec. v. Pub Serv. Comm. of N.Y.*, the Supreme Court established the applicable analytical framework for determining the constitutionality of a regulation of commercial speech that is not misleading and does not otherwise involve illegal activity.[666] Under that framework, the regulation (1) must serve a substantial governmental interest; (2) must directly advance this interest; and (3) may extend only as far as the interest it serves[667]—that is, there must be ''a 'fit' between the legislative ends and the means chosen to accomplish those ends . . . a fit that is not necessarily perfect, but reasonable . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.''[668]

With regard to the first of these criteria, protecting the privacy of consumers from unwanted commercial telemarketing calls is a substantial governmental interest.[669] ''Individuals are not required to welcome unwanted speech into their own homes and the government may protect this freedom.''[670] The ''do-not-call'' registry is designed to advance the privacy rights of consumers by providing them with an effective, enforceable means to make known to sellers their wishes not to receive solicitation calls. Simply put, sellers or telemarketers soliciting sales may not call persons who have placed themselves on the registry. The registry is also designed to cure the inadequacies as a privacy protection measure that became apparent in the company-specific ''do-not-call'' provisions included in the original Rule.[671] Thus, the second of *Central Hudson's* criteria is satisfied. Finally, the national ''do-not-call'' registry is a mechanism closely and exclusively fitted to the purpose of protecting consumers from unwanted telemarketing calls.

In *Rowan v. Post Office Dept.*, the Supreme Court upheld a federal statute empowering a homeowner to bar mailings from specific senders by notifying the Postmaster General that she wished to receive no further mailings from that sender.[672] The Court stated:

> We therefore categorically reject the argument that a vendor has a right under the constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even ''good'' ideas on an unwilling recipient. That we are often ''captives'' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain. . . . To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that ''a man's home is his castle'' into which ''not even the king may enter'' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.[673]

Under *Rowan*, the First Amendment allows a statutory scheme whereby a person may block a sender's mailings by notifying the Postmaster General, who then will prevent that sender's mailings from being delivered to that person. The Commission believes that the First Amendment similarly raises no impediment to Rule provisions that will enable a person by signing up on a national ''do-not-call'' registry to block commercial communications via telephone, which are far more intrusive than the communications, at issue in *Rowan*, via printed words and images.[674]

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those who have a prior relationship with the Foundation . . . . If the Foundation cannot contact prior donors and volunteers on the basis of a preexisting relationship, then the effectiveness of our fundraising program will be jeopardized.'' *See also, e.g.*, APTS-NPRM at 2; ADA-NPRM at 1; AAST-NPRM at 3; FireCo-NPRM at 1; NTC-NPRM at 3; Southern Poverty-NPRM at 2; NCLF-NPRM at 1.

[661] Not-for-Profit Coalition-NPRM at 10.

[662] *Id.* at 18, 19.

[663] Hudson Bay-Goodman-NPRM at 2. *See also, e.g.*, APTS-NPRM at 3; Not-For-Profit Coalition-NPRM at 19.

[664] *See, e.g.,* Hudson Bay-Goodman-NPRM at 4, 5; DMA-NonProfit-NPRM at 7; Not-For-Profit Coalition-NPRM at 15.

[665] *See, e.g.,* DMA-NonProfit-NPRM at 5, 6; Not-for-Profit Coalition at 41.

[666] 447 U.S. 557 (1980).

[667] *Id.* at 566.

[668] *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

[669] In some instances, the ''do-not-call'' registry provisions will also serve another substantial governmental interest—prevention of fraud and abuse, as in cases where elderly consumers are signed up on the registry to protect them from exploitative or fraudulent telemarketers. *Cf. Metromedia v. San Diego*, 453 U.S. 490, 509 (1981) (holding, *inter alia*, that San Diego's ''twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial government goals.'')

[670] *Frisby v. Schultz*, 487 US 474, 485 (1988).

[671] The shortcomings of the company-specific approach are set forth above in the discussion of § 310.4(b)(1)(iii).

[672] 397 U.S. 728 (1969).

[673] *Id.*, at 737-38 (internal citations omitted).

[674] While the statute under consideration in *Rowan* was focused on mailed advertisements of a sexual nature, the Court specifically rejected arguments that it should be read narrowly to cover only ''salacious'' or ''pandering'' advertisements—or even all advertisements. Instead, the court upheld the statute interpreted as covering all mailings from the sender, regardless of whether they were advertisements, and regardless of

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With respect to telemarketing that solicits charitable contributions, the Commission believes that the applicable analytical framework is more stringent.[675] ''[C]haritable solicitations involve a variety of speech interests . . . that are within the protection of the First Amendment and therefore have not been dealt with as purely commercial speech.''[676] In considering the more stringent analysis, the Commission notes, preliminarily, that the company-specific ''do-not-call'' provisions that apply to charitable solicitation telemarketing are content-neutral. ''Laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.''[677] The company-specific ''do-not-call'' provisions apply equally to all for-profit solicitors, regardless of whether they are seeking sales of goods or services or charitable contributions, and regardless of what may be expressed in the solicitation calls themselves or the viewpoints of the organizations on whose behalf the solicitation calls are made. Thus, these provisions are content-neutral.[678]

As in the case of commercial speech, the analysis applicable to charitable solicitations also inquires into the nature of the governmental interest that the regulation seeks to advance. The case law indicates that with respect to the higher level of scrutiny applicable to charitable solicitation, privacy protection is a sufficiently strong governmental interest to support a regulation that touches on protected speech.[679] However, the case law also indicates that, in the case of charitable solicitation, greater care must be given to ensuring that the governmental interest is actually advanced by the regulatory remedy, and tailoring the regulation narrowly so as to minimize its impact on First Amendment rights. In *Riley* and *Schaumburg*, the Court rigorously examined laws that regulated the percentage of charitable contributions raised by a professional fundraiser that could be retained as the fundraiser's fee. The Court struck down the laws because there was, in the Court's view, at best an extremely tenuous correlation between charity fraud and the percentage of funds paid as a professional fundraiser's fee; the laws therefore were unlikely to achieve their intended purposes of preventing fraud and protecting charities. The Court also found that these laws were not tailored narrowly enough to minimize the impact on the charities' First Amendment rights.

By contrast, a very tight nexus exists between the Commission's legitimate interest in protecting consumers' privacy against unwanted telemarketing calls and the company-specific ''do-not-call'' provisions that apply to telemarketing to solicit charitable contributions. This nexus does not rely on an attenuated theoretical connection between fraud and the percentage of funds raised that a telefunder takes as its fee. Rather, there is a direct correlation between the governmental interest and the regulatory means employed to advance that interest: The consumer requests a specific caller not to call again, and the regulation requires the caller to make a record of and honor that request in the future.

The Commission approaches with extreme care the issue of tailoring ''do-not-call'' requirements narrowly to advance its legitimate interest in privacy protection and yet minimize the impact on the First Amendment rights of charitable organizations and the telemarketers who solicit on their behalf. The Commission is concerned that subjecting charitable solicitation telemarketing—along with commercial telemarketing to solicit sales of goods and services—to national ''do-not-call'' registry requirements may sweep too broadly, because it could, for example, prompt some consumers to accept the blocking of charitable solicitation calls that they would not mind receiving, as an undesired but unavoidable side-effect resulting from signing up for the registry to stop sales solicitation calls.[680] In the NPRM, the Commission proposed to resolve this problem by including in the Rule a provision enabling consumers who signed up for the ''do-not-call'' registry nonetheless to choose selectively to receive calls from specific entities from whom they would welcome solicitation calls. This proposed solution met with uniform condemnation from non-profit organizations, who opined that it would be too costly for non-profit organizations to obtain prospective donors' express permission to call, and too difficult for consumers to exercise their right to hear from them.[681] The Commission is persuaded that these objections may be well-founded, and that this, therefore, would not be an adequate approach to narrow tailoring.

Another solution alluded to in a specific question posed in the NPRM might be to bifurcate the registry into separate categories, one for commercial solicitation and another for charitable solicitation, enabling consumers to sign up separately to stop commercial calls while allowing charitable solicitations.[682] At this time, however,

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whether they were sexually provocative. The determinative factor was that the mailings were unwanted. The Commission does not advance a theory, however, that *Rowan* should be read here to cover any non-commercial communications.

[675] *Metromedia* makes clear that a less exacting standard is applied in analyzing a regulation's constitutionality with respect to commercial speech than in analyzing the same regulation's constitutionality with respect to noncommercial speech. ''[I]nsofar as it regulates commercial speech, the San Diego ordinance meets the constitutional requirements of *Central Hudson*.... It does not follow, however, that San Diego's ban on signs carrying noncommercial advertising is also valid . . . . Commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech.'' *Metromedia*, 453 U.S. at 513. In *Watchtower Bible and Tract Soc'y v. Village of Stratton*, ____ U.S. ____, 122 S. Ct. 2080 (2002), where the Court invalidated an ordinance that required anyone who wanted to engage in door-to-door canvassing or soliciting to obtain a permit before doing so, the Court went out of its way to suggest that the ordinance might have been constitutional if it were limited to commercial speech. *Id*. at 2089. This may be dicta, but it is significant because the Court seems to have approved a distinction between commercial and noncommercial speech—the same distinction drawn in the amended Rule—and to have done so in the same context as the Rule, *i.e.*, solicitation that threatens to invade the privacy of the home.

[676] *Riley v. Nat'l. Fed. of the Blind*, 487 U.S. 781 (1988) (internal quotation marks omitted).

[677] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 648 (1994). ''[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.'' *Turner* at 642, *citing Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (''[The] principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.''). *See also Am. Target Adver. v. Giani*, 199 F.3d 1241 (10th Cir. 2000), *cert. denied*, 531 U.S. 811 (200) (applying this principle in the context of solicitation).

[678] Similarly, the ''do-not-call'' registry provisions are also content-neutral, because they apply equally to all sellers and telemarketers engaged in the solicitation of sales of goods or services, regardless of the content of the calls, or the viewpoints of the telemarketers or the sellers.

[679] ''The Village argues that three interests are served by its ordinance: the prevention of fraud, the prevention of crime, and the protection of residents' privacy. We have no difficulty concluding, in light of our precedent, that these are important interests that the village may seek to safeguard through some form of regulation.'' *Watchtower*, 122 S. Ct. 2080 (2002); *Schaumburg v. Citizens for Better Env't.*, 444 U.S. 620, 637 (1980) (protecting the public from fraud, crime, and undue annoyance are indeed substantial).

[680] Childhood Leukemia-NPRM at 1 (''I firmly believe if this change is implemented, people attempting to avoid calls from those who sell goods and services over the telephone will put themselves out of reach of our organization, thereby threatening our financial foundation. The victims will be the children because we will no longer have the resources to help them.'')

[681] Non-profit organizations also argued that this proposal was tantamount to a constitutionally impermissible requirement for non-profits to seek permission to speak before speaking.

[682] ''Should the ''do-not-call'' registry be structured so that requests not to receive

the Commission believes that such an approach may be impractical because of cost considerations and because of the difficulty for consumers to understand and deal with the complications of such a system. Thus, these factors may render a bifurcated registry an insufficient or excessively cumbersome response to the imperative of narrow tailoring.

After careful consideration of the record as a whole and the relevant case law, the Commission has determined that the best approach to achieve narrow tailoring of the ''do-not-call'' provisions at this time is to exempt from the ''do-not-call'' registry requirements solicitations to induce charitable contributions via outbound telephone calls,[683] and instead to bring charitable solicitation telemarketing only within the ambit of the company-specific ''do-not-call'' regime contained in the original Rule.[684]

The Commission believes that the encroachment upon consumers' privacy rights by unwanted solicitation calls is not exclusive to commercial telemarketers; consumers are disturbed by unwanted calls regardless of whether the caller is seeking to make a sale or to ask for a charitable contribution.[685] Thus, the Commission rejects the suggestion from numerous non-profit organizations and their representatives that no privacy protection measures are necessary with respect to charitable solicitation telemarketing, and that telefunders should be exempt from even the company-specific ''do-not-call'' provisions.[686]

The Commission believes that even though the company-specific approach has not been fully adequate to the task of protecting consumers' privacy rights against an onslaught of commercial solicitations, this more limited approach does provide some privacy protection in the context of charitable fundraising, and works better to accommodate both the right of privacy and the right of free speech. The Commission is persuaded by the arguments of Hudson Bay that fundamental differences between commercial solicitations and charitable solicitations may confer upon the company-specific ''do-not-call'' requirements a greater measure of success with respect to preventing a pattern of abusive calls from a fundraiser to a consumer than it was able to produce in the context of commercial fundraising:

> When a pure commercial transaction is at stake, callers have an incentive to engage in all the things that telemarketers are hated for. But non-commercial speech is a different matter. The success of an advocacy call does not hinge entirely on whether the recipient decides to part with a sum of money. A calling center employee working for a citizens' group is less interested in the volume of calls than in effective communication of the group's concerns. That is the reason the money is needed in the first place, not for profit.
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> In a non-commercial call the recipient is more than a potential source of income. Rather he or she is also a voter, a constituent, a consumer, a source of information to others, and a potential source of a future contribution, even if not in the current call. There is more than a sale, there is a cause at stake. It is, therefore, self-defeating for the advocacy caller to engage in the abusive telemarketing practices that motivated the draft TSR. Such a caller risks alienating the recipient of the call against the cause not just against the caller or their organization.[687]

Nevertheless, if experience indicates that the company-specific approach does not in fact provide adequate protections for consumers' privacy in the context of charitable solicitation telemarketing, the Commission may revisit this decision in the future, and reconsider whether to require telemarketing calls soliciting charitable donations to comply with the national ''do-not-call'' registry requirements.

*FTC authority to establish a ''do-not-call'' registry.* Several industry members questioned whether the FTC had the statutory authority to establish a national ''do-not-call'' registry.[688] They argued that the Telemarketing Act does not mention the creation of a ''do-not-call'' registry and that, in fact, another statute (TCPA) had directed another agency (the FCC) to explore the possibility of establishing such a registry.[689] They noted that the FCC had considered such a registry and rejected it in 1992 in favor of a company-specific approach that required consumers to tell those companies from which they did not wish to receive calls to place them on the company's ''do-not-call'' list.[690]

Congress passed the Telemarketing Act three years after the FCC rejected a national registry. As noted in the NPRM, the Telemarketing Act authorizes the Commission to prescribe rules ''prohibiting deceptive telemarketing acts or practices *and other abusive telemarketing acts or practices*,'' and specifically mandates that these rules prohibit telemarketers from undertaking ''a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy.''[691] Thus, establishment of the national ''do-not-call'' registry is squarely within the authority granted by the statute.

The goal in both the TCPA and § 6102(a)(3) of the Telemarketing Act is to protect consumer privacy. When Congress directed the FTC to include in the TSR a prohibition against a pattern of unsolicited telephone calls which the reasonable consumer would consider

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telemarketing calls to induce the purchase of goods and services are handled separately from requests not to receive calls soliciting charitable contributions?'' Question 5 i, 67 FR at 4539. Few commenters addressed this question, and those who did so expressed only the most general views, without advocating or opposing the concept of bifurcation. *See, e.g.*, NYSCPB-NPRM at 23 (''[T]he technical problems and costs of implementing such a system might be prohibitive.''); NCLC-NPRM at 19; NCL-NPRM at 9; NAAG-NPRM at 20. Only about 100 individual consumer email comments received by the Commission responded to a direct question on the issue included on the Commission's website. A minority of these commenters (about 40 percent) expressed the view that the ''do-not-call'' registry should not treat calls from charitable fundraisers differently, while about 60 percent expressed the view that it should do so.

[683] ''Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule.'' Section 310.6(a) of the amended Rule.

[684] The comments of many non-profit or charitable organizations indicate that these organizations have a policy of maintaining a ''do-not-call'' list even though not legally required to do so. Lautman-NPRM at 1 (''[Professional fundraisers] use the Direct Marketing Association's 'do not call' database, in addition to client maintained 'do not call' lists.''); HRC-NPRM at 1 (''[W]e have (like most nonprofit organizations) eliminated unwanted calls to our donors by requiring our telemarketing partners to keep a 'do-not-call' list. We also require them to use the Direct Marketing Association's 'do not call' list.''); Telefund-NPRM at 1 (''Most non-profit organizations maintain lists of their own donors who prefer to be contacted via the mail. Telefund Inc. also maintains such a database for its clients.''). *See also* ADA-NPRM at 1; American Rivers-NPRM at 1; Angel Food-NPRM at 1; APTS-NPRM at 3; Childhood Leukemia-NPRM at 1; FOP-NPRM at 1; Italian American Police- NPRM at 1; Illinois Police-NPRM at 1; Leukemia Society-NPRM at 2; SO-CN-NPRM at 1; SO-CO-NPRM at 1; National Children's Cancer-NPRM at 1; Southern Poverty-NPRM at 2; Stage Door-NPRM at 1.

[685] One indication of this is that, even though the FTC web page advising consumers on how to comment specifically included a direct question calling attention to the possibility of a separate database for charitable fundraisers, only about 100 consumer email comments responded to it. A great many consumer email comments expressed the view that unsolicited calls disturb their privacy, and did not distinguish between sales calls and other types of solicitation calls, such as those for charities.

[686] *See generally* Not-For-Profit Coalition-NPRM; DMA-NonProfit-NPRM.

[687] *See also* HRC-NPRM at 1 (''Most importantly, nonprofits are dependent upon the revenue generated by their supporters and will do nearly anything to honor their requests and treat them with the utmost respect.'')

[688] *See, e.g.*, Advanta-NPRM at 2; ATA-NPRM at 6-10, 20-21; DMA-NPRM at 16-22; ERA-NPRM at 26-27; MPA-NPRM at 34-38; PMA-NPRM at 25-26. *See also* ARDA-Supp. at 1; ATA-Supp. at 7.

[689] *See, e.g.*, DMA-NPRM at 16-22; ERA-NPRM at 26; MPA-NPRM at 34-38; PMA-NPRM at 25-26.

[690] FCC Report and Order, CC Docket No. 92-90, 7 FCC Rcd 8752 at 8762-67 (Oct. 16, 1992).

[691] 15 U.S.C. 6102 (a)(1) and (a)(3)(A) (emphasis added).

coercive or abusive of such consumer's right to privacy, Congress knowingly put the FTC on the same path that the FCC had trod three years earlier, but did not mandate that the two agencies arrive at the identical conclusion. Instead, the Telemarketing Act is written broadly and does not limit how the Commission is to effectuate the Congressional mandate; it leaves the method of achieving the goal of protecting privacy to the Commission's discretion.[692] There is nothing in the TCPA that would lead to the conclusion that the FCC was the only federal agency authorized to create a national registry. In fact, although Congress had passed the TCPA only three years earlier, it mandated in the Telemarketing Act that the FTC promulgate provisions similar to those that the FCC had promulgated pursuant to TCPA. For example, although FCC regulations already restricted the times that telemarketers can call consumers,[693] Section 6102(a)(3)(B) of the Telemarketing Act directed the FTC to also include in its regulations a provision that would prohibit telemarketers from making unsolicited phone calls to consumers during certain hours of the day or night. Thus, Congress clearly intended to provide the FTC with sufficient authority to remedy the problem of unwanted telemarketing calls by means of a national registry, notwithstanding that the FCC had earlier decided not to exercise its own authority to do so.

*Interplay between the national ''do-not-call'' registry and state ''do-not-call'' laws.* The NPRM specifically requested comment on how the proposed establishment of a national ''do-not-call'' registry should interplay with similar requirements on the state level.[694] In response, NAAG and representatives of individual states with ''do-not-call'' laws expressed concern about the possible preemptive effect of a national ''do-not-call'' registry.[695] On the other hand, industry representatives urged that if, despite their opposition, the Commission adopted TSR provisions establishing a national ''do-not-call'' registry, the national registry must preempt similar state requirements.[696]

At this time, the Commission does not intend the Rule provisions establishing a national ''do-not-call'' registry to preempt state ''do-not-call'' laws. Rather, the Commission's intent is to work with those states that have enacted ''do-not-call'' registry laws, as well as with the FCC, to articulate requirements and procedures during what it anticipates will be a relatively short transition period leading to one harmonized ''do-not-call'' registry system and a single set of compliance obligations.[697] The Commission is actively consulting with the individual states to coordinate implementation of the national registry to minimize duplication and maximize efficiency for consumers and business. The Commission's goal is a consistent, efficient system whereby consumers, in a single transaction, can register their requests not to receive calls to solicit sales of goods or services, and sellers and telemarketers can obtain a single list to ensure that in placing calls they do not contravene those consumers' requests. In adopting the ''do-not-call'' provisions in the amended Rule, the Commission intends to advance that goal. At this time, the Commission specifically reserves further action on the issue of preemption until sufficient time has passed to enable it to assess the success of the approach outlined above.[698]

*Implementation of a National Do-Not-Call Registry*

In developing an implementation plan for a national ''do-not-call'' registry, the Commission has been guided by a number of concerns. Most importantly, the Commission has sought to ensure the accuracy and validity of the consumer telephone numbers added to the registry, and to build a system that can handle the potential volume of consumer requests to be placed on the registry.[699] Equally important, the system must ensure the security of the information maintained in the registry. The registry also must be easily accessible to both telemarketers and appropriate law enforcement agencies. In addition, the Commission seeks to develop the system with the lowest possible costs.

The Commission conducted extensive research to determine the feasibility of a national ''do-not-call'' registry and to develop a plan for implementing such a registry. The NPRM asked for comment on a number of specific implementation questions.[700] The staff contacted the states with their own registries, and also contacted many of the contractors used by those states to develop their registries. On February 28, 2002, as part of its research, the Commission issued a Request for Information (''RFI'') to contractors capable of assisting the FTC in the development, deployment, and operation of the national registry.[701] Thirty-six different companies responded to the RFI. In August 2002, the Commission issued a Request for Quotes (''RFQ'') to selected vendors.[702] A number of those vendors have submitted proposals and quotes to the Commission; the agency is currently evaluating those proposals.[703]

Based on all of the information gathered during this process, the Commission plans to develop a national registry with three components: consumer registration; access to the consumer registration database by telemarketers and sellers; and law enforcement access to both the consumer registration database and the list of telemarketers and sellers who have accessed the consumer registration database. The entire system will be fully automated to simplify the process and keep costs to a minimum.

*Consumer registration.* Consumers will be able to add their telephone numbers to the national ''do-not-call'' registry through two methods: either through a toll-free telephone call or over

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[692] *See* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.2 (3rd ed. 1994) (noting that agencies have the power to ''fill any gaps'' that Congress either expressly or implicitly left to the agency to decide pursuant to the decision in *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). It is, therefore, permissible for agencies to engage in statutory construction to resolve ambiguities in laws directing them to act, and courts must defer to this administrative policy decision.

[693] 47 CFR 64.1200(e)(1). *See also* discussion at 7 FCC Rcd at 8767-68.

[694] 67 FR at 4539.

[695] *See, e.g.*, NAAG-NPRM at 6-14; Connecticut-NPRM at 3; DC-NPRM at 4-5 (District of Columbia); NYSCPB-NPRM at 13-17 (New York); Texas PUC-NPRM at 3-4.

[696] *See, e.g.*, ATA-NPRM at 28-29; DMA-NPRM at 3, 14; ERA-NPRM at 34.

[697] In this regard, the Commission notes that in September 2002, the FCC published an NPRM to review its TCPA regulations, including, among other things, whether its company-specific ''do-not-call'' requirement has been effective and whether a national registry would better serve the public interest. *See* FCC TCPA 2002.

[698] *See generally English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990) (preemption can occur ''where it is impossible for a private party to comply with both state and federal requirements, *see, e. g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).''); *Crosby v. Nat'l. Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Ass'n of Banks in Ins. v. Duryee*, 270 F.3d 397, 404 (6th Cir. 2001) (where state and federal laws are inconsistent, state law can be pre-empted even if it was enacted to protect its citizens or consumers).

[699] Consumer interest in state ''do-not-call'' registries has varied from a few percent to over 40 percent of all telephone lines within the state.

[700] 67 FR at 4538-39.

[701] *See* http://www.ftc.gov/procurement.

[702] The Commission issued the RFQ to those vendors that expressed an interest in developing the national registry and that were on General Service Administration (''GSA'') schedules to provide goods or services to the federal government.

[703] All vendor responses to both the RFI and RFQ contain confidential proprietary business information and therefore cannot be made public.

the Internet. Consumers who choose to register by phone will have to call the registration number from the telephone line that they wish to register. Their calls will be answered by an Interactive Voice Response (''IVR'') system. After a brief introductory message, the consumer will be asked to enter on his or her telephone keypad the telephone number from which the consumer is calling. The number entered will be checked against the automatic number information (''ANI'') that is transmitted with the call. If the telephone number the consumer enters on the keypad matches the ANI of the line from which the consumer is calling, then the IVR system will inform the consumer that the number is registered and the call will end. If the telephone number does not match, the IVR system will advise the consumer to call back from the telephone the consumer wishes to register. In the small percentage of calls in which ANI is not available, the system will offer other verification options.

Using this process, the Commission will verify, at a minimum, that each consumer is calling from a telephone line assigned the number the consumer is attempting to register. The Commission has determined that this is sufficient verification for the limited purposes involved here — ensuring that a telephone number in the national registry was entered by someone in the household to which that telephone number is assigned.[704] A number of commenters stated that the FTC should prohibit third parties from registering consumers' preferences not to receive telemarketing calls with the national ''do-not-call'' registry, citing concerns that such third-party registrations could lead to abuse.[705] The Commission agrees that third-party registrations should not be permitted, and believes that the verification procedures to be established for telephone registrations will prevent these potential types of third-party abuse, because the person registering will have to be present physically in the household with which the telephone number being registered is associated.

Other commenters suggested that only the line subscriber or person who is billed for the telephone line be allowed to register that number in the national registry.[706] In fact, one commenter suggested that the FTC should ''permit each adult user of the telephone to prevent calls to him or herself, but not to be able to bar all calls to all adults using that telephone.''[707] The Commission does not believe this is a realistic approach. Because numerous people in a household often share a common telephone number, the Commission has determined that the decision to be part of the ''do-not-call'' registry does not rest with the line subscriber (or any single resident) alone. In such a shared-number situation, the privacy rights of all are affected by unwanted telemarketing calls. Thus, the decision to register the household telephone number in the national registry is a joint decision of all household members. The Commission's telephone registration system will accept the registration from any member of the household, but will remind consumers that they are registering on behalf of all household members.[708]

Consumers who choose to register via the Internet will go to a website dedicated to the registration process, where they will be asked to enter the telephone number they wish to register. Consumers will be told that they may register only their household or personal telephone number(s). As with the telephone registration system, they will be reminded that if they share a household number with others, they are registering on behalf of all household members. The Commission is considering two possible methods for verifying consumers' information. One possible option is that a consumer will be asked to enter certain address information, such as his or her zip code and the numeric portion of his or her street address, which the system would then check against a national database to ensure that it matches the telephone number provided. The second possible option is that the consumer will be asked to enter his or her email address; the system will send a confirming email to that address, and the consumer will then have to respond to reconfirm his or her registration decision.

The Commission will use one or both of these verification methods for Internet registrations. Such verification processes will enhance the likelihood that individuals will register their own telephone numbers. If the email verification process is used, the Commission will also develop procedures to prevent large numbers of registrations from being confirmed through the same email account. Once again, the Commission has determined that these are sufficient verification procedures for the limited purpose of adding telephone numbers to the national ''do-not-call'' registry, and should help prevent the potential abuses cited concerning massive third-party registrations.

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[704] Unlike the Commission's cases challenging the unauthorized billing of goods or services to consumers' telephone numbers based solely on ANI verification, *see, e.g., FTC v. Verity Int'l, Ltd.*, No. 00 Civ. 7422 (LAK) (S.D.N.Y. 2000); *FTC v. American TelNet, Inc.*, No. 99-1587 CIV:KING (S.D. Fla. 1999), the verification process needed to ensure the validity of numbers in the national registry is much less stringent. Here, only the right not to receive unwanted telemarketing calls is being asserted; the line subscriber is not incurring charges for goods and services, possibly purchased by unauthorized third parties, based on ANI information.

[705] *See, e.g.*, DialAmerica-NPRM at 13; Household-NPRM at 13; Texas PUC-NPRM at 2; PMA-NPRM at 29. NAAG also cited recent state cases against companies that have deceptively offered to add consumers' numbers, for a fee, to ''do-not-call'' lists. *See* NAAG-NPRM at 19, n.47.

[706] *See, e.g.*, DialAmerica-NPRM at 13; Nextel-NPRM at 26.

[707] AFSA-NPRM at 8.

[708] Several commenters supported allowing any household member to register the household telephone number. *See, e.g.*, NCL-NPRM at 9 (allow registration requests to be made by the line subscriber, spouse, roommate, care giver, or others with a legitimate interest). One telemarketer that calls on behalf of non-profit organizations opposed this view, commenting that ''each person has an individual, separate constitutional right to speak and be in association with other like-minded people, and the groups to which they belong also have the right to contact their members and the public at large. When dealing with fully protected, non-commercial speech, any do-not-call list that keeps track only of numbers, rather than names and numbers, needs some way to be certain that everyone who is lawfully and regularly reached at a telephone number has consented to be cut off from the organizations to which they belong.'' Hudson Bay-Goodman-NPRM at 13 (emphasis omitted). As an initial matter, non-commercial speech is not covered by the national ''do-not-call'' provisions of the amended Rule. *See* amended Rule § 310.6(a) (exempting solicitations to induce charitable contributions via outbound telephone calls from § 310.4(b)(1)(iii)(B) of the Rule). Moreover, the Commission has determined that to accomplish its privacy protection objectives, there is no workable alternative to allowing any member of a household to exercise the ''do-not-call'' rights of the entire household using a shared telephone number. Households in which one member wants to sign up with the national ''do-not-call'' registry and another does not have the option of subscribing to an additional telephone line that is not on the registry and may therefore receive telemarketing calls, or they can provide express authorization to specific entities to receive telemarketing calls from them, regardless of their national registry status, pursuant to § 310.4(b)(1)(iii)(B)(i) of the amended Rule. The Commission notes that the ''do-not-call'' provisions will not ''cut off'' individuals from organizations or sellers because it will not foreclose other means of communication with any member of the household, such as by conventional mail, email, or door to door solicitation. The ''do-not-call'' provisions are strongly analogous to laws requiring solicitors to honor a ''no solicitation'' sign posted by a homeowner, which the Supreme Court has approved in such cases as *Martin v. Struthers*, 319 U.S. 141 (1941), involving ''a form of regulation . . . which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed.'' According to the Court, ''[t]his or any similar regulation leaves the decision as to whether distributers of literature may lawfully call at a home where it belongs—with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant.. . .'' *Id.* at 148.

For both telephone and Internet registrations, the only personal identifying information that will be maintained by the national ''do-not-call'' registry will be the consumer's telephone number. Based on our discussions with the states, that appears to be the only piece of information that is needed by telemarketers.[709] Moreover, the Commission has determined that it has no need for consumer names or addresses in the registry.[710] Thus, the Commission will not collect that information.

Consumers will be able to verify or cancel their registration status using either the telephone or Internet. The same verification procedures established for the initial registration will apply to these requests as well. Allowing consumers to verify their registration status and to cancel their registrations if they so wish offers yet another method to enhance the accuracy of the national registry.

The Commission has determined that consumer registrations will remain valid for five years, with the registry periodically being purged of all numbers that have been disconnected or reassigned. The Commission wishes to minimize the inconvenience to consumers entailed in periodically re-registering their preference not to receive telemarketing calls.[711] However, the Commission is also aware that the length of time registrations remain valid directly affects the overall accuracy of the national registry.[712] A number of commenters stated that 16 percent of all telephone numbers change each year, and that 20 percent of all Americans move each year.[713] Unless the system includes a process to counteract this effect, numbers in the national registry that have been disconnected and then reassigned to other line subscribers would remain in the registry even though those line subscribers to whom the numbers are reassigned may not object to receiving telemarketing calls. To guard against this possibility, the system will include a procedure to periodically check all telephone numbers in the national registry against national databases, and those telephone numbers that have been disconnected or reassigned will be purged from the registry. This procedure will help maintain the accuracy of the national registry, while limiting the number of times consumers must go through the registration process.[714] The Commission believes that a five-year registration period coupled with the periodic purging of disconnected telephone numbers from the registry adequately balances, on the one hand, the need to maintain a high level of accuracy in the national registry and, on the other hand, the onus on consumers to periodically re-register their telephone numbers.

*Access to consumer registration information.* To comply with the amended Rule's ''do-not-call'' provisions, telemarketers and sellers must gain access to the telephone numbers in the national registry so that they can ''scrub'' their call lists to eliminate the telephone numbers of consumers who have registered a desire not to be called. For the telemarketer and seller access component of the registry, the Commission plans to develop a fully-automated, secure website dedicated to providing this information to telemarketers and sellers. The first time a telemarketer or seller accesses the system, the company will be asked to provide certain limited identifying information, such as company name and address, company contact person, and the contact person's telephone number and email address. If a telemarketer is accessing the registry on behalf of a client seller, the telemarketer will also need to identify that client.

The only consumer information telemarketers and sellers will receive from the national registry is the registrants' telephone numbers. Those telephone numbers will be sorted and available by area code. Telemarketers and sellers will be able to access as many area codes as desired, by selecting, for example, all area codes within a certain state or region of the country. Of course, telemarketers and sellers will also be able to access the entire national registry, if desired.

When a seller or telemarketer first submits an application to access registry information, the company will be asked to specify the area codes that they want to access.[715] Each company accessing the registry data will be required to pay an annual fee for that access, based on the number of area codes of data the company accesses.[716] Fees will be payable via credit card (which will permit the real-time transfer of data) or electronic funds transfer (which will require the telemarketer or seller to wait approximately one day for the funds to clear before data access will be provided).

After payment is processed, the telemarketer or seller will be given an account number and permitted access to the appropriate portions of the registry.

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[709] In fact, based on discussions between the states and the Commission staff, it appears that in states where additional information is provided to telemarketers, the states have received requests to strip their lists of all information except the telephone number.

[710] Some commenters stated that the Commission would have to collect consumers'' names, addresses and telephone numbers for the national registry to remain accurate. *See, e.g.*, NAA-NPRM at 12; Household-NPRM at 13. Another stated that to keep the registry accurate, ''the Commission must be prepared to accept a data stream from every local exchange carrier in the country on a daily basis.'' SBC-NPRM at 11. The Commission has learned that this is not necessarily true. National databases with sufficient accuracy that contain only telephone numbers now exist, permitting the Commission to purge a telephone number from the national registry when that number is disconnected or the party in whose name the number is registered changes.

[711] Consumer inconvenience includes not just their time and effort necessary to register, but also their need to remember when it is time to re-register. Of course, requiring frequent consumer re-registrations also increases the costs of operating the national registry. Several commenters supported allowing registrations to continue indefinitely, until the consumer's phone number is disconnected or he requests that his number be removed. *See, e.g.*, New Orleans at 9; NCL at 9. In addition, 14 states with ''do-not-call'' registries do not specify a renewal period for registrations in their ''do-not-call'' statutes (Alabama, Alaska, California, Colorado, Indiana, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, New York, Oklahoma, Pennsylvania, and Tennessee).

[712] Commenters citing this concern over the accuracy of the national registry reached various conclusions concerning the time period for which registrations remain should remain valid. Some suggested registrations remain valid for only one year. *See* DialAmerica-NPRM at 13; NCTA-NPRM at 16; Nextel-NPRM at 26. Others stated that registrations should remain valid for two years, unless the Commission can ensure greater accuracy through some purging process. *See* NRF-NPRM at 18; PMA-NPRM at 29. Still others suggested that a five-year registration period is sufficient. *See* NAAG-NPRM at 18; Household-NPRM at 13. State registration periods vary from one year to five years, while, as stated in the previous footnote, fourteen states impose no expiration on consumer registrations. Three states require consumers to renew their registration annually (Arkansas, Florida, and Oregon). Two states (Georgia and Wisconsin) have a two-year registration, and two others (Texas and Idaho) have registrations that are good for three years. Six states require consumers to re-register after five years (Connecticut, Illinois, Kansas, Maine, Vermont, and Wyoming).

[713] *See* DMA-NPRM at 12; Nextel-NPRM at 26; Household-NPRM at 13; SBC-NPRM at 11. Of course, not all consumers who move change their telephone numbers. For consumers who keep their existing telephone numbers when they move, no action by either the consumer or the Commission is necessary to maintain the registry's accuracy.

[714] The DMA TPS is operated in a similar manner. TPS registrations remain valid for five years. During that five-year period, the DMA checks the information in the TPS against the U.S. Postal Service's National Change of Address List, purging the telephone numbers of those registered consumers who have moved. DMA-NPRM at 7, 12.

[715] They will be able to amend the list of area codes for which they seek data on future visits, provided they pay the appropriate fee for the additional area codes.

[716] On May 29, 2002, the Commission issued a Notice of Proposed Rulemaking to add a new section 310.9 to the Rule, which would establish a ''user fee'' for telemarketer access to the national do-not-call registry. 67 FR. 37362. After reviewing the comments received in response to that NPRM, the Commission has decided that it will issue a revised NPRM seeking additional comment on the fee issue in the near future. Section 310.8 of the amended Rule has been reserved for the fee section.

That account number will be used in future visits to the website, to shorten the time needed to gain access. On subsequent visits to the website, telemarketers and sellers will be able to download either an entire updated list of numbers from their selected area codes, or a more limited list, consisting only of additions to or deletions from the registry that have occurred since the company's last download. This would limit the amount of data that a company needs to download during each visit. Telemarketers and sellers will be permitted to access the registry as often as they wish for no additional cost, once the annual fee has been paid. As indicated in the discussion of Section 310.4(b)(3)(iv), however, the Rule requires a seller or a telemarketer to employ a version of the ''do-not-call'' registry obtained from the Commission no more than three months prior to the date any telemarketing call is made.

*Law enforcement access to the registry.* Any law enforcement agency that has responsibility to enforce either the Rule or any state do-not-call statute or regulation will be permitted to access appropriate information in the national registry. This information will be provided through a secure Internet website, with access obtained through the Commission's existing Consumer Sentinel® system. Law enforcers will be able to query the registry to determine if and when a particular telephone number was registered by a consumer. They will also be able to query if and when a particular telemarketer or seller accessed the registry, and the information accessed by that telemarketer or seller. Such law enforcement access to data in the national registry is critical to enable state Attorneys General and other appropriate law enforcement officials to gather evidence to support enforcement actions under the Telemarketing and Consumer Fraud and Abuse Prevention Act,[717] and, as discussed below, once harmonization between the national registry and state do-not-call programs has been completed, to support law enforcement action under state law as well.

*Harmonization of various do-not-call registries.* As discussed above, the Commission is working with the states to develop a single, national ''do-not-call'' registry. The Commission envisions allowing consumers throughout the United States to register their preference not to receive telemarketing calls in a single transaction with one governmental agency. In addition, the Commission anticipates allowing telemarketers and sellers to access that consumer registration information through one visit to a national website, developed for that purpose.

To further those goals, the Commission will allow all states, and the DMA if it so desires, to download into the national registry—at no cost to the states or the DMA—the telephone numbers of consumers who have registered with them their preference not to receive telemarketing calls. Telemarketers and sellers will be allowed to access that data through the national registry as the information is received.

It will take some time to achieve these goals completely, however. Some states will be able to transfer their state ''do-not-call'' registration information, and will cease requiring telemarketers to access the state registries, by the time telemarketers first gain access to the national registry. For other states, it may take from 12 to 18 months to achieve those results. At least one state, Indiana, may need up to three years before it can become part of the national system. In any event, the Commission will continue to work diligently with the states in an effort to harmonize these different systems.

*Implementation time line.* As stated above, the Commission has issued an RFQ to vendors to develop and operate a national ''do-not-call'' registry. The implementation time line for the registry begins on the date the contract is awarded to a vendor in response to that RFQ. The Commission anticipates awarding the contract as soon as the agency receives appropriate authority and funding from Congress to begin building the national registry.

Consumers will be allowed to begin to register their preference not to receive telemarketing calls approximately four months after a contract for the national ''do-not-call'' registry is awarded. To avoid an unmanageable surge of calls when the national registry is initially opened, the Commission anticipates phasing in registry availability to consumers one geographic region at a time throughout the United States over a period of approximately two months. Telemarketers and sellers will be given access to the telephone numbers in the national registry approximately six months after the contract is awarded. The effective date for the ''do-not-call'' provisions of the amended Rule will be approximately seven months after the date the contract to develop and implement the system is awarded. Thus, to comply with the amended Rule, telemarketers will need to obtain the list of registered telephone numbers during the sixth month after the contract is awarded, allowing themselves sufficient time to scrub their calling lists before placing outbound telemarketing calls in the seventh month after the date the contract is awarded.

As stated below in the Effective Date section, in the future the Commission will announce the date by which full compliance with the national ''do-not-call'' registry provisions of the amended Rule will be required. As noted elsewhere in this document, full compliance with all other provisions of the amended Rule—with the exception of the Caller ID provision (§ 310.4(a)(7))—will be required by the date on which the amended Rule is effective, March 31, 2003. Full compliance with the Caller ID provisions will be required by January 29, 2004.

*§ 310.4(b)(1)(iv) — Abandoned calls & § 310.4(b)(4) — Safe harbor for abandoned calls*

In the NPRM, the Commission explained that ''abandoned calls'' violate § 310.4(d) of the original Rule because such calls failed to provide the requisite prompt disclosures.[718] In providing this explanation, the Commission noted that ''abandoned calls'' include two distinguishable scenarios: ''hang up'' calls, in which telemarketers hang up on consumers whom they have called without speaking to them; and ''dead air'' calls, in which there is a prolonged period of silence between the consumer's answering a call and the connection of that call to a sales representative.[719] The record shows that both types of abandoned calls arise from the use of predictive dialers, which promote telemarketers' efficiency by calling multiple consumers for every available sales representative.[720] Doing so maximizes the amount of time representatives spend speaking with consumers and minimizes the amount of time representatives spend waiting to reach a prospective customer.[721] An inevitable ''side effect'' of predictive dialers' functionality is that the dialer will reach more consumers than can be connected to available sales

[717] 15 U.S.C. 6101 *et seq.*

[718] 67 FR at 4524.

[719] 67 FR at 4522.

[720] ABA-NPRM at 12; ATA-NPRM at 32; CADM-NPRM at 3; DialAmerica-NPRM at 22; Pelland-NPRM at 2; Sytel-NPRM at 3; Miller Study at 13; http://www.predictive-dialers.com/home/faq.html.

[721] ATA-NPRM at 31; ERA-NPRM at 41; MPA-NPRM at 31; NAA-NPRM at 14; Private Citizen-NPRM at 3; PMA-NPRM at 30; TeleDirect-NPRM at 2.

representatives.[722] In those situations, the dialer will either disconnect the call or keep the consumer connected in case a sales representative becomes available.[723]

According to one consumer organization, the Rule's prohibition on abandoned calls as set forth in the NPRM addresses ''one of the most invasive practices of the telemarketing industry.''[724] ''Hang up'' calls and ''dead air'' frighten consumers,[725] invade their privacy,[726] cause some of them to struggle to answer the phone only to be hung up on,[727] and waste the time and resources of consumers working from home.[728]

The amended Rule prohibits abandoning outbound telephone calls, but constructs a safe harbor allowing telemarketers to continue using predictive dialers in a regulated manner. Under § 310.4(b)(1)(iv), an outbound telephone call is abandoned if, once the call has been answered by a consumer, the telemarketer fails to connect the call to a sales representative within two seconds of the consumer's completed greeting. (As explained herein, ''hang up'' calls and delays of more than two seconds before connecting the call to a sales representative are prohibited by this section of the Rule.) The Commission's prohibition of abandoned calls is authorized by § 6102(a)(3)(A) of the Telemarketing Act, which directs the Commission to prohibit telemarketers from undertaking a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy, and by § 6102(a)(3)(C), which directs the Commission to require telemarketers to promptly and clearly disclose certain material information. Section 6102(a)(3), which directs the Commission to consider recordkeeping requirements in prescribing rules regarding deceptive and abusive telemarketing acts or practices, is the authority for the required recordkeeping related to predictive dialers.

Section 310.4(b)(4), the amended Rule's safe harbor provision, provides that the Commission will refrain from bringing a Rule enforcement action against a seller or telemarketer based on violations of § 310.4(b)(1)(iv) if the seller or telemarketer's conduct meets certain specified standards designed to minimize call abandonment. These standards are: (1) the seller or telemarketer must employ technology that ensures abandonment of no more than three percent of all calls answered by a consumer, measured per day per calling campaign; (2) the seller or telemarketer must allow each telemarketing call placed to ring for at least fifteen seconds or four complete rings before disconnecting an unanswered call; (3) whenever a sales representative is not available to speak with the person answering the call within two seconds of that person's completed greeting, the seller or telemarketer must promptly play a recorded message; and (4) the seller or telemarketer must retain records, in accordance with § 310.5(b)-(d), establishing compliance with § 310.4(b)(4)(i)-(iii).

Telemarketers voiced strong objection to the NPRM discussion of abandoned calls as violative of § 310.4(d),[729] and argued that this interpretation would in effect ban the use of predictive dialers,[730] causing the loss of efficiency benefits that arise from the use of predictive dialers.[731] The Commission is mindful of the benefits of increased efficiency, but believes that the increased efficiency of predictive dialers must be balanced against the abusive nature of abandoned calls. The abuses of abandoned calls were delineated in the NPRM and elsewhere in the record.[732] As NAAG asserted at the June 2002 Forum, an abandoned call is basically a ''prank call.''[733] However, the Commission is persuaded that a total ban on abandoned calls, which would amount to a ban on predictive dialers, would not strike the proper balance between addressing an abusive practice and allowing for the use of a technology that provides substantially reduced costs for telemarketers. At the June 2002 Forum, one telemarketing group posited that consumers who make purchases via the telephone ultimately benefit from these reduced costs in the form of lower prices.[734] Therefore, taking into account the record as a whole, and arguments raised by both sides of this issue, the Commission has determined to prohibit abandoned calls from continuing without regulation, and has created requirements that, in effect, closely govern the use of predictive dialers. Under this approach, consumers will benefit from a substantial reduction in the number of abandoned calls they receive,[735] but telemarketers will not be deprived of a large part of the efficiency benefits that accrue from the use of predictive dialers.[736] The Commission also notes that the amended Rule's establishment of a national ''do-not-call'' registry should significantly reduce the number of calls received by consumers who place their numbers on the registry, thereby reducing the number of abandoned calls these consumers must contend with as well.

''*Abandoned call*'': Section 310.4(b)(1)(iv) of the amended Rule defines a prohibited abandoned outbound call as one in which the recipient of the call answers the call, and the telemarketer does not connect the call to a sales representative within two seconds of the person's completed greeting. This definition of abandoned call covers ''dead air'' and ''hang up'' calls, in which the telemarketer hangs up on a called consumer without connecting that consumer to a sales representative. This approach to abandoned calls clarifies several issues raised by telemarketers in the record.

The amended Rule removes any possibility of doubt that a call placed by a telemarketer is an outbound telephone call within the meaning of the Rule, even if the telemarketer hangs up on the called consumer without speaking to him or her, or subjects the called consumer to dead air. The Rule's disclosure requirement is triggered once a recipient of a telemarketing call

[722] June 2002 Tr. I at 211 (CCC); Time-NPRM at 11; ATA-Supp. at 11; Miller Study at 13-14.

[723] NASUCA-NPRM at 12-13; Sytel-NPRM at 4-7; ATA-Supp. at 11; Miller Study at 13-14.

[724] PRC-NPRM at 3.

[725] 67 FR at 4523.

[726] AARP-NPRM at 9.

[727] 67 FR at 4523; Texas PUC-NPRM at 5; Worsham-NPRM at 5.

[728] PRC at 3.

[729] ABA-NPRM at 12; ACA-NPRM at 9; ATA-NPRM at 30; Associations-NPRM at 3; Capital One-NPRM at 6; DialAmerica-NPRM at 24-25; DMA-NPRM at 44; ERA-NPRM at 40-41; Gannett-NPRM at 4; Infocision-NPRM at 6-7; Metris-NPRM at 10; MPA-NPRM at 29-30; NAA-NPRM at 13, 15; Time-NPRM at 11; Tribune-NPRM at 9.

[730] June 2002 Tr. I at 211 (CCC); ABA-NPRM at 12; Advanta-NPRM at 4; Aegis-NPRM at 5; AFSA-NPRM at 16; Capital One-NPRM at 6; Gannett-NPRM at 4; Household Auto-NPRM at 12; ICT-NPRM at 2; PMA-NPRM at 30; PCIC-NPRM at 2; VISA-NPRM at 12; Miller Study at 14. *But see* EPIC-NPRM at 23.

[731] ACA-NPRM at 8-9; ARDA-NPRM at 15; ANA-NPRM at 6; ATA-NPRM at 31; BofA-NPRM at 9; BRI-NPRM at 3; Discover-NPRM at 6; Fleet-NPRM at 6; FPIR-NPRM at 2; Household Auto-NPRM at 11-12; ICT-NPRM at 2; ITC-NPRM at 2-3; KeyCorp-NPRM at 6; Marketlink-NPRM at 3; MPA-NPRM at 8; NAA-NPRM at 14; Noble-NPRM at 4; NATN-NPRM at 4; NSDI-NPRM at 4; SHARE-NPRM at 4; Synergy Solutions-NPRM at 4; Technion-NPRM at 5; TeleDirect-NPRM at 2; Teleperformance-NPRM at 3; TRC-NPRM at 4; TeleStar-NPRM at 2; Time-NPRM at 10; Allstate-Supp. at 2; Miller Study at 15. *See also* Citigroup-NPRM at 10; IMC-NPRM at 7 (Predictive dialers enhance dialing accuracy); NAA-NPRM at 7 (Predictive dialers help with ''do not call'' compliance).

[732] 67 FR at 4522-24; AARP-NPRM at 9; NAAG-NPRM at 47; NACAA-NPRM at 10; PRC-NPRM at 3.

[733] June 2002 Tr. II at 27 (NAAG). *See also* NAAG-NPRM at 47; McKenna-Supp. at 2.

[734] June 2002 Tr. I at 212-13 (CCC). *But see* June 2002 Tr. I at 222-23 (EPIC).

[735] AFSA-NPRM at 16; Sytel-NPRM at 7-8.

[736] *See* KeyCorp-NPRM at 6; PCIC-NPRM at 2.

answers the phone.[737] This approach is consistent with the treatment of this issue in the NPRM.[738] The Commission rejects the argument, advanced by ACA, ATA, DMA, and ERA, that abandoned calls cannot be regulated by the Rule because they are not ''outbound telephone calls.''[739] If this theory were valid, telemarketers could abuse consumers in a variety of ways without violating the Rule as long as they did not also engage in a sales pitch. That interpretation and that result are contrary to the overall purpose and intent of the Telemarketing Act and plainly at odds with the Rule's definition of ''outbound telephone call'' and with the Rule generally. A telemarketer initiates a telephone call by causing the called consumer's telephone to ring. Abandoning the call after the consumer answers but before the sales representative begins a sales pitch is an abusive telemarketing act or practice. Certainly this is the type of practice that prompted Congress, in the Telemarketing Act, to direct the Commission to prohibit telemarketers from undertaking ''a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy.''[740] The record contains ample evidence that consumers find abandoned calls to be coercive or abusive of their privacy rights.[741]

ATA, in its comment and at the June 2002 Forum, requested guidance from the Commission on how ''abandoned call'' would be defined in the Rule.[742] Accordingly, the Commission has clarified, in § 310.4(b)(1)(iv), that an outbound call is ''abandoned'' if, once answered by a consumer, it is not connected to a sales representative within two seconds of the consumer's completed greeting (*i.e.*, no more than two seconds of ''dead air'').[743] As was explained above, this definition of ''abandoned call'' also includes situations in which the telemarketer hangs up on a consumer who has answered the telemarketer's call without connecting that call to a sales representative.

*Abandoned call ''safe harbor''*: The abandoned call safe harbor consists of four components, each of which is supported by record evidence. A seller or telemarketer will not be deemed to have violated § 310.4(b)(1)(iv) by abandoning calls, provided that the seller or telemarketer can show that its conduct conforms to the standards specified in this safe harbor.

Under the first subsection of the safe harbor, the seller or telemarketer must employ technology that ensures abandonment of no more than three percent of all calls answered by called consumers. The safe harbor's three percent abandonment rate is measured per day per calling campaign. The ''per day per campaign'' unit of measurement is consistent with DMA's guidelines addressing its members' use of predictive dialer equipment.[744] Under this standard, a telemarketer running two or more calling campaigns simultaneously cannot offset a six percent abandonment rate on behalf of one seller with a zero percent abandonment rate for another seller in order to satisfy the Rule's safe harbor provision. Each calling campaign must record a maximum abandonment rate of three percent per day to satisfy the safe harbor.

What constitutes an ''acceptable'' abandonment rate was the subject of substantial comment on the record. A number of telemarketers urged the Commission to alter the position implied in the NPRM that the appropriate standard is a zero percent abandonment rate.[745] Among industry representatives who advanced this argument, ATA took the most extreme position, arguing against any regulation of abandonment rates.[746] The Commission rejects this position in light of the record of conduct affiliated with abandoned calls and predictive dialers under the current regulatory scheme.[747] Other industry comments recommended that the Commission set a ''reasonable'' or ''acceptable'' abandonment rate above zero percent that would curb abuses while allowing use of predictive dialers to continue.[748] A third group of telemarketers argued that the Commission's abandonment rate should be consistent with DMA's current guideline, which calls for an abandonment rate no higher than five percent.[749] Consumer groups and law enforcement representatives advocated strongly for a zero abandonment rate.[750]

Taking all of these viewpoints into account, the Commission has concluded that neither extreme strikes the right balance on this issue. The Commission believes that a maximum abandonment rate of three percent strikes a reasonable balance between curbing a very abusive practice and preserving some of the substantial economic benefits that accrue from the use of predictive dialers. Two telemarketers essentially supported this abandonment rate as being ''feasible, realistic'' and ''fully capable'' of being achieved.[751] ATA asserted that the three percent standard would result in ''a significant drop in efficiency'' among some of its members.[752] Sytel, a leading provider of predictive dialer technology, urged the Commission not to set a rate *below* three

[737] The safe harbor, which, among other things, directs how long telemarketers must allow a called consumer's telephone to ring before disconnecting the call, addresses telemarketers' practices before the consumer answers the phone.

[738] 67 FR at 4524.

[739] ACA-NPRM at 9-10; ATA-NPRM at 30; DMA-NPRM at 43-44; ERA-NPRM at 40. DMA, ERA, and PMA argued that the FTC lacks authority to regulate telemarketers' use of predictive dialer technology. [*See* DMA-NPRM at 4, 42-48; ERA-NPRM at 38-40; PMA-NPRM at 29-30.] Specifically, DMA, ERA, and PMA argued that the FCC has authority to regulate automatic telephone dialing systems through the TCPA. But nothing in the TCPA limits the authority of the FTC under the Telemarketing Act. The Rule's regulation of abandoned calls falls squarely within the FTC's authority to regulate abusive telemarketing acts or practices under the Telemarketing Act. As the Commission stated in the NPRM, the harm to consumers that arises from abandoned calls is very real and falls within the areas of abuse that the Telemarketing Act explicitly aimed to address. [*See* 67 FR at 4524.] The Commission therefore rejects the argument offered by DMA, ERA, and PMA that it lacks the legal authority to address call abandonment in the TSR.

[740] 15 U.S.C. 6102(a)(3)(A).

[741] AARP-NPRM at 8-9; EPIC-NPRM at 23; Private Citizen-NPRM at 4; McKenna-Supp. at 2. *See also* Pelland-NPRM at 2.

[742] ATA-NPRM at 34; June 2002 Tr. II at 38 (ATA). *See also* Convergys-NPRM at 6; MPA-NPRM at 32-33.

[743] DialAmerica-NPRM at 19; Sytel, Outbound Focus Issue 16, http://www.outboundfocus.com.

[744] *See* http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38. See also MBNA-NPRM at 8. *But see* ATA-NPRM at 35: Commenter advocated a unit of measurement incorporating ''a broad period of time'' to allow for variances in abandonment rates caused by such factors as the time of day a call is placed; ERA-NPRM at 44; MPA-NPRM at 30, 32; NAA-NPRM at 15; PMA-NPRM at 31; ERA-Supp. at 24.

[745] DialAmerica-NPRM at 24; NAA-NPRM at 15; PMA-NPRM at 31.

[746] ATA-NPRM at 33; ATA-Supp. at 14. *See also* TeleDirect-NPRM at 2.

[747] 67 FR at 4522-23. In the present environment, telemarketers have engaged in predictive dialer practices that frighten, disturb, and aggravate consumers. *See, e.g.*, June 2002 Tr. II at 17-18 (AARP); June 2002 Tr. II at 21 (NAAG); June 2002 Tr. II at 22 (DialAmerica).

[748] BofA-NPRM at 9; Citigroup-NPRM at 10; ITC-NPRM at 3; KeyCorp-NPRM at 6; MasterCard-NPRM at 13; Time-NPRM at 11.

[749] http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38; ABA-NPRM at 12; AFSA-NPRM at 16; ARDA-NPRM at 16; CBA-NPRM at 10; Citigroup-NPRM at 10; Discover-NPRM at 6; ERA-NPRM at 43; MPA-NPRM at 8, 32-33; June 2002 Tr. II at 24 (ERA). *See also* NAA-NPRM at 15; PMA-NPRM at 31; ERA-Supp. at 22-23; MPA-Supp. at 6, 23; NAA-Supp. at 2; Miller Study at 2. *But see* NASUCA-NPRM at 14; Tribune-NPRM at 9.

[750] EPIC-NPRM at 22-23; NAAG-NPRM at 47; NASUCA-NPRM at 14; NCL-NPRM at 11; PRC-NPRM at 3; Private Citizen-NPRM at 4; June 2002 Tr. I at 220 (Junkbusters). *See also* Horick-NPRM at 1; McKenna-Supp. at 2. *But see* McClure-NPRM at 1.

[751] PCIC-NPRM at 2; Aegis-NPRM at 5. *See also* ARDA-Supp. at 1: ''A rate between three and five percent is reasonable.''

[752] June 2002 Tr. II at 49 (ATA). *See also* ATA-Supp. at 15; Associations-Supp. at 6-7; ERA-Supp. at 23; MPA-Supp. at 23; NAA June 28-Supp. at 2.

percent to allow for continuing use of predictive dialers.[753] The three percent standard is also consistent with the California Public Utilities Commission's Interim Opinion regarding predictive dialer use and abandoned calls.[754]

The second component of the abandoned call safe harbor addresses ''ring time'' or ''early hang ups.'' According to Sytel, some telemarketers using predictive dialers may disconnect calls to consumers after allowing the phone to ring for only a very short period of time before hanging up, without giving consumers a reasonable opportunity to answer the phone; these disconnected calls are not considered ''abandoned'' by predictive dialers.[755] Employing a short ''ring time'' is yet another way for telemarketers to maximize the efficiency of their sales representatives; the predictive dialer calls many more consumers than the telemarketer can handle to minimize the chance that a sales representative will remain idle.[756] This kind of call is abusive of a consumer's right to privacy, as consumers' lives at home are interrupted without any benefit or purpose whatsoever. One runs to the phone only to have it stop ringing before one can pick it up; or answers it only to find no one there. Surprisingly, one commenter, MPA, actually argued in favor of allowing telemarketers to hang up after one ring if no sales representatives were available to handle the call.[757] Sytel recommends that the Commission follow DMA guidelines on predictive dialers, which recommend allowing the phone to ring at least four times or for twelve seconds before disconnecting the call.[758] Sytel stated that the practice of ''early hangups'' is widespread, and it urged the Commission to set a ''ring time'' standard that allows consumers a reasonable length of time to answer the phone.[759] The Commission has concluded that a modified version of the DMA guidelines presents a reasonable approach. Under this part of the safe harbor, telemarketers must let the phone ring either four times or for fifteen seconds before disconnecting the call.[760] This ring time standard will give consumers, including the elderly or infirm who may struggle to get to the telephone, a reasonable opportunity to answer telemarketing calls while preventing the undesirable result of consumers' privacy being disrupted by ringing phones with no caller present on the other end of the line.

The third component of the abandoned call safe harbor requires telemarketers to play a recorded message whenever a sales representative is not available to speak with a consumer within two seconds of the consumer's completed greeting. The silence that consumers face when the sales representative is unavailable and does not respond after the consumer says, ''hello'', is ''dead air.''[761] The recorded message will significantly mitigate the problems associated with ''dead air'' by identifying the caller responsible for the extended silence.

According to the record amassed in this proceeding, dead air is an unavoidable feature of predictive dialers.[762] Some dead air in telemarketing calls is caused by answering machine detection (''AMD''): consumers are met with silence as the dialer determines whether the call was answered by a person or an answering machine.[763] Dead air also results when the dialer waits for a sales representative to become available to speak with the called consumer.[764] Sytel argued in favor of setting a maximum dead air standard of two seconds.[765] DMA's predictive dialer guidelines also set a two second maximum for dead air.[766] This standard is consistent with the recent CPUC Interim Opinion governing predictive dialers.[767] Based on the record established on this issue—that use of predictive dialers inevitably entails some dead air and that two seconds of dead air allows predictive dialers to impart significant efficiencies—the amended Rule provision allows two seconds of dead air before a call answered by a consumer will be considered ''abandoned.''

Consumers on the receiving end of dead air may wonder if ''someone is waiting to get into my home when I'm away, or . . . determining when I'm home alone.''[768] The Commission believes it is not so much the pause that frightens consumers, it is the silence. By playing a recorded message giving the name and telephone number of the seller responsible for the call, the fear generated by telemarketers' dead air is substantially mitigated, and telemarketers are able to continue using predictive dialer technology.[769]

The ''recorded message'' component of the safe harbor must be read in tandem with the prohibition of abandoned calls, under which telemarketers must connect calls to a sales representative within two seconds of the consumer's completed greeting to avoid a violation of the Rule. Clearly, telemarketers cannot avoid liability by connecting calls to a recorded solicitation message rather than a sales representative. The Rule distinguishes between calls handled by a sales representative and those handled by an automated dialing-announcing device.[770] The Rule specifies that telemarketers must connect calls to a sales representative rather than a recorded message.[771]

The record reflects a range of views regarding the prospect of using recorded messages in telemarketing. A consumer advocacy group, a law enforcement body, and some telemarketers expressed support for recorded messages as a way to mitigate the abuses arising from dead air.[772] Others opposed requiring the use of recorded messages.[773] DMA opposed it based on the assumption that telemarketers' messages would need to include all of the prompt disclosures required by § 310.4(d).[774] DMA noted

[753] June 2002 Tr. II at 53 (Sytel).

[754] CPUC Interim Opinion, Rulemaking 02-02-020 (June 27, 2002) at 20. The CPUC concluded that, based on comments it had received in its rulemaking process, ''most responsible users of predictive dialing equipment are either already at or near a 3 percent error rate or can achieve it with minimum reprogramming effort.''

[755] Sytel-NPRM at 4; Sytel, Outbound Focus Issue 16, http://www.outboundfocus.com.

[756] Private Citizen-NPRM at 3.

[757] June 2002 Tr. II at 25 (MPA).

[758] Sytel-NPRM at 4; http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38.

[759] Sytel-NPRM at 4.

[760] According to Sytel, the 15-second standard has been adopted by the United Kingdom DMA. Outbound Focus Issue 16, http://www.outboundfocus.com.

[761] ARDA-NPRM at 15.

[762] Sytel, Outbound Focus Issue 16, http://www.outbound.focus.com; Sytel-NPRM at 4-5. *See also* ATA-NPRM at 34; Cendant-NPRM at 9; DMA-NPRM at 42.

[763] DialAmerica-NPRM at 19-20; Private Citizen-NPRM at 3; Sytel-NPRM at 4-5; Time-NPRM at 10.

[764] ARDA-NPRM at 15; DialAmerica-NPRM at 20-21; Sytel-NPRM at 4.

[765] Sytel-NPRM at 5-6.

[766] *See* http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38. *But see* ATA-Supp. at 14 (supporting a four-second dead air standard); ERA-Supp. at 25, MPA-Supp. at 23 (Commenters' proposed definition of ''abandoned call'' has no dead air time limit).

[767] CPUC Interim Opinion at 11-12.

[768] AARP-NPRM at 9.

[769] ARDA-NPRM at 15-16; Household Auto-NPRM at 12; NACAA-NPRM at 10; PCIC-NPRM at 2; TeleDirect-NPRM at 3; Texas PUC-NPRM at 5.

[770] *But see* Kans. Rev. Stat. 50-670(b)(6), which does not distinguish between the two.

[771] This comports with the CPUC Interim Opinion governing predictive dialers, DMA's guidelines for predictive dialers, and Sytel's recommended approach. *See* CPUC Interim Opinion at 10-12; http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38; Sytel-NPRM at 3.

[772] AARP-NPRM at 9; ARDA-NPRM at 15; BofA-NPRM at 9; CADM-NPRM at 1; Household Auto-NPRM at 12; PCIC-NPRM at 2; Texas PUC-NPRM at 5. *See also* McClure-NPRM at 2. *But see* MasterCard-NPRM at 13.

[773] DMA-NPRM at 44; EPIC-NPRM at 24; Time-NPRM at 11; Worsham-NPRM at 5.

[774] DMA-NPRM at 44. *See also* Capital One-NPRM at 6-7; NASUCA-NPRM at 13-14; NCL-NPRM at 11; Private Citizen-NPRM at 4.

that recorded messages containing these disclosures could violate the TCPA.[775] Time similarly opposed it based on concern for requiring the recorded message to include the prompt disclosures and, in addition, posited that consumers would not support receiving recorded-message disclosures on their answering machines.[776] The Commission's approach to the recorded message component of this safe harbor should allay these concerns.[777] The recorded message need not include all required prompt disclosures; rather, the message need contain no more than the seller's name and telephone number.[778] Of course, it must comply with applicable state and federal laws governing the use of recorded messages, such as the FCC's TCPA regulations. Moreover, telemarketers are not required to leave a recorded message on the answering machines of consumers who are not home to answer the telemarketer's call. In light of the limited nature of the elements of the recorded message component of the safe harbor, the Commission's approach also resolves Sytel's caution against allowing the use of recorded messages without regulation.[779]

The fourth component of the abandoned call safe harbor is a recordkeeping requirement. Specifically, telemarketers using predictive dialers under this safe harbor must keep records documenting compliance with the first three components of this safe harbor in a manner that is in accordance with the recordkeeping requirements of the Rule set out in § 310.5(b)-(d). The record clearly establishes the need for this requirement. According to statements at the June 2002 Forum, some telemarketers routinely exceed DMA's recommended maximum abandonment rate of five percent.[780] At the June 2002 Forum, DMA explained that enforcement of its guideline was difficult despite receiving complaints.[781] The Commission foresees that, absent recordkeeping requirements, the Commission would encounter similar difficulty in enforcing this aspect of the amended Rule. Furthermore, the record does not contain opposition to a recordkeeping requirement associated with the use of predictive dialers, and the records required by the Commission in this provision of the Rule are similar to those supported by industry representatives in the CPUC's predictive dialer rulemaking proceeding.[782] The Commission believes that predictive dialer technology can capture and preserve abandonment rate records as a matter of routine;[783] records showing compliance with the ring time and recorded message requirements will not impose a significant burden on telemarketers who wish to take advantage of this safe harbor.

*§ 310.4(b)(2) — Restrictions on use of list*

Section 310.4(b)(1)(iv) of the proposed Rule prohibited any seller or telemarketer from selling, purchasing, or using a seller's ''do-not-call'' list for any purpose other than complying with the Rule's ''do-not-call'' provision. The amended Rule retains the provision but modifies the language to also prohibit the sale, purchase, rental, lease, or use of the national registry maintained by the Commission for any purpose other than compliance with the Rule's ''do-not-call'' provision or otherwise to prevent telephone calls to telephone numbers on either the sellers' lists or the national registry.

Those commenters who addressed this provision supported such a prohibition.[784] NCL stated that, since consumers who sign up for a ''do-not-call'' list are seeking to preserve their privacy, it would be an invasion of their privacy to use any information that would identify those consumers (*e.g.*, names or telephone numbers) for any purpose other than to ensure that those individuals do not receive unsolicited telemarketing calls.[785]

In addition to expanding the provision to cover the sale, purchase, rental, lease, or other use of the registry, the amended Rule has made this prohibition a separate and distinct abusive practice. In the proposed Rule, this provision was part of § 310.4(b)(1), which sets out prohibited practices by telemarketers, including adherence to the ''do-not-call'' provision. Section 310.4(b)(1) also prohibited sellers from causing telemarketers to engage in the prohibited practices. However, the Commission believes that it is important for *all* persons, not just sellers and telemarketers, to use the ''do-not-call'' lists properly. Therefore, the amended Rule retains this provision, renumbered as § 310.4(b)(2), but extends the prohibition to ''*any person*,'' in order to prohibit all entities, not just sellers and telemarketers, from misusing ''do-not-call'' lists. By extending the prohibition to ''any person,'' the Commission intends that the provision apply to such parties as list brokers and other entities that do not fall within the definitions of ''seller'' or ''telemarketer.'' In addition, the amended Rule adds a provision that permits a person to use either seller-specific lists, or the national registry, not only to comply with the ''do-not-call'' provisions of the Rule, but also ''to prevent telephone calls to telephone numbers on such lists.'' This provision will permit an entity not subject to the amended Rule for whatever reason (*e.g.*, because it is outside of the Commission's jurisdiction) to access the national registry in order to scrub its calling lists, if it wants to avoid calling consumers who have expressed a preference not to receive telemarketing calls.

*§ 310.4(b)(3) — Safe harbor for ''do-not-call''*

Section 310.4(b)(3) provides sellers and telemarketers with a limited safe harbor from liability for violating the ''do-not-call'' provision found in § 310.4(b)(1)(iii).[786] During the original rulemaking, the Commission determined that sellers and telemarketers should not be held liable for calling a person who previously asked not to be called if they had made a good faith effort to comply with the Rule's ''do-not-call'' provision and the call was the result of error. The Rule established four requirements that a seller or telemarketer must meet in order to avail itself of the safe harbor: (1) it must establish and implement written procedures to comply with the ''do-not-call'' provision; (2) it must train its personnel in those procedures; (3) it must maintain and record lists of persons who may not be contacted; and (4) any subsequent call must be the result of error.

These criteria tracked the FCC's regulations, which set forth the minimum standards that companies must follow to comply with the TCPA's

[775] DMA-NPRM at 44. *See also* Sytel-NPRM at 6; Worsham-NPRM at 5.

[776] Time-NPRM at 11. *See also* ANA-NPRM at 6; Associations-NPRM at 3.

[777] Capital One-NPRM at 6-7.

[778] When consumers receive this information, they will not have to wonder whether the call has been placed by someone with sinister motives, as described by AARP. *See* AARP-NPRM at 9; ATA-Supp. at 11.

[779] Sytel-NPRM at 6.

[780] June 2002 Tr. II at 29 (ATA); June 2002 Tr. II at 45 (DialAmerica); June 2002 Tr. II at 52 (Sytel). *See also* Capital One-NPRM at 6; DialAmerica-NPRM at 23; NASUCA-NPRM at 14; Sytel-NPRM at 7.

[781] June 2002 Tr. II at 51 (DMA).

[782] CPUC Interim Opinion at 20-22.

[783] TeleDirect-NPRM at 2.

[784] *See, e.g.*, AARP-NPRM at 3; EPIC-NPRM at 16; NCL-NPRM at 8-9; NYSCPB-NPRM at 6-7; Texas PUC-NPRM at 1-2; Verizon-NPRM at 5. *See also* June 2002 Tr. I at 215-25.

[785] NCL-NPRM at 8-9.

[786] This provision has been renumbered in the amended Rule. In the original Rule and in the NPRM, the ''safe harbor'' provision is § 310.4(b)(2).

''do-not-call'' provision.[787] In the NPRM, the Commission proposed three additional requirements which have to be met by sellers or telemarketers or others acting on behalf of a seller or charitable organization before they may avail themselves of the ''safe harbor:'' (1) they must use a process to prevent telemarketing calls from being placed to any telephone number included on the Commission's national registry using a version of the registry obtained not more than 30 days before the calls are made; (2) they must maintain and record consumers' express verifiable authorizations to call; and (3) they must monitor and enforce compliance with their ''do-not-call'' procedures.

Based on the record in this matter, and for the reasons set forth below, the amended Rule retains the ''safe harbor'' requirement to monitor and enforce compliance. However, the amended Rule deletes the ''safe harbor'' provision expressly requiring maintenance and recording of express verifiable authorizations.[788] In addition, § 310.4(b)(3)(iv), the ''safe harbor'' requirement to purchase and reconcile the registry, has been modified to delete the 30-day requirement and, instead, require that telemarketers employ a version of the registry which has been obtained no more than three months before a call is made, and to maintain records documenting that process.[789]

The Commission continues to believe that the Rule should contain a ''safe harbor'' from liability for violations of its ''do-not-call'' provision. Commenters generally agreed with this position.[790] Sellers or telemarketers who have made a good faith effort to provide consumers or donors with an opportunity to exercise their ''do-not-call'' rights should not be liable for violations that result from error. Further, as discussed in the NPRM, the Commission believes that the same rationale applies to potential violations of § 310.4(b)(1)(ii), and therefore has, in the introductory sentence of § 310.4(b)(5), extended the ''safe harbor'' to cover violations of *both* amended §§ 310.4(b)(1)(ii) and (iii). Section 310.4(b)(1)(ii) prohibits a seller or telemarketer from denying or interfering with a person's right to be placed on a ''do-not-call'' list, whereas § 310.4(b)(1)(iii) prohibits calling a person who has previously requested to be placed on such a list.

Although the Commission has extended the ''safe harbor'' provision to cover the additional practice of denying or interfering with a consumer's right to be on a ''do-not-call'' list, it has also tightened the provision by adding the requirement that sellers and telemarketers monitor compliance and take disciplinary action for non-compliance in order to be eligible for the safe harbor. Section § 310.4(b)(5)(v) of the amended Rule requires the seller or telemarketer to monitor and enforce compliance with the procedures established in § 310.4(b)(5)(i).

During the Rule Review, numerous commenters described the problems they had encountered in attempting to assert their ''do-not-call'' rights and with companies that continued to call after the consumer asked not to be called.[791] Several commenters echoed these complaints in their responses to the NPRM.[792] This anecdotal evidence indicates that some entities may not be enforcing employee compliance with their ''do-not-call'' policies. In fact, one consumer reported that telemarketers for two different companies told her that it was not necessary that a company's ''do-not-call'' policy be effective, only that such a policy exist.[793]

To clarify this apparent misconception about the Rule's requirements, the Commission proposed that, in order to avail themselves of the ''safe harbor'' provision, sellers and telemarketers must be able to demonstrate that, as part of ordinary business practice, they monitor and enforce compliance with the written procedures required by § 310.4(b)(5)(i). The Commission received few comments on this proposal, and those commenters supported the proposal.[794] Therefore, the Commission retains § 310.4(b)(5)(v) unchanged, except for renumbering. It is not enough that a seller or telemarketer has written procedures in place; the company must be able to show that those procedures have been and *are implemented* in the regular course of business. Thus, a seller or telemarketer cannot take advantage of the safe harbor exemption in § 310.4(b)(5) unless it can demonstrate that it actually trains employees in implementing its ''do-not-call'' policy, and enforces that policy.

Finally, in the ''safe harbor'' provision in the proposed Rule, the Commission required that the seller or telemarketer use a process to prevent calls to telephone numbers on the national ''do-not-call'' list, employing a version of the ''do-not-call'' registry obtained from the Commission not more than 30 days before the calls are made, and to maintain records documenting this process.[795] Virtually all comments on the safe harbor provision were directed at the proposed 30-day requirement for using the registry, which would have required sellers and telemarketers to reconcile or ''scrub'' the names on the registry with their customer list every 30 days. Industry commenters were unanimous in their view that a 30-day requirement would be extremely burdensome.[796] They also pointed out that a 30-day requirement would be virtually impossible to meet without shutting down operations for a day to scrub their lists, and would be particularly burdensome for small businesses with few employees or those that do not use sophisticated technology.[797] Industry commenters urged the Commission to require quarterly updating, which is the standard adopted by the majority of states in implementing their ''do-not-call'' statutes.[798] They pointed out that, after an initial period of ''volatility'' when consumers sign up for the new registry, the number of names on the registry will stabilize and there may not be as great a need for frequent updating.[799]

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[787] 47 CFR 64.1200(e)(2).

[788] This requirement was in § 310.4(b)(2)(v) of the proposed Rule.

[789] This requirement was in § 310.4(b)(2)(iii) of the proposed Rule.

[790] *See, e.g.*, ARDA-NPRM at 13; BofA-NPRM at 6; NACAA-NPRM at 9; Verizon-NPRM at 4-6. *But see* CATS-NPRM at 2; Patrick-NPRM at 5-6 (cautioning that the standards set forth in the ''safe harbor'' should be obligatory for all telemarketers subject to the Rule).

[791] *See, e.g.*, Bennett-RR at 1; A. Gardner-RR at 1; Gilchrist-RR at 1; Gindin-RR at 1; Harper-RR at 1; Heagy-RR at 1; Johnson-RR at 3; McCurdy-RR at 1; Menefee-RR at 1; Mey-RR, *passim*; Nova53-RR at 1; Peters-RR at 1; Runnels-RR at 1.

[792] *See, e.g.*, Synergy Global-NPRM at 1-2 (ex-telemarketer says firm ignored ''do-not-call'' lists); Denny (Feb. 21, Msg. 970); Connolly (Mar. 6, Msg. 961); Young (Feb. 27, Msg. 165); Jackson (Feb. 2, Msg. 521); Horowitz (Feb. 27, Msg. 598); Truitt (Feb. 28, Msg. 687); Griffin (Feb. 28, Msg. 708); Loeher (Feb. 28, Msg. 729).

[793] Mey-RR at 2. *See also* DC-NPRM at 6-7.

[794] *See, e.g.*, DC-NPRM at 6-7; Verizon-NPRM at 5. *But see* Patrick-NPRM at 5-6 (cautioning that the standards set forth in the ''safe harbor'' should be obligatory for all telemarketers subject to the Rule).

[795] This requirement was in § 310.4(b)(2)(iii) of the proposed Rule.

[796] *See, e.g.*, ABA-NPRM at 12; AFSA-NPRM at 9-10; ARDA-NPRM at 13; Capital One-NPRM at 5-6; Cox-NPRM at 38; Discover-NPRM at 3; Household Auto-NPRM at 8; Household Credit-NPRM at 13; Household Finance-NPRM at 13; HSBC-NPRM at 2; Nextel-NPRM at 26; NFIB-NPRM at 2; NRF-NPRM at 16. *See also* June 2002 Tr. I at 234-72.

[797] *See, e.g.*, ABA-NPRM at 12; AFSA-NPRM at 9-10; ARDA-NPRM at 13; Capital One-NPRM at 5-6; Cox-NPRM at 38; Discover-NPRM at 3; HSBC-NPRM at 2; Nextel-NPRM at 26; NFIB-NPRM at 2; NRF-NPRM at 16. *See also* June 2002 Tr. I at 234-72.

[798] *See, e.g.*, ABA-NPRM at 12; AFSA-NPRM at 9-10; ARDA-NPRM at 13; Capital One-NPRM at 5-6; Cox-NPRM at 38; Discover-NPRM at 3; Household Auto-NPRM at 8, 10; Household Credit-NPRM at 13, 15; HSBC-NPRM at 2; Nextel-NPRM at 26; NFIB-NPRM at 2; NRF-NPRM at 16. *See also* June 2002 Tr. I at 234-72.

[799] *See* June 2002 Tr. I at 237-39.

The Commission is persuaded that the costs of requiring monthly updating outweigh any additional benefits that might accrue to consumers from such a provision. Based on the record in this matter, the amended Rule modifies the ''safe harbor'' requirement that lists be reconciled every 30 days. Instead, re-numbered § 310.4(b)(3)(iv) of the amended Rule requires that the seller or telemarketer employ a version of the registry obtained not more than three months before any call is made, and maintain records documenting the process it uses to prevent telemarketing to any number on the list. Thus, telemarketers will be required to update their lists at least every three months, a time period that is consistent with most state requirements. Instead of making the list available on specific dates, the registry will be available for downloading on a constant basis, 24 hours a day, seven days a week, so telemarketers can access the registry at any time. As a result, each telemarketer's three-month period may begin on a different date. The Commission intends that the records documenting the process to prevent telemarketing calls to telephone numbers on the ''do-not-call'' registry will include copies of any express agreements the seller has obtained from consumers giving their permission for the seller to call, as well as documentation showing when and how often the seller has reconciled its list of names and/or telephone numbers against the national ''do-not-call'' registry.

The Commission is confident that the additional criteria in the amended Rule do not conflict with FCC regulations. FCC regulations are silent as to the process to be used, or the specific time frame within which the company must reconcile the names on its ''do-not-call'' list with its list of prospective customers to be called in a telemarketing campaign.[800] Therefore, any FTC requirement that there be a process in place to prevent calls to telephone numbers on a ''do-not-call'' list would not conflict with the FCC's regulations. Similarly, FCC regulations are silent as to the requirement to monitor compliance and take action to correct any non-compliance, or to maintain evidence of express verifiable written authorization to accept telemarketing calls. Thus, the proposed Rule would not conflict with the FCC's regulations. Furthermore, as discussed more fully above, the Commission believes that it is necessary for the amended Rule to diverge from FCC regulations by imposing a monitoring requirement in the ''safe harbor'' provision in order to clarify the applicability of the safe harbor.

*§ 310.4(c) — Calling time restrictions*

Section 310.4(c) of the original Rule proscribes the making of outbound telemarketing calls before 8:00 a.m. and after 9:00 p.m. local time at the called person's location.[801] In response to comments received during the Rule Review suggesting further limitations on calling times, the Commission noted in the NPRM that it declined to adopt further restrictions because the original Rule's calling times strike the appropriate balance between protecting consumer privacy and not unduly burdening industry.

In response to the NPRM, the Commission received more than 100 comments from consumers on this issue, the vast majority of which recommended that the calling times be limited in some fashion. Many consumers urged that the calling times provision further restrict calls during the ''dinner hour,''[802] or at either end of the day, arguing that calls that come at 8:00 a.m. or 9:00 p.m. are inconvenient, particularly for families with small children.[803] Some commenters urged the Commission to prohibit telemarketing on Saturdays, Sundays, or the entire weekend.[804] Still others urged the Commission to consider the plight of those shift workers for whom the current calling hours provide little or no protection from calls during ''sleep time.''[805]

The few industry comments regarding calling times were supportive of the current hours, but critical of the notion that allowing consumers to customize their preferred calling times via the national ''do-not-call'' registry would be workable.[806] EPIC noted that it favored retaining the current calling times provision, but found it desirable to allow consumers who wish to do so to set other preferred times via the national ''do-not-call'' registry.[807]

As noted in the NPRM, the Commission believes the current calling hours provide a reasonable window for telemarketers to reach their existing and potential customers. The Commission recognizes that while some consumers may find it objectionable to receive telemarketing calls between 8:00 a.m. and 9:00 p.m., the majority of consumers would not find calls within these hours to be particularly abusive of their privacy. Furthermore, consumers who wish to avoid telemarketing calls will, under the amended Rule, have the option of placing their telephone numbers on the national ''do-not-call'' registry, thus blocking most unwanted calls at all times.[808] Therefore, the Commission declines to modify the calling hours prescribed by § 310.4(c), and retains this provision without amendment.

*§ 310.4(d) — Required oral disclosures*

Section 310.4(d) of the original Rule requires that a telemarketer in an outbound call make certain oral disclosures promptly, and in a clear and conspicuous manner. The NPRM proposed to make two minor modifications to the wording of this section. First, the Commission proposed inserting, after the phrase ''in an outbound telephone call,'' the phrase ''to induce the purchase of goods or services.'' This would clarify that § 310.4(d) applies only to telemarketing calls made to induce sales of goods or services (in contrast to proposed new § 310.4(e), which contains an analogous phrase clarifying that § 310.4(e) will apply to calls made ''to induce a charitable contribution''). Second, the Commission proposed to add the word ''truthful'' to clarify that it is not enough that the disclosures be made; the disclosures must also be made

[800] FCC regulations require companies to reconcile ''do-not-call'' requests for company-specific lists on a continuing or ongoing basis. Specifically, 47 CFR § 64.1200(e)(2)(iii) requires the seller or telemarketer to record the consumer's ''do-not-call'' request and place the consumer's name and telephone number on the company's ''do-not-call'' list at the time the request is made. The TSR is silent as to how frequently a company must reconcile ''do-not-call'' requests for company-specific lists.

[801] *See* 16 CFR 310.4(c).

[802] *See, e.g.*, Harvey Butler (Msg. 197); Roy Broman (Msg. 452); Robert Clifton (Msg. 3762); Ernie and Helen Darrow (Msg. 9941); SSMBOYLE (Msg. 14401); Worsham-NPRM at 4.

[803] *See, e.g.*, John Hallberg Jones (Msg. 1644); Jim Coupal (Msg. 3504); Adam Block Willow (Msg. 3513); Donald Nelson (Msg. 4225); Lolla469 (Msg. 5115); Anonymous (Msg. 27184).

[804] *See, e.g.*, Sjkble (Msg. 12060) (no Saturday calls); OMEGA217 (no Sunday calls); David Meads (Msg. 13726) (no Sunday calls); Lisa Hallman (Msg. 20291) (no Sunday calls); H00Kie (Msg. 1040) (no weekend calls); Lee C. Clayton (Msg. 1950) (no weekend calls); Sherrell Goggin (Msg. 2247) (no weekend calls); Henry Miller (Msg. 10173) (no weekend calls); Nanagusgus (Msg. 12471) (no weekend calls).

[805] *See, e.g.*, Paul Merchant, Jr. (Msg. 387); Bobby Morris (Msg. 639); Gayle Tanner (Msg. 4505); Anonymous (Msg. 27196).

[806] *See* ARDA-NPRM at 13 (noting it felt no need to comment on this provision because the Commission had proposed no modification, and urging that no customizable calling preferences be allowed); NAA-NPRM at 17.

[807] *See* EPIC-NPRM at 18, 22 (noting that while generally acceptable, the current calling times ''represent only the Commission's judgment on what time of day people most value their privacy,'' and urging the Commission to allow for customizable calling time preferences).

[808] *See* amended Rule § 310.4(b)(1)(iii)(B), discussed above.

truthfully. The amended Rule adopts both modifications, but also provides additional guidance on when the oral disclosures should be made in upsell transactions and what information should be disclosed in those situations.

The Commission received very few comments on these proposed changes. NAAG expressed its support for inclusion of the word ''truthfully'' in this section, noting that however obvious it might seem that mandatory disclosures be made truthfully, abuses have occurred when, for example, a telemarketer misstates the purpose of the call, claiming it is a ''courtesy'' call rather than a sales call.[809] The Commission agrees that the express requirement that the required disclosures be ''truthful'' will benefit consumers, and should impose no additional burden on telemarketers. Thus, this requirement is adopted in the amended Rule.

A few commenters recommended limiting or expanding the provision. ASTA urged the Commission to limit the applicability of parts of the oral disclosure provision so that sellers with whom a customer had a prior business or personal relationship would be exempt from making two particular disclosures: 1) that the purpose of the call is to sell goods and services (§ 310.4(d)(2)); and 2) the nature of the goods and services (§ 310.4(d)(3)).[810] ASTA argued that it does not believe ''situations in which there is a prior business or personal relationship between the parties, are, in practice, subject to the same sort of abuses that the Rule seeks to address by way of [the § 310.4(d)(2) and (3) disclosures].''[811] Tribune made a similar argument, requesting an exemption from compliance with the § 310.4(d) disclosures for newspapers with whom a customer has a prior business relationship. According to Tribune, in many instances, newspapers call current subscribers to ascertain whether the customer is satisfied, and then to offer additional services, such as the weekday paper in addition to an existing Sunday-only subscription; Tribune also believes the required oral disclosures may be off-putting to customers.[812] The Commission does not believe that the existence of a prior or even an ongoing business or personal relationship obviates the need for the required prompt oral disclosures in calls that are, in whole or in part, designed to induce the purchase of goods or services. Therefore, the Commission declines to create exemptions to § 310.4(d).

DOJ recommended that an additional disclosure—the ''seller's title or position in the company''—be added to this section, arguing that such a disclosure would directly address the fraudulent practice wherein a telemarketing sales agent misrepresents that he or she holds a position of great authority within the company on behalf of whom the call is made, such as a claim that he or she is the president of the company.[813] Although the Commission agrees that such misrepresentations could be injurious to consumers, the Commission does not believe that in non-fraudulent solicitations a prompt, truthful disclosure of the telemarketing sales representative's position within the company would be so beneficial to consumers as to outweigh the costs to business of making such an additional disclosure. Further, the Commission believes that it is highly likely that fraudulent telemarketers who resort to such prevarication to induce sales will be in violation of other provisions of the Rule as well.[814] Therefore, the Commission declines to add a disclosure regarding the telemarketing sales agent's position within the company.

A few commenters requested further clarification regarding the meaning of the term ''promptly,'' suggesting that it is too vague to be a useful guideline in the Rule.[815] One of these commenters also sought to clarify the timing of the prompt oral disclosures required by this section in a multiple purpose call.[816] These two issues were discussed at length in the NPRM, and the Commission reiterates here what it has previously stated: 1) the term ''promptly,'' as used in the Rule, means ''at once or without delay, and before any substantive information about a prize, product or service is conveyed to the customer,'' a standard which allows for some flexibility without sacrificing the consumer's need to know certain material information prior to the beginning of any sales pitch; and 2) in ''any multiple purpose call where the seller or telemarketer plans, in at least some of those calls, to sell goods or services, the [§ 310.4(d) disclosures] must be made 'promptly,' during the first part of the call, before the non-sales portion of the call takes place.''[817] The Commission does not believe that any change in the text of the Rule is necessary to achieve clarity regarding these two issues, nor does it believe the suggested modifications would provide greater clarity; thus, the Commission declines to modify this section.

A few commenters suggested that an additional disclosure—of the seller's telephone number—should be added.[818] NASUCA suggested that this number be one useful to consumers who wish to be placed on a seller's ''do-not-call'' list, while Patrick suggested that the number be one consumers could use to report violations of the Rule. Patrick suggested, in the alternative, that the Rule prohibit the failure to provide name, address, and telephone number information for the seller or telemarketer, if such information is requested by the consumer. The Commission previously has expressed its concern that if too many disclosures are required, particularly in the beginning of the call, their effectiveness is diluted. Further, the Commission believes that amended § 310.4(a)(7), regarding transmission of Caller ID, and § 310.4(b)(1)(iii)(B), creating a national ''do-not-call'' registry, will help to mitigate the problem these commenters have proposed to cure. Therefore, the Commission declines to require a disclosure of the seller's telephone number in this section.

As explained in the discussion of § 310.2(dd) above, regarding the definition of ''upselling,'' the Commission believes that upsell transactions are analogous to outbound telephone calls. Therefore, the amended Rule requires that the oral disclosures mandated by § 310.4(d) must be promptly disclosed at the initiation of the upsell if any of the information in these disclosures differs from the disclosures made in the initial transaction. For example, in an external upsell (where there is a second seller), the consumer must be told the identity of the second seller—the one on whose behalf the upsell offer is being made. In an internal upsell, however, the identity of the seller remains the same in both transactions and need not be repeated in the second transaction. Thus, the Commission has inserted the phrase ''or internal or external upsell'' after the

[809] *See* NAAG-NPRM at 47.

[810] *See* ASTA-NPRM at 2.

[811] ASTA-NPRM at 2.

[812] *See* Tribune—NPRM at 9–10.

[813] DOJ-NPRM at 5 (also noting that some fraudulent telemarketers claim to be with government agencies. The Commission notes that such a misrepresentation would violate amended Rule § 310.3(a)(2)(vii)).

[814] For example, such a ''false and misleading'' statement, if made to ''induce any person to pay for goods or services or to induce a charitable contribution,'' would violate amended Rule § 310.3(a)(4).

[815] LSAP-NPRM at 17 (urging that the term ''promptly'' be defined as ''at the outset of the call''); NASUCA-NPRM at 16; Patrick-NPRM at 3 (suggesting that at least the identity of the seller be disclosed ''*first*, before any other information is disclosed'').

[816] *See* NASUCA-NPRM at 16.

[817] 67 FR at 4526 (citing the original SBP).

[818] NASUCA-NPRM at 15; Patrick-NPRM at 4.

term ''outbound telephone call'' in § 310.4(d) of the amended Rule; and has inserted the requirement that ''in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.'' The goal in this provision is to ensure that consumers receive all of the information they need in order to make an informed decision whether to make a purchase,[819] without requiring duplicative or irrelevant disclosures.

*§ 310.4(d)(4) — Sweepstakes disclosure*

Section 310.4(d)(4) of the original Rule required that a telemarketer promptly disclose that no purchase or payment is necessary to be eligible to win a prize or participate in a prize promotion if a prize promotion is offered. In the NPRM, the Commission proposed to modify § 310.4(d)(4) to require that the telemarketer disclose that a purchase will not enhance a customer's chances of winning a prize or sweepstakes, which would make the amended Rule's disclosure requirement consistent with the requirements for direct mail solicitations under the Deceptive Mail Prevention and Enforcement Act (''DMPEA'').[820] As discussed above with regard to the same disclosure in § 310.3(a)(1)(iv), commenters generally supported this proposal.[821]

PMA maintained that the disclosure was unnecessary and that there was no evidence in the record to support adding the disclosure.[822] Nonetheless, PMA stated that, as a gesture of good faith, they would not oppose the change.[823] They asked, however, that the Commission allow them flexibility on when to make the disclosure, rather than mandating that it be made ''promptly,'' as required by § 310.4(d), because the disclosure would be more meaningful if it were delivered in conjunction with the sales solicitation rather than the discussion about the sweepstakes.[824]

The Commission believes that it is important that consumers promptly be put on notice when a call promoting a sweepstakes also includes a sales solicitation. The Commission does not believe it necessary to script the telemarketing call or to define with finite specificity within how many seconds particular disclosures must be made. As with the Rule's requirement that the telemarketer promptly disclose that no purchase or payment is necessary to win a prize,[825] the Commission believes that the disclosure that a purchase will not enhance the consumer's chances of winning may occur ''before or in immediate conjunction with the description of the prize.''[826] As the Commission stated in the original Rule's SBP, this language was included in § 310.4(d)(4) ''to prohibit deceptive telemarketers from separating the disclosure (in that instance, of the fact that no purchase or payment is necessary to win a prize) from the description of the prize, thereby negating or diluting its salutary effect.''[827] Although this guidance does not alter the imperative that the disclosures be made ''promptly''—*i.e.*, ''at once or without delay,'' but ''[a]t a minimum. . . before any sales pitch is given''[828]—it should provide telemarketers of prize promotions the necessary flexibility in making the requisite disclosures.

Therefore, the Commission has determined that it is an abusive telemarketing act or practice to fail to disclose truthfully, promptly, and in a clear and conspicuous manner, in any prize promotion, that no purchase or payment is required to win a prize or participate in a prize promotion, that any purchase or payment will not increase the customer's chances of winning, and, upon request, the no-purchase/no-payment method of participating in the prize promotion.

*§ 310.4(e) — Required oral disclosures in charitable solicitations*

As noted in the NPRM, § 1011(b)(2)(D) of the USA PATRIOT Act mandates that the TSR include a requirement to address abusive practices in the solicitation of charitable contributions.[829] Specifically, the USA PATRIOT Act directs the Commission to include in the Rule:

> a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and to make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.[830]

In response to this mandate, the Commission included in the proposed Rule new § 310.4(e), which requires in calls to solicit charitable contributions the truthful, prompt, clear and conspicuous disclosure of two pieces of information: 1) the identity of the charitable organization on behalf of which the request is being made; and 2) that the purpose of the call is to solicit a charitable contribution.[831] The Commission declined to require the oral disclosure of a charitable organization's mailing address because it was dubious that requiring disclosure of this information in every instance would prove sufficiently beneficial to consumers to justify the costs incurred by telemarketers, and the charities for whom they solicit, of making this disclosure.[832] However, the Commission did pose specific questions on this issue, including whether the disclosure requirement should be triggered only when a donor asks for such information.[833]

Few comments addressed the proposed requirements for disclosures in the solicitation of charitable

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[819] As the Commission noted in the NPRM:

''[I]n external up-selling, when calls are transferred from one seller or telemarketer to another, or when a single telemarketer solicits on behalf of two distinct sellers, it is crucial that consumers . . . clearly understand that they are dealing with separate entities. In the original Rule, the Commission determined that a disclosure of the seller's identity was necessary in every outbound call to enable the customer to make a fully-informed purchasing decision. In the case of a call transferred by one telemarketer to another to induce the purchase of goods or services, or one in which a single telemarketer offers the goods or services of two separate sellers, it is equally important that the consumer know the identity of the second seller, and that the purpose of the second call is to sell goods or services.''

67 FR at 4500. The proposed Rule also required telemarketers on behalf of charitable organizations to adhere to the requirements for upsell transactions. However, the record in this proceeding does not show any evidence that upselling is prevalent in the solicitation of charitable contributions. Therefore, the Commission has deleted any reference to charitable solicitations from the upselling provisions. The Commission will continue to monitor this issue, and, if necessary, may address it in future rule reviews.

[820] *Id.* 39 U.S.C. 3001(k)(3)(A)(II).

[821] NAAG-NPRM at 54-55; NACAA-NPRM at 6-7; NCL-NPRM at 4. *See also* June 2002 Tr. II at 105-15.

[822] PMA-NPRM at 4-8.

[823] PMA-NPRM at 5, 7; ARDA-NPRM at 14-15. *See also* June 2002 Tr. II at 106, 108 (PMA and ARDA state that they do not oppose the disclosure).

[824] June 2002 Tr. II at 106-07. ARDA also requested flexibility in the timing of the disclosure. ARDA-NPRM at 14-15 and June 2002 Tr. II at 108.

[825] This provision is found at § 310.4(d)(4) of the original and amended Rules.

[826] 16 CFR 310.4(d)(4); 60 FR at 43856.

[827] 60 FR at 43856-57.

[828] TSR Compliance Guide at 15. *See also* 60 FR at 43856.

[829] *See* 67 FR at 4522 (discussing the USA PATRIOT Act's mandate to include in the TSR certain prompt disclosures in the solicitations of charitable contributions).

[830] Section 1011(b)(2)(D), Pub. L. 107-56 (Oct. 26, 2001).

[831] Proposed Rule § 310.4(e); *see also* 67 FR at 4522 (including the discussion of the rationale for including these specific disclosures).

[832] 67 FR at 4522.

[833] 67 FR at 4522, 4539.

contributions.[834] AFP agreed that the proposed Rule struck the appropriate balance, by requiring disclosure of both the identity of the charity and the fact that the purpose of the call was to solicit a charitable contribution, but not requiring disclosure of the mailing address of the charity.[835] AFP also noted that the required disclosures are consistent with its own ethics standards and its belief that these disclosures are sufficient to effectuate the purposes of the USA PATRIOT Act.[836] AFP recommended against including a required disclosure of the charitable organization's mailing address, arguing that such information would be of little use to consumers in discerning whether a charity was legitimate, and that the time and distraction involved in disclosing an address would be ''counterproductive to the charitable contribution process.''[837]

Hudson Bay expressed its view that both of the proposed disclosures are unconstitutional.[838] According to Hudson Bay, the requirement that a telefunder promptly disclose that the call is to solicit a charitable contribution runs afoul of the First Amendment because it mandates not only what must be said, but when.[839] Hudson Bay further argues that the mandatory disclosure of the name of the charitable organization on behalf of which the solicitation is made strips charitable organizations of their right to anonymity and violates the First Amendment's guarantee of freedom of association.[840]

As previously noted, the USA PATRIOT Act directs the Commission to include these specific disclosures in the TSR.[841] Congress' purpose in the Telemarketing Act, in requiring telemarketers to disclose basic identifying information in unsolicited outbound telemarketing calls, is to ensure that the consumer is given information promptly that will enable the consumer to decide whether to allow the infringement on his or her time and privacy to go beyond the initial invasion. The Commission believes that the USA PATRIOT Act amendments are consistent with this purpose. Moreover, the Commission believes there is a tight nexus between this purpose and the statutory and regulatory means employed to achieve this purpose. The Commission also believes that these disclosure requirements are very narrowly tailored to impinge as little as possible on protected speech while still accomplishing the purpose Congress intended. The Commission has exercised restraint in implementing this statutory mandate, keeping the disclosure requirements for charitable solicitation telemarketing to the bare minimum necessary to fulfill the purpose of the USA PATRIOT Act amendments. The Commission notes that the Supreme Court has specifically noted that requiring a professional fundraiser ''to disclose unambiguously his or her professional status . . . [is a] narrowly tailored requirement [that] would withstand First Amendment scrutiny.''[842] The Commission believes that if a requirement to disclose one's status as a professional fundraiser would pass First Amendment scrutiny, then so would a requirement to make the disclosures now required by the Rule to fulfill the mandate of the USA PATRIOT Act amendments.

Some commenters recommended that the Commission expand the provision to require additional disclosures in certain circumstances. For example, NAAG recommended that, in the event a paid telefunder is making the charitable solicitation, three additional disclosures be required: ''(1) the name of the caller; (2) the name of the telemarketing company; and (3) the fact that the caller is being paid to solicit.''[843] NCL concurred, suggesting that the Rule require fundraisers to ''identify themselves as well as the charities on whose behalf they are operating.''[844] NAAG and NCL argued that this additional set of disclosures would provide three distinct benefits. First, such disclosures would prevent donors from being deceived about the identity of the solicitor. NAAG noted that in many instances, for-profit fundraisers ''misrepresent that they are affiliated with, or members of, the charity or public safety organization in whose name they are calling.''[845] Second, the information would serve as an important means of identifying potential Rule violators.[846] The third benefit from these suggested disclosure requirements would be the triggering role they would serve, prompting consumers to inquire, of the telefunder or of a state regulatory agency, about the amount of their contribution that will go to charity after the fundraiser takes its share.[847]

The Commission declines to add a mandatory disclosure of the name of the caller in calls to induce charitable contributions. In the initial proposed TSR, the Commission had included such a requirement for all outbound telephone calls;[848] but it was deleted because commenters noted that '''desk names' are commonly used in the industry to protect the safety and privacy of employees, and to protect against potential prejudice and harassment.''[849] The Commission concluded that the disclosure of the seller's identity is most meaningful to consumers, not the name of the individual with whom they are speaking. The Commission can conceive of no reason why this analysis would not apply with equal force in the context of charitable solicitations. Moreover, the Commission is not persuaded that disclosure of this information is necessary to advance the privacy objectives underlying the Commission's authority to prohibit ''abusive'' practices pursuant to § 6102(a)(3) of the Telemarketing Act.[850] Therefore, the Commission declines to include in the amended Rule a requirement that the caller's name be disclosed in charitable telemarketing solicitations.

The Commission also declines to adopt the suggestion that it mandate disclosure of the name of the telemarketing company.[851] In adopting the original Rule, the Commission rejected such a disclosure in the context of the sale of goods or services because it was deemed unnecessary; rather, a requirement to disclose the identity of the seller—which is clearly material to the consumer—was included. In the charitable fundraising context, the Commission believes the identity of the charity is the analogous material item of

[834] As noted above in the section discussing amended § 310.3(d), AARP and NCL noted in their comments in response to the NPRM that they supported the goal of expanding the Rule's ambit to cover charitable solicitations.

[835] *See* AFP-NPRM at 3.

[836] *Id.*

[837] *Id.* (noting, however, that it had no objection to requiring the disclosure of the mailing address, provided the donor asked for such information).

[838] *See* Hudson Bay-Goodman-NPRM at 6-7.

[839] *Id.* (*citing Riley*, 441 [sic] U.S. at 791).

[840] *Id.* at 7 (*citing Talley v. California*, 362 U.S. 60 (1960)).

[841] USA PATRIOT Act, § 1011.

[842] *Riley*, 487 U.S. at 799, n.11.

[843] NAAG-NPRM at 52.

[844] NCL-NPRM at 11. *See also* Make-A-Wish-NPRM at 6 (recommending adding a disclosure that the professional fundraiser is being paid for its services); NASCO-NPRM at 6.

[845] NAAG-NPRM at 52.

[846] NCL-NPRM at 11.

[847] NAAG-NPRM at 52; *see also* NCL at 11.

[848] *See* 60 FR at 8331 (§ 310.4(d)(1)(i)).

[849] 60 FR at 30418.

[850] *See* discussion of § 310.4 above, describing the Commission's analysis of its authority to prohibit ''abusive'' practices.

[851] The Commission notes, however, as discussed by NAAG, that at least 20 states have statutes requiring such a disclosure. NAAG-NPRM at 52. The Commission believes that the states, which have extensive regulatory authority over charities, and extensive experience in such regulation, may continue to require disclosures beyond those mandated by the TSR, and notes that compliance with the TSR will not fulfill telemarketers obligations under any such state laws or regulations.

information. The Commission believes there is a limit to the number of distinct items of information that can reasonably be absorbed at the beginning of a solicitation call. This being the case, the Commission believes that the charity's identity is a more meaningful piece of information than the name of the professional fundraising company. In this regard, it is noteworthy that the USA PATRIOT Act did not specifically require such a disclosure.[852] Arguably, disclosure of the identity of the telemarketer may be beneficial to potential donors because it may prompt them to think and inquire about the portion of a contribution that will be consumed by a professional fundraiser's fee; but the Commission believes the record falls short of showing that the benefits of mandating such a disclosure would outweigh the burdens it would impose upon legitimate charities who choose to conduct their fundraising efforts using professional telemarketers.[853] Therefore, the Commission does not believe the current record supports a finding that disclosure of this information is necessary to prevent ''abusive'' practices pursuant to § 6102(a)(3) of the Telemarketing Act.[854]

For similar reasons, the Commission also declines to require a mandatory disclosure that the telemarketer is a paid fundraiser. The comments on this issue reflect considerable concern about instances where only a minuscule portion of contributions are devoted to the actual support of a charitable organization's mission, while the telefunder's fee gobbles up the lion's share. This occurs in some instances,[855] but the record does not support an inference that such a scenario inevitably follows from the use of paid telefunders by charitable organizations, and there is evidence on the record tending to show that the opposite is often true: the use of professional telemarketers saves charitable organizations money—as compared with in-house telephone fundraising.[856]

Additionally, the Commission is concerned here, as it is with the other recommended disclosures, about the potential negative consequences that derive from overloading the beginning of a charitable solicitation call. Further, it is notable that the USA PATRIOT Act did not specifically require such a disclosure.[857] While disclosure of the identity of the telemarketer may, arguably, be beneficial to potential donors because it may prompt them to think and inquire about the proportion of a contribution that will be consumed by a professional fundraiser's fee, the Commission believes the record does not support mandating such a disclosure because of the burden the disclosure would impose on legitimate charities who choose to conduct their fundraising efforts using professional telemarketers.[858] A showing of these benefits would be necessary to support a requirement for disclosure of this information. Therefore, the Commission declines at this time to add a requirement that the telemarketer disclose that he or she is being paid to solicit charitable contributions.

*Other issues regarding abusive practices raised in response to the NPRM.*

Commenters responded to the Commission's questions in the NPRM regarding additional issues related to abusive practices that had surfaced during the Rule Review, in particular, prison-based telemarketing. Commenters also raised other issues: telemarketers' use of courier services to pick up payments from consumers; telemarketers' targeting of vulnerable groups; and the sale of victim lists. Each of these issues, and the reasoning behind the Commission's responses to them, are discussed in detail below.

*Prisoner telemarketing*: During the Rule Review, the Commission received several comments describing problems that had occurred when sellers or telemarketers used prison inmates to telemarket goods or services. These commenters recommended that the Commission ban the use of prisoners as telemarketers or, in the alternative, tightly regulate it, including requiring that inmates disclose their status as prisoners when they make calls to, or receive calls from, the public.[859] These commenters cited several graphic incidents in which inmates have abused consumers' information and other resources to which they had access through inmate telemarketing to make improper, invasive, and illegal contact with members of the public.[860]

Specifically, these commenters pointed out that, while working as telemarketers, inmates inevitably gain access to personal information about individuals, including minors, that may endanger the lives and safety of those they call.[861] In the NPRM, the Commission stated that it was extremely concerned about the potential misuse of personal information and abusive telemarketing activity in connection with prison-based telemarketing, but

[852] *See* USA PATRIOT Act § 1011(b)(2)(D). The absence of such a requirement from the USA PATRIOT Act is noteworthy because such a disclosure was specifically approved in *Riley*. 487 U.S. at 799, n.11.

[853] As noted by Not-for-Profit Coalition, Hudson Bay and others, telefunders play a critical role in enabling charitable organizations, particularly smaller ones, to raise funds necessary to fund their missions. Not-for-Profit Coalition-NPRM at 17-20; Hudson Bay-Goodman-NPRM at 2.

[854] The Commission believes that, as in the case of the required oral disclosures in the sale of goods or services, the failure to make certain material disclosures in the solicitation of a charitable contribution rises to the level of an abusive practice under the Rule. As noted in the NPRM, the Commission believes that the prompt disclosure of certain information in a telemarketing call to induce the sale of goods or services is necessary to enable a consumer ''to decide whether to allow the infringement on his or her time and privacy to go beyond the initial invasion.'' 67 FR at 4511. Similarly, a consumer who receives a telemarketing solicitation to induce a charitable contribution must have certain information to determine if he or she wishes to continue the call. At this time, the Commission believes it prudent to require only the disclosure of the name of the charity on whose behalf the fundraising is occurring and that the call is being made to induce a charitable contribution. However, the Commission will continue to study the issue and will revisit it during the next Rule Review.

[855] *See, e.g.*, Pennies for Charity, 2001, New York Attorney General, http://www.oag.state.ny.us/charities/pennies01/penintro.html (accessed Oct. 8, 2002) (stating that ''charities retained an average of 31.5% of the funds raised by telemarketers registered to solicit contributions in New York in 2000. Some of the charities received much less than that and some received nothing at all.''); NASCO-NPRM at 2 (citing the New York Attorney General's report as well as a 1999 report by the California Attorney General showing charities received only 48.2 percent of funds raised by telemarketers who solicited on their behalf in California that year). *See also* Private Citizen-NPRM at 5.

[856] Hudson Bay-Goodman-NPRM at 2.

[857] *See* USA PATRIOT Act § 1011(b)(2)(D). This omission, too, is conspicuous in light of the fact that numerous states have included this mandatory disclosure and that such a disclosure is, at least in dicta, sanctioned by the Court in *Riley*. *See* NAAG-NPRM at 52; *Riley*, 487 U.S. at 799, n.11.

[858] *See* note 856 above.

[859] *See generally* Jordan-RR, S. Gardner-RR, Budro-RR, and Warren-RR. In addition, this issue received considerable attention during the Rule Review Forum. See RR Tr. at 220-45, 367-75, 443-47.

[860] For example, in its 1997 report to Congress on the privacy implications of individual reference services, the FTC cited an example where a prison inmate (and convicted rapist), who was employed as a data processor, used his access to a database containing personal information to compose and send a threatening letter to an Ohio grandmother. *See* FTC, ''Individual Reference Services: A Report to Congress'' (Dec. 1997), at 16. Several states, including Wisconsin, Nevada, and Massachusetts, have considered legislation that would require their Departments of Correction to restrict prisoners' access to personal information about individuals who are not prisoners and/or to require prisoners conducting telephone solicitations or answering inbound calls to identify themselves as prisoners. The Utah State Prison stopped using inmates as telemarketers after conceding that they could not ensure that prisoners would not misuse personal information they obtain. *See Prison to End Telemarketing By Inmates*, SALT LAKE TRIB., June 1, 2000, at B1. In addition, DMA noted that it had supported legislation banning the use of inmates in remote sales situations because these sales require the telemarketer to get personal information from the consumer. *See* RR Tr. at 371-72.

[861] *See generally* Jordan-RR, Gardner-RR, Warren-RR, and Budro-RR.

also that some public benefit likely came from inmate work programs that entail telemarketing. The Commission noted that the record contained insufficient information upon which to base a proposal regarding prisoner telemarketing or to assess the costs and benefits of such a proposal. Therefore, the NPRM posed several questions to elicit comment on what action by the Commission, if any, might be appropriate regarding this issue.

In response to the NPRM, the Commission received several comments on this issue.[862] In addition, the June 2002 Forum devoted a session to the topic.[863] Based on the entire record in this proceeding, the Commission has determined that any problems associated with the use of prison-based telemarketing would be more appropriately handled by the state legislatures and regulatory agencies than by adding a provision to the TSR.

The comments show that the number of inmates used for commercial telemarketing purposes is a small percentage of the prisoners who are employed in inmate work programs.[864] The majority of prison-based telemarketing programs are used by federal and state governments, often for such tasks as providing information to consumers who call state tourist bureaus.[865] A 1999 GAO Report reveals that only seven percent of the inmates who had access to consumer information were performing work for private firms, while 93 percent were working for government agencies, performing tasks such as answering calls from the public to state tourist centers.[866] Thus, the vast majority of prison-based telemarketing would be outside the ambit of the Rule because it does not involve ''telemarketing'' as that term is defined in the Rule.[867]

EPI estimates that there are only ten private companies in the United States who use prisoners as telemarketers, that these ten companies employ approximately 300 inmates in prison-based telemarketing programs, and that all these programs use inmates housed in state prisons.[868] Commenters noted that the state prison work programs are heavily regulated by the state legislatures and Departments of Correction.[869] EPI points out that the federally-administered Prison Industry Enhancement (''PIE'') program was created to encourage the states and local governments to establish inmate work programs that mimic the private work environment. In passing the legislation, Congress elected to have the states manage these programs.[870]

Opponents of the use of prison-based telemarketing cited the potential for misuse of consumers' personal information by inmates, but were unable to point to actual incidents other than the isolated example raised during the Rule Review.[871] EPI noted that, after an exhaustive search, the 1999 GAO study was able to identify only nine incidents of misuse over an eight-year period, and only three of those nine incidents were the result of telemarketing for a private firm.[872] Commenters noted that similar problems occur, perhaps with even more frequency, among non-prisoner or civilian telemarketers.[873]

The proponents of prison-based telemarketing pointed out the significant social and economic benefits that accrue to the inmates, to the states, and to society as a whole by having inmates engage in productive work that develops skills that can later be transferred to a private sector job once the inmate is released.[874] They indicate that inmate jobs serve as a source of funds to compensate crime victims, provide financial support to children of inmates, repay taxpayers for the inmates' room and board, and are an effective tool for rehabilitation and reducing recidivism.[875] They maintain that inmate jobs are ''vital to helping keep prisons safe and secure and offering meaningful educational and vocational training to aid in successful re-entry.''[876] These commenters outlined the significant precautions taken in screening and monitoring inmates for these jobs.[877]

Based on the record in this proceeding, the Commission believes that, while there is some evidence of consumer injury in a very few documented cases, it is not possible to conclude that the risk of consumer harm outweighs the countervailing benefits. Such a conclusion would be necessary to condemn prison-based telemarketing as an abusive practice.[878] The extensive system of state regulation, coupled with the local nature of the work programs, persuades the Commission that any problems associated with prison-based telemarketing would best be handled at the state level.

*Use of couriers*: In response to the NPRM, AARP again raised its concern that the Commission ban the practice of allowing couriers, including overnight mail delivery services, to pick up payment for goods and services purchased through telemarketing.[879] AARP points out that the use of couriers in sweepstakes and lottery scams is prevalent, and that some unscrupulous telemarketers use couriers not only to quickly separate the consumer from his or her money, but to make a ''contest seem more 'official.'''[880] AARP notes that, in some instances, even legitimate companies benefit unfairly from the use of couriers by avoiding oversight by the U.S. Postal Service, and by ensuring that non-refundable ''deposits'' are secured, diminishing the likelihood, in many instances, that a consumer would back out of a transaction.[881] NACAA concurred, and noted its further concern that in-person payment pickups by those posing as public safety officers is a practice perhaps even more harmful to consumers who are intimidated into quickly giving a contribution.[882]

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[862] DialAmerica-NPRM at 28; Spiegel-NPRM at 1; Worsham-NPRM at 6. In addition, *see generally* CURE-NPRM; CCA-NPRM; UNICOR-NPRM; EPI-NPRM; and EPI-Supp.

[863] June 2002 Tr. III at 115-57.

[864] The comments indicate that federal inmates are not used as telemarketers except in connection with sales to the federal government. (UNICOR is the trade name for Federal Prison Industries, Inc., a wholly-owned government corporation within the U.S. Department of Justice, Federal Bureau of Prisons. UNICOR sells its products primarily to federal agencies and uses federal prisoners in connection with those sales. In addition to calling UNICOR's federal government agencies, the federal prisoners also call the businesses that support UNICOR's federal sales.) UNICOR-NPRM at 2; *see also* EPI-Supp. at 1. UNICOR's sales using prisoner-based telemarketing would not be covered by the TSR. Section 310.6(g) of the Rule exempts telemarketing sales to businesses. In addition, sales to government entities do not fall within the Rule's definition of ''person.''

[865] EPI-Supp. at 1.

[866] ''Prison Work Programs, Inmates'' Access to Personal Information,'' GAO/GGD-99-146, cited in EPI-NPRM at 13, n.18. *See also* EPI-Supp. at 1 (All prisoners employed as telemarketers by the private sector are inmates in state prisons, regulated by state agencies.).

[867] ''Telemarketing'' is defined, in part, as a ''plan, program or campaign which is conducted to induce the purchase of goods or services or a charitable contribution . . .'' The prison-based telemarketing used by government agencies does not appear to involve calls to ''induce the purchase of goods or services.''

[868] EPI-NPRM at 2, 3, 9.

[869] CCA-NPRM at 2; EPI-NPRM at 3, 14

[870] EPI-NPRM at 3.

[871] DialAmerica-NPRM at 28; Spiegel-NPRM at 1; Worsham-NPRM at 6. *See also* June 2002 Tr. III at 115-57.

[872] EPI-NPRM at 10.

[873] CURE-NPRM at 1; EPI-NPRM at 13-14. *See also* June 2002 Tr. III 115-57.

[874] *See generally* CURE-NPRM; CCA-NPRM; EPI-NPRM; and UNICOR-NPRM. *See also* June 2002 Tr. III at 115-57.

[875] *Id.*

[876] CCA-NPRM at 1. *See also* EPI-NPRM at 5-8; *and generally* CURE-NPRM; and UNICOR-NPRM. *See also* June 2002 Tr. III at 115-57.

[877] EPI-NPRM at 5-8. *See also* June 2002 Tr. III at 115-57.

[878] *See* 67 FR at 4510-12.

[879] AARP-NPRM at 9-10.

[880] *Id.* (citing NAAG's comment in the original rulemaking proceeding).

[881] AARP-NPRM at 9-10.

[882] *See* NACAA-NPRM at 10-11.

The record does not contain any new evidence regarding the potential harm that accrues from the use of couriers, or any new evidence regarding the benefits to legitimate companies of being able to use couriers to collect payment. Although the Commission recognizes that fraudulent telemarketers often use couriers to collect payment, it continues to believe that ''[t]here is nothing inherently deceptive or abusive about the use of couriers by legitimate business.''[883] Moreover, the Commission reiterates its view that telemarketers who seek to use courier services to defraud consumers are likely to ''engage in other acts or practices that clearly are deceptive or abusive, and that are prohibited by this Rule.''[884] Therefore, the Commission declines to adopt the recommendation to ban the use of couriers to collect payment for goods or services sold through telemarketing.

*Targeting vulnerable groups and the sale of victim lists*: DOJ proposed that the Commission include in the amended Rule a provision that ''would prohibit a seller or telemarketer who is engaged in any act or practice that violates §§ 310.3(a), (c), or (d) or 310.4(a)-(e) from purchasing lists of prospective contacts from any source.''[885] This suggested change responds to the problems of the sale of victim lists and the targeting of vulnerable groups. As DOJ explains, such a provision would ''ensure that any injunctive relief it sought in enforcement proceedings would include a prohibition on any further purchases of 'mooch lists' by any individual or corporate defendants in the action,'' and lay the foundation for criminal contempt proceedings if such an injunction were violated.[886] DOJ also argued that such an injunction, served on ''any list provider known to have done business with the fraudulent telemarketer,'' would limit such telemarketer's ability to resume fraudulent solicitations.[887] Finally, DOJ noted that such a provision ''would enable the Commission to address, at least in part, the targeting of vulnerable victims by fraudulent telemarketers, without having to grapple with the difficulties of defining what constitutes ''vulnerability'' or ''targeting.''[888]

After careful consideration, the Commission has determined not to adopt the provision proposed by DOJ. The Commission believes that it is unnecessary to include an explicit prohibition against Rule violators purchasing lists of prospective contacts to provide the benefits detailed by DOJ in its comment. In numerous cases, the Commission has already included a similar prohibition in final orders that achieves the goals articulated by DOJ.[889] Thus, the Commission declines to include a provision to this effect in the amended Rule.

*E. Section 310.5 — Recordkeeping*

Section 310.5 of the original Rule identifies the kinds of records that must be kept by sellers and telemarketers, and the time period for retention of these records.[890] In the NPRM, the Commission noted that it had declined to adopt any of the suggested modifications to this section submitted pursuant to the Rule Review. Specifically, the Commission declined to: (1) reduce the record retention period to less than 24 months; or (2) tie the duration of record retention either to the value of the goods or services sold or the refund policy of the seller, believing that such modifications would minimize the effectiveness of this provision in law enforcement.[891] The Commission did note that the effect of the USA PATRIOT Act amendments was to extend the recordkeeping requirement to include not only calls to induce the purchase of goods or services, but also calls to induce charitable contributions.[892] The only explicit change to the language of the section to implement the USA PATRIOT Act amendments was to add the phrase ''or solicitations of charitable contributions'' to § 310.5(a)(4) following the phrase ''employees directly involved in telephone sales.''[893]

Very few comments addressed the recordkeeping requirements set forth in § 310.5. ARDA noted that it ''agrees with the Commission and feels that the current provisions are adequate.''[894] DMA-NonProfit stated that ''imposing burdensome and lengthy (two-year) recordkeeping responsibilities'' on charities would hurt the ability of charities, especially small ones, because it would divert funds away from fulfillment of charities' missions.[895] The Commission believes that the recordkeeping burden on telemarketers who solicit on behalf of charities will be minimal. As noted in the SBP for the original Rule, the recordkeeping provision was already tailored to ''strike a balance between minimizing the recordkeeping burden on industry and retaining the records necessary to pursue law enforcement actions. . .''[896] In addition, the Commission believes that the records required to be maintained are those commonly maintained by businesses in the ordinary course of business.[897] The Commission believes that, as applied to telemarketers who solicit on behalf of charities, the burden of compliance with the recordkeeping provision will be further lessened because many of the recordkeeping provisions will be inapplicable in the charitable solicitation context, or are burdens typically borne by the telemarketer, not the organization on whose behalf the calls are made.[898]

NEMA requested that the Commission consider the recordkeeping burden on energy marketers who must, pursuant to their self-regulatory guidelines, already

[883] 60 FR at 30415.

[884] *Id.*

[885] DOJ-NPRM at 7.

[886] *Id.*

[887] *Id.*

[888] *Id.*

[889] *See, e.g., FTC v. Fed. Data Servs.*, No. 00-6462-CV-Ferguson (S.D. Fla. filed Apr. 3, 2000) (Stipulated final judgment entered Jan. 9, 2001); *FTC v. Data Med. Capital, Inc.*, No. SA-CV-99-1266AHS (EHC) (S.D. Cal. filed Oct. 14, 1999) (Stipulated final order for permanent injunction and other settlement of claims entered July 13, 2001); *FTC v. RJB Telecom, Inc.*, No. CIV002017PHXEHC (D. Ariz. filed Oct. 25, 2000) (Stipulated final judgment and order for permanent injunction filed Aug. 27, 2001); *FTC v. Story d/b/a Network Publ'ns.*, No. 3-99CV0968-L (N.D. Tex. filed Apr. 25, 1999) (Stipulated order for permanent injunction and civil penalty filed June 6, 2000).

[890] 16 CFR 310.5.

[891] 67 FR at 4527-28.

[892] 67 FR at 4528.

[893] Due to an oversight, the text of the NPRM noted the correct language of the provision (''or solicitations of charitable contributions''), while the text of the proposed Rule included an abbreviated version (''or solicitations'').

[894] ARDA-NPRM at 17. ARDA did reiterate, however, its concern that ''overlapping, inconsistent, and conflicting state laws create a substantial burden.''

[895] DMA-NonProfit-NPRM at 16.

[896] 60 FR at 43857.

[897] *Id.*

[898] For example, § 310.5(a)(2) only applies when the offer includes a prize promotion, a circumstance unlikely to be implicated in most charitable solicitations. Section 310.5(a)(3) only applies in the commercial solicitation context, as it requires maintenance of records showing information about ''customers.'' Section 310.5(a)(4) is a requirement typically borne by telemarketers, and the Commission believes that charitable organizations are unlikely to incur additional costs of compliance with this provision as a result of the Rule's inclusion of charitable solicitations. The Commission does not believe that compliance with amended § 310.5(a)(5), which requires that all verifiable authorizations or records of express informed consent or express agreement required to be provided under the Rule be maintained will be unduly burdensome to charities who are less likely to avail themselves of the marketing methods that implicate these Rule requirements. Therefore, the only provision of the recordkeeping section that is likely to affect charities is § 310.5(a)(1), the requirement that ''[a]ll substantially different advertising, brochures, telemarketing scripts, and promotional materials'' be maintained. To the extent that retention of such materials is not already customary in the non-profit sector, the Commission believes that the burden of compliance is offset by the corresponding law enforcement benefits that accrue from this provision.

maintain certain records.[899] As noted above in the discussion of the express verifiable authorization provision, § 310.3(a)(3)(ii), the Commission believes that sellers, when they accept payment via methods that are novel or lack certain fundamental consumer protections, must obtain express verifiable authorization by any of the three means allowed by the amended Rule. The maintenance of such records is also necessary to ensure the law enforcement goals of the recordkeeping provision.

Finally, ERA noted in its supplemental comment that it believed that it would be expensive for telemarketers conducting upsells to comply with the Rule's recordkeeping requirements.[900] As addressed above in the discussion of § 310.4(a)(6), the Commission believes that both because the cost of digital audio recording and storage is decreasing, and because of the limited circumstances in which such recording is required under the Rule, the burden on sellers who choose to market goods and services using a combination of a ''free-to-pay conversion'' coupled with preacquired account information is offset by the consumer protection benefits that will accrue from recording and maintaining consumers' express informed consent in these circumstances.

Thus, the only modification to the language of § 310.5(a)(5) in the amended Rule is to require that in addition to retaining all verifiable authorizations, a seller or telemarketer must keep all ''records of express informed consent or express agreement'' for 24 months. This modification is necessitated by the introduction of these two terms in § 310.4(a)(6), dealing with unauthorized billing, and § 310.4(b)(1)(iii)(B)(*i*), addressing permission to a seller to call despite a consumer's inclusion on the national ''do-not-call'' registry. The Commission believes it is necessary for a seller or telemarketer to retain such records of express informed consent and express agreement to enable the Commission and the states to determine compliance with these provisions of the Rule.

*F. Section 310.6 — Exemptions*

Section 310.6 exempts certain telemarketing activities from the Rule's coverage.[901] The exemptions to the Rule were designed to ensure that legitimate businesses are not unduly burdened by the Rule.[902] Based on the record in this proceeding, and on its law enforcement experience, the Commission has determined to add an exemption, § 310.6(a), to specifically exempt outbound calls to solicit charitable contributions from the national ''do-not-call'' registry provisions of the amended Rule. In addition, the Commission has determined to modify each of the subsections of the original Rule that are now found in renumbered § 310.6(b).

The Commission amends newly renumbered §§ 310.6(b)(1), (2), and (3)[903] to require telemarketers and sellers of pay-per-call services, franchises, and those whose sales involve a face-to-face meeting before consummation of the transaction, to comply with the ''do-not-call'' and certain other provisions of § 310.4.

The Commission amends renumbered § 310.6(b)(4),[904] which exempts inbound calls that are not a result of a solicitation, to make this exemption unavailable to upsell transactions and to calls in response to a message left pursuant to the abandoned call safe harbor provision in § 310.4(b)(4)(iii).

The Commission amends the general media exemption, now renumbered § 310.6(b)(5),[905] and the direct mail exemption, now renumbered § 310.6(b)(6),[906] to make these exemptions unavailable to upsells, and to telemarketers of credit card loss protection plans and business opportunities other than business arrangements covered by the Franchise Rule. In addition, the amended Rule makes clear that email and facsimile messages are direct mail for purposes of the Rule. Finally, the amended Rule modifies the proposed business-to-business exemption, now at § 310.6(b)(7)[907] to clarify that sellers and telemarketers of nondurable office or cleaning supplies need not comply with the amended Rule's ''do-not-call'' provisions.

In addition, the amended Rule removes the proposal that would have made the business-to-business exemption unavailable to the telemarketing of Web services, Internet services, and charitable solicitations to businesses. Pursuant to the USA PATRIOT Act amendments to the Telemarketing Act, the Commission amends the Rule to expand several of the exemptions to encompass calls to induce charitable solicitations. Thus, the amended Rule exempts: charitable solicitation calls that are followed by face-to-face payment, § 310.6(b)(3); prospective donors' inbound calls not prompted by a solicitation, § 310.6(b)(4); charitable solicitation calls placed in response to general media advertising, § 310.6(b)(5); and donors' inbound calls placed in response to direct mail solicitations that comply with § 310.4(e). In the NPRM, the Commission proposed to make the business-to-business exemption unavailable for charitable solicitation calls. Based upon the record in this proceeding, the Commission has determined that it should not proceed with this proposal.

*§§ 310.6(b)(1), (2), and (3) — Exemptions for pay-per-call services, franchising, and face-to-face transactions*

Section 310.6(a) of the original Rule exempts all transactions subject to the Commission's Pay-Per-Call Rule.[908] Similarly, § 310.6(b) exempts transactions subject to the Commission's Franchise Rule.[909] Section 310.6(c) exempts transactions in which the sale of goods or services is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation by the seller.[910] In the NPRM, the Commission proposed to retain the exemptions for pay-per-call services, franchising, and face-to-face transactions,[911] and require

[899] NEMA-NPRM at 8-10.

[900] ERA-Supp. at 7.

[901] Specifically, the original Rule exempts: (1) goods and services subject to the Commission's Pay-Per-Call Rule and Franchise Rule; (2) telemarketing sales consummated after face-to-face transactions; (3) inbound telephone calls that are not the result of any solicitation by the seller or telemarketer; (4) telephone calls in response to a general media advertisement (except those related to investment opportunities, credit repair, ''recovery,'' or advance fee loan services); (5) inbound telephone calls in response to direct mail solicitations that truthfully disclose all material information (except solicitations relating to prize promotions, investment opportunities, credit repair, ''recovery,'' or advance fee loan services); and (6) business-to-business telemarketing (except calls involving the retail sale of nondurable office or cleaning supplies).

[902] 60 FR at 43859.

[903] These exemptions were found at § § 310.6(a), (b), and (c) of the original Rule.

[904] This provision was § 310.6(d) in the original Rule.

[905] The general media exemption was at § 310.6(e) in the original Rule.

[906] The direct mail exemption was at § 310.6(f) in the original Rule.

[907] The business-to-business exemption was at § 310.6(g) in the original Rule.

[908] The renumbered exemption in the amended Rule is found at § 310.6(b)(1).

[909] The renumbered exemption in the amended Rule is found at § 310.6(b)(2).

[910] Face-to-face transactions are also covered by the Commission's Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR 429. This exemption has been renumbered in the amended Rule and is now found at § 310.6(b)(3).

[911] No modifications to § § 310.6(b)(1) and (2) are necessary to implement the USA PATRIOT Act amendments because charitable solicitations are not likely to be combined with pay-per-call or franchise sales. Therefore, there is no need to expressly exempt such an unlikely scenario from TSR coverage. However, it is necessary to amend

telemarketers selling these exempted goods and services to comply with § 310.4(a)(1) (prohibiting threats, intimidation, or use of profane or obscene language), § 310.4(a)(7) (requiring transmission of Caller ID), § 310.4(b) (prohibiting abusive pattern of calls and requiring compliance with ''do-not-call'' provisions), and § 310.4(c) (calling time restrictions).

The NPRM pointed out that the Rule Review record contained ample evidence of consumers' increasing frustration with unwanted telemarketing calls, including those soliciting for pay-per-call services or sales appointments.[912] A number of participants in the Rule Review Forum concurred that the ''do-not-call'' provision of the Rule should also be applicable to calls where a seller attempts to set up an in-person sales meeting at a later date.[913] For these reasons, the Commission proposed making face-to-face, franchise, and pay-per-call transactions subject to the ''do-not-call,'' calling time restriction, and certain other abusive practices provisions in § 310.4.

Consumer and privacy advocates, as well as state regulators, supported the Commission's proposal to make these transactions subject to the ''do-not-call'' and certain other provisions of § 310.4.[914] They recommended that, in order to be effective, a ''do-not-call'' registry should have as few exemptions as possible. PRC pointed out:

> [T]elemarketing as a business practice transcends the boundaries of regulated and unregulated industries. So-called ''cold calling'' is a common marketing technique, used by the most established regulated entity down to the fraudulent ''boiler room'' that is here today and gone tomorrow.
> Each type of entity—and all those in between that make unwanted telephone calls to a private home—contribute to privacy invasions, costs for devices to stop the invasions, and the overall annoyance factor voiced so strongly by the public. For this reason, telemarketing abuses can only be curtailed if the practice itself— rather than the type of business involved—is subject to the Commission's rules.[915]

The Commission received no comments opposing application of the ''do-not-call'' and other abusive practices provisions to pay-per-call transactions. With regard to transactions subject to the Commission's Franchise Rule, industry commenters expressed concern about ambiguities on how the ''do-not-call'' and calling time restrictions would be applied when inbound calls are converted to outbound calls.[916] The Commission has addressed this issue in its discussions above of the definition of ''outbound call'' and required disclosures in upsell transactions. IFA also noted that compliance with a national ''do-not-call'' registry would be costly, particularly if the registry does not contain an exemption for established business relationships and does not preempt state ''do-not-call'' laws.[917] The Commission has addressed these issues in its discussion above regarding the national ''do-not-call'' registry.

*Face-to-face transactions*: Industry commenters generally opposed making face-to-face transactions subject to the ''do-not-call,'' calling time restriction, and certain other abusive practices provisions.[918] These commenters argued that face-to-face transactions should continue to be exempt because their practices are already heavily regulated by the states and by the Commission through other FTC rules and thus are less susceptible to abusive practices.[919] However, the national ''do-not-call'' registry is not focused on fraud, but rather on consumer privacy. The Commission agrees that the incidence of fraud may be diminished in face-to-face transactions, where the transactions are subject to regulation by other Commission rules or by state regulations. For that reason, the Commission has retained the exemption for face-to-face transactions from the provisions of the Rule that address deceptive or other abusive practices. However, the commenters failed to provide arguments showing why they should be exempted from regulations covering the particular abusive practices set forth in the Commission's proposal— *i.e.*, a national ''do-not-call'' registry, calling time restrictions, the prohibition against denying or interfering with a consumer's right to be placed on a ''do-not-call'' list, the requirement to transmit Caller ID information, and the prohibition against threats and intimidation.

NAR argued that Congress intended the TSR to address abusive, deceptive, and fraudulent telemarketing practices, not to regulate or prohibit a single telephone call from a real estate professional that simply provides information to a consumer.[920] Transactions subject to the Commission's amended Rule (and thus subject to the national ''do-not-call'' registry) are those that fall within the definition of ''telemarketing,'' *i.e.*, ''a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call.''[921] A single, isolated telephone call would not be part of a plan, program, or campaign and thus would not fall within the definition of ''telemarketing.'' Furthermore, it is unlikely that the majority of real estate agents conduct campaigns of outbound calls to solicit potential customers who live out-of-state. Most of the outbound solicitation calls made by real estate agents are probably intrastate calls that would be excluded from the Rule's coverage. However, if a real estate agent routinely places outbound calls to solicit potential customers in other states, those calls, in the aggregate, would fall within the definition of ''a plan, pattern, or campaign'' of outbound calls and would be subject to the Rule.

NAR also argued that a call to set up a meeting does not fall within the definition of ''telemarketing'' because such calls do not involve the inducement to purchase using the telephone, but rather non-deceptive

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§ 310.6(b)(3) to exempt charitable solicitations that entail a face-to-face meeting before the donor pays.

[912] 67 FR at 4516-18. One consumer who spoke during the public participation portion of the DNC Forum noted frustration about her inability to invoke her right not to be called again by a company that called her to solicit a sales appointment. *See generally* DNC Tr. at 241-46 (Mey). *See also FTC v. Access Resource Servs.*, No. 02-60226 CIV GOLD (S.D. Fla. filed Feb. 13, 2002) (regarding Miss Cleo's psychic services where psychics continued to call consumers despite repeated requests from the consumer to stop calling).

[913] *See* RR Tr. at 291-96.

[914] EPIC-NPRM at 20; PRC-NPRM at 3-4 (there should be no exemptions whatsoever from ''do-not-call'' registry); FCA-NPRM at 1-2 (intrastate calls should not be exempt); NAAG-NPRM at 57; NFDA-NPRM at 5 (in connection with the face-to-face transaction exemption, telemarketers should also be required to comply with the oral disclosure requirements of § 310.4(d)).

[915] PRC-NPRM at 3-4.

[916] Car Wash Guys-NPRM at 51-56; IFA-NPRM at 2; NFC-NPRM at 3.

[917] IFA-NPRM at 2.

[918] *See generally* Craftmatic-NPRM; DSA-NPRM; NAR-NPRM; ICFA-NPRM at 2-3; Insight-NPRM. *See also* June 2002 Tr. III at 157-226. *But see* ARDA-NPRM at 2, 7-9, which supports creation of a national ''do-not-call'' registry as long as the registry preempts state laws and the Commission provides an exemption for established business relationships.

[919] *See, e.g.* DSA-NPRM at 6-7; NAR-NPRM at 4; June 2002 Tr. III 157-226.

[920] NAR-NPRM at 1-2. Similarly, DSA notes that many of the calls by direct sellers involve single telephone calls to individuals with whom the seller has a personal relationship. DSA maintains that calls to individuals with whom an on-going commercial or personal relationship exists are reasonable, frequently welcome, and expected by the consumer, and therefore suggests that the Commission provide an exemption for a prior business or personal relationship. DSA-NPRM at 5-8. As discussed above in the section regarding the national ''do-not-call'' registry, the amended Rule provides an exemption for ''established business relationships.''

[921] Amended Rule § 310.2(cc).

communication of information about services that are not offered or made available for purchase in a phone conversation.[922] However, the definition of ''telemarketing'' does not require that the purchase be made during the telephone conversation. The definition simply states that the call be ''conducted to induce the purchase of goods or services.'' The inducement could be made during the telephone call, or it could be in the form of setting up a subsequent face-to-face meeting at which an additional sales presentation could take place.

In summary, the Telemarketing Act mandates that the Commission's Rule address abusive telemarketing practices and specifically mandates that the Commission's Rule include a prohibition on calls that a reasonable consumer would consider coercive or abusive of the consumer's right to privacy, as well as restrictions on calling times.[923] The rulemaking record shows that face-to-face transactions are *not* less susceptible to certain abusive practices prohibited in § 310.4.[924] For this reason, the Commission has determined that telemarketing calls to solicit a face-to-face presentation or the purchase of pay-per-call services should be subject to certain Rule provisions designed to limit abusive practices. Because franchise sales generally involve a face-to-face meeting at some point, these transactions are simply another type of face-to-face transaction and thus the telemarketing of franchises should be held to the same standard.

Therefore, the Commission retains the exemptions for pay-per-call services, franchising, and face-to-face transactions set out in §§ 310.6(b)(1)-(3), but amends the TSR to require that telemarketers making these types of calls comply with §§ 310.4(a)(1) and (7), and §§ 310.4(b) and (c). The amended Rule continues to exempt such calls from the requirements of § 310.3 relating to deceptive practices and from the recordkeeping requirements set out in § 310.5.[925] These calls would also continue to be exempt from providing the oral disclosures required by § 310.4(d). Similarly, telemarketers soliciting charitable donations would be exempt from § 310.4(e) when the payment or donation is made subsequently in a face-to-face setting. However, the amended Rule requires that, even when a call falls within these exemptions, a telemarketer may not engage in the following practices:

- threatening or intimidating a customer, or using obscene language;
- failing to transmit Caller ID information;
- causing any telephone to ring or engaging a person in conversation with intent to annoy, abuse, or harass the person called;
- denying or interfering with a persons's right to be placed on a ''do-not-call'' registry;
- calling persons whose telephone numbers have been placed on the national ''do-not-call'' registry maintained by the Commission, unless an established business relationship exists between the seller and the person (telemarketers seeking charitable solicitations are exempted from this requirement);
- calling persons who have placed their names on that seller's or charitable organization's ''do-not-call'' list; and
- calling outside the time periods allowed by the Rule.

*§ 310.6(b)(4) — Inbound calls not in response to a solicitation*

The amended Rule revises § 310.6(b)(4) to expressly except from the exemption any upsell following an exempt transaction initiated by the consumer. When the Commission issued the original Rule in 1995, this exemption was intended to apply to a single telemarketing transaction initiated by the consumer without any solicitation by the seller or telemarketer. Since then, the practice of upselling has emerged, and has grown dramatically, particularly in the inbound telemarketing context. The reasons for exempting a telemarketing transaction pursuant to § 310.6(b)(4) do not apply to an upsell linked to that initial transaction.

Section 310.6(b)(4) of the amended Rule exempts calls initiated by consumers without solicitation by the seller or telemarketer because such calls are not part of a ''plan, program, or campaign to induce the purchase of goods or services.''[926] Thus, these calls do not fall within the definition of ''telemarketing.'' The exemption was intended to cover incidental uses of the telephone that are not in response to a direct solicitation, *e.g.*, calls from a customer to make hotel, airline, car rental, or similar reservations, to place carry-out or restaurant delivery orders, or to obtain information or customer technical support.[927]

Furthermore, in these calls, the consumer presumably is in control of the transaction that the consumer initiated, absent any outbound call or direct mail piece.

In contrast, the upsell is a direct solicitation for a product or service other than that for which the consumer initiated the call. As such, upsells *are* part of a telemarketing ''plan, program, or campaign to induce the purchase of goods or services'' and thus *do* fall within the definition of ''telemarketing.'' Furthermore, in upsells, the consumer does not initiate the sales transaction; the sales solicitation is initiated by the seller. When the consumer initiates an unsolicited inbound call, the consumer does not necessarily expect to be offered a good or service during the course of that call (such as in the case of a technical support call), or to be offered additional goods or services (in the case where the consumer was calling to make a purchase). Some commenters suggested that upsells appended to inbound calls should be exempted.[928] However, the Commission's experience indicates that upsells appended to unsolicited inbound calls open the door to potential deception and abuse in the subsequent upsell transaction.[929] Accordingly, the amended Rule excepts upsell transactions from the exemption provided for unsolicited inbound calls by consumers in § 310.6(b)(4).

There was substantial comment on the potential cost of subjecting upsells associated with inbound calls to any provisions beyond the Rule's disclosure requirements.[930] The original Rule exempted most inbound calls entirely, since most would fall within either this exemption for calls initiated by the consumer, or into renumbered §§ 310.4(b)(5) or (6) for general media advertisements or certain direct mail solicitations—each of which is discussed below. As a result, sellers and telemarketers were not required to

[922] NAR-NPRM at 3-4. *See also* ICFA-NPRM at 1-2 (regarding funeral goods and services).

[923] 15 U.S.C. 6102(a)(1) and (3)(A)-(B).

[924] *See* Gindin-RR at 1; Mey-RR *generally*; DNC Tr. at 241-46; RR Tr. at 291-95.

[925] Of course, a seller or telemarketer would have to keep documentation in order to successfully raise the ''safe harbor'' defense in § 310.4(b)(3) regarding compliance with the amended Rule's ''do-not-call'' requirements. The safe harbor relating to abandoned calls, discussed in § 310.4(b)(4), also includes a requirement to maintain certain records.

[926] *See* S. REP. NO. 103-80, at 8 (1993).

[927] 60 FR at 43860.

[928] *See, e.g.*, AFSA-NPRM at 15.

[929] Indeed, NAAG noted that the states' law enforcement experience revealed that upsells often proved problematic when appended to inbound calls initiated by the consumer, or by general media advertisements. NAAG-NPRM at 33 (''[Upsells] are usually inbound calls during which the company receiving the call completes the purpose for which the consumer initiated the call and then entices the consumer to consider another seller's products. The upsell can follow either a sales call or a call related to customer service such as a call about an account payment or product repair.'') *See, e.g., New York v. Ticketmaster and Time, Inc.*, (Assurance of Discontinuance).

[930] *See, e.g.*, DMA-NPRM at 38; ERA-NPRM at 11; PMA-NPRM at 9-13.

comply with the Rule's recordkeeping requirements with respect to these exempt telephone calls. While the amended Rule retains these exemptions (although with some modification), upsell transactions are excluded from those exemptions. Thus, to the extent that the Rule requires that records be maintained, including recordings of express verifiable authorization or express informed consent, such records must be maintained regarding these inbound upsells.

Commenters expressed concern primarily about the potential need for sellers and telemarketers to record certain inbound transactions.[931] These commenters suggested that call centers accustomed to handling only inbound telemarketing calls were not necessarily equipped with recording equipment, and that obtaining and implementing the necessary systems would be prohibitively expensive for many such organizations.[932] However, the Commission notes that taping is required only in one circumstance: under new § 310.4(a)(6)(i)(C), the seller or telemarketer must make and maintain a recording of the entire sales transaction any time a telemarketing transaction involves both preacquired account information and a ''free-to-pay conversion'' feature.[933] In instances where it is necessary to obtain the consumer's express verifiable authorization pursuant to § 310.3(a)(3), the amended Rule provides alternatives to making a recording of the consumer's oral authorization.[934] Thus, the number of industry members who would be required to obtain recording equipment is relatively limited. Moreover, with the growth of digital recording technology, the capital investment in recording equipment and record storage is rapidly declining.[935]

CCC argued that in inbound calls not currently subject to the Rule, the impact of these amendments would be to ''unnecessarily increase inbound call length by 50 percent or more and thereby increase the cost of goods or services to consumers.''[936] CCC also suggested that additional recordkeeping, ''public disclosure,'' and taping requirements will be overly burdensome.[937] While the Commission recognizes that, to the extent telemarketers have not been subject to the Rule, there is potential for additional burdens, the obligations of the Rule are minimal, and generally reflect regular practices already in place for most sellers and telemarketers in the ordinary course of business—such as the basic disclosure requirements, prohibition on misrepresentations, and recordkeeping requirements.[938] Moreover, the taping requirement is limited to those transactions that involve both preacquired account information and a ''free-to-pay conversion'' offer. Thus, only those sellers and telemarketers that choose to structure their upselling campaigns in this fashion will be subject to this additional requirement. The Commission therefore believes that any additional burden caused by these new requirements will be minimal. Ultimately, the Commission believes that the benefits to consumers of receiving the appropriate disclosures in an upsell transaction outweigh the costs to industry of providing those disclosures and ensuring that any charges are authorized by the consumer.

Additionally, it should be clear that telephone calls initiated by a customer or donor in response to a telemarketer's transmission of Caller ID information or use of a recorded message under the abandoned call safe harbor provision described in § 310.4(b)(4) are excepted from this exemption, as the customer or donor in this context would have had no reason to initiate a telephone call but for the solicitation efforts of the seller, charitable organization, or telemarketer. The transmission of Caller ID information and the use of a recorded message are considered forms of solicitation by a seller, charitable organization, or telemarketer under this exemption because they are part of a telemarketer's efforts to induce the purchase of goods or services or a charitable contribution. Although the information displayed on a consumer's caller identification service or provided via a recorded message will not include a sales pitch, it is a ''result of [a] solicitation'' and therefore outside the scope of the exemption described in this section.

*310.6(b)(5) — Exemption for general media advertisements*

The Commission received few comments addressing its proposal to narrow the general media exemption by adding two additional categories of goods or services to the list of its exceptions: credit card loss protection plans, and business opportunities other than those covered by the Franchise Rule or any subsequent rule covering business opportunities the Commission may promulgate.[939] The proposed expansion of the exemption to cover charitable solicitations pursuant to the USA PATRIOT Act yielded no comments.

Several of the commenters who addressed the general media exemption opposed having any exemption at all for general media, and therefore supported any effort to narrow it.[940] NCL stated that if the Commission determined to retain the general media exemption, it supported the addition of credit card loss protection plans and business opportunities other than those covered by the Franchise Rule to the list of goods and services excepted from the exemption. In support of its position, NCL noted that in 35 percent of the work-at-home complaints made to the NFIC in the year 2001, consumers reported that they were solicited through print media.[941] Since work-at-home solicitations are not ''business arrangements covered by the Franchise Rule,'' the exception from the general media exemption will now ensure that inbound calls in response to general media advertisements touting work-at-home opportunities will be subject to the Rule. NCL also noted that although most of the solicitations for credit card loss protection plans were made by telephone, these services should be covered by the Rule regardless of how they are promoted ''given the egregious nature of these complaints.''[942]

While commenters and forum participants generally endorsed the proposed narrowing of the general media exemption, some urged the Commission to reconsider whether a general media exemption is ''appropriate and workable,'' arguing that consumers who call in response to such advertisements are vulnerable to fraud and deception unless certain minimal disclosures are made.[943] NCL acknowledged that the Commission could combat such deception using its authority under Section 5 of the FTC Act, but argued that consumer injury could better be prevented if disclosures

[931] CCC-NPRM at 12-13; June 2002 Tr. II at 224 (CCC); June 2002 Tr. II at 232-33 (MPA).

[932] CCC-NPRM at 12-13; June 2002 Tr. II at 224 (CCC); MPA-NPRM at 28-29; June 2002 Tr. II at 232-33 (MPA).

[933] *See* discussion of § § 310.2(o) and (w), and § 310.4(a)(6) above for a detailed explanation of these provisions.

[934] *See* discussion of § 310.3(a)(3) above.

[935] *See* note 480 above.

[936] CCC-NPRM at 16.

[937] *Id.*

[938] 60 FR at 32682-83 (June 23, 1995).

[939] This section was found at § 310.6(e) in the proposed Rule.

[940] *See, e.g.*, EPIC-NPRM at 25-26; NCL-NPRM at 12; NAAG-NPRM at 58; June 2002 Tr. III at 177, 182-83 (NAAG has historically opposed the exemption; AARP supports NAAG position).

[941] NCL-NPRM at 12.

[942] *Id.*

[943] *Id. See also* June 2002 Tr. III at 177-83 (NAAG and AARP).

were required. NCL further advanced the proposition that all telemarketers should be subject to the express verifiable authorization requirements when consumers' accounts will be billed, regardless of whether calls are outbound or inbound, and, in the latter instance, even when such calls are in response to an advertisement delivered by general media or direct mail.[944] EPIC noted its position that ''[g]eneral media advertising may be deceptive, abusive or merely lack the information required to be disclosed under the Rule, thus substantially reducing the level of protection otherwise afforded to consumers by the Rule.''[945]

The Commission declines to adopt these recommendations to further regulate inbound calls resulting from general media advertisements. In the SBP issued with the original Rule, the Commission explained that in its experience ''calls responding to general media advertising do not typically involve the forms of deception and abuse the Act seeks to stem.''[946] The Commission's experience since the promulgation of the Rule continues to support the exemption for general media advertising, with targeted exceptions for certain goods or services that have routinely been touted by fraudulent sellers using general media advertising to generate inbound calls. In response to the suggestion that express verifiable authorization be required in all telemarketing transactions when the consumer's account will be billed, the Commission notes that the parameters of the amended express verifiable authorization provision, and the Commission's rationale in adopting it, are discussed above in the analysis of § 310.3(a)(3).[947]

NAAG expressed concern about the growing number of sellers of membership or buying club opportunities that operate using an ''upsell'' technique after an initial inbound call is placed by consumers in response to an advertisement for a completely different product.[948] NAAG suggested that the Commission amend the general media exemption to ensure that the Rule does not inadvertently exempt upselling transactions that occur when a consumer calls a seller or telemarketer in response to a general media advertisement.[949] The Commission agrees that this scenario would be an unwelcome consequence of the provision's wording and thus has amended this provision to clarify that the exemption may not be claimed in any instances of upselling that occur in the call.

NAAG also recommended that the list of exceptions to the general media exemption be expanded to include other transactions that involve a high risk of abuse, such as discount buyers clubs and offers involving ''opt out free trials.''[950] The Commission agrees that the telemarketing of these products or services frequently involves fraudulent or deceptive practices. However, there is no evidence on the record indicating that these products or services are telemarketed through general media advertisements. Rather, the states and the Commission have brought law enforcement actions challenging the deceptive telemarketing of these products predominantly when they are sold via outbound cold calls or in upselling, after the consumer has called to purchase another product or service in response to a general media advertisement.[951] As discussed above, the amended Rule contains a modified general media exemption, which makes the exemption unavailable to upselling transactions that occur in a call in response to a general media advertisement. In addition, the amended Rule contains specific requirements for negative option, ''free-to-pay conversion,'' and upselling transactions.[952] Therefore, the Commission finds it unnecessary to except discount buyers clubs and offers involving ''opt out free trials'' from the general media exemption.

DSA opposed the amendment of the general media exemption provision, expressing the concern that the exception for ''business opportunities other than business arrangements covered by the Franchise Rule'' will require individual direct sellers to comply with the Rule when they solicit customers or salespeople through general media advertisements.[953] DSA argues that ''[t]here is nothing inherently deceptive or abusive about communications over the telephone (particularly those initiated by the consumer) regarding a business opportunity'' and that ''there should be even fewer concerns about communications related to *prospective* transactions involving activities clearly deemed de minimis by the Franchise Rule.''[954] As the Commission stated in the NPRM, it has determined, based on the record and in particular on its extensive law enforcement experience in this area, that ''telemarketing fraud perpetrated by the advertising of work-at-home and other business opportunity schemes in general media sources is a prevalent and growing phenomenon.''[955] Outbound telephone calls to induce the purchase of a business opportunity not regulated by the Franchise Rule have been subject to the Rule's coverage since it was promulgated, and the new exception for general media advertisements merely expands that requirement when an inbound call results from the advertisement of such ventures in the general media.[956] Moreover, if a direct seller is marketing its underlying product to customers, the exception would not bring such activity under the Rule because it would not implicate the sale of a business opportunity.[957] Furthermore, as the Commission noted in the SBP for the original Rule, DSA's concern about recruitment of persons to engage in the direct sale of goods or services is likely unfounded because the face-to-face exemption takes such efforts outside the Rule's coverage.[958]

Based on its review of the record in this matter, and its law enforcement experience, the Commission has determined to retain the proposed general media provision in the amended

[944] NCL-NPRM at 12.

[945] EPIC-NPRM at 25-26.

[946] 60 FR at 43860.

[947] The Commission also notes that new § 310.4(a)(6) requires that, in every instance, a seller or telemarketer secure the consumer's express informed consent to be charged for the goods or services or charitable contribution, and to be charged using the identified account.

[948] NAAG-NPRM at 58-59.

[949] *Id. See also* EPIC-NPRM at 25 (agreeing that upselling calls should be subject to the Rule). *Cf.* Capital One-NPRM at 5 (requesting clarification that upselling calls are exempt, at least in an internal upsell).

[950] NAAG-NPRM at 59.

[951] *See, e.g., FTC v. Smolev.*, No. 01-8922 CIV ZLOCH (S.D. Fla. 2001); *New York v. MemberWorks, Inc.*, Assurance of Discontinuance (Aug. 2000); M*innesota v. MemberWorks, Inc.*, No. MC99-010056 (4th Dist. Minn. June 1999); *Minnesota v. Damark Int'l, Inc.*, No C8-99-10638, Assurance of Discontinuance (Ramsey County Dist. Ct. Dec. 3, 1999); *FTC v. S.J.A. Soc'y, Inc.*, No. 2:97 CM 472 (E.D. Va. filed May 31, 1997).

[952] *See* amended Rule § § 310.3(a)(1)(vii), 310.3(a)(2)(ix), 310.3(a)(3)(iii), 310.4(a)(6), 310.4(a)(7), and 310.4(d).

[953] DSA-NPRM at 8-9.

[954] *Id.*

[955] 67 FR at 4530-31 (this determination is equally applicable to the advertisement by direct mail of business opportunities other than business arrangements covered by the Franchise Rule).

[956] The Commission noted in the original SBP that ''[w]hen a business venture is not covered by the Franchise Rule, then consumers do not receive the protection afforded by that Rule's pre-sale disclosure requirements. Therefore, it is appropriate that telephone sales of such ventures should be covered by this Rule, so that consumers may receive the benefit of its protections.'' 60 FR at 4360. The addition of the exception provisions to the direct mail and general media exemptions merely expands upon the initial requirement.

[957] For example, the exception to the general media exemption would bring under the Rule an effort by a direct seller to recruit others to market its products, but not the sale by the direct seller of cosmetics to its own end-customers.

[958] 60 FR at 43860, n.185.

Rule with two changes. First, the phrase ''or any subsequent rule covering business opportunities the Commission may promulgate'' has been deleted in the amended Rule. Should the Commission promulgate a rule covering business opportunities, the nexus between the TSR and any such rule will be considered, and any necessary conforming amendments made to the TSR at that time. Second, § 310.6(b)(5) has also been amended to expressly except from the general media exemption any upsell following the exempt transaction associated with the general media solicitation. As with telephone calls initiated by the consumer without any solicitation by the seller or telemarketer, the reasons for exempting a telemarketing transaction following certain general media solicitations do not apply to an upsell linked to that initial transaction.[959] The original Rule exempts calls in response to a general media advertisement because ''calls responding to general media advertising do not typically involve the forms of deception and abuse the Act seeks to stem.''[960] However, the Commission recognized that some fraudulent telemarketers and sellers have used general media advertisements to entice victims to call, and thus has excepted those problem areas from the exemption. Upselling is one of the problem areas where general media advertisements have provided the opening for subsequent deception and abuse.[961] In addition, an upsell transaction is not similar to a general media advertisement. It is a wholly new sales offer targeted at the consumer a seller or telemarketer has on the line for some other purpose, whether it be in response to a general media advertisement about a different product or service, or a customer service call initiated by the consumer. Accordingly, the amended Rule excepts upsell transactions from the general media exemption in § 310.6(b)(5).

*§ 310.6(b)(6) — Exemption for direct mail solicitations*

Section 310.6(b)(6) of the original Rule exempts from the Rule's requirements inbound telephone calls resulting from a direct mail solicitation that clearly, conspicuously, and truthfully disclosed all material information required by § 310.3(a)(1). Certain categories of transactions, specifically those in which the solicitation was for a prize promotion, investment opportunity, credit repair service, ''recovery'' service, or advance fee loan, were excepted from this exemption because the record and the Commission's law enforcement experience made clear that these particular products and services were so often subject to abuse by fraudulent telemarketers that regulation under the TSR was appropriate.

The proposed Rule retained the direct mail exemption provision, but clarified that advertisements sent via facsimile or electronic mail were considered direct mail for purposes of this exemption.[962] The proposed Rule also added two new categories of transactions to be excepted from the direct mail exemption: credit card loss protection plans and business opportunities other than those covered by the Franchise Rule or any subsequent Rule covering business opportunities the Commission may promulgate. Finally, pursuant to the USA PATRIOT Act, the proposed Rule expanded the exemption to exclude from the Rule's coverage inbound calls to solicit a charitable contribution made in response to a direct mail solicitation that complies with § 310.3(a)(1).

The Commission has determined, based on a review of the record and its own law enforcement experience, to adopt the proposed amendments to the direct mail exemption, renumbered in the amended Rule as § 310.6(b)(6). The amended Rule, however, differentiates between the requirements for direct mail solicitations for goods or services and direct mail solicitations for charitable contributions. The amended Rule retains unchanged the requirements of the original Rule—*i.e.*, the direct mail solicitation must clearly, conspicuously, and truthfully disclose all material information required by § 310.3(a)(1). However, because § 310.3(a)(1) applies only to goods and services and not to charitable solicitations, the amended Rule modifies the direct mail exemption language to ensure that prospective donors who receive direct mail solicitations for charitable contributions have protections similar to those enjoyed by consumers who purchase goods or services. Thus, the amended Rule adds language to the direct mail exemption provision prohibiting material misrepresentations regarding any item contained in § 310.3(d) in charitable solicitations sent by direct mail to donors.

In the proposed Rule, the Commission stated that the direct mail exemption would be applicable to inbound calls made in response to a direct mail charitable solicitation that complies with § 310.3(a)(1). NAAG suggested that inbound calls resulting from a direct mail charitable solicitation be exempt instead if the direct mail piece clearly, conspicuously, and truthfully sets forth the disclosure in § 310.4(e)(1) (the identity of the charitable organization) and the fact that the organization is soliciting a charitable contribution.[963] NAAG further recommended that, at a minimum, several categories of information (including the nature of the goods or services and the facts relating to a charitable contribution) deemed important to consumers and donors be expressly referenced in § 310.6(f).[964] The Commission agrees that the specific disclosures required by § 310.3(a)(1)—targeted at the sale of goods or services—are an imperfect fit with the type of information a potential donor would need to determine if he or she wished to contact a charitable organization in response to a solicitation received via direct mail. Therefore, the amended Rule requires that, in order for the telemarketer to take advantage of the direct mail exemption for inbound calls in response to any direct mail charitable solicitation, such solicitation contain no material misrepresentation regarding any item contained in § 310.3(d) of the Rule.

Section 310.6(b)(6) has also been amended to expressly except from the direct mail exemption any upsell following the exempt transaction associated with the direct mail advertisement. As with telephone calls initiated by the consumer without any solicitation by the seller or telemarketer, or in response to general media solicitations, the reasons for exempting a telemarketing transaction triggered by a direct mail advertisement do not apply to an upsell linked to that initial transaction.[965] Section 310.6(b)(6) of the amended Rule exempts direct mail solicitations only if the disclosures required by § 310.3(a)(1) are truthfully, clearly, and conspicuously provided in the direct mail piece. The Commission

[959] The reasons for this exception are explained in greater detail in the discussion of amended Rule § 310.6(b)(4) above.

[960] 60 FR at 43860.

[961] *FTC v. Smolev* (a/k/a Triad Discount Buying Service) is one example of an internal upsell triggered by consumer response to a general media advertisement. *Smolev*, No. 01-8922-CIV ZLOCH (S.D. Fla. 2001). *New York v. Ticketmaster* (Settlement announced on Jan. 7, 2002).

[962] The direct mail exemption provision is found in the proposed Rule at § 310.6(f).

[963] NAAG-NPRM at 59-60.

[964] *Id.*

[965] The reasons for this exception are discussed in greater detail in the explanation of §§ 310.6(b)(4) and (5) above. Capital One requested clarification of the applicability of this exemption to upselling transactions. Capital One-NPRM at 5-6. EPIC requested that upselling be subject to the Rule. EPIC-NPRM at 25.

exempted these direct mail solicitations because such solicitations

> are not uniformly related to the forms of deception and abuse the Act seeks to stem, nor are they uniformly related to such misconduct. Rather, in certain discrete areas of telemarketing, such solicitations often provide the opening for subsequent deception and abuse. The Commission has drawn upon its enforcement experience, identified those problem areas, and excluded them from this exemption.[966]

Upselling transactions are one of the problem areas where direct mail solicitations have provided the opening for subsequent deception and abuse.[967] Upon receiving a direct mail solicitation in which all of the material terms of the offer may be available to evaluate in the direct mail piece, the consumer has the time and the information necessary to make an informed decision whether to call and inquire further or make a purchase. By contrast, an upsell presentation provides the consumer no opportunity to review the material disclosures pertinent to the offer. Once again, the upsell is more akin to an unsolicited outbound call to the consumer, who does not necessarily expect to be solicited for a purchase, and who has none of the material information he or she needs to evaluate the offer and make a purchasing decision. Accordingly, the amended Rule excepts upselling transactions from the direct mail exemption in § 310.6(b)(6).

Finally, the phrase ''or any subsequent rule covering business opportunities the Commission may promulgate'' has been deleted in the amended Rule. Should the Commission promulgate a rule covering business opportunities, the nexus between the TSR and any such rule will be considered, and any necessary conforming amendments made to the TSR at that time.

*Facsimile and electronic mail solicitations as ''direct mail*'': NCL and ARDA supported the Commission's view that facsimile and electronic mail solicitations are analogous to direct mail sent via the U.S. Postal Service, and should be considered direct mail for purposes of the exemption.[968] NCL noted that facsimile (''fax'') or electronic mail (''email'') solicitations are often sent to promote fraudulent goods or services.[969] For example, in ''Nigerian money offer'' schemes, the fastest growing category of telemarketing fraud reported to NCL, faxes and emails are the primary methods of solicitation.[970] NCL noted that faxes and email are also used to solicit businesses for a variety of telemarketing scams.[971] DMA also supported the interpretation that advertisements sent via fax or email should be considered as ''direct mail'' pieces for purposes of the Rule.[972]

Some commenters opposed the inclusion of fax and email advertisements in the exemption,[973] and some expressed concern that the Commission's interpretation could actually increase the number of unwanted solicitations sent to consumers by fax and email.[974] NCL stated that unsolicited fax advertisements were prohibited under the TCPA because of their intrusive impact on recipients' privacy, and expressed concern that exempting calls in response to unsolicited faxes from the Rule, even if the information in them is accurate and complete, ''would ignore this important public policy determination.''[975] NCL recommended that the Commission ban the sending of unsolicited fax advertisements as an abusive practice under the Rule.[976]

The record in this matter provides no support for the assertion that the number of unwanted, but truthful, fax and email solicitations may increase as a result of being exempted from the TSR. The Commission notes that the TCPA, enforced by the FCC, already bans unsolicited fax messages.[977] The FCC has promulgated rules effectuating the Congressional ban and has enforced those regulations.[978] Thus, the Commission's determination that, for the purposes of the TSR, faxes and email are forms of ''direct mail'' should have no impact on the number of unsolicited faxes that are sent. To presume such would be to anticipate that sellers would blatantly ignore the FCC's regulations. To be entirely clear, however, the Commission wishes to state that its interpretation of the term ''direct mail'' in no way alters the legality of the underlying direct mail contact. Rather, the new TSR provision will require that, to the extent that a fax or email solicitation is allowed by law, these direct mail solicitations must include the required disclosures, or else resulting inbound calls from consumers will be subject to the entire TSR.[979]

Although it favored the Commission's proposed interpretation which viewed faxes and email as ''direct mail'' for purposes of the Rule, DMA argued that the Rule should allow the disclosures of material information to be made in the telephone call, rather than in the fax or email advertisement.[980] As support for its position, DMA stated that to do otherwise could result in increased expense to sellers who use email to reach their target audience, due to the increased length of the message. DMA further argued that the Commission lacks authority to dictate the content of either email or fax advertisements. Finally, DMA posited that, if the intent of the provision is to mandate disclosures, the NPRM failed to evaluate the costs of requiring such disclosures, particularly in email solicitations.[981]

The Commission believes that, to warrant exemption of the inbound call in response to a direct mail solicitation from the Rule, it is critical that a consumer receive the required disclosures (or, in the case of a charitable solicitation, that the solicitation not contain misrepresentations) at the time the consumer contemplates contacting the seller or charitable organization by telephone. The amended Rule follows the reasoning of the original Rule, which requires that any direct mail

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[966] 60 FR at 43860.

[967] *See, e.g., United States v. Prochnow*, No. 1 02-cv-917 (N.D. Ga. 2002).

[968] *See* ARDA-NPRM at 17; NCL-NPRM at 12.

[969] *See* NCL-NPRM at 12.

[970] *Id.*

[971] *Id.*

[972] *See* DMA-NPRM at 56.

[973] *See, e.g.*, EPIC-NPRM at 26.

[974] *See, e.g.*, CNO-NPRM at 6; NCL-NPRM at 12.

[975] *See* NCL-NPRM at 12-13.

[976] NCL-NPRM at 13.

[977] 47 U.S.C. 227(b). In its recent Notice of Proposed Rulemaking, the FCC noted that complaints about unsolicited faxes have been steadily increasing, from 519 in 1996 to over 2100 in 2000. FCC TCPA 2002 (*see* note 633 above), at para. 8. There is no suggestion in the FCC's NPRM that a spike in the actual number of unsolicited faxes has occurred or that any increase is attributable to the FTC's determination that faxes and email are forms of direct mail for purposes of the TSR.

[978] 47 CFR 64.1200(a)(3). *See also* FCC Press Release: ''FCC Cracks Down on 'Junk Fax' Violations,'' http://www.fcc.gov/cgb/news/080802.junkfax.html; FCC's 2002 NPRM at para. 7, n.40.

[979] If the fax or email advertisement is sent in violation of state or other federal law, the sender would be liable under those federal or state laws, but not under the TSR, unless the fax or email also failed to include the requisite disclosures and the seller or telemarketer, in any subsequent telemarketing effort, failed to abide by the Rule.

[980] DMA-NPRM at 58 (''The types of disclosures proposed by the Commission are worthwhile, so long as they can be provided over the phone by the telemarketer.''). *See also* Associations-NPRM at 4; Associations-Supp. at 8.

[981] In their supplemental comment, Associations, of which DMA is a member, noted only that inclusion of the required disclosures in an email or fax ''imposes significant costs on businesses. Particularly on email communications, 'real estate' and location have significant financial value.'' Associations-Supp. at 8. This mere assertion remains all that exists on the record regarding the cost of requiring the § 310.3(a)(1) disclosures in an email or fax, and the Commission finds this insufficient to cause it to reconsider its position based on the financial harm argument asserted by Associations.

solicitation contain the required disclosures in order to afford the consumer an opportunity to know certain material information before determining whether to call the telemarketer. Apart from DMA's comment, the Commission finds no record evidence to support alteration of this requirement simply because the direct mail solicitations are sent by email rather than the U.S. Postal Service. It is not the intent of the Commission to use this provision to require new disclosures surreptitiously; indeed, the disclosures required (and misrepresentations prohibited, in the case of a charitable solicitation) are merely those that a telemarketer must make in the course of any non-exempt telemarketing transaction. Sellers remain free to choose the most advantageous method by which to contact consumers, and those opting for direct mail solicitations sent by email must determine whether the costs of making the relevant disclosures[982] are offset by the savings attained by being exempt from the rest of the Rule.

*Exceptions to the direct mail exemption*: Commenters were generally supportive of the Commission's proposal to narrow the direct mail exemption to make it unavailable to sellers of credit card loss protection and business opportunities other than business arrangements covered by the Franchise Rule or any subsequent rule covering business opportunities the Commission may adopt. In expressing its support, NCL noted that, although most solicitations for credit card loss protection plans were made via outbound telephone calls, it endorsed excepting such plans from the exemption to ensure that they will be covered by the Rule regardless of how they are promoted.[983] Similarly, NCL supported the exclusion from the direct mail exemption of work-at-home solicitations, noting that in 2001, 42 percent of the victims of work-at-home scams said that the initial method of contact was direct mail.[984] Because work-at-home solicitations are not ''business arrangements covered by the Franchise Rule,'' the exception from the direct mail exemption will now ensure that inbound calls in response to direct mail advertising work-at-home opportunities will be subject to the Rule.

Some consumer advocates and law enforcement officials argued, however, that by simply narrowing the categories of offers eligible for the exemption, the proposed Rule did not go far enough to protect consumers.[985] Instead of narrowing the exemption, NCL recommended that the Commission eliminate the direct mail exemption altogether,[986] a position with which NAAG and AARP concurred at the June 2002 Forum.[987] NCL argued that telemarketing fraud and abuse could be prevented if those currently exempt from the Rule's coverage were required to adhere to its provisions, particularly those Rule provisions mandating material disclosures and express verifiable authorization.[988] As an alternative to eliminating the direct mail exemption, NCL suggested that all telemarketers should be required to obtain customers' express verifiable authorization in every call, even those that would otherwise be exempt, such as inbound calls in response to a direct mail solicitation.[989] NAAG suggested that the Rule should also except from the direct mail exemption transactions that involve a high risk of abuse, such as the sale of memberships for discount buyers clubs and for transactions involving negative option features.[990]

Based on a review of the record, the Commission declines to adopt these suggestions. In the SBP of the original Rule, the Commission noted that the direct mail exemption was included in the Rule because, in its experience, direct mail solicitations were not ''uniformly related to the forms of deception and abuse the Act seeks to stem.''[991] Based on this understanding, and in an effort to strike the appropriate balance between reining in fraudulent telemarketers and not unduly burdening legitimate industry, the Commission included the direct mail exemption in the original Rule. While it may be true that fraudulent telemarketing scams might be reduced if the direct mail exemption were excised from the Rule, the Commission believes that to do so would tip the balance and unnecessarily burden legitimate telemarketers without bringing commensurate benefits to consumers. Therefore, the Commission declines to eliminate the exemption entirely.

The Commission also declines to require express verifiable authorization in all calls. The parameters of the amended express verifiable authorization provision, and the Commission's rationale in adopting it, are discussed above in the analysis of § 310.3(a)(3). Finally, the Commission declines to add the sale of discount buyers club memberships and solicitations in which there is a negative option feature to the exceptions to the direct mail exemption. The record does not demonstrate that the sale of membership clubs or solicitations in which there is a negative option feature are particularly subject to abuse in conjunction with direct mail solicitations, and thus does not support including such exceptions.[992]

*Other suggested changes*

Some commenters raised concerns about the situation where there is a disparity between the disclosures made in a direct mail solicitation and those made in the subsequent telephone call. NAAG urged the Commission to clarify that a pre-call mailing is not truthful if it is inconsistent in some material way with what is stated during the call.[993]

In order to avail itself of the exemption, a direct mail solicitation must provide the material disclosures required by § 310.3(a)(1) to ensure that the material information about the offer is in the hands of the consumer when the consumer elects whether to place a call to a telemarketer, including information about the total cost and quantity of the goods or services, all material restrictions, limitations or conditions to the offer, and certain information regarding refund policies and prize promotions. By its very definition, this material information is presumed ''likely to affect a person's choice of goods or services, or their conduct regarding them.''[994] Thus, in order to meet the Rule's requirement that the information in the direct mail solicitation be ''truthful,'' the information provided to the consumer in the telemarketing call should not vary in any material respect from the disclosures provided in the direct mail solicitation.[995]

[982] Presumably in the solicitation of a charitable contribution, there is no cost associated with refraining from making misrepresentations.

[983] NCL-NPRM at 12.

[984] *Id.*

[985] *See* NCL-NPRM at 12 (expressing concern that increasing the number of exceptions to exemptions is confusing to businesses and consumers).

[986] NCL-NPRM at 12.

[987] June 2002 Tr. III at 177, 182-83.

[988] NCL-NPRM at 12.

[989] *Id.*

[990] *See* NAAG-NPRM at 59.

[991] 60 FR at 43860.

[992] The record does show that buyers club memberships have frequently been associated with complaints regarding preacquired account telemarketing, a practice that is addressed by amended Rule § § 310.4(a)(5) and (6). Similarly, goods or services offered in conjunction with a ''free-to-pay conversion'' negative option feature have been shown to result in complaints of unauthorized charges, and are addressed by amended Rule § 310.4(a)(6) and § § 310.3(a)(1)(vii) and 310.3(a)(2)(ix).

[993] NAAG-NPRM at 59-60.

[994] *Cliffdale*, 103 F.T.C. at 165.

[995] The Commission recognizes that, in some instances, prices may be subject to change, or may only be in effect for a specified period of time. A

Continued

AFSA expressed concern over the ''specter of vicarious liability'' for telemarketers who receive inbound calls in response to direct mail solicitations sent by another party in which the required disclosures are not made ''truthfully.'' The Commission believes that under § 310.3(b), the assisting and facilitating provision, liability would only attach if a telemarketer knew or consciously avoided knowing that there was a disparity between the material representations in a direct mail piece and the telemarketing script being used in inbound calls in response to that solicitation.

EFSC requested, in connection with the proposal to broaden the direct mail provision to include solicitations by email and fax, that the Commission explicitly state that ''a telemarketer's electronic disclosure of the material information satisfies'' the telemarketer's obligation under the Rule.[996] EFSC argued that the E-SIGN Act makes such electronic disclosures permissible, and that the Commission should explicitly state that such is the case.[997] As noted above, in the response to DMA's suggestion that it should be permissible to make the required disclosures in the email or fax *or* in the subsequent telemarketing call, the Commission believes that to avail itself of the direct mail exemption, the seller must include the required disclosures in the direct mail piece itself, for to make these disclosures outside that context would defeat the consumer protection purpose of that requirement.[998] Thus, for the same reason, the Commission believes that in the case of any direct mail solicitation conveyed by email or fax, the required disclosures would have to be included in the email or fax itself in order for any subsequent telemarketing call to benefit from the § 310.6(b)(6) exemption.

Finally, NFC requested that the Commission clarify whether the direct mail exemption applies to franchisors.[999] The Commission believes that § 310.6(b)(2) makes clear that sales of franchises subject to the Commission's Franchise Rule are exempt from the TSR. The sale of business opportunities not covered by the Franchise Rule, however, is subject to regulation by the Rule. Section 310.6(b)(6) of the amended Rule expressly states that a seller of ''business opportunities other than business arrangements covered by the Franchise Rule'' would not be able to avail itself of the direct mail exemption, and thus would be required to comply with the Rule's provisions. Therefore a business opportunity seller, if not eligible for exemption pursuant to § 310.6(b)(2), would be ineligible for the direct mail exemption because of the specific exception for the sale of such services under § 310.6(b)(6).

*§ 310.6(b)(7) — Business-to-business telemarketing*

Section 310.6(g) of the original Rule exempts from the Rule's requirements telemarketing calls to businesses, except calls to induce the sale of nondurable office or cleaning supplies. Based on the Commission's law enforcement experience, the Commission proposed in the NPRM to add two more categories to the list of exceptions to the exemption for calls to businesses: the sale of Internet or Web services, and charitable solicitations.[1000] The Commission has determined, however, based upon comments received in response to the NPRM, not to include in the amended Rule the exception of the sale of Internet or Web services and charitable solicitations from the business-to-business exemption. The amended Rule retains unchanged the wording in the original Rule, except to add language clarifying that the Commission's national ''do-not-call'' registry provisions do not apply to the telemarketing of nondurable office or cleaning supplies to businesses. The provision is also renumbered, and can be found at § 310.6(b)(7) of the amended Rule.

Consumer groups and state law enforcement officials argued that the Rule should not contain any exemption for business-to-business telemarketing, but if the Commission were to retain the exemption, they supported narrowing the exemption as much as possible so that sellers and telemarketers of those products or services that have particularly been subject to abuse would not benefit from the exemption.[1001] Thus, these commenters generally supported the Commission's proposal to ''carve out'' the telemarketing of Internet and Web services from the business exemption, citing extensive law enforcement efforts to combat the proliferation of fraudulent telemarketing of website design, hosting, and maintenance services to small businesses.[1002]

On the other hand, industry commenters uniformly opposed the ''carve out'' of Internet and Web services from the business-to-business exemption.[1003] These commenters argued that the proposed definitions of these services were overly broad and that there was insufficient record evidence to support regulation of all Internet and Web services.[1004] They noted that federal and state law enforcement efforts had focused on website design, development, hosting, and maintenance services, but that the record does not reveal a pattern of fraud in the sale of Internet access services, including wireless Internet access services.[1005] Industry commenters argued that if the Commission persisted in requiring that the telemarketing of Internet and Web services comply with the TSR, the effect would be to chill innovation and development in a nascent industry that is rapidly changing.[1006] They also argued that such an action would be anticompetitive because it would subject those sellers and telemarketers who are within the FTC's jurisdiction to the TSR's requirements, while exempting competitors who happen to be common carriers.[1007] Furthermore, these commenters stated that although the Commission's goal is to protect small business from fraud in the sale of Internet and Web services, the Commission's proposal would actually

disclosure to that effect in the direct mail solicitation should provide the consumer with sufficient notice that the price may fluctuate or may not be available after a particular date.

[996] EFSC-NPRM at 12.

[997] *Id.*

[998] The Commission believes that for purposes of § 310.6(b)(6), it is critical that telemarketing calls in response to direct mail solicitations be exempt only on the condition that the direct mail piece contains the requisite disclosures. The requirement that these disclosures be displayed in the direct mail piece itself ensures that these disclosures are proximate in time and location to the direct mail solicitation, which makes it more likely that consumers will be made aware of certain material information that is useful or necessary to evaluate the sales transaction proposed in the solicitation before responding to it. The Commission notes that this outcome is consistent with § 101(f) of the E-SIGN Act, which states that, ''Nothing in this title affects the proximity required by any statute, regulation, or other rule of law with respect to any warning, notice, *disclosure*, or other record required to be posted, *displayed*, or publicly affixed.'' (emphasis added).

[999] NFC-NPRM at 4-5.

[1000] *See* NPRM discussion regarding proposed § 310.6(g), 67 FR at 4531-32.

[1001] *See, e.g.*, NAAG-NPRM at 60; NCL-NPRM at 11.

[1002] NAAG-NPRM at 60; NCL-NPRM at 11.

[1003] *See, e.g.*, Comcast-NPRM at 5; Cox-NPRM at 30-32; ICC-NPRM at 1-2; Nextel-NPRM at 23, 24; Reed-Elsevier-NPRM at 5; SBC-NPRM at 2, 13; SIIA-NPRM at 1-2; YPIMA-NPRM at 5. *See also* June 2002 Tr. III at 210-20, 222-23, 226.

[1004] *See, e.g.*, Nextel-NPRM at 23; SBC-NPRM at 3; SIIA-NPRM at 1-2. June 2002 Tr. III at 210-20, 222-23, 226.

[1005] *See, e.g.*, Nextel-NPRM at 23; SIIA-NPRM at 1-2. *See also* June 2002 Tr. III at 213-14, 217-18, 224.

[1006] Nextel-NPRM at 24; Reed-Elsevier-NPRM at 7; SBC-NPRM at 14; SIIA-NPRM at 1-2. *See also* June 2002 Tr. III at 210-24.

[1007] *See, e.g.*, DMA-NPRM at 9. *See also* June 2002 Tr. III at 213-14, 217-18, 224.

harm those small businesses because it would increase their costs and hamper their use of Web-based advertising such as online Yellow Pages.[1008] Industry commenters argued that current law enforcement tools, coupled with active industry self-regulation, are sufficient to challenge deceptive and fraudulent telemarketing of Internet or Web services.[1009]

The Commission finds persuasive industry's arguments that the proposal to make the business-to-business exemption unavailable to telemarketing of Internet and Web services is overbroad and likely to produce perverse results for the small businesses it was intended to protect. The Commission believes that, although coverage by the Rule would provide benefits to law enforcement efforts, current federal and state consumer protection statutes have been effective tools in challenging fraudulent practices in this industry.[1010] Furthermore, the Commission believes that it is preferable to move cautiously so as not to chill innovation in the development of cost-efficient methods for small businesses to join in the Internet marketing revolution. Therefore, the Commission has removed the proposed exception for Internet and Web services sales to businesses by telephone, which will continue to be exempt from the Rule's coverage. The Commission will, however, continue to monitor closely the practices in the telemarketing of Internet and Web services, and may revisit this issue in subsequent Rule Reviews should circumstances warrant.

Consumer groups and state law enforcement officials also supported the Commission's proposal to make the business-to-business exemption unavailable to entities soliciting charitable contributions, citing the extensive problems with telefunders soliciting on behalf of public safety organizations (so-called ''badge fraud'' operators) who often target small businesses.[1011] DMA-NonProfit and Not-For-Profit Coalition were among the few non-profit organizations that addressed the business-to-business exemption,[1012] arguing that the legislative history of the USA PATRIOT Act does not support extending the Rule's coverage to charitable solicitations directed to businesses, particularly in the absence of substantial evidence of abuse.[1013] As discussed above, the Commission already has determined to exempt telemarketing on behalf of charitable organizations from the national ''do-not-call'' registry, thus addressing the principal concern of the non-profit organizations.

The Commission notes that ''badge fraud'' telemarketing directed at businesses has been a particularly pernicious practice that has been attacked on a regular basis by both the Commission and state regulators.[1014] Commenters have made it clear, however, that many legitimate non-profit organizations rely heavily on business contributions as a major portion of their donor base.[1015] The Commission seeks to protect businesses—particularly small businesses—from fraudulent fundraising, without burdening legitimate non-profit organizations with the cost of complying with unnecessary regulations. As some commenters pointed out, many legitimate non-profit organizations operate on a very narrow margin, and such costs may have a very significant impact on the viability of an organization's fundraising efforts or even the very viability of the organization itself.[1016]

The Commission also notes that law enforcement actions attacking badge fraud under Section 5 and analogous state laws have been effective on a case-by-case basis.[1017] Furthermore, several of the entities that were targets of these law enforcement efforts also telemarketed to individuals, which would bring them within the purview of the amended Rule with respect to those transactions.[1018] In addition, the Commission recognizes that there are many legitimate public safety organizations that solicit funds for their charitable purposes in a non-deceptive manner. Therefore, the Commission believes that the more prudent course is to continue to rely upon its authority under Section 5 and the states' authority under their analogous laws to address fraudulent fundraising, and, at this time, to leave beyond the scope of the TSR legitimate charitable fundraising directed to businesses. This issue could be revisited in subsequent Rule Reviews should evidence develop that the Commission has not struck the correct balance in making this determination.

*Other recommendations by commenters*

Some commenters recommended that the Rule be amended to include more exemptions. For example, several commenters advocated that their industry be exempt from compliance with the national ''do-not-call'' registry and/or from all of the Rule's provisions.[1019] The Commission notes that many of those who requested

[1008] *See, e.g.*, SBC-NPRM at 15; SIIA-NPRM at 2. *See also* June 2002 Tr. III at 213-14, 217-18, 224.

[1009] *See, e.g.*, Reed-Elsevier-NPRM at 4-5 (noting, for example, that industry has adopted the Best Billing Practices guidelines set forth by the FCC to address unauthorized billing or ''cramming'' problems); SBC-NPRM at 14. *See also* June 2002 Tr. III at 213-14, 217-18, 224.

[1010] *See E-Commerce Fraud Targeted at Small Business: Hearings on Web Site Cramming Before the Senate Committee on Small Business* (Oct. 25, 1999) (statement of Jodie Bernstein, Director of the Bureau of Consumer Protection, FTC); FTC Press Release: ''FTC Cracks Down on Small Business Scams: Internet Cramming is Costing Companies Millions,'' June 17, 1999, http://www.ftc.gov/opa/1999/small9.htm. *See also, e.g., FTC v. Shared Network Servs., LLC.*, No. S-99-1087-WBS JFM (E.D. Cal. filed June 12, 2000); *FTC v. U.S. Republic Communications, Inc.*, No. H-99-3657 (S.D. Tex. filed Oct. 21, 1999) (Stipulated Final Order for Permanent Injunction and Other Equitable Relief entered Oct. 25, 1999); *FTC v. WebViper LLC*, No. 99-T-589-N, (M.D. Ala. June 9, 1999); *FTC v. Wazzu Corp.*, No. SA CV-99-762 AHS (ANx) (C.D. Cal. filed June 7, 1999).

[1011] *See, e.g.*, NAAG-NPRM at 60-61; NCL-NPRM at 11. *See also* June 2002 Tr. III at 224-25.

[1012] Most non-profit organizations commented on the application of the national ''do-not-call'' registry to their solicitation efforts, not on whether they should be otherwise excepted from the business-to-business exemption. *See, e.g.*, Childhood Leukemia-NPRM at 1; Community Safety-NPRM at 1-2; California FFA-NPRM at 1-2; FPIR-NPRM at 1-2; HRC-NPRM at 1-2; OSU-NPRM at 1; SO-AZ-NPRM at 1-2.

[1013] *See* DMA-NonProfit-NPRM at 14-15; Not-for-Profit Coalition-NPRM at 46-48. There is scant legislative history on the USA PATRIOT Act with regard to this issue.

[1014] *See, e.g., FTC. v. Southwest Mktg. Concepts, Inc.*, No. H-97-1070 (S.D. Tex. filed 1999) (Stipulated Final Judgment and Order for Permanent Injunction and Monetary Relief entered May 28, 1999); *FTC v. Saja*, No. CIV-97-0666 PHX SMM (D. Ariz. filed Apr. 1997); *FTC v. Dean Thomas Corp., Inc.*, No. 1:97CV0129 (N.D. Ind. 1997) (Stipulated Final Judgment entered Jan. 19, 1998); *FTC v. Century Corp.*, No. 1:97CV0130 (N.D. Ind. filed Apr. 7, 1998) (Stipulated Final Judgment and Order entered April 8, 1998); *FTC v. Image Sales & Consultants, Inc.*, No. 1:97CV0131, (N.D. Ind.) (Stipulated Final Judgment and Order entered June 9, 1998); *FTC v. Omni Adver., Inc.*, No. 1:98CV0301 (N.D. Ind. filed Oct. 9, 1998); *FTC v. T.E.M.M. Mktg., Inc.*, No. 1:98CV0300, (N.D. Ind. filed Oct. 5, 1998); *FTC v. Tristate Adver. Unlimited, Inc.*, No. 1:98CV0302 (N.D. Ind. filed Oct 5, 1998); *FTC v. Gold*, No. CV 99-99-2895-WDK (AIJx) (C.D. Calif. filed 1998); *FTC v. Eight Point Communications, Inc.*, No. 98-74855 (E.D. Mich. filed Nov. 10, 1998). *See also* Pa. Stat. Ann. tit. 10 § 162.15(A)(11) (West 2000).

[1015] *See, e.g.*, DMA-NonProfit-NPRM *passim*; Not-for-Profit Coalition-NPRM *passim*. *See also* June 2002 Tr. III at 110, 205-10, 220-21.

[1016] *Id.*

[1017] *See* note 1015 above.

[1018] *See, e.g., Saja*, No. CIV-97-0666 PHX SMM; and *Eight Point Communications*, No. 98-74855.

[1019] *See, e.g.*, Tribune-NPRM at 2-3 (exempt newspapers because of their ''unique position and mission in our society''); Herald Bulletin-NPRM at 1 (exempt newspapers); CNHI-NPRM at 1-2 (exempt newspapers); AFSA-NPRM at 10 (exempt debt collection calls); ACA-NPRM at 2-4 (expressly exempt debt collection activities from the Rule); DBA-NPRM at 5 (expressly exempt debt collectors from the ''do-not-call'' registry provision); AFSA-NPRM at 14 (exempt financial services companies with an established business relationship); CASE-NPRM at 3 (exempt educational institutions from ''do-not-call'' registry provision); ANA-NPRM at 7 (explicitly exempt market researchers); Green Mountain-NPRM *passim* (exempt energy marketers).

exemptions already are exempt from the Rule and, therefore, there is no reason to expressly restate that exemption in the Rule.[1020] The Commission also declines to add additional exemptions on behalf of specific industry segments, with the exception of charitable organizations. As noted above in the discussion on exempting charities from compliance with the national ''do-not-call'' registry provision, the Commission believes that charitable solicitations present unique circumstances that make an exemption necessary and appropriate. The Commission declines, however, to introduce further limitations to the applicability of the ''do-not-call'' registry because it believes such action would be inconsistent with the privacy mandate of the Telemarketing Act and would likely result in consumer confusion and frustration.

*G. Section 310.7 — Actions by States and Private Persons.*

Section 310.7 in the original and proposed Rules sets forth the procedures by which the states and private persons may bring actions under the Rule, as is provided for in the Telemarketing Act.[1021] In the NPRM, the Commission noted that it received no comments directly on this section, but that commenters were generally supportive of the Rule's enforcement scheme allowing the Commission, the states, and private parties to bring actions under the TSR.[1022] The Commission noted that the record at that time contained evidence of two sources of frustration regarding enforcement of the Rule: 1) the $50,000 monetary threshold required for a private party to bring suit under the Rule; and 2) the difficulty in identifying Rule violators, particularly those who violate the abusive practices section of the Rule.[1023] The Commission noted then that the amount in controversy requirement was included in the Telemarketing Act, and it is therefore up to Congress to make any change to this amount.[1024] With regard to the difficulty in identifying violators, the Commission expressed its belief that two proposed provisions—the prohibition on blocking Caller ID information, and the prohibition on denying or interfering with a consumer's right to be placed on a ''do-not-call'' list—would be beneficial in addressing these concerns.[1025]

The Commission received no comments on this section in response to the NPRM, and thus no modifications are included in the amended Rule.[1026]

*H. Section 310.8 — Fees.*

This section of the Rule, now allocated for the new provision on fees, is reserved. When completed, the fee section will be included here.

*I. Section 310.9 — Severability.*

This provision of the Rule is retained in the amended Rule, but renumbered as § 310.9. Section 310.8, formerly the section number for the Severability provision, now contains the provision regarding fees for the national ''do-not-call'' registry.

*J. Rulemaking Review Requirement.*

The original Rule required that a Rule Review proceeding be commenced within five years of the effective date of the original Rule. The amended Rule does not contain an equivalent provision. The Commission has a policy of reviewing all of its Rules and guides on a periodic basis to ensure that they continue to meet their goals and provide the protections that were intended when they were promulgated. This periodic review also provides an opportunity to examine the economic costs and benefits of the particular Rule or guide under review. The Commission believes that this periodic review should be sufficient for the amended Rule, and that it is unnecessary to include a specific provision regarding review within the text of the amended Rule.

*K. Effective Date.*

The amended Rule is effective on March 31, 2003, and full compliance with all provisions of the amended Rule—except § 310.4(a)(7), the caller identification transmission provision, and § 310.4(b)(1)(iii)(B), the national ''do-not-call'' registry provision—is required by that date. The Commission believes that making the amended Rule effective on March 31, 2003 will provide more than sufficient time for sellers and telemarketers to change their practices to conform to the amended Rule. The publication of the proposed Rule in January 2002 provided industry members with ample notice of the proposed changes in the Rule, and making the amended Rule effective on March 31, 2003 will give industry members sufficient additional time to familiarize themselves with the requirements of the amended Rule, and to ensure that their operations are in full compliance with all except two provisions of the amended Rule.

The Commission has determined that additional time may be required to allow sellers and telemarketers to come into full compliance with the caller identification transmission requirement. Therefore, full compliance with § 310.4(a)(7) is required by January 29, 2004. The Commission will announce at a future time the date by which full compliance with § 310.4(b)(1)(iii)(B), the ''do-not-call'' registry provision, will be required. The Commission anticipates that full compliance with the ''do-not-call'' provision will be required approximately seven months from the date a contract is awarded to create the national registry.

## IV. Paperwork Reduction Act

In light of both changes to the Rule following the NPRM and public comments received on Commission staff's prior PRA burden analysis for the NPRM, staff will submit for OMB review and clearance a supporting statement detailing its revised burden analysis.

## V. Regulatory Flexibility Act

*A. Need for and Objectives of the Rule.*

The amendments to the TSR announced here are the result of a review of the existing Rule as required by the Telemarketing Act.[1027] As discussed above in this SBP, and in the NPRM, the objective of the amendments is to fulfill the mandate of the Telemarketing Act to ensure that consumers are protected from

[1020] For example, debt collection and market research activities are not covered by the Rule because they are not ''telemarketing''—*i.e.*, they are not calls made ''to induce the purchase of goods or services.'' Of course, if the debt collection or market research call also included an upsell, the upsell portion of the call would be subject to the Rule as long as it met the criteria for ''telemarketing'' and was not otherwise exempt from the Rule.

[1021] 15 U.S.C. 6103 (states) and 6104 (private persons).

[1022] 67 FR at 4532-33.

[1023] 67 FR at 4533.

[1024] *Id.*

[1025] *Id.*

[1026] Some commenters did advocate for meaningful Rule enforcement, including random monitoring and publicity regarding enforcement. *See* AARP-NPRM at 10 (meaningful enforcement and publicity); EPIC-NPRM at 27 (suggesting random monitoring and also recommending registration and bonding requirements, which the Commission declines to adopt noting the states already have such requirements in many instances, and that further duplication of that effort would not enhance the Commission's law enforcement efforts). The Commission believes that the enforcement record for the TSR to date, with over 139 cases brought and $200 million in judgments, shows that the Commission and its state law enforcement partners have made enforcement of the Rule a top priority. Moreover, enforcement actions under the Rule often have been conducted as part of a ''sweep'' of cases, often accompanied by a media advisory and public education campaign, which serves as a means of raising public awareness of certain kinds of telemarketing fraud. In regard to the suggestion that call centers be randomly monitored for compliance with the Rule, the Commission notes that it has used, and will continue to use, a variety of law enforcement techniques to ensure compliance with the Rule.

[1027] 15 U.S.C. 6108.

''deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.''[1028] Other amendments, relating to the solicitation of charitable contributions through telemarketing, are made pursuant to the USA PATRIOT Act.[1029]

*B. Summary of the Significant Issues.*

The public comments on the proposed Rule are discussed above throughout the SBP, as are the changes that have been made in response to comments indicating that the costs of some of the proposed amendments would be excessive. Many of the commenters did not focus specifically on the costs faced by small businesses relative to those that would be borne by other firms. Rather, they argued that the costs to be borne by all firms—including small firms—would be excessive. In response to these comments, the Commission has made a number of modifications in the amended Rule. These changes should significantly reduce the burden on all businesses, including small businesses.

*Calls permitted where there is an existing business relationship.*

One proposal that commenters contended would impose particularly great costs on small businesses was the proposed national ''do-not-call'' registry. Commenters were particularly concerned with the requirement that businesses could only call consumers who had put their telephone numbers on the ''do-not-call'' registry if they had obtained the consumer's express verifiable authorization to make calls to that consumer. For example, Community Bankers expressed the concern that its members would be unable to use outside telemarketers to contact their existing customers. This would, they suggested, force community banks to do their own telemarketing, at higher cost, because calls made by third party telemarketing bureaus would be covered by FTC regulations.[1030] Another commenter noted that small firms may not have the recording equipment that would be needed to establish that they had obtained the consumer's express verifiable authorization to accept calls from that seller.[1031]

Furthermore, many small businesses may not keep their customer records in a form that would permit them to economically compare the telephone numbers of their customers with those on the national ''do-not-call'' registry and avoid calling those numbers that appear on the registry.[1032] According to NRF, converting their customer lists to a form that can be feasibly compared to the numbers on the national ''do-not-call'' registry could cost small businesses up to $1.00 per name. Furthermore, even after the records are converted, the NRF reports that the cost of eliminating names that appear on the ''do-not-call'' registry would be higher for small firms than for larger ones. Whereas, it might cost $0.01 per name to purge a large list, the cost for a small list is put at $0.10 to $0.15 per name.[1033]

As discussed above in the SBP, the Commission has decided to alter the ''do-not-call'' provision proposed in the NPRM. One of the changes is to create an exemption that will allow a seller and its telemarketer to call consumers with whom the seller has an established business relationship, even if the consumer has placed his or her telephone number on the ''do-not-call'' registry.[1034] The effect of this change will be that businesses—and in particular small businesses—will not need to check their lists of existing customers against the national ''do-not-call'' registry. There will also be no need to obtain express verifiable permission before calling someone with whom the business has an established business relationship. Thus, most, if not all, of the costs described above will not be faced by small businesses.[1035]

*Quarterly access to ''do-not-call'' registry.*

In addition, as discussed above, the Commission has decided not to require sellers and telemarketers to scrub their calling lists against the national ''do-not-call'' registry on a monthly basis. Instead, such updating will only be required on a quarterly basis.[1036] Commenters argued that this change was necessary to reasonably limit the costs imposed by the ''do-not-call'' registry.[1037] It should significantly reduce the expense associated with complying with the ''do-not-call'' requirements since firms will not need to scrub their lists twelve times per year at an expense that has been estimated at around $100 per seller or telemarketer each time its lists must be scrubbed.[1038]

*Harmonization with state ''do-not-call'' regulations.*

Many industry representatives argued that in order to avoid imposing an undue burden on business, particularly small businesses, it was essential that the proposed national ''do-not-call'' registry not simply be added on to the existing set of state ''do-not-call'' lists. Rather, in the view of industry, the national registry should incorporate existing and any future state lists and all of the lists should operate under a single, unified set of regulations.[1039] While many industry representatives argued that the way to achieve the necessary level of coordination between the state and federal lists was for the Commission to preempt inconsistent state regulations, the Commission has declined to do so at this time. Instead, as discussed above in the SBP, the Commission is engaged in a process of active consultation with the states that have enacted ''do-not-call'' statutes and with the FCC in order to develop procedures that will result in one harmonized ''do-not-call'' registry.[1040] Once fully effectuated, this harmonization should substantially reduce the burden of having to scrub against a large number of separate lists.

*For-profit fundraisers exempted from national ''do-not-call'' registry compliance.*

The burden placed on small charities by the ''do-not-call'' requirements has also been significantly reduced. As discussed above, the Commission has determined that for-profit firms that make fundraising calls on behalf of

[1028] 15 U.S.C. 6102.

[1029] Pub. L. 107-56 (Oct. 26, 2001).

[1030] Community Bankers-User Fee at 3.

[1031] AmEx-NPRM at 2. One small company reported that in order to comply with Oregon's ''do-not-call'' requirements, they had been forced to spend $12,500 to get a computer program written and have hired two additional employees at a cost of approximately $800 per week. (Celebrity Prime Foods-User Fee at 1).

[1032] *See, e.g.*, Ameriquest-NPRM at 9.

[1033] NRF-NPRM at 4-5. ERA placed the cost of comparing a company's calling lists against the ''do-not-call'' registry at $3 to $5 per 1,000 names, while CCC suggested that the cost would be in the neighborhood of $50 per hour and that it would take two hours for the average firm to compare their calling lists to the national ''do-not-call'' registry and delete from the company's lists any numbers that appear on the ''do-not-call'' registry. ERA-NPRM at 36; Miller Study at 11-12.

[1034] *See* discussion of § 310.4(b)(1)(iii) above.

[1035] While small businesses that wish to telemarket their products to consumers who are not existing customers will still have to check their calling lists against the ''do-not-call'' registry, they will not necessarily have to perform this work themselves. It is the Commission's understanding that small businesses often find it more economical to employ telemarketing bureaus who make such calls on the behalf of these businesses. A seller that employs a telemarketing bureau can arrange to have the telemarketer compare the names and/or telephone numbers on its lists against the ''do-not-call'' registry.

[1036] Amended Rule § 310.4(b)(3).

[1037] Household Bank-User Fee at 2.

[1038] Miller Study at 11-12.

[1039] *See, e.g.*, Household Bank-User Fee at 2-3; ARDA-User Fee at 1; Ameriquest-User Fee at 9-10; ICIA-User Fee at 1; NEMA-User Fee at 4.

[1040] This approach is consistent with the recommendation of the Small Business Administration (''SBA''), Office of Advocacy. *See* SBA-User Fee at 5-6.

charitable organizations will not be required to ensure that they are not making calls to consumers who have placed their telephone numbers on the national ''do-not-call'' registry.[1041] Rather, they will only have to honor individual consumer requests not to be called by the particular charity.[1042]

This change is likely to be of significant benefit to smaller charitable organizations since these organizations often find it more efficient to employ for-profit firms to make their calls rather than developing and maintaining the capacity to make such calls using their own staff.[1043] For example, APTS reported that 75 percent of their members chose to hire other firms to manage their telemarketing operations. They further reported that the average annual cost of outsourcing these operations was $182,000, whereas the estimated cost of the stations doing the same amount of telemarketing with its own personnel was $224,000, an increase of almost 25 percent.[1044] Similarly, Red Cross commented that it is more economical to hire a third party to operate short term blood-donor recruitment programs than to hire and maintain a full-time staff to perform such functions. According to Red Cross ''[s]uch trained third party professionals offer expertise and operational efficiencies that cannot be rapidly duplicated by Red Cross to respond to the volatile demand for blood.''[1045]

*Written confirmation as express verifiable authorization.*

Another change that should reduce the burden on small firms involves the procedures a firm may use to obtain the consumer's express verifiable authorization to use an account other than the consumer's credit card or debit card to pay for a purchase. In the NPRM, the Commission proposed to eliminate a procedure by which a firm was permitted to obtain authorization by sending the consumer written confirmation prior to the time the account was charged. In part this proposal was based on the impression that very few firms used this method of obtaining express verifiable authorization.[1046] However, commenters indicated that this was not the case and that many smaller firms—particularly newspapers—used this method.[1047] In response, the Commission has decided to retain the written confirmation method of obtaining express verifiable authorization, with certain modifications, including an exception that makes it unavailable in cases where the transaction involves a ''free-to-pay conversion'' feature and preacquired account information.[1048]

*No ban on preacquired account information.*

Another proposal in the NPRM that attracted considerable business opposition was the prohibition on the disclosure or receipt of any consumer's billing information. Commenters argued that such a prohibition on the use of preacquired account information would increase the costs of telemarketing. While these costs were not argued to be specific to small businesses, the costs faced by small businesses would be increased along with those of larger ones. According to CCC, requiring the consumer to provide an account number would add between 60 and 90 seconds to the length of a telemarketing call in those instances where the telemarketer already has the consumer's account information.[1049] MPA estimated the cost of requiring consumers to repeat their account information in the case of an upsell to be between 35 and 60 seconds.[1050] In addition, MPA suggested that requiring consumers to read their account numbers in all instances would lead some consumers to decide not to purchase the item being offered. The effect could be, they suggested, a reduction of five to 30 percent in consumer purchases in response to particular offers.[1051] Finally, a ban on the use of preacquired account information could increase the costs of engaging in telemarketing because of errors in the account information obtained from the consumer—either because the consumer misreads the account number or because the telemarketer makes a mistake in taking down the number.[1052]

As discussed in the SBP above, the Commission has decided not to prohibit the acquisition and use of preacquired account information. Instead, the Commission is limiting the prohibition to unencrypted account information and is requiring that telemarketers and sellers obtain the consumer's express informed consent before any purchase is charged to a consumer's account using preacquired account information. Except for transactions that involve a ''free-to-pay conversion'' feature combined with preacquired account information, the only steps a seller or telemarketer is required to undertake to obtain this consent are to provide the consumer with sufficient information for the consumer to understand the account that will be charged and to obtain the consumer's express agreement to have the purchase charged to that account. Since both of these are practices that an honest business would follow even in the absence of a rule provision, it is clear that the costs businesses argued would follow from the original proposal have been eliminated.

*Relaxed regulation of abandoned calls.*

Another proposal contained in the NPRM that businesses argued would significantly increase the costs of telemarketing was the proposal to prohibit telemarketers from ''abandoning'' telemarketing calls—that is, to prohibit making a call unless a telemarketing sales representative is available to talk to the consumer if the consumer answers. Critics of this proposal argued that it would effectively ban the use of predictive dialers.[1053] This would, they argued, significantly reduce the amount of time the individual telemarketing sales person spends talking to consumers. According to CCC, a telemarketing sales person can handle 13 to 14 calls per hour using a predictive dialer set to abandon five percent of calls. Without a predictive dialer, the same agent can only handle around eight calls per hour—a reduction of about 40 percent.[1054] Another source suggested that a telemarketer using a predictive dialer could make 20 calls per hour, whereas only five calls per hour would be possible without the dialer.[1055]

[1041] Amended Rule § 310.6(a).

[1042] Amended Rule § 310.4(b)(1)(iii).

[1043] Hudson Bay-Goodman-NPRM at 2. Hudson Bay noted that ''[i]nstead of renting space, buying computers and phone equipment, hiring supervisors and so on, HBC's clients find it cheaper to contact their members and donors by sharing these resources. Even after paying HBC's fee, which ranges from 4 to 7%, it is much cheaper for these non-profits to centralize these services. The savings achieved by phone company volume discounts alone pays more than half of HBC's fee.''

[1044] APTS-NPRM at 3-4.

[1045] Red Cross-NPRM at 3-4.

[1046] 67 FR at 4508.

[1047] *See, e.g.*, June 2002 Tr. III at 32-33 (NAA).

[1048] *See* amended Rule § 310.3(a)(3)(iii), and discussion of that provision above.

[1049] Miller Study at 17. According to the Miller Study, the total cost of this prohibition would have been approximately $1.5 billion. However, this estimate appears to be based on the incorrect assumption that the prohibition on the use of preacquired account information would add 60 to 90 seconds to every sale made in an outbound telemarketing call. In fact, the only sales that would be affected are those where the seller would otherwise obtain payment using preacquired account information.

[1050] MPA-NPRM at 24.

[1051] *Id.* at 19.

[1052] ABA-NPRM at 8; Assurant-NPRM at 3-4; BofA-NPRM at 7; Cendant-NPRM at 7.

[1053] June 2002 Tr. I at 211 (CCC); PMA-NPRM at 30; PCIC-NPRM at 2.

[1054] Miller Study at 15.

[1055] Marketlink-NPRM at 3. This estimate, and perhaps the estimate of CCC, may overestimate the

As discussed in the SBP, the Commission has determined to create a safe harbor to the prohibition on abandoned calls. This safe harbor will allow firms to avoid being cited for violation of this provision of the Rule provided they play a recording that identifies the seller and provides the seller's phone number when a sales representative is not available to handle a call and provided that this occurs in three percent or less of calls that are answered by a consumer. This change should substantially reduce the burden that would have been imposed by a total prohibition on abandoned calls.[1056]

*Regulation of upselling.*

Finally, the Commission has eliminated an unintended burden that would have resulted from treating any upsell as a separate outbound telemarketing call. As several people have noted, this would have required telemarketers who receive inbound calls to comply with the ''do-not-call'' provisions of the Rule as well as the calling hours provision before offering any upsell product.[1057] Such a requirement would have imposed substantial burdens on sellers who receive inbound telemarketing calls. However, it was never the intention of the Commission to require compliance with either the ''do-not-call'' provisions or the calling hour provisions in this context,[1058] and this requirement has been eliminated in the amended Rule which provides a separate definition of an upsell and clarifies that these provisions do not apply to an upsell.

*C. Description of Small Entities to Which the Rule Will Apply.*

This Rule will primarily impact firms that make telephone calls to consumers in an attempt to sell their products or services or entities that make calls to solicit charitable contributions. That is, the Rule will primarily impact entities that make outbound calls to consumers. Also affected will be firms that provide such services for others on a contract basis. It has been estimated that outbound calls to consumers resulted in total sales of $274.2 billion in 2001, and that the telemarketing industry that markets to consumers employs 4.1 million workers.[1059]

The number of firms making such outbound telemarketing calls, and the number that qualify as small entities, cannot be reliably estimated. According to the Office of Advocacy of the SBA, United States Census data shows that there are 2,305 firms that are identified as telemarketing bureaus. Of these, 1,279 are classified as being small businesses because they have sales of less than $5 million per year.[1060] These are firms that provide telemarketing services for other firms. However, not all of these firms will be impacted by the Rule to the same extent. According to NAICS, firms that are classified as telemarketing bureaus include firms that provide ''telemarketing services on a contract or fee basis for others, such as (1) promoting clients' products or services by telephone, (2) taking orders for clients by telephone, and (3) soliciting contributions or providing information for clients by telephone.''[1061] Firms that take orders for clients by telephone, as well as some firms that provide information for their clients by telephone, are going to be responding to calls made by consumers and not making calls themselves. Unless such firms are engaging in upselling of products or services that involve a ''free-to-pay conversion'' feature, they will not be impacted by the proposed Rule to any significant extent.

In addition to firms that provide telemarketing services for others, the Rule will have an effect on firms that use telemarketing as a way to market their own products. These may include, among others, retailers, manufacturers, and financial service providers.[1062] The number of such firms—and the number of those that are classified as small businesses—cannot be determined because such firms generally think of themselves as producers or sellers of particular products and not as telemarketers. Similarly, in the available statistics, these firms will be classified as producers or sellers of particular products and not as telemarketers.[1063]

*D. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule.*

As discussed above in the SBP, the amended Rule alters some collection of information requirements. The effect of those requirements on all businesses is discussed in detail in the PRA section of this Notice. First, the amended Rule requires firms that use preacquired account information in conjunction with a ''free-to-pay conversion'' feature to tape record all such transactions to show that they have obtained the consumer's express informed consent to charge the consumer's account.[1064] Section 310.5(a)(5) requires that the seller or telemarketer maintain copies of such audio recordings for 24 months. Similarly, § 310.5(a)(5) requires that firms retain for 24 months copies of any written express agreements received from consumers permitting the company to call the consumer even though the consumer's phone number is included on the ''do-not-call'' registry.[1065] Finally, the amended Rule extends the recordkeeping requirements of § 310.5 to include charitable solicitations in a non-sales context, as required by the USA PATRIOT Act. All other amendments to the Rule relate to the Rule's disclosures or other compliance requirements and are necessary to prevent telemarketing fraud and abuse.

The classes of small entities affected by the amendments include telemarketers or sellers engaged in acts or practices covered by the Rule. The types of professional skills required to comply with the Rule's recordkeeping, disclosure, or other requirements would include attorneys or other skilled labor needed to ensure compliance.

*E. Steps Taken to Minimize Impact on Small Entities.*

As discussed above, the Telemarketing Act directs the Commission to enact ''rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or

efficiency losses from prohibiting abandoned calls in that the five calls per hour figure is based on the assumption that calls are dialed ''manually.'' This suggests that the estimate may be based on an operation in which the individual sales representative actually dials the number to be called. A requirement not to abandon calls would not require that sales representatives dial their own calls. It would still be possible, if it were cost efficient, to use computer systems to dial the calls, and this could generate some efficiencies relative to manual dialing. What would not be permitted is to dial a call prior to the time a sales representative becomes available or to dial more than one call at a time for each available sales representative.

[1056] As CCC testified at the workshop, ''[W]hat we found out is that ... below 5 percent or 4 percent or 3 percent [rate of abandonment], you're really beginning to raise costs....'' June 2002 Tr. I at 212 (CCC).

[1057] *See, e.g.,* June 2002 Tr. I at 210 (CCC); June 2002 Tr. II at 214-15 (DMA).

[1058] June 2002 Tr. I at 210-11 (FTC); June 2002 Tr. II at 215 (FTC).

[1059] DMA-NPRM at 5. ATA estimates employment in business-to-consumer telemarketing at 5.4 million. ATA-NPRM at 3.

[1060] SBA-User Fee at 3. The size of telemarketing bureaus that qualify as being small businesses was increased to $6 million as of October 2, 2002. *See* SBA, Small Business Size Standards Matched to North American Industry Classification System (NAICS), http://www.sba.gov/size/sizetable2002.html.

[1061] U.S. Census Bureau, 1997 NAICS Definitions, 561 Administrative and Support Services, http://www.census.gov/pub/epcd/naics/NDEF561.HTM.

[1062] ATA-User Fee at 2.

[1063] Some commenters suggested that small firms are more likely to rely on telemarketing to sell their products because they cannot afford other, more expensive forms of advertising. *See, e.g.,* Ameriquest-User Fee at 6; ATA-NPRM at 4.

[1064] *See* § 310.4(a)(6)(i)(C).

[1065] The provision allowing for such consent is at § 310.4(b)(1)(iii)(B)(*i*).

practices.''[1066] Each of the amendments in the amended Rule is intended to better protect consumers from deceptive and abusive telemarketing practices. In order to achieve this end, the Commission believes that it is necessary to enact regulations that cover small and large firms equally. Based on the Commission's enforcement experience, it is clear that many of the firms that engage in fraudulent telemarketing activities are small firms. A failure to include such small firms within the requirements of the regulations would, therefore, fail to prohibit deceptive practices by the types of firms that account for a significant share of the problems the Commission encounters.

At the same time, as discussed above both in the SBP and in the ''Summary of Significant Issues Raised by the Public Comments in Response to the IRFA,'' the Commission has sought to minimize as much as possible the burdens imposed on all affected entities, including small businesses. In general, the changes made in response to public comments have further reduced the burdens. The amendments to the disclosure and recordkeeping provisions of the TSR are generally consistent with the business practices that most sellers and telemarketers, regardless of size, would choose to follow, even absent legal requirements.

The Commission has taken care in developing the amendments to the Rule to set performance standards, which establish the objective results that must be achieved by regulated entities, but do not establish a particular technology that must be employed in achieving those objectives. For example, the Commission does not specify the form in which records required by the TSR must be kept. It also allows a seller and a telemarketer making calls on the seller's behalf to allocate between themselves the responsibility for maintaining required records.

## VI. National Environmental Policy Act

Under the Commission's Rules of Practice implementing the National Environmental Policy Act of 1969 (''NEPA''),[1067] no ''major action significantly affecting the quality of the human environment will be instituted unless an environmental impact statement ('EIS') has been prepared,'' if such is required.[1068] To determine if such an impact statement is required, the Commission generally prepares an ''environmental assessment.'' However, such an environmental assessment is not necessary in every circumstance. For example, in circumstances when the ''environmental effects, if any, would appear to be . . . so uncertain that environmental analysis would be based on speculation,'' no ''environmental assessment'' is required.[1069] The Commission believes, for the reasons set forth below, that this exception is applicable in the instant case, and that because the environmental effects, if any, of the amended TSR are uncertain and based on speculation, the Commission is not required to prepare an environmental assessment.

The amended TSR would modify the original Rule in several ways. Each of these is outlined above in Section I (F), which summarizes the changes in the amended Rule. However, the only comment that raised the issue of the environmental effects of the Rule did so solely with regard to the national ''do-not-call'' registry provision. Because the Commission does not believe that any other modification in the amended Rule implicates any impact on the environment, the analysis is confined to this provision.

The ''do-not-call'' registry provision will establish a centralized means for consumers across the country to notify sellers and telemarketers of their preference not to receive unsolicited outbound telemarketing calls.[1070] As discussed in greater detail above, in the section discussing § 310.4(b)(1)(iii), the ''do-not-call'' registry provision supplements the original Rule's provision that allows consumers to exercise their ''do-not-call'' rights on a company-by-company basis. The Commission determined, based on the extensive record evidence from the rulemaking proceeding, that a national ''do-not-call'' registry is necessary to effectuate the purposes of the Telemarketing Act.[1071]

The comment that addressed the potential environmental impact of the proposed national ''do-not-call'' registry stated, in relevant part,

> For obvious reasons the FTC's proposed action may drastically reduce the ability to sell goods and services via telemarketing. In addition, and for the reasons stated above [wherein the commenter argues that the national ''do-not-call'' registry will negatively impact inbound call centers who rely upon a combination of inbound and outbound calling to survive],[1072] consumers' ability to themselves purchase via catalogs may be compromised as well, as ''call centers'' are forced to close in the face of insufficient ''outbound telemarketing work.'' Either event would force consumers to climb into their cars and return to the mall for their wares, a result that itself would increase gas consumption and cause more air pollution.[1073]

DeHart concluded, based on its belief that the ''do-not-call'' registry provision would increase the number of consumers driving to shopping at malls as a result of the implementation of the national ''do-not-call'' registry provision, that the Commission must prepare an EIS or, at minimum, an environmental assessment.[1074]

The underlying premise in the DeHart comment, that a national ''do-not-call'' registry will have a negative impact on call centers that rely in part on inbound telemarketing and in part on outbound telemarketing for their livelihood, is unsupported in the comment. No evidence, other than a mere allusion to a study that purportedly shows that some firms' cost of providing inbound call center service would increase if their outbound telemarketing load decreased, is provided by DeHart, nor is support for this proposition found in the record as a whole. Therefore, the fundamental assumption on which DeHart's argument is based is one that appears to be mere speculation.

The Commission believes that speculation, and indeed, logic, could as easily lead to the conclusion that a diminution in outbound calling, resulting from consumers' decision to place their telephone numbers on the national ''do-not-call'' registry, could lead sellers to use other channels of distance marketing to sell their products, including channels that would significantly increase inbound telemarketing, such as direct mail, catalog sales, and Internet sales. This would mean that, even if many consumers utilize the ''do-not-call'' registry, inbound calling may benefit, not suffer, from such a result. Moreover, DeHart cites no authority for the

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[1066] 15 U.S.C. 6102(a)(1).

[1067] 42 U.S.C. 4321 *et seq.*

[1068] 16 CFR 1.81, 1.82.

[1069] 16 CFR 1.83. *See also National Citizens Comm. for Broad. v. FCC*, 567 F.2d 1095, 1098 n.3 (D.C. Cir. 1977).

[1070] *See* discussion of § 310.4(b)(1)(iii) above.

[1071] 15 U.S.C. 6102(a)(3)(A) (mandating that the Commission include in its Rule ''a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy'').

[1072] DeHart-NPRM at 2-3 (although the commenter alludes to a study that corroborates its assertion on this point, no title or citation is provided for such study).

[1073] DeHart-NPRM at 3.

[1074] *Id.* The Commission believes that this allegation would constitute, at most, ''indirect effects'' under the NEPA implementing regulations, or those ''which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.'' 40 CFR 1508.8(b). The Commission does not believe that the ''do-not-call'' registry provision has been or could reasonably be alleged to have ''direct effects'' or those ''caused by the action and occur at the same time and place.'' 40 CFR 1508.8(a).

proposition that local retail shopping has, to date, been reduced as a result of inbound or outbound telemarketing. And, the fact remains that, other than DeHart, none of the commenters, including major sellers, telemarketers, and industry groups, provides any evidence relating to the potential for a national ''do-not-call'' registry to result in a reduction in service or an increase in cost for inbound telemarketing, nor in a concomitant increase in retail shopping done in local malls.

Moreover, the Commission believes there can be no hard evidence on which to base a prediction of consumers' actions following the implementation of the ''do-not-call'' registry provision. It seems likely, based on the experience of states that have implemented statewide ''do-not-call'' lists, and the overwhelmingly high response of consumers to the Commission's proposal, that many consumers will avail themselves of the opportunity to place their telephone numbers on the national ''do-not-call'' registry. However, as noted above, this may or may not have any impact on consumers' decision to shop at local malls, or on their choice of transportation. Thus, while consumer behavior may change as a result of the promulgation of amendments to the Rule, such changes cannot be quantified or even reasonably estimated because consumer decisions are influenced by many variables other than existence of the ''do-not-call'' registry. Any indirect impact of the amended Rule on the environment would therefore be highly speculative and impossible to accurately predict or measure.

The Commission does not believe that any alternative to creating a national ''do-not-call'' registry would both provide the benefits of the registry and ameliorate all potential concerns regarding environmental impact. For example, the Commission does not believe that given its justification for the necessity of the registry, eliminating the provision from the amended Rule would be appropriate based solely on the unsupported allegations of indirect environmental effect raised in the DeHart comment. Furthermore, the Commission can think of no alternative other than eliminating the national ''do-not-call'' registry that would address DeHart's unsupported and highly speculative concern.

In sum, although any evaluation of the environmental impact of the amendments to the TSR is uncertain and highly speculative, the Commission finds no evidence of avoidable adverse impacts stemming from the amended Rule. Therefore, the Commission has determined, in accordance with § 1.83 of the FTC's Rules of Practice, that no environmental assessment or EIS is required.[1075]

**List of Subjects in 16 CFR Part 310.**

Telemarketing, Trade practices.

Accordingly, title 16, part 310 of the Code of Federal Regulations, is revised to read as follows:

## PART 310—TELEMARKETING SALES RULE

Sec.

310.1 Scope of regulations in this part.
310.2 Definitions.
310.3 Deceptive telemarketing acts or practices.
310.4 Abusive telemarketing acts or practices.
310.5 Recordkeeping requirements.
310.6 Exemptions.
310.7 Actions by states and private persons.
310.8 Reserved: Fee for access to ''do-not-call'' registry.
310.9 Severability.

**Authority:** 15 U.S.C. 6101–6108.

### § 310.1 Scope of regulations in this part.

This part implements the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-6108, as amended.

### § 310.2 Definitions.

(a) *Acquirer* means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

(b) *Attorney General* means the chief legal officer of a state.

(c) *Billing information* means any data that enables any person to access a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

(d) *Caller identification service* means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone.

(e) *Cardholder* means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.

(f) *Charitable contribution* means any donation or gift of money or any other thing of value.

(g) *Commission* means the Federal Trade Commission.

(h) *Credit* means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(i) *Credit card* means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(j) *Credit card sales draft* means any record or evidence of a credit card transaction.

(k) *Credit card system* means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

(l) *Customer* means any person who is or may be required to pay for goods or services offered through telemarketing.

(m) *Donor* means any person solicited to make a charitable contribution.

(n) *Established business relationship* means a relationship between a seller and a consumer based on:

(1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or

(2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

(o) *Free-to-pay conversion* means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.

(p) *Investment opportunity* means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation.

(q) *Material* means likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution.

(r) *Merchant* means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the

[1075] 16 CFR 1.83. *See also National Citizens Comm. for Broad. v. FCC*, 567 F.2d 1095, 1098 n.3 (D.C. Cir. 1977).

purchase of goods or services or a charitable contribution.

(s) *Merchant agreement* means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(t) *Negative option feature* means, in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.

(u) *Outbound telephone call* means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.

(v) *Person* means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(w) *Preacquired account information* means any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged.

(x) *Prize* means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

(y) *Prize promotion* means:

(1) A sweepstakes or other game of chance; or

(2) An oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

(z) *Seller* means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.

(aa) *State* means any state of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(bb) *Telemarketer* means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

(cc) *Telemarketing* means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term ''further solicitation'' does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

(dd) *Upselling* means soliciting the purchase of goods or services following an initial transaction during a single telephone call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction. An ''external upsell'' is a solicitation made by or on behalf of a seller different from the seller in the initial transaction, regardless of whether the initial transaction and the subsequent solicitation are made by the same telemarketer. An ''internal upsell'' is a solicitation made by or on behalf of the same seller as in the initial transaction, regardless of whether the initial transaction and subsequent solicitation are made by the same telemarketer.

### § 310.3 Deceptive telemarketing acts or practices.

(a) *Prohibited deceptive telemarketing acts or practices.* It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer pays[1] for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer;[2]

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(iii) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and, if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and the no-purchase/no-payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(vi) In the sale of any goods or services represented to protect, insure, or otherwise limit a customer's liability in the event of unauthorized use of the customer's credit card, the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. 1643; and

(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

[1] When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment.

[2] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226, compliance with the disclosure requirements under the Truth in Lending Act and Regulation Z shall constitute compliance with § 310.3(a)(1)(i) of this Rule.

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(v) Any material aspect of a prize promotion including, but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion;

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability;

(vii) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity;

(viii) That any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. 1643; or

(ix) Any material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(3) Causing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z,[3] or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E.[4] Such authorization shall be deemed verifiable if any of the following means is employed:

(i) Express written authorization by the customer or donor, which includes the customer's or donor's signature;[5]

(ii) Express oral authorization which is audio-recorded and made available upon request to the customer or donor, and the customer's or donor's bank or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges, or payments (if more than one);

(B) The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;

(C) The amount(s) of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

(E) The customer's or donor's billing information, identified with sufficient specificity such that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;

(F) A telephone number for customer or donor inquiry that is answered during normal business hours; and

(G) The date of the customer's or donor's oral authorization; or

(iii) Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer's or donor's billing information, and that includes all of the information contained in §§ 310.3(a)(3)(ii)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; *provided*, however, that this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and preacquired account information.

(4) Making a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution.

(b) *Assisting and facilitating.* It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule.

(c) *Credit card laundering.* Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

(1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

(2) Any person to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

(d) *Prohibited deceptive acts or practices in the solicitation of charitable contributions.* It is a fraudulent charitable solicitation, a deceptive telemarketing act or practice, and a violation of this Rule for any telemarketer soliciting charitable contributions to misrepresent, directly or by implication, any of the following material information:

(1) The nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested;

(2) That any charitable contribution is tax deductible in whole or in part;

(3) The purpose for which any charitable contribution will be used;

(4) The percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program;

(5) Any material aspect of a prize promotion including, but not limited to: the odds of being able to receive a prize; the nature or value of a prize; or that a charitable contribution is required to win a prize or to participate in a prize promotion; or

(6) A charitable organization's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.

### § 310.4 Abusive telemarketing acts or practices.

(a) *Abusive conduct generally.* It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

[3] Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR part 226.

[4] Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.*, and Regulation E, 12 CFR part 205.

[5] For purposes of this Rule, the term ''signature'' shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(1) Threats, intimidation, or the use of profane or obscene language;

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

(i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and

(ii) The seller has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule should be construed to affect the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose;

(3) Requesting or receiving payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney;

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person;

(5) Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; *provided*, however, that this paragraph shall not apply to the disclosure or receipt of a customer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction;

(6) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements in paragraphs (a)(6)(i) through (ii) of this section must be met to evidence express informed consent.

(i) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the seller or telemarketer must:

(A) obtain from the customer, at a minimum, the last four (4) digits of the account number to be charged;

(B) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account number pursuant to paragraph (a)(6)(i)(A) of this section; and,

(C) make and maintain an audio recording of the entire telemarketing transaction.

(ii) In any other telemarketing transaction involving preacquired account information not described in paragraph (a)(6)(i) of this section, the seller or telemarketer must:

(A) at a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged; and

(B) obtain from the customer or donor his or her express agreement to be charged for the goods or services and to be charged using the account number identified pursuant to paragraph (a)(6)(ii)(A) of this section; or

(7) Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call; *provided* that it shall not be a violation to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.

(b) *Pattern of calls.*

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with § 310.4(b)(1)(iii);

(iii) Initiating any outbound telephone call to a person when:

(A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or

(B) that person's telephone number is on the ''do-not-call'' registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller

(*i*) has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature[6] of that person; or

(*ii*) has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

(iv) Abandoning any outbound telephone call. An outbound telephone call is ''abandoned'' under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

(2) It is an abusive telemarketing act or practice and a violation of this Rule for any person to sell, rent, lease, purchase, or use any list established to comply with § 310.4(b)(1)(iii)(A), or maintained by the Commission pursuant to § 310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists.

(3) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) and (iii) if it can demonstrate that, as part of the seller's or telemarketer's routine business practice:

(i) It has established and implemented written procedures to comply with § 310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance, in

[6] For purposes of this Rule, the term ''signature'' shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

the procedures established pursuant to § 310.4(b)(3)(i);

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact, in compliance with § 310.4(b)(1)(iii)(A);

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to §§ 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the ''do-not-call'' registry obtained from the Commission no more than three (3) months prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to § 310.4(b)(3)(i); and

(vi) Any subsequent call otherwise violating § 310.4(b)(1)(ii) or (iii) is the result of error.

(4) A seller or telemarketer will not be liable for violating 310.4(b)(1)(iv) if:

(i) the seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign;

(ii) the seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed[7]; and

(iv) the seller or telemarketer, in accordance with § 310.5(b)-(d), retains records establishing compliance with § 310.4(b)(4)(i)-(iii).

(c) *Calling time restrictions.* Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.

(d) *Required oral disclosures in the sale of goods or services.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion; *provided*, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

(e) *Required oral disclosures in charitable solicitations.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the charitable organization on behalf of which the request is being made; and

(2) That the purpose of the call is to solicit a charitable contribution.

### § 310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of $25.00 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;[8]

(4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations; *provided*, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

(5) All verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by § 310.5(a) in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by § 310.5(a) shall be a violation of this Rule.

(c) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this Section. When a seller and telemarketer have entered into such an agreement, the terms of that agreement shall govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, the seller shall be responsible for complying with §§ 310.5(a)(1)-(3) and (5); the telemarketer shall be responsible for complying with § 310.5(a)(4).

(d) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer shall maintain all records as required under this Section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this Section.

### § 310.6 Exemptions.

(a) Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule.

(b) The following acts or practices are exempt from this Rule:

(1) The sale of pay-per-call services subject to the Commission's Rule

[7] This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

[8] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with § 310.5(a)(3) of this Rule.

entitled ''Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992,'' 16 CFR Part 308, *provided*, however, that this exemption does not apply to the requirements of § § 310.4(a)(1), (a)(7), (b), and (c);

(2) The sale of franchises subject to the Commission's Rule entitled ''Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures,'' (''Franchise Rule'') 16 CFR Part 436, *provided*, however, that this exemption does not apply to the requirements of § § 310.4(a)(1), (a)(7), (b), and (c);

(3) Telephone calls in which the sale of goods or services or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales or donation presentation by the seller or charitable organization, *provided*, however, that this exemption does not apply to the requirements of § § 310.4(a)(1), (a)(7), (b), and (c);

(4) Telephone calls initiated by a customer or donor that are not the result of any solicitation by a seller, charitable organization, or telemarketer, *provided*, however, that this exemption does not apply to any instances of upselling included in such telephone calls;

(5) Telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than direct mail solicitation, *provided*, however, that this exemption does not apply to calls initiated by a customer or donor in response to an advertisement relating to investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or advertisements involving goods or services described in § § 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls;

(6) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule, for any goods or services offered in the direct mail solicitation, and that contains no material misrepresentation regarding any item contained in § 310.3(d) of this Rule for any requested charitable contribution; *provided*, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls; and

(7) Telephone calls between a telemarketer and any business, except calls to induce the retail sale of nondurable office or cleaning supplies; *provided*, however, that § 310.4(b)(1)(iii)(B) and § 310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

### § 310.7 Actions by states and private persons.

(a) Any attorney general or other officer of a state authorized by the state to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, shall serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, and shall include a copy of the state's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the state or private person shall serve the Commission with the required notice immediately upon instituting its action.

(b) Nothing contained in this Section shall prohibit any attorney general or other authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state.

**§ 310.8 [Reserved: Fee for access to ''do-not-call'' registry.]**

**§ 310.9 Severability.**

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

**Note:** Appendices A and B are published for informational purposes only and will not be codified in Title 16 of the Code of Federal Regulations.

## Appendix A

*List of Acronyms for Rule Review Commenters*

February 28, 2000 Request for Comment

*Acronym — Commenter*

AARP—AARP
Alan—Alan, Alicia
ARDA—American Resort Development Association
ATA—American Teleservices Association
Anderson—Anderson, Wayne
Baressi—Baressi, Sandy
Bell Atlantic—Bell Atlantic
Bennett—Bennett, Douglas H.
Biagiotti—Biagiotti, Mary
Bishop—Bishop, Lew & Lois
Blake—Blake, Ted
Bowman-Kruhm—Bowman-Kruhm, Mary
Braddick—Braddick, Jane Ann
Brass—Brass, Eric
Brosnahan—Brosnahan, Kevin
Budro—Budro, Edgar
Card—Card, Giles S.
Collison—Collison, Doug
Conn—Conn, David
Conway—Conway, Candace
Croushore—Croushore, Amanda
Curtis—Curtis, Joel
Dawson—Dawson, Darcy
DMA—Direct Marketing Association
DSA—Direct Selling Association
Doe—Doe, Jane
ERA—Electronic Retailing Association
FAMSA—FAMSA-Funeral Consumers Alliance, Inc.
Gannett—Gannett Co., Inc.
Garbin—Garbin, David and Linda
A. Gardner—Gardner, Anne
S. Gardner—Gardner, Stephen
Gibb—Gibb, Ronald E.
Gilchrist—Gilchrist, Dr. K. James
Gindin—Gindin, Jim
Haines—Haines, Charlotte
Harper—Harper, Greg
Heagy—Heagy, Annette M.
Hecht—Hecht, Jeff
Hickman—Bill and Donna
Hollingsworth—Hollingsworth, Bob and Pat
Holloway—Holloway, Lynn S.
Holmay—Holmay, Kathleen
ICFA—International Cemetery and Funeral Association
Johnson—Johnson, Sharon Coleman
Jordan—Jordan, April
Kelly—Kelly, Lawrence M.
KTW—KTW Consulting Techniques, Inc.
Lamet—Lamet, Jerome S.
Lee—Lee, Rockie
LSAP—Legal Services Advocacy Project
LeQuang—LeQuang, Albert
Lesher—Lesher, David
Mack—Mack, Mr. and Mrs. Alfred
MPA—Magazine Publishers of America, Inc.
Manz—Manz, Matthias
McCurdy—McCurdy, Bridget E.
Menefee—Menefee, Marcie
Merritt—Merritt, Everett W.
Mey— Mey, Diana
Mitchelp—Mitchelp
TeleSource—Morgan-Francis/Tele-Source Industries
NACHA—NACHA-The Electronic Payments Association
NAAG—National Association of Attorneys General
NACAA—National Association of Consumer Agency Administrators
NCL—National Consumers League
NFN—National Federation of Nonprofits
NAA—Newspaper Association of America
NASAA—North American Securities Administrators Association
Nova53—Nova53
Nurik— Nurik, Margy and Irv
PLP—Personal Legal Plans, Inc.
Peters—Peters, John and Frederickson, Constance
Reese—Reese Brothers, Inc.
Reynolds—Reynolds, Charles
Rothman—Rothman, Iris
Runnels—Runnels, Mike
Sanford—Sanford, Kanija
Schiber—Schiber, Bill
Schmied—Schmied, R. L.
Strang—Strang, Wayne G.
TeleSource—Morgan-Francis/Tele-Source Industries
Texas—Texas Attorney General
Thai—Thai, Linh Vien
Vanderburg—Vanderburg, Mary Lou
Ver Steegt—Ver Steegt, Karen
Verizon—Verizon Wireless
Warren—Warren, Joshua
Weltha—Weltha, Nick
Worsham—Worsham, Michael C., Esq.

## Appendix B

*List of Acronyms for NPRM Commenters*

*Acronym — Commenter*

1–800-DoNotCall—1–800-DoNotCall, Inc.
AARP—AARP
ACA—ACA International
ACUTA—ACUTA
Advanta—Advanta Corp.
Aegis—Aegis Communications Group
Alabama Police—Alabama State Police Association, Inc.
AAST—American Association of State Troopers
ABA—American Bankers Association
ABIA—American Bankers Insurance Association
American Blind—American Blind Products, Inc.
ACE—American Council on Education
ADA—American Diabetes Association
AmEx—American Express
AFSA—American Financial Services Association
Red Cross—American Red Cross
ARDA—American Resort Development Association
ARDA–2—American Resort Development Association-Do Not Call Registry
American Rivers—American Rivers
ASTA—American Society of Travel Agents
ATA—American Teleservices Association
Blood Centers—America's Blood Centers
Community Bankers—America's Community Bankers
Ameriquest—Ameriquest Mortgage Company
Armey—Armey, The Honorable Dick (U.S. House of Representatives)
AFP—Association of Fundraising Professionals
APTS—Association of Public Television Stations
ANA—Association of National Advertisers
Associations—joint comment of: American Teleservices Association, Direct Marketing Association, Electronic Retailing Association, Magazine Publishers Association, and Promotion Marketing Association
Assurant—Assurant Group
Avinta—Avinta Communications, Inc.
Ayres—Ayres, Ian
Baldacci—Baldacci, The Honorable John Elias (U.S. House of Representatives)
BofA—Bank of America
Bank One—Bank One Corporation
Beautyrock—Beautyrock, Inc.
BellSouth—BellSouth Corporation
Best Buy—Best Buy Company, Inc.
BRI—Business Response Inc.
CCAA—California Consumer Affairs Association
CATS—Californians Against Telephone Solicitation
Capital One—Capital One Financial Corporation
Car Wash Guys—WashGuy Systems
Carper—Carper, The Honorable Thomas R. (U.S. Senate)
Celebrity Prime Foods—Celebrity Prime Foods
Cendant—Cendant Corporation
Chamber of Commerce—Chamber of Commerce of the United States of America
CRF—Charitable Resource Foundation, Inc.
Chicago ADM—Chicago Association of Direct Marketing
Childhood Leukemia—Childhood Leukemia Foundation
CDI—Circulation Development, Inc.
CURE—Citizens United for Rehabilitation of Errants
Citigroup—Citigroup Inc.
Civil Service Leader—Civil Service Leader
Collier Shannon-Collier Shannon Scott
Comcast—Comcast
CNHI—Community Newspaper Holdings, Inc.
Community Safety—Community Safety, LLC
Connecticut—Connecticut Commissioner of Consumer Protection
CBA—Consumer Bankers Association
CCC—joint comment of: Consumer Choice Coalition, ACI Telecentrics, Coverdell & Company, Discount Development Services, HSN LP d/b/a HSN and Home Shopping Network, Household Credit Services, MBNA America Bank, MemberWorks

Incorporated, Mortgage Investors Corporation, Optima Direct, TCIM Inc., Trilegiant Corporation and West Corporation
CMC—Consumer Mortgage Coalition
Consumer Privacy—Consumer Privacy Guide
Convergys—Convergys Corporation
CCA—Corrections Corporation of America
CASE—Council for Advancement and Support of Education
Cox—Cox Enterprises
Craftmatic—Craftmatic Organization, Inc.
Davis—Davis, The Honorable Tom (U.S. House of Representatives)
DBA—Debt Buyers Association
DeHart—DeHart & Darr Associates
Deutsch—Deutsch, The Honorable Peter (U.S. House of Representatives)
DialAmerica—DialAmerica Marketing, Inc.
DMA—Direct Marketing Association/U.S. Chamber of Commerce
DMA-NonProfit—Direct Marketing Association NonProfit Federation
DSA—Direct Selling Association
Discover—Discover Bank
DC—District of Columbia, Office of the People's Counsel
Eagle—Eagle Bank
EFSC—Electronic Financial Services Council
EPIC—Joint comment: Electronic Privacy Information Center, Center for Digital Democracy, Junkbusters Corp, International Union UAW, Privacy Rights Clearinghouse, Consumers Union, Evan Hendricks of Privacy Times, Privacyactivisim, Consumer Action, Consumer Project on Technology, Robert Ellis Smith of Privacy Journal, Consumer Federation of America, Computer Scientists for Social Responsibility, and Private Citizen, Inc.
ERA—Electronic Retailing Association
EPI—Enterprise Prison Institute
Experian—Experian Marketing Information Solutions, Inc.
Fiber Clean—Fiber Clean
Roundtable—Financial Services Roundtable
Fire Fighters Associations:
Asheville FFA—Asheville (NC) Fire Fighters Association
Bethelehem FFA—Bethlehem (PA), IAFF Local 735
Boone FFA—Boone (IA)
California FFA—California Professional Firefighters
Cedar Rapids FFA—Cedar Rapids (IA), IAFF Local 11
Cedar Rapids Airport FFA—Cedar Rapids Airport (IA)
Chattanooga FFA—Chattanooga (TN) Fire Fighters Association, Local 820
Edwardsville FFA—Edwardsville (IL) Fire Fighters Local 1700
Greensboro FFA—Greensboro (NC)
Hickory FFA—Hickory (NC) Firefighters Association, IAFF Local 2653
Indiana FFA—Indiana, Professional Fire Fighters Union of
Iowa FFA—Iowa Professional Firefighters
Missouri FFA—Missouri State Council of Fire Fighters
North Carolina FFA—North Carolina, Professional Fire Fighters & Paramedics of
North Maine FFA—North Maine (Des Plaines, IL) Firefighters, IAFF Local 224
Ottumwa FFA—Ottumwa (IA)
Roanoke FFA—Roanoke (VA) Fire Fighters Association
Springfield FFA—Springfield (MO) Firefighters Association, Local 52
Sycamore FFA—Sycamore, IAFF Local 3046
Utah FFA—Utah, Professional Firefighters of
Vermont FFA—Vermont, Professional Firefighters of
Wisconsin FFA—Wisconsin, Professional Fire Fighters of
FireCo—FireCo, L.L.C.
Fleet—FleetBoston Financial Corporation
FOP—Fraternal Order of Police, Grand Lodge
FPIR—Fund for Public Interest Research, Inc.
FCA—Funeral Consumers Alliance, Inc.
Gannett—Gannett Co., Inc.
Gottschalks—Gottschalks, Inc.
Greater Niagara—Greater Niagara Newspapers
Green Mountain—Green Mountain Energy Company
Gryphon—Gryphon Networks
Hagel, Johnson & Carper—Joint letter from: The Honorable Chuck Hagel, Tim Johnson, and Thomas R. Carper (U.S. Senate)
Hastings—Hastings, The Honorable Doc (U.S. House of Representatives)
Herald Bulletin—Herald Bulletin
Horick—Horick, Bob
Household International:
Household Auto—Joint comment: Household Finance Corp, OFL-A Receivables Corp., and Household Automotive
Household Credit—Household Bank, Credit Card Services
Household Finance—Household Finance Corporation
Household-Montalvo—Montalvo, David
HSBC—HSBC Bank USA
Hudson Bay-Anderson—Hudson Bay Company of Illinois-owner
Hudson Bay-Goodman—Hudson Bay Company-Goodman
HRC—Human Rights Campaign
IBM—IBM
ICT—ICT Group, Inc.
Illinois Police—Illinois Council of Police & Sheriffs
Infocision—Infocision Management Corporation
Inhofe—Inhofe, The Honorable James (U.S. Senate)
Insight—Insight Realty, Inc.
ITC—Interactive Teleservices Corp.
ICFA—International Cemetery & Funeral Association
IFA—International Franchise Association
IUPA—International Union of Police Associations
ICC—Internet Commerce Coalition
Intuit—Intuit Inc.
Italian American Police—Italian American Police Society of New Jersey
Johnson—Johnson, The Honorable Tim (U.S. Senate)
Kansas—Kansas, House of Representatives
KeyCorp—KeyCorp.
Lautman—Lautman & Associates
LSAP—Legal Services Advocacy Project
Leggett & Platt—Leggett & Platt
Lenox—Lenox Inc.
Leukemia Society—Leukemia & Lymphoma Society
Life Share—Life Share
Lucas—Lucas, The Honorable Ken (U.S. House of Representatives)
MPA—Magazine Publishers Association
Make-A-Wish—Make-A-Wish Foundation of America
Manzullo—Manzullo, The Honorable Donald A. (U.S. House of Representatives)
March of Dimes—March of Dimes Birth Defects Foundation
Marketlink—Marketlink, Inc.
MBA—Massachusetts Bankers Association
MasterCard—MasterCard International
MBNA—MBNA America Bank, N.A.
McClure—McClure, Scott
McConnell—McConnell, The Honorable Mitch (U.S. Senate)
Metris—Metris Companies, Inc.
Michigan Nonprofit—Michigan Nonprofit Association
MidFirst—MidFirst Bank
MBAA—Mortgage Bankers Association of America
Myrick—Myrick, The Honorable Sue (U.S. House of Representatives)
NACHA—NACHA-The Electronic Payments Association
Nadel—Nadel, Mark S. (law review article: ''Rings of Privacy: Unsolicited Telephone Calls and the Right to Privacy,'' 4 *Yale Journal on Regulation* 99 (Fall 1986)
NAAG—National Association of Attorneys General
NACAA—National Association of Consumer Agency Administrators
NAIFA—National Association of Insurance & Financial Advisors
NAR—National Association of Realtors
NARUC—National Association of Regulatory Utility Commissioners
ARVC—National Association of RV Parks & Campgrounds
NASCO—National Association of State Charity Officials
NASUCA—National Association of State Utility Consumer Advocates
E-Commerce Coalition—National Business Coalition on E-Commerce & Privacy
NCTA—National Cable & Telecommunications Association
National Children's Cancer—National Children's Cancer Society, Inc.
NCLC—Joint comment: National Consumer Law Center, National Association of Consumer Advocates, Consumer Federation of America, Consumers Union, and US Public Interest Research Group
NCLF—National Children's Leukemia Foundation
NCL—National Consumers League
NEMA—National Energy Marketers Association
NFPPA—National Family Privacy Protection Association
NFIB—National Federation of Independent Business
NFC—National Franchise Council
NFDA—National Funeral Directors Association
NNA—National Newspaper Association of America
NPMA—National Pest Management Association
NPR—National Public Radio
NRF—National Retail Federation
NTC—National Troopers Coalition
Nelson— Nelson, The Honorable E. Benjamin (U.S. Senate)
NetCoalition—NetCoalition

Nethercutt—Nethercutt, The Honorable George R., Jr. (U.S. House of Representatives)
NeuStar—NeuStar, Inc.
New Orleans—New Orleans, City Council of (CNO)-Utility, Cable & Telecommunications Committee
NJ Police—New Jersey Police Officers Foundation, Inc.
NYSCPB— New York State Consumer Protection Board
NAA—Newspaper Association of America
Nextel—Nextel Communications, Inc.
Ney, Sandlin, Jones, Shows and Cantor—Joint letter from: The Honorable Bob Ney, Max Sandlin, Walter Jones, Ronnie Shows, and Eric Cantor (U.S. House of Representatives)
Noble—Noble Systems
NATN—North American Telephone Network LLC
NC Zoo—North Carolina Zoological Society
Not-For-Profit Coalition—Not-For-Profit and Charitable Coalition
NSDI—NSDI Teleperformance
OSU—Ohio State University
OTC—Ohio Troopers Coalition
Pacesetter—Pacesetter Corporation
PVA—Paralyzed Veterans of America
Paramount—Paramount Lists, Inc.
Pascrell—Pascrell, The Honorable Bill, Jr. (U.S. House of Representatives)
Patrick—Patrick, George W.
Paul—Paul, The Honorable Ron (U.S. House of Representatives)
Pelland—Pelland, Paul
PLP—Personal Legal Plans, Inc.
Michigan Police—Police Officers Association of Michigan
possibleNOW—possibleNOW.com, Inc.
PRC—Privacy Rights Clearinghouse
Private Citizen—Private Citizen, Inc.
Proctor—Proctor, Alan
PBP—Progressive Business Publications
PCIC—Progressive Casualty Insurance Company
Angel Food—Project Angel Food
PMA—Promotion Marketing Association
Purple Heart—Purple Heart Service Foundation, Military Order of
Ramstad—Ramstad, The Honorable Jim (U.S. House of Representatives)
Redish—Redish, Martin H., Esq.
Reed Elsevier—Reed Elsevier Inc.
Reese—Reese Brothers, Inc.
SBC—SBC Communications Inc.
Schrock—Schrock, The Honorable Edward L. (U.S. House of Representatives)
Sensenbrenner—Sensenbrenner, The Honorable F. James, Jr. (U.S. House of Representatives)
SHARE—SHARE
SIIA—Software & Information Industry Association
Southerland—Southerland, Inc.
Southern Poverty—Southern Poverty Law Center
Special Olympics—Special Olympics, Inc.
SO-AZ—Special Olympics Arizona
SO-CA—Special Olympics Southern California
SO-CO—Special Olympics Colorado
SO-CN—Special Olympics Connecticut
SO-IA—Special Olympics Iowa
SO-KY—Special Olympics Kentucky
SO-MD—Special Olympics Maryland
SO-MO—Special Olympics Missouri
SO-MT—Special Olympics Montana
SO-NH—Special Olympics New Hampshire
SO-NJ—Special Olympics New Jersey
SO-NM—Special Olympics New Mexico
SO-NY—Special Olympics New York
SO-VT—Special Olympics Vermont
SO-VA—Special Olympics Virginia
SO-WA—Special Olympics Washington
SO-WI—Special Olympics Wisconsin
SO-WY—Special Olympics Wyoming
Spiegel—Spiegel, Marilyn
Stage Door—Stage Door Music Productions, Inc.
Statewide Appeal—Statewide Appeal Inc.
Success Marketing—Success Marketing, Inc.
Synergy Global—Synergy Global Networks, The
Synergy Solutions—Synergy Solutions, Inc.
Sytel—Sytel Limited
Tate—Tate & Associates
Technion—Technion Communications Corp
TDI—Telecommunications for the Deaf, Inc.
TeleDirect—TeleDirect International, Inc.
Telefund—Telefund, Inc.
Teleperformance—Teleperformance USA
TRC—Tele-Response Center
TeleStar—TeleStar Marketing, L.P.
TRA—Tennessee Regulatory Authority
Terry—Terry, The Honorable Lee (U.S. House of Representatives)
Texas Environment—Texas Campaign for the Environment
Texas PUC—Texas Office of Public Utility Counsel
Thayer—Thayer, Richard E., Esq.
Time—Time, Inc.
Tribune—Tribune Publishing Company
UNICOR—UNICOR: (Federal Prison Industries, Inc, DOJ, Federal Bureau of Prisons)
DOJ—U.S. Department of Justice
Uniway—Uniway of Coastal Georgia
Verizon—Verizon Companies
Virginia—Virginia Attorney General
VISA—VISA U.S.A., Inc.
Watts—Watts, The Honorable J.C., Jr. (U.S. House of Representatives)
Weber—Weber, Ron & Associates, Inc.
Wells Fargo—Wells Fargo & Company
White—White, David T.
WTA—Wisconsin Troopers'Association Inc.
Worsham—Worsham, Michael C., Esq.
YPIMA—Yellow Pages Integrated Media Association (YPIMA)

*Supplemental Comments*

AARP-Supp.—AARP
AOP-Supp.—Aircraft Owners and Pilots Association (Marsha Mason-Thies)
Allstate-Supp.— Allstate Life Insurance Company
Community Bankers-Supp.— America's Community Bankers
AICR-Supp.— The American Institute for Cancer Research (Kathryn L. Ward)
Red Cross-Supp.—American Red Cross
ARDA-Supp.— The American Resort Development Association (Yartin DePoy and Stratis Pridgeon)
ATA-Supp.— American Teleservices Association
Associations-Supp.—Associations Letter
Avinta-Supp.— Avinta (Abe Chen)
Bond-Supp.— Bond, The Honorable Christopher S. (U.S. Senate)
Celebrity Prime Foods-Supp.— Celebrity Prime Foods
Chesapeake-Supp.—The Chesapeake Bay Foundation (Amelia Koch and Melissa Livingston)
Christian Appalachian-Supp.— The Christian Appalachian Project
Comic Relief-Supp.—Comic Relief, Inc. (Dennis Albaigh)
Covington & Burling-Supp.— Covington and Burling
DialAmerica-Supp.—DialAmerica Marketing, Inc.
DMA Letter-Supp.—Direct Marketing Association-Transmittal Letter
DMA Study-Supp.—Direct Marketing Association-Study
ERA and PMA-Supp.—Electronic Retailing Association and Promotion Marketing Association
EPI-Supp.— Enterprise Prison Institute
Domenici-Supp.—Domenici, The Honorable Pete V. (U.S. Senate)
FDS-Supp.— Federation Department Stores
Hoar-Supp.— Hoar, Wesley C.
Illinois-Supp.— Illinois Attorney General's Office
ICTA-Supp.— Industry Council for Tangible Assets
Luntz-Supp.— Luntz Research Companies (Chrys Lemon)
MPA-Supp.— Magazine Publishers of America
Maryland-Supp.—Maryland Attorney General's Office (Carol Beyers)
McIntyre-Supp.—McIntyre Law Firm, PLLC (Chrys Lemon)
McKenna-Supp.—McKenna, Douglas M.
Memberworks-Supp.—Memberworks National Survey Topline (Chrys Lemon)
Minnesota-Supp.—Minnesota Attorney General's Office
Missouri-Supp.—Missouri Attorney General's Office
NACDS-Supp.—National Association of Chain Drug Stores
Ney, Sandlin, Jones, Shows and Cantor-Supp.—Joint letter from: The Honorable Bob Ney, Max Sandlin, Walter Jones, Ronnie Shows, and Eric Cantor (U.S. House of Representatives)
NAR-Supp.— National Association of Realtors
NWF-Supp.— National Wildlife Federation
NAA June 28-Supp.—Newspaper Association of America (John F. Sturm)
NAA July 31-Supp.—Newspaper Association of America
Not-For-Profit Coalition-Supp.—Not-For-Profit and Charitable Coalition
PMA-Supp.—Promotion Marketing Association
Putnam-Supp.— Putnam, The Honorable Adam H. (U.S. House of Representatives)
Riley-Supp.—Riley, The Honorable Bob (U.S. House of Representatives)
SBC-Supp.— SBC Communications Inc.
Time-Supp.— Time, Inc.
Vermont-Supp.—Vermont Attorney General's Office
WWF-Supp.— World Wildlife Fund (Deborah Hechinger)
Worsham-Supp.—Worsham, Michael C.

*User Fee Comments*

AARP-User Fee—AARP

ABA-User Fee—American Bankers Association
Red Cross-User Fee—American Red Cross
ARDA-User Fee—American Resort Development Association
ATA-User Fee—American Teleservices Association
Community Bankers-User Fee— America's Community Bankers
Ameriquest-User Fee—Ameriquest Mortgage Company
Celebrity Prime Foods-User Fee— Celebrity Prime Foods
CBA-User Fee—Consumer Bankers Association
DialAmerica-User Fee— DialAmerica Marketing, Inc.
DMA Letter-User Fee— Direct Marketing Association
DMA Comments-User Fee— Direct Marketing Association
Discover-User Fee—Discover Bank
ERA/PMA-User Fee—Electronic Retailing Association and Promotion Marketing Association (joint comment)
Household-User Fee—Household Bank (SB), N.A. and Household Bank (Nevada), N.A. (joint comment)
Hudson Bay-User Fee— Hudson Bay Company of Illinois, Inc.
ICTA-User Fee—Industry Council for Tangible Assets
InfoCision-User Fee—InfoCision Management Corporation
ITC-User Fee— Interactive Teleservices Corporation
MPA-User Fee—Magazine Publishers of America
MasterCard-User Fee—MasterCard International, Inc.
NACDS-User Fee—National Association of Chain Drug Stores
NAR-User Fee—National Association of Realtors
NASUCA-User Fee—National Association of State Utility Consumer Advocates
NEMA-User Fee—National Energy Marketers Association
Not-For-Profit Coalition-User Fee—Not-For-Profit and Charitable Coalition
SBC-User Fee—SBC Communications, Inc.
Tennessee-User Fee—Tennessee Regulatory Authority
SBA-User Fee—United States Small Business Administration, Office of Advocacy
Visa-User Fee— Visa U.S.A., Inc.
Wells Fargo-User Fee— Wells Fargo & Company

## Concurring Statement of Commissioner Orson Swindle in *Telemarketing Sales Rule*, File No. R411001

I wholeheartedly support the amendments to the Telemarketing Sales Rule (''TSR''), because I believe that they will help protect consumers from deceptive and abusive telemarketing practices. In particular, these amendments will give consumers the ability to avoid the sheer volume of unwanted telemarketing calls that many consider to be a nuisance. I write separately to explain my views on two issues — how the Commission determines whether an act or practice is ''abusive'' for purposes of the TSR, and the national do-not-call registry.

### *Abusive Telemarketing Acts or Practices*

The Telemarketing and Consumer Fraud and Abuse Prevention Act (''Telemarketing Act'') directs the Commission to promulgate rules that prohibit ''deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.'' 15 U.S.C. 6102 (a)(1). To determine what constitutes an abusive telemarketing practice, the Commission for the most part has used the examples of abusive practices that Congress provided in the Telemarketing Act and principles drawn from these examples. I agree that this is an appropriate analysis, and in light of the rulemaking record as a whole, I fully support the TSR amendments that fall within these parameters. These amendments include, among other things, the provisions involving the national do-not-call registry, transmission of caller identification information, and abandoned calls and predictive dialers.

When the Commission seeks to identify practices as abusive that are less distinctly within the parameters of the Act's examples and their emphasis on privacy protection, the Commission employs its traditional unfairness analysis.[1] I understand the Commission's intention to narrow the potentially expansive scope of the term ''abusive'' by using its unfairness analysis. However, given the broad ordinary meaning of the term ''abusive,'' I believe that the standard for determining what constitutes an abusive telemarketing practice likely is broader than the stringent definition of the term ''unfair.'' Therefore, I would have preferred it had the Commission looked to the plain meaning of the term ''abusive'' and then formulated a separate standard to identify abusive telemarketing practices for purposes of the Telemarketing Act and the TSR.

Nevertheless, I agree with the Commission's conclusion that a telemarketing practice that meets the strict unfairness standard will constitute an abusive practice for purposes of the Act and the TSR. In light of the rulemaking record, I therefore support the TSR amendments that are analyzed under this standard. This includes the requirement that telemarketers obtain consumers' or donors' express informed consent before causing their information to be submitted for payment. The rulemaking record evidences the harm that results from unauthorized billing, the need for the consent requirement, and the need to mandate specific steps that telemarketers must take to obtain consumers' consent in transactions involving preacquired account information.

In addition, the record supports the prohibition on the disclosure or receipt, for consideration, of unencrypted account numbers for use in telemarketing (except to process a payment for goods or services or a charitable contribution pursuant to a transaction). I do not believe that the mere disclosure of personal financial information, without more, causes or is likely to cause substantial consumer injury. In this situation, however, the rulemaking record provides a basis for concluding that trafficking in unencrypted account numbers is likely to cause substantial consumer injury in the form of unauthorized billing. Industry comments state that there is no legitimate reason to purchase unencrypted lists of credit card numbers. Therefore, there is a strong likelihood that telemarketers who do engage in this practice will misuse the information in a manner that results in unauthorized charges to consumers' accounts. The Commission's law enforcement experience corroborates this conclusion.[2] As a result, I conclude that this practice is abusive for purposes of the Telemarketing Act.

### *The National Do-Not-Call Registry*

The Telemarketing Act and the TSR recognize consumers' ''right to be let alone.'' *See, e.g., Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (stating that the ''right to be let alone'' is the ''most comprehensive of rights and the right most valued by

[1] Given that nothing in the language of the Telemarketing Act or its legislative history indicates that Congress intended the Commission to use its unfairness standard to determine which practices are abusive, I previously raised concerns about this analysis and requested comment on this issue. *Concurring Statement of Commissioner Orson Swindle in Telemarketing Sales Rule Review*, File No. R411001, available at (www.ftc.gov/os/2002/01/swindletsrstatment.htm). Although some comments agreed with this concern, they did not offer an alternative analysis of abusive practices beyond suggesting that the Commission's authority is limited to the examples of abusive practices included in the Telemarketing Act and its legislative history. *See Statement of Basis and Purpose* at 100, n. 428. However, because the Act does not limit the Commission's authority to identify abusive practices to the examples in the Act, the Commission may prohibit other practices that it identifies as abusive.

[2] *See Statement of Basis and Purpose* at 97-98. In addition, given the evidence that the use of encrypted account information in telemarketing can result in unauthorized charges, there is an even greater likelihood that injury will occur when a telemarketer has obtained, for consideration, consumers' actual credit card numbers.

civilized men''). In the context of telemarketing, there is an inherent tension between this right and the First Amendment's right to free speech. With this in mind, and in light of the rulemaking record as a whole, the Commission has determined to establish a national do-not-call registry. This will enable consumers to stop certain telemarketing calls — calls to induce the purchase of goods and services from companies within the FTC's jurisdiction (except where the consumer has an ''established business relationship'' with the seller).

Although the USA PATRIOT Act of 2001 gave the Commission authority to regulate for-profit companies that make telephone calls seeking charitable donations on behalf of charities, the Commission has determined to exempt these entities from the national do-not-call registry requirements. Instead, the Commission requires these telemarketers to comply with the ''entity-specific'' do-not-call provision, which prohibits them from calling consumers who have said they do not want to be called by or on behalf of a particular entity. This more narrowly tailored approach seeks to protect consumers from unwanted telemarketing calls seeking charitable donations, while minimizing the impact of the TSR on charities' First Amendment rights. I do not object to taking this approach at the outset; but if there is evidence that suggests that this approach is not effective in protecting consumers from unsolicited telemarketing calls, the Commission should revisit this decision and require for-profit telemarketers seeking charitable donations to comply with the national do-not-call registry.

While I believe that the amended TSR and the national do-not-call registry will go a long way to help consumers prevent unwanted intrusions into their homes, a number of entities are not subject to the TSR's requirements. Under the Telemarketing Act and the TSR, the Commission does not have jurisdiction in whole or in part over the calls of entities such as banks, telephone companies, airlines, insurance companies, credit unions, charities, political campaigns, and political fund-raisers. From the perspective of consumers, the right to be let alone is invaded just as much by unwanted calls from exempt entities (*e.g.*, banks, telephone companies, or political fund-raisers) as it is by such calls from covered entities.[3] Therefore, I believe that the entire spectrum of entities that make telemarketing calls to consumers should be subject to do-not-call requirements.

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[3] The Federal Communications Commission, however, has requested comment on whether to establish a national do-not-call registry that would address telemarketing calls by at least some of the entities that are exempt from the FTC's jurisdiction. *Notice of Proposed Rulemaking*, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 67 FR 62667 (Oct. 8, 2002).

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## LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.nara.gov/fedreg/plawcurr.html*.

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**H.R. 11/P.L. 108–3**

National Flood Insurance Program Reauthorization Act of 2003 (Jan. 13, 2003; 117 Stat. 7)

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