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Rules and Regulations

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

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

FEDERAL RESERVE SYSTEM

12 CFR Part 272

[Docket No. R–1142]

Federal Open Market Committee; Amendment to Rules of Procedure

AGENCY: Federal Open Market Committee.

ACTION: Final rule.

SUMMARY: The Federal Open Market Committee has amended its definition of a quorum of the Committee. The amendment is designed to enhance the Committee's ability to perform its functions in the event of a national emergency.

DATES: The rule is effective February 6, 2003.

FOR FURTHER INFORMATION CONTACT: Kieran J. Fallon, Senior Counsel (202–452–5270), Legal Division; Board of Governors of the Federal Reserve System; or Normand R.V. Bernard, Deputy Secretary (202–452–3606), Federal Open Market Committee, 20th Street and Constitution Avenue, NW., Washington, DC 20551. Users of Telecommunication Device for Deaf (TTD) only, call (202) 263–4869.

SUPPLEMENTARY INFORMATION: The Federal Open Market Committee (Committee) is composed of (1) all of the members of Board of Governors of the Federal Reserve System (Board), and (2) five representatives of the Federal Reserve Banks elected in the manner provided in the Federal Reserve Act (Act).[1] Because the Board has an authorized membership of seven Governors, the Committee has a maximum authorized strength of 12 members (7 Board members and 5 Federal Reserve Bank representatives).

The Act does not define a quorum of the Committee. Since the current structure of the Committee was established in 1936, the Committee itself has defined a quorum of the Committee to be seven members, including alternates serving in place of a primary Federal Reserve Bank representative.[2]

The Committee's current quorum rule would prevent the Committee from taking action, including adjusting the Committee's target for the federal funds rate, if an act of war, terrorist attack or other catastrophic event reduced the membership of the Committee to below seven members (including alternates). In light of this possibility, the Committee has amended its definition of a quorum of the Committee. Under the Committee's amended rule, a quorum of the Committee will continue to be seven members unless there are fewer than seven members of the Committee in office, in which case a quorum of the Committee will consist of the number of members in office. As under the current rule, alternates serving in place of an absent primary Federal Reserve Bank representative are considered members for purposes of determining whether a quorum of the Committee is available.

The Committee believes that the revised quorum rule will enhance the Committee's ability to fulfill its critical monetary policy responsibilities in a national emergency. At the same time, the revised rule should not alter the functioning of the Committee in normal operating environments. As noted above, under the revised rule, a quorum of the Committee would continue to be seven members whenever seven or more members of the Committee are in office. The Committee notes that the Securities and Exchange Commission (SEC) has revised its quorum rule in a similar fashion to ensure that the SEC could continue to function if the 5-member SEC ever had fewer than 3 commissioners in office.[3]

The amended rule relates solely to the internal procedure of the Committee. Accordingly, the public notice, public comment and delayed effective date provisions of the Administrative Procedure Act do not apply. *See* 5 U.S.C. 553(b) and (d). Because public notice and comment is not required, the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) also does not apply to the amended rule.

List of Subjects

Administrative practice and procedure, Federal Open Market Committee, Organization and functions (Government agencies).

For the reasons set out in the preamble, the Federal Open Market Committee amends 12 CFR part 272 as follows:

PART 272—FEDERAL OPEN MARKET COMMITTEE—RULES OF PROCEDURE

1. The authority citation for part 272 continues to read as follows:

Authority: 5 U.S.C. 552.

2. Section 272.3(c) is revised to read as follows:

§ 272.3 Meetings

* * * * *

(c) *Quorum.* Seven members constitute a quorum of the Committee for purposes of transacting business except that, if there are fewer than seven members in office, then the number of members in office constitute a quorum. For purposes of this paragraph (c), members of the Committee include alternates acting in the absence of members. Less than a quorum may adjourn a meeting of the Committee from time to time until a quorum is in attendance.

* * * * *

[1] *See* 12 U.S.C. 263(a). Pursuant to the Act, the Federal Reserve Banks also elect an alternate for each primary Federal Reserve Bank representative on the Committee. Each alternate is authorized to serve on the Committee in the absence of the relevant primary representative. Each primary and alternate Federal Reserve Bank representative on the Committee must be a President or First Vice President of a Federal Reserve Bank. *Id.*

[2] *See* 12 CFR 272.3(c). From 1936 to 1973, the Committee's quorum rule was reflected in the Committee's By-Laws. *See* Minutes of the Committee's Meeting of March 18, 1936. In 1973, the Committee's By-Laws were rescinded and the Committee's quorum rule was incorporated into the Committee's Rules of Procedure. *See* 38 FR 2754, Jan. 30, 1973.

[3] *See* 17 CFR 200.41; 60 FR 17201, Apr. 5, 1995. The enabling statutes of the SEC, like those of the Committee, do not define a quorum of the SEC. The SEC's revised quorum rule has been upheld by two separate Federal courts. *See Falcon Trading Group, Ltd.* v. *SEC,* 102 F.3d 579 (D.C. Cir. 1996); *SEC* v. *Feminella,* 947 F. Supp. 722 (S.D.N.Y. 1996).

By order of the Federal Open Market Committee, January 30, 2003.

Vincent R. Reinhart,

Secretary, Federal Open Market Committee.

[FR Doc. 03–2582 Filed 2–5–03; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 201

[Docket No. 00N–1463]

RIN 0910–AB78

Labeling Requirements for Systemic Antibacterial Drug Products Intended for Human Use

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending its regulations to require that the labeling for all systemic antibacterial drug products (i.e., antibiotics and their synthetic counterparts) intended for human use include certain statements about using antibiotics in a way that will reduce the development of drug-resistant bacterial strains. The final rule reflects a growing concern in FDA and the medical community that unnecessary use of systemic antibacterials has contributed to a dramatic increase in recent years in the prevalence of drug-resistant bacterial infections. The final rule is intended to encourage physicians to prescribe systemic antibacterial drugs only when clinically necessary. The final rule is also intended to encourage physicians to counsel their patients about the proper use of such drugs and the importance of taking them exactly as directed.

DATES: This rule is effective February 6, 2004.

FOR FURTHER INFORMATION CONTACT: Christine F. Rogers, Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–594–2041.

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I. Background

In the **Federal Register** of September 19, 2000 (65 FR 56511), FDA proposed to amend its regulations to require that the labeling for all systemic antibacterial drug products (i.e., antibiotics and their synthetic counterparts) intended for human use include certain statements about using antibiotics in a way that will reduce the development of drug-resistant bacterial strains. The new labeling is intended to help educate physicians and the public about the resistance problem and to encourage physicians to prescribe systemic antibacterial drugs only when clinically necessary. FDA personnel involved in drafting the statements included practicing physicians who are in a position to evaluate the effect of the labeling on physicians. The statements were also reviewed by other practicing physicians in the agency.

Antibacterial resistance among disease-causing bacteria represents a serious and growing public health problem in the United States and worldwide. Many bacterial species, including the species that cause pneumonia and other respiratory tract infections, meningitis, and sexually transmitted diseases, are becoming increasingly resistant to the antibacterial drugs used to treat them. Several bacterial species have developed strains that are resistant to every approved antibiotic, thus severely limiting the therapeutic options available for adequate treatment. The incidence of resistance in both hospital- and community-acquired infections has increased dramatically in the past several years, making many common illnesses more difficult to treat than they were only 5 or 10 years ago.

According to the Centers for Disease Control and Prevention (CDC), half of the 100 million antibiotic prescriptions a year written by office-based physicians in the United States are unnecessary because they are prescribed for the common cold and other viral infections, against which antibiotics are not effective (Ref. 1). Unnecessary use of antibiotics in hospitals is common as well. The more an antibiotic is used, the more likely it is that bacteria will develop resistance to it. Thus, using antibiotics when they are not necessary contributes to the increasing prevalence of antibacterial resistance without providing any patient benefit.

Educating physicians and the public about the resistance problem and discouraging unnecessary use of antibiotics are important steps to decrease the prevalence of antibacterial resistance and slow its future development and spread. FDA believes that professional labeling has an important role in that educational effort. Therefore, FDA is requiring that the labeling for systemic antibacterial drug products include certain statements about unnecessary use of antibiotics and the link between such use and the emergence of drug-resistant bacterial strains.

Recent reports of a reduction in antibiotic prescribing raise the hope that the trend in overuse of antibiotics can be reversed and provide additional support for the need to include information in labeling to ensure the continued safety and efficacy of antibiotics (Refs. 2 and 3). The studies reported were conducted in children seen in outpatient practice and have not been confirmed in either adults or hospitalized patients. Nevertheless, as the authors of the two studies and the editorial (Ref. 4) that accompanied them note, efforts to promote the appropriate use of antibiotics have likely contributed to a decrease in antibiotic prescribing. These authors observe that it is important to continue such efforts if these gains are to be maintained. The authors cite the ongoing role of the U.S. Public Health Service Action Plan (Ref. 5) to combat antimicrobial resistance. FDA is one of the three lead agencies for this plan. The plan indicates that educational efforts should be one of the highest priorities and placing information on the labeling of systemic antimicrobial products is specifically cited in the plan.

II. Highlights of the Final Rule

The final rule amends FDA regulations to require that all systemic antibacterial drug products (i.e., antibiotics and their synthetic counterparts) intended for human use contain additional labeling information

about the emergence of drug-resistant bacterial strains.

The final rule has been revised in response to comments received on the proposed rule. The comments and responses are discussed in section III of this document. In the final rule, the agency has significantly revised the statements required directly under the product name, in the ''Indications and Usage'' section, and in the ''General'' subsection of the ''Precautions'' section. The agency made minor revisions to the statement proposed for the ''Information for Patients'' subsection of the ''Precautions'' section. The final rule omits the statement that was proposed for the ''Clinical Pharmacology'' section.

The final rule requires that the labeling for all systemic drug products indicated to treat a bacterial infection, except a mycobacterial infection, include the following information.

At the beginning of the label, under the product name, the labeling must state that to reduce the development of drug-resistant bacteria and maintain the effectiveness of the antibacterial drug product and other antibacterial drugs, the drug product should be used only to treat or prevent infections that are proven or strongly suspected to be caused by bacteria.

In the ''Indications and Usage'' section, the labeling must state that to reduce the development of drug-resistant bacteria and maintain the effectiveness of the antibacterial drug product and other antibacterial drugs, the drug product should be used only to treat or prevent infections that are proven or strongly suspected to be caused by susceptible bacteria. The labeling must state that, when culture and susceptibility information are available, they should be considered in selecting or modifying antimicrobial therapy. The labeling must also state that in the absence of such data, local epidemiology and susceptibility patterns may contribute to the empiric selection of therapy.

In the ''General'' subsection of the ''Precautions'' section, the labeling must state that prescribing the antibacterial drug product in the absence of a proven or strongly suspected bacterial infection of a prophylactic indication is unlikely to provide benefit to the patient and increases the risk of the development of drug-resistant bacteria.

In the ''Information for patients'' subsection of the ''Precautions'' section, the labeling must state that patients should be counseled that antibacterial drugs, including the antibacterial drug product prescribed, should only be used to treat bacterial infections and that they do not treat viral infections (e.g., the common cold). The labeling must state that when an antibacterial drug product is prescribed to treat a bacterial infection, patients should be told that, although it is common to feel better early in the course of therapy, the medication should be taken exactly as directed. The labeling must also advise physicians to counsel patients that skipping doses or not completing the full course of therapy may: (1) Decrease the effectiveness of the immediate treatment, and (2) increase the likelihood that bacteria will develop resistance and will not be treatable by the antibacterial drug product or other antibacterial drugs in the future.

III. Comments on the Proposed Rule

FDA received 19 comments on the proposed rule. The comments were submitted by pharmaceutical companies, trade associations, individuals, and public and private health organizations.

A. Statements of Support

(Comment 1) Many comments supported the proposed rule. One comment expressed the view that the proposal will be another step in building public awareness and improving antibiotic use before there is a public health emergency. Another comment stated that the proposed rule is an important first step in more appropriate use of antimicrobial agents by health care workers and that regulatory actions have the potential for positive impact on the problem of antibiotic resistance. Another supportive comment stated that for the label changes to have an impact, it will be important to ensure that all antimicrobial drug promotional and marketing activities, whether directed at clinicians, health care organizations, or the public, explicitly and thoroughly communicate the cautions expressed in the rule.

(Response) FDA recognizes the importance of increasing awareness by health care providers and patients about the appropriate use of antibiotics and the cautions about antibiotic resistance. FDA will work with sponsors on ways that these important messages can best be communicated.

B. Sources and Frequency of Antibiotic Resistance

(Comment 2) The agency received many comments concerning the sources of antibiotic resistance. One comment contended that the proposed labeling statements imply that inappropriate use of antibiotics is the only reason for the development of resistance, a notion with which the comment disagreed. Another comment maintained that more likely causes of resistance than individual misuse of antibiotics are a breakdown in basic infection control practices and hygiene (e.g., hand washing, immunization, adequate personal care in daycare centers for children and adults). Another comment cited daycare, veterinary use, and improper hand washing as reasons for antibiotic resistance. This comment also stated that even if doctors prescribe appropriately, resistance to antibiotics will still occur because of selection of resistant strains arising from normal physiological spontaneous mutations.

One comment stated that the emergence of resistance involves many factors including intrinsic properties of the drug, such as whether it has a static or cidal mechanism of action and the nature of its cellular target, and extrinsic considerations, such as the target organism, the health of the patient, the type and site of infection, and prior exposure of the patient to antibiotics. Another comment stated that the proposal ignores other factors involved in minimizing resistance and determining clinical outcome. These factors include pharmacodynamic data, including information on tissue or drug concentrations at the site of infection, and host factors, such as risk for resistant bacterial infections.

(Response) FDA believes labeling concerning antibiotic resistance has the potential to make a significant contribution toward the goal of reducing resistance. The agency is aware, however, that many factors contribute to antibiotic resistance and that there need to be efforts on many fronts to combat the resistance problem. FDA's proposal does not imply that the wisest use of antibiotics by physicians would eliminate the resistance problem entirely. FDA agrees that, regardless of the measures adopted, some level of antibiotic resistance will be present because of the selection of resistant strains that arise during normal bacterial reproduction.

This final rule is one of many ongoing efforts by FDA to combat antibiotic resistance. FDA has previously and will continue to organize and participate in numerous advisory committee meetings, open public meetings, and workshops with industry and academia to focus on strategies to encourage the development of new antimicrobials while preserving the usefulness of existing drug products. Past meetings have already led to changes in the collection of clinical data by stakeholders that will ultimately shorten the development time of future antimicrobial products. The agency has an ongoing partnership with other

government agencies and medical organizations to educate the public about the proper use of antimicrobials and the risks of inappropriate use. FDA has recently awarded a contract to a company to obtain antimicrobial resistance surveillance information in an effort to help the agency identify resistant organisms that pose a significant health threat to the public.

(Comment 3) One comment agreed that any use of antibiotics may increase selective pressure, but stated that decreased effectiveness of antibiotics is a greater clinical concern in empiric therapy when microbiological data for a particular patient are not readily available.

(Response) Existing antibiotics may become less effective because of antibiotic resistance. Thus, reducing the development of resistance and maintaining the effectiveness of existing antibiotics are intertwined goals. FDA's concern with these goals is indicated in the revised statement to appear under the product name, which advocates using antibiotics only for bacterial infections in order to reduce the development of drug-resistant bacteria and maintain the effectiveness of existing antibiotics.

(Comment 4) One comment objected to the general nature of the proposed labeling statements because certain antibiotics, for example cephalosporins, are more likely to be associated with the development of resistance than others. Another comment stated that newer antibiotics are less likely to generate resistance. The comment also stated that the differences in in vitro frequency of resistance in different classes of antibiotics suggest that continued research can decrease the frequency of resistance by emphasizing, in drug development, factors such as area under the curve/minimum inhibitory concentration (MIC) and maximum concentration (Cmax)/MIC ratios. Another comment maintained that there should be greater emphasis on the use of pharmacokinetic (PK) and pharmacodynamic (PD) data to provide clinically relevant information to establish which antibiotics are likely to maximize efficacy and minimize the risk of developing resistance. The comment stated that this suggestion accords with the FDA Anti-Infectives Advisory Committee's recommendation that the PK/PD relationship for antibiotics be investigated during drug development.

(Response) The final rule affects all systemic antibacterial products because all antibiotics develop resistance, even though the frequency of resistance can vary among different antibiotics. FDA supports efforts by pharmaceutical companies to investigate PK/PD relationships during drug development. However, it would not be appropriate at this time to require PK/PD information in the labeling of antibiotic drug products. A number of factors limit the usefulness of PK/PD relationships in clinical practice. First, it has not been established that population PK/PD relationships are predictive of outcomes in individual patients. Second, there are practical obstacles to the use of this information by physicians. To make use of a PK/PD relationship, the physician would have to have access to PK information, that is the level of antibiotic in the patient's blood, and PD information, the MIC for the specific strain of bacteria. Measuring antibiotic levels in patients' blood requires specialized testing that is not available on an outpatient basis and may not even be available in hospitals. As discussed in section III.H of this document, susceptibility testing is often not performed. Even if susceptibility data were available, the information may not be provided quantitatively so that it can be used in a PK/PD ratio.

(Comment 5) One comment maintained that all antimicrobials have built-in obsolescence, and thus there will be a natural progression of selection for resistance regardless of how appropriately doctors prescribe antibiotics.

(Response) Regardless of whether all antibiotics will eventually lead to resistant bacteria, there are great benefits to delaying that progression as long as possible. As stated previously, there is a strong correlation between the improper use of antibiotics and the incidence of antibiotic drug resistance. The CDC estimates that as much as 50 percent of antibiotic use is unnecessary, that is, prescribed for diseases like the common cold that do not respond to antibacterial drugs. Judicious physician prescribing of antimicrobial agents and proper antibiotic usage by patients play an important role in slowing down the natural progression of selection for resistance to antibiotics. For example, limiting the use of erythromycin in Finland decreased the rate of resistance to this drug in group A streptococci causing sore throats by approximately 50 percent.

C. Influence of Labeling

(Comment 6) Some comments suggested that doctors will probably not be influenced by the proposed labeling. One comment stated that since doctors treat infections empirically despite advice in current labeling to determine the causative agent, it is unlikely that the new labeling will influence doctors' behavior. One comment stated that FDA's Director of the Office of Postmarketing Drug Risk Assessment expressed the opinion that labeling changes do not alter doctors' prescribing practices. Another comment expressed the view that doctors are already aware of the information contained in the proposed labeling and therefore might be offended by the labeling or might not read the warnings. Another comment stated that it is questionable whether prescribers read package inserts thoroughly because of their length and small print. Another comment contended that before adopting the proposal, FDA should assess whether physicians understand the proposed labeling and change their behavior as a result. One comment stated that FDA should send periodic letters to prescribers giving updates on antibiotic resistance and prudent use of antibiotics because doctors may not read package inserts.

(Response) Antibiotic resistance is a serious public health problem that needs to be addressed by a major educational effort. FDA believes that physician labeling can contribute to that effort by reminding physicians that their individual prescribing decisions have a collective impact on the resistance problem. The agency believes that physicians frequently consult selected portions of the package insert and thus will encounter one or more of the statements on antibiotic resistance that appear in multiple, significant locations in the package insert. The agency believes that the prominence of the statement under the product name will be particularly likely to have an effect on prescribing decisions. FDA believes it is important to institute labeling discussing antibiotic resistance as soon as possible because it will be an important step in addressing the resistance problem; therefore, the agency declines to adopt the suggestion to measure the effect of the labeling before adopting the rule. The agency also rejects the suggestion to send ''Dear Doctor'' letters; the package insert, rather than letters, is FDA's primary tool for communicating with physicians.

D. Alternatives and General Comments

(Comment 7) Many comments stated that labeling is not the best way to accomplish the goal of reducing antibiotic resistance and suggested alternative mechanisms. Several comments suggested using educational and scientific forums to educate doctors. Organizations mentioned as appropriate to provide educational programs included pharmaceutical companies

and pharmaceutical industry trade organizations, the American Medical Association (AMA), and the CDC in conjunction with FDA.

(Response) The agency agrees that labeling alone will not be sufficient to reduce or prevent antibiotic resistance. This final rule is one of many ongoing efforts by FDA to combat antibiotic resistance. FDA has previously and will continue to organize and participate in numerous advisory committee meetings, open public meetings, and workshops with industry and academia to focus on strategies to encourage the development of new antimicrobials while preserving the usefulness of existing drug products. Past meetings have already led to changes in the collection of clinical data by stakeholders which will ultimately shorten the development time of future antimicrobial products. The agency has an ongoing partnership with other government agencies and medical organizations to educate the public about the proper use of antimicrobials and the risks of inappropriate use. FDA has recently awarded a contract to a company to obtain antimicrobial resistance surveillance information in an effort to help the agency identify resistant organisms that pose a significant health threat to the public.

(Comment 8) One comment urged FDA to focus on the effective implementation of existing guidelines, such as the CDC guidelines for the treatment of acute otitis media in children and the Sinus and Allergy Health Partnership guidelines for the treatment of acute bacterial sinusitis, as a means of addressing antibiotic resistance. The comment added that these guidelines are both comprehensive and able to be updated as new information becomes available, whereas labeling cannot be updated quickly.

(Response) Many responsible organizations issue guidelines for the treatment of various types of bacterial infections. FDA supports these efforts and has worked with many of the sponsoring organizations to develop guidelines for clinical studies and related matters. The agency disagrees that labeling cannot be updated as quickly as guidelines. Guidelines for the treatment of bacterial infections are not usually revised more often than every 2 years. If necessary, FDA's professional labeling can be revised in 2 years.

(Comment 9) Another comment stated that peer review of antimicrobial use and prescribing practices is preferred over static treatment guidelines and restrictions, given the complexity of the decisionmaking process in evaluating patients.

(Response) The labeling statements required by this final rule are not static treatment guidelines or restrictions. Furthermore, nothing in the final rule forecloses the use of peer review as a way of reducing antibiotic resistance. FDA recognizes that many different approaches can assist physicians in making good prescribing decisions.

(Comment 10) One comment asserted that resistant infections are most often acquired in hospitals and then spread to the community and, therefore, FDA should work with public health agencies and state boards of health to establish more effective hospital infection-control programs, rather than addressing the resistance problem through labeling.

(Response) FDA is working with the CDC and other public health agencies to establish more effective hospital infection-control programs and to develop means for educating physicians and communicating current information on the resistance problem. However, the agency believes that antibiotic resistance labeling is also needed as a part of a multifaceted attack on the resistance problem. FDA also notes that some resistant organisms, for example, penicillin-resistant *Streptococcus pneumoniae*, are acquired in the community, rather than in the hospital.

(Comment 11) One comment endorsed the development and implementation of a coordinated plan for monitoring antimicrobial resistance at the local level using standardized tests. This comment stated that the use of universally accepted standard tests is critical to the consistent and meaningful interpretation of surveillance data throughout the United States and that these standards need to be in place before collecting and collating surveillance data. Without such standards, collated surveillance data would be difficult to interpret and of very limited value.

(Response) FDA is working with the CDC and other agencies to develop tools and methods that will allow for a coordinated plan for monitoring antibiotic resistance. However, efforts to curb the development of antibiotic resistance should not be delayed pending the creation of such a monitoring plan.

(Comment 12) Another comment suggested requiring a special prescription blank for antimicrobials, formatted to include FDA criteria for prescribing antibiotics, and placing the responsibility on pharmacists to ensure that the criteria are met.

(Response) Such a restriction would be extraordinarily difficult to implement because of the large number of systemic antibacterial products. The agency believes that measures less restrictive of medical practice are more reasonable at this time.

(Comment 13) One comment recommended that marketed antibiotics be evaluated and that older products with higher potential for inducing resistance (i.e., poor PKs and/or potency, single-step resistance development) be retired in favor of newer antibiotics with optimized PKs, potency, and multiple-step pathways. This comment contended that doctors need to be educated to prescribe improved antibiotics and asserted that the rule might hinder this goal.

(Response) FDA does not agree that newer antibiotics are necessarily preferable to older ones. While some newer antibiotics may require more than one pathway to develop resistance, newer antibiotics tend to be broad-spectrum, which, in itself, can increase the development of resistance.

(Comment 14) One comment stated that the antibiotic labeling proposal should be coordinated with other agency labeling initiatives.

(Response) Rulemaking requires an opportunity for the public to comment and thus have input into proposed agency actions. To make it easy for the public to comment on only those issues that are of interest, FDA generally pursues separate rulemakings for labeling proposals concerning different subjects. FDA has proposed to revise the content and format of labeling for prescription drugs (physician labeling rule) (65 FR 81082, December 22, 2000). The agency has received comments on the proposal and is in the process of finalizing it. Whether the requirements of the physician labeling rule will apply to a systemic antibacterial drug product will depend on the approval date of that product. For those systemic antibacterial drug products that must comply with the physician labeling rule by using the new format, the final physician labeling rule will explain where in the new format the statements required by § 201.24 should be placed and when implementation of the new format must be completed.

E. Scope and Implementation

(Comment 15) A number of comments addressed the scope of the proposal. One comment stated that resistance can also develop from using topical, veterinary, and antimycobacterial antibiotics, and that there should be education about all these sources. One comment stated that the proposed rule should also apply to prescription and over-the-counter (OTC) otic, ophthalmic, and topical agents. One

comment suggested that FDA propose another rule that would cover antimycobacterials, topical antibiotics, and antiseptics. Another comment stated that the proposal should cover topical products because they are sometimes an alternative to systemic antibacterials. Another comment questioned the exclusion of drugs to treat tuberculosis. Another comment anticipated that statements concerning antibiotic resistance will eventually be included in the labels of antiparasitic, antiviral, antifungal, and antimycobacterial agents, topical antibacterials, and topical antiseptics. This comment recognized that labeling for these products involves unique challenges, but expressed the view that development of resistance to these types of agents is a real or potential problem that may be aggravated by inappropriate use.

(Response) Prescription and OTC topical antibacterials, topical antiseptics, antimycobacterial drugs, and veterinary antibiotics raise different scientific and regulatory issues than do systemic antibacterials. The agency is considering how to address concerns about the development of antibiotic resistance from the use of these other types of products and will consider whether additional rulemaking would be appropriate.

(Comment 16) A few comments requested clarification of the scope of the proposed rule. One comment asked if the rule would apply to oral antibiotics or intravenous (IV) antibiotics, or both. Another comment asked whether the proposal would apply to antibiotics such as clarithryomycin and rifampin that are used for mycobacterial infections as well as for regular bacterial infections.

(Response) The final rule applies to both oral and IV antibiotics. The final rule applies to all systemic antibacterials that are indicated for the treatment of bacterial infections, even if, like clarithryomycin and rifampin, they are also indicated for the treatment of mycobacterial infections.

(Comment 17) One comment stated that generic antibiotics should be held to the same standard as innovator products. Another comment asserted that labeling that has already been approved should be grandfathered, and the rule should not apply to it. Another comment stated that the rule's effective date should be contingent on complete implementation of the surveillance, prevention, and control goals identified in the joint CDC, FDA, and National Institutes of Health ''Draft Public Health Action Plan to Combat Antimicrobial Resistance'' (65 FR 38832, June 22, 2000).

(Response) The final rule applies to both generic and branded systemic antibacterial drug products. FDA declines to adopt the suggestion that the rule not apply to already-approved labeling because there is no scientific basis to distinguish between products approved before the effective date of the rule and products approved after the effective date in terms of causing antibiotic resistance. The agency believes it is important to implement the final rule as soon as possible and therefore rejects the notion that the effective date should be delayed to coordinate the rule with other items in the June 22, 2000, Action Plan.

F. Location of Statements

(Comment 18) Many comments expressed the view that requiring statements in five locations in the labeling would be redundant. One such comment stated that the repetitiveness would clutter the label without adding value. Another comment contended that the redundancy of the warnings would cause doctors to view them as ''boilerplate noise.'' Another comment pointed out that the same statement appears under the product name and in the ''Precautions'' section. Another comment stated that the statements in the ''Clinical Pharmacology'' section and the ''Indications and Usage'' section are redundant.

(Response) In response to these comments, FDA has eliminated the statement proposed for the ''Clinical Pharmacology'' section. In addition, the same statement does not appear under the product name and in the ''Precautions'' section in the final rule; the statements for these locations have been revised. As discussed in the response to comment 6 in section III.C of this document, FDA recognizes that physicians are unlikely to read the package insert in its entirety whenever they prescribe an antibiotic. Instead, physicians consult selected portions of the package insert. The agency's intent in requiring warnings directly under the product name and in the ''Indications and Usage'' and ''Precautions'' sections was to ensure that most physicians will encounter one of the statements on antibiotic resistance when they are considering whether to prescribe an antibiotic.

In addition, the context and wording of each of the four statements is different. The statement under the product name emphasizes that the goal of reducing the development of drug-resistant bacteria and maintaining the effectiveness of antibacterial drugs can be accomplished by using antibacterials only to treat infections that are proven or strongly suspected to be caused by bacteria. The statement in the ''Precautions'' section warns that prescribing antibacterials other than to treat a proven or strongly suspected bacterial infection is unlikely to provide benefit to the patient. The ''Indications and Usage'' section is where the physician looks to see what the uses of the product are. It is the most frequently consulted portion of the labeling. The statement in this section advises physicians to consider culture and susceptibility information and local epidemiology and suspectibility patterns when prescribing antibacterial therapy. The context of the statement in the ''Information for Patients'' section is very different from the other statements because it is information for physicians to convey to their patients. Patients should be advised not to skip doses of antibacterial therapy and to complete the full course of therapy, even if they start to feel better. Patients should also be advised that antibacterials do not treat viral infections.

(Comment 19) One comment asserted that standard statements about inappropriate use of antibacterial drugs do not merit the extraordinary prominence of appearing directly under the product name, thus giving the impression that these statements are the most important information about the product.

(Response) FDA believes it is important that the pressing public health problem of antibiotic resistance be highlighted in a prominent location. Furthermore, there is precedent for the appearance of a statement in this location. Oral contraceptives contain a statement under the product name indicating that they do not protect against sexually transmitted diseases. The antibiotic resistance statement, like the statement in oral contraceptive labeling, provides an important context for product use.

(Comment 20) Several comments stated that placement of a statement concerning antibiotic resistance under the product name would dilute the effectiveness of black boxed warnings, which are often placed there. One comment also claimed that the placement of a statement under the product name would conflict with FDA regulations at § 201.57(e) (21 CFR 201.57(e)) that reserve the area under the product name for boxed warnings, which, in turn, are reserved for critical safety information on hazards that may lead to death or serious injury.

(Response) FDA disagrees with the assertion that a statement under the

product name would detract from boxed warnings that appear at the beginning of labeling. Systemic antibacterial products rarely contain boxed warnings. Furthermore, physicians recognize that a box demarcates a critical warning; therefore, placement of a statement before the boxed warning would not detract from that warning.

The agency disagrees with the claim that placing a statement under the product name conflicts with § 201.57(e). That section does not state that the only information that can be placed directly under the product name is a boxed warning. Nor does the section state that boxed warnings must be placed directly under the product name. Section 201.57(e) states: ''If a boxed warning is required, its location will be specified by the Food and Drug Administration.'' It should be noted that boxed warnings may appear anywhere in the package insert, not only under the product name.

(Comment 21) One comment objected to placement of the statement under the product name because the same statement appears in the ''Precautions'' section.

(Response) In the final rule, the statements for both locations have been revised, and two different statements now appear in these two sections.

(Comment 22) One comment opposed the proposal but stated that if the agency were to proceed with it, a statement concerning antimicrobial resistance should be in a new section entitled ''General,'' which would appear before one of the existing sections of labeling that doctors are likely to read such as ''Microbiology,'' ''Indications and Usage,'' or ''Dosage and Administration.'' Another comment stated that of the two locations proposed for a general statement on antibiotic resistance, the ''Precautions'' section is a more suitable place for such a statement than directly under the product name.

(Response) FDA believes that the labeling statements required by this final rule are appropriately placed to be as visible as possible to readers; therefore, the agency declines to adopt the suggestion to create a new labeling section entitled ''General'' or to adopt the suggestion not to require a statement under the product name.

(Comment 23) Three identical comments stated that all anti-infective labeling should contain a new section entitled ''Clinical Microbiology'' because physicians and nurses are used to seeing clinical microbiology information under that heading rather than under ''Clinical Pharmacology.'' The comments maintained that the statement proposed for the ''Clinical Pharmacology'' section appear instead in this new section because the statement is more correctly a ''Clinical Microbiology'' statement rather than a ''Clinical Pharmacology'' statement. The comments also stated that readers would recognize the statement more easily if it were in a separate section. Another comment stated that the language proposed for the ''Clinical Pharmacology'' section should appear in a ''Microbiology'' subsection of the ''Clinical Pharmacology'' section, adding that this type of information does not belong in any other area of the ''Clinical Pharmacology'' section. Another comment stated that the ''Clinical Pharmacology'' section should also include a summary of the preclinical and clinical data regarding PK and PD parameters to predict clinical response and minimize development of resistance, but that if such data are lacking, that should be stated.

(Response) The agency has decided that advice about obtaining cultures belongs in the ''Indications and Usage'' section rather than the ''Clinical Pharmacology'' section. Because the rule does not require microbiology information, there is no need for a separate microbiology section.

(Comment 24) Two comments stated that the proposal contradicted approved labeling for prophylaxis indications. One comment stated that antibiotic use for prophylaxis is within the standard of care and is found in indications in several labels (i.e., mezlocillin, cefuroxime, and metronidazole). Another comment noted that antibiotic use for prophylaxis of bacterial infection in some settings is an FDA-approved and valuable clinical use of several antibacterial drugs. Another comment stated that the ''proposed statements deviate from the long-standing practice of FDA to grant indications for each specific infection that was studied in adequate and well-controlled trials.''

(Response) FDA recognizes that some antibacterial drug products are indicated for prophylactic use, for example, to prevent postoperative bacterial infection. The statements required by the final rule to appear under the product name and in the ''Indications and Usage'' section advise that antibacterial drug products ''should be used only to treat or prevent infections that are proven or strongly suspected to be caused by bacteria.'' The statement required in the ''Precautions'' section, under the ''General'' subsection, also recognizes that some antibacterial drug products are indicated for prophylaxis. The final rule has no impact on the approval of antibiotics for various indications.

G. Statements Under the Product Name and in the ''Precautions'' Section

The proposed rule would have required that the following statement appear directly under the product name and also in the ''Precautions'' section:

Inappropriate use of (*insert name of antibacterial drug product*) may increase the prevalence of drug resistant microorganisms and may decrease the effectiveness of (*insert name of antibacterial drug product*) and related antimicrobial agents.

Use (*insert name of antibacterial drug product*) only to treat infections that are proven or strongly suspected to be caused by susceptible microorganisms. See Indications and Usage section.

This statement used the term ''inappropriate use'' of antibacterial drug products.

(Comment 25) Several comments objected to the term ''inappropriate use'' as vague and subject to varying interpretations. One comment asked that inappropriate use be defined. Another comment maintained that the rule should focus on appropriate, rather than inappropriate, prescribing and should include a clear definition of appropriate prescribing. This comment asserted that it is important to distinguish between unnecessary use, such as prescribing an antibiotic for a viral infection, and inappropriate use, such as prescribing antibiotics at the wrong dose or for the wrong duration, or prescribing the wrong antibiotic to treat a particular bacterial infection. The comment also maintained that it is entirely appropriate to prescribe antibiotics whenever a bacterial infection is suspected, even in patients who initially have influenza-like symptoms.

The comment also stated that a definition of appropriate prescribing should include the following points: (1) There must be a known or suspected bacterial infection, and (2) the choice of antibiotic should effect a rapid inhibition of bacterial growth, ideally by bacterial kill, and minimize the development of resistance and drug-related toxicity. This comment also stated that failure to use antibiotics may lead to serious bacterial infections that progress, and that the proposed rule's focus on inappropriate use might have the unwanted result of making doctors hesitate to prescribe antibiotics when they are truly necessary to treat a bacterial infection. One comment expressed the opinion that when a doctor uses his judgment about prescribing, that is not inappropriate use. Another comment stated that appropriate use of antibiotics may also

increase resistance if patients do not comply with the full course of therapy or otherwise alter the prescribed dosing regimen.

(Response) In response to the comments, the agency has decided not to use the words ''appropriate'' or ''inappropriate'' because it recognizes that determining appropriate use, and therefore what is not appropriate, involves many factors and requires the exercise of the physician's judgment in using available information to select an antibiotic for a particular patient in a particular context. Instead, FDA has revised the statement under the product name to directly link reducing antibiotic resistance with prescribing antibiotics only to treat or prevent infections that are proven or strongly suspected to be caused by bacteria. Similarly, the statement in the ''Precautions'' section indicates that prescribing antibiotics in the absence of a proven or strongly suspected bacterial infection increases the risk of developing resistance.

(Comment 26) One comment offered the following examples of inappropriate use: (1) Using antibiotics for common respiratory viral infections, (2) using a broad-spectrum antibiotic when a narrower spectrum antibiotic would be more appropriate, (3) using an antibiotic with an excessively long half-life, and (4) using a less potent antibiotic when a more potent agent would be more appropriate. Another comment described inappropriate use as including the use of antibiotics to treat viral infections, failure to prescribe an adequate length of treatment, failure of patients to complete the entire course of treatment, and skipping doses. This comment stated that it is important for physicians and the public to understand the basic value of antibiotics and went on to say that only inappropriate usage should be highlighted as requiring further education and restraint.

(Response) As discussed in the response to comment 25, the agency has decided not to use the words ''appropriate'' or ''inappropriate'' in the labeling statements required by this rule. The agency agrees, however, that examples of inappropriate use may include using antibiotics for viral infections, failure to prescribe an adequate length of treatment, failure of patients to complete the entire course of treatment, skipping doses, and using a broad-spectrum antibiotic when a narrower spectrum antibiotic would be more appropriate. The agency does not agree that it is never appropriate to use an antibiotic with a very long half-life. Half-life is a factor to be considered along with other many other specific factors involved in patient management, but it is not appropriate to make generalizations about it in the context of this rule. Furthermore, focusing on the potency of an antibiotic is not a helpful approach because there is no standard definition of the potency of an antibiotic.

(Comment 27) The agency received the following five suggestions for wording to appear in place of that proposed to appear under the product name. Suggestions 1 through 4 were also proposed for the ''Precautions'' section:

1. ''Inappropriate use of antibiotic products may increase the prevalence of drug resistant microorganisms, leading to a potential decrease in the general overall effectiveness of antimicrobial agents.''

2. ''Appropriate use of antimicrobial agents may help decrease the prevalence of drug resistant microorganisms, resulting in the continued effectiveness of this product and related agents. This product should be used only to treat infections that are strongly suspected or proven to be caused by susceptible microorganisms.''

3. ''Inappropriate use of an antibiotic may increase the prevalence of drug-resistant microorganisms and may decrease the future effectiveness of the antibiotic and related antimicrobial agents. It is not appropriate to extrapolate the benefit/risk profile established in patients with documented bacterial infections to other patients (e.g., patients with viral infections). This antibiotic does not treat viral infections.''

4. ''Appropriate antibiotic use requires the selection of an antibiotic, for a known or suspected bacterial infection, that optimizes clinical therapeutic effect by maximizing bacteriological eradication and minimizing the development of resistance and drug-related toxicity. In order to eradicate the bacteria and minimize the development of bacterial resistance, it is important to administer the appropriate antibiotic at the right dose and for the right duration. See Dosage and Administration Section.''

5. ''Inappropriate use of antibacterial agents, including (insert name of antibacterial drug product) may increase the prevalence of drug resistant bacteria and may decrease the effectiveness of antibacterial agents, including (insert name of antibacterial drug product). (Insert name of antibacterial drug product) should be used only to treat infections that are proven or suspected to be caused by indicated bacteria.''

Suggestion 5 eliminates from the proposed phrase ''strongly suspected'' the word ''strongly,'' contending that it adds nothing.

The agency also received a suggestion intended only for the ''Precautions'' section:

''Inappropriate use of antibacterial agents, including (insert name of antibacterial drug product) may increase the prevalence of drug resistant bacteria and may decrease the effectiveness of antibacterial agents, including the drug product. Antibacterial agents, including the drug product, should be used to treat infections that are proven or suspected to be caused by indicated bacteria. The antibacterial agent chosen to treat a documented or presumptive bacterial infection should be targeted to the most likely bacterial pathogen(s) and should have the narrowest spectrum possible to cover the likely pathogen(s).''

(Response) All of the previous wording suggestions are phrased in terms of either inappropriate or appropriate use. The agency has been persuaded by the comments that using the words ''inappropriate'' or ''appropriate'' is confusing and unhelpful; therefore, the final rule does not use these terms. Because FDA has decided not to use the words ''inappropriate'' or ''appropriate,'' the agency declines to adopt any of the wordings suggested in the comments. The agency disagrees with the opinion that there is no difference between ''suspected'' and ''strongly suspected.'' Since many infections could theoretically be either viral or bacterial, the direction to use antibiotics for suspected bacterial infections could be interpreted as approving of antibiotic use whenever there is a possibility of a bacterial infection. Therefore, the final rule retains the word ''strongly.''

H. Culture and Susceptibility Tests

Proposed § 201.24(b) would have required the following statement in the ''Clinical Pharmacology'' section: ''Appropriate use of (*insert name of antibacterial drug product*) includes, where applicable, identification of the causative microorganism and determination of its susceptibility profile.''

(Comment 28) Many comments objected to this statement, asserting that it is not always possible or advisable to do cultures. Comments stated that for the majority of infections, including respiratory tract infections, obtaining a specimen for a culture is not possible. One comment objected that diagnostic tests that immediately distinguish viral and bacterial infections are not available.

(Response) The agency recognizes that it is not possible to obtain specimens for cultures for many common community-

acquired infections, including many respiratory tract infections and *otitis media*. FDA also agrees that there are no diagnostic tests that can immediately determine whether an infection is bacterial or viral. The revised statement for the ''Indications and Usage'' section recognizes these realities by advising that culture and susceptibility information should be considered in selecting or modifying antibacterial therapy when it is available.

(Comment 29) Many comments stated that the majority of infections, especially those acquired in the community rather than in the hospital, are and should be treated empirically without waiting for identification of the causative microorganism. One comment asserted that antibiotics must be initiated empirically for a febrile neutropenic patient or a patient with pneumonia in an intensive care unit (ICU). Another comment stated that the American Thoracic Society Guideline for Pneumonia recommends empirical treatment of pneumonia and concludes that Gram stains of sputum, cultures, and susceptibility testing are not cost-effective, particularly for outpatient infection. One comment stated that to delay the start of treatment waiting for culture results would be unethical as well as impractical. Another comment maintained that when patients are at risk of serious complications from infection, they must be treated empirically, and broad-spectrum therapy may be used to avoid treatment failure. Another comment stated that the agency has not considered outcome data concerning the benefits of empiric treatment on mortality and morbidity. One comment stated that doctors should decide whether to change antibiotic therapy based on the clinical situation, not only on in vitro susceptibility data. Another comment stated that there are not many efforts to gather information on treatment outcomes in ambulatory settings. One comment asked what the agency meant by the phrase ''where applicable'' in the statement: ''Appropriate use of (*insert name of antibacterial drug product*) includes, where applicable, identification of the causative microorganism and determination of its susceptibility profile.''

(Response) FDA agrees that antibiotic therapy must often be initiated empirically, including for patients with febrile neutropenia or ICU patients with pneumonia, and that it may be unethical to delay the initiation of therapy. FDA recognizes that in many situations physicians must make difficult choices about the need for empiric therapy and broad-spectrum agent use. Most clinical guidelines concerning the management of such situations also recommend taking measures to alter treatment to more targeted antimicrobial coverage, such as through the use of bacterial cultures, whenever possible.

The agency did not intend to call for physicians to always refrain from initiating antibiotic therapy until the causative microorganism has been identified. The statement proposed for the ''Indications and Usage'' section recommended that initial selection of an antibiotic be guided by local epidemiology and susceptibility patterns, thus clearly contemplating that antibiotic therapy would be initiated before the results of culturing had been obtained. In addition, the modifier ''where applicable'' was intended to indicate that it is not always possible to do culture and susceptibility testing.

In response to comments, the agency has revised the statements about the role of culture and susceptibility tests and the use of local epidemiology and susceptibility patterns to make clear that FDA is not advising physicians that they should never prescribe antibiotics without first obtaining culture and susceptibility results or without referring to local epidemiology and susceptibility patterns. The agency has decided that the statement about culture and susceptibility information is more appropriate for the ''Indications and Usage'' section than for the ''Clinical Pharmacology'' section. The statement suggests that after initiating antibiotic therapy empirically, physicians should consider modifying therapy if susceptibility information becomes available and indicates that the microorganisms causing the infection are different from those initially suspected. FDA recognizes, however, that the physician must also weigh the clinical situation.

(Comment 30) One comment asserted that there is no scientific consensus on the need to use narrow-spectrum antibiotics targeted at organisms that have been identified through cultures.

(Response) FDA believes that using narrower spectrum, more targeted therapy, to treat a known organism can reduce the development of resistance. Narrower spectrum antimicrobials may have less impact on the normal organisms that colonize the body. Normal flora may protect the body from becoming colonized with other, more pathogenic bacteria. Also, normal flora exposed to an antimicrobial may become resistant to that antimicrobial and pass resistance genes on to more pathogenic bacteria. Therefore, prescribing narrower spectrum drugs may limit the spread of resistance while still treating the pathogenic organisms causing the disease. This subject was discussed by presenters and panel members at the January 8, 2003, Anti-Infective Drugs Advisory Committee meeting. However, the labeling statements in the final rule do not dictate the use of narrow-spectrum antibiotics.

(Comment 31) Comments maintained that there are not enough laboratories to perform susceptibility testing for all of the antibiotics prescribed and that, in many parts of the country, physicians do not have access to susceptibility testing. One comment stated that few clinics have access to local microbiology labs; that the majority of microbiological diagnostic testing is done in central locations by a few laboratories, and that many hospitals do not have microbiology laboratories. This comment noted that the Infectious Disease Society of America has recently issued a position paper on the lack of access to microbiology laboratories and the threat that this lack of facilities poses to the public health. Two comments stated that the regulations of the Clinical Laboratory Improvement Act provide that Gram stains should be performed and interpreted by qualified lab technicians, not doctors.

One comment stated that the infrastructure required to support diagnostic testing in primary care settings is not in place and that diagnostic testing is not likely to be funded unless there are data to support the cost-effectiveness of doing culture and susceptibility testing rather than using broad-spectrum antibiotics. This comment also stated that the pharmaceutical industry should not have to fund such testing. Another comment stated that managed care and third-party payers have not funded the infrastructure required for diagnostic testing in primary care settings.

(Response) FDA agrees that some physicians lack access to facilities that perform susceptibility testing. The agency also agrees that it is not the responsibility of the pharmaceutical industry to make such testing available. The final rule's statement in the ''Indications and Usage'' section takes into account that culture and susceptibility information may not always be available.

I. Local Epidemiology and Susceptibility Patterns

Proposed § 201.24(c) would have required the following statement in the ''Indications and Usage'' section:

Local epidemiology and susceptibility patterns of the listed microorganisms should direct initial selection of (*insert name of*

antibacterial drug product) for the treatment of the following indications. Because of changing susceptibility patterns, definitive therapy should be guided by the results of susceptibility testing of the isolated pathogens.

(Comment 32) One comment stated that the direction to use local epidemiology and susceptibility patterns is not practical because this information is not available to doctors. Another comment stated that lack of susceptibility data on a particular product in a particular geographic region should not contraindicate use of the drug. Several comments stated that various practice guidelines do not recommend the use of surveillance data to guide antibiotic therapy. Another comment stated that there are different datasets of susceptibility data and asked which set should be used. This comment also stated that susceptibility patterns can change rapidly, making data obsolete.

(Response) FDA recognizes that surveillance data on microbial sensitivities may not be available in some settings and are not helpful in other situations. However, in many circumstances, the data provide a source of information that may assist the prescriber in the selection of empiric therapy. FDA suggests that physicians obtain epidemiology and susceptibility data from local hospitals or State health departments. Physicians who have access to such sources of information and make it a practice to update their information periodically can remain current on susceptibility patterns in their areas.

(Comment 33) One comment contained the following detailed objections to the use of susceptibility data:

- MIC data from in vitro testing are unproven as predictors of clinical outcome in many diseases.
- Susceptibility data obtained from surveillance studies have limitations for prospective therapeutic decisions. These limitations include the fact that large national and international surveillance studies obtain data from hospitalized patients who are more likely to have resistant isolates. These data are unlikely to be linked to clinical data so that the relevance of the MIC values generated is limited.
- Local surveillance data can be biased because of small sample sizes. The data that are likely to be available to physicians in the community come from clinical trials that exclude patients who would be at risk for resistant isolates.
- Laboratory methodology and expertise can influence susceptibility testing, e.g., E tests often err for drugs that are highly dependent on pH for activity, which is a particularly important problem for macrolides such as erythromycin and clarithromycin.
- Clinical outcome data are not the basis for current National Committee for Clinical Laboratory Standards (NCCLS) and FDA breakpoints for most drugs used for outpatient respiratory tract infections. The NCCLS changed the breakpoints for some beta-lactam antibacterials and that has altered the susceptibility rates.

(Response) The agency agrees that surveillance data has limitations; however, data with limitations may still be useful. Accordingly, the revised statement in the ''Indications and Usage'' section states that local epidemiology and susceptibility patterns may contribute to the empiric selection of therapy when culture and susceptibility information are not available.

(Comment 34) One comment contended that recommending the use of local epidemiology and susceptibility patterns will lead to the use of newer, possibly broad-spectrum agents that have lower rates of in vitro resistance, although older agents are still appropriate choices. This comment also stated that other factors may be useful in selecting antibiotic therapy. For example, molecular resistance mechanisms for particular bacteria may be useful to predict clinical efficacy, and the location of infection predicts response to therapy in some diseases.

(Response) FDA agrees that it is not reasonable to focus solely on epidemiology and susceptibility patterns as the decisive factor in selecting an antibiotic. Most clinicians use this information as one of many factors considered in deciding which drug to use.

(Comment 35) Two comments suggested alternative wording for the statement to appear in the ''Clinical Pharmacology'' section as follows:

1. ''Appropriate use of this product may include, where applicable and practical, identification of the causative microorganism and the determination of its susceptibility profile.''

2. ''Appropriate use of antibacterial agents includes, where applicable, identification of the causative bacteria and determination of its susceptibility profile. The pharmacokinetic and pharmacodynamic profile of the agent and the location of the infection should also be considered when selecting an appropriate antibiotic for treatment of a documented or presumptive infection.''

(Response) The previous two wording suggestions are modified versions of the statement that was proposed for the ''Clinical Pharmacology'' section. The final rule does not require a statement in the ''Clinical Pharmacology'' section because the agency has decided that advice about obtaining cultures belongs in the ''Indications and Usage'' section rather than the ''Clinical Pharmacology'' section. Therefore, FDA declines to adopt either of these suggestions.

(Comment 36) The agency received three suggestions for wording to appear in the ''Indications and Usage'' section as follows:

1. ''Appropriate culture and susceptibility tests should be performed before treatment in order to isolate and identify organisms causing infection and to determine their susceptibility to (name of drug). Therapy with (name of drug) may be initiated before results of these tests are known; once results become available, appropriate therapy should be continued.''

2. ''Appropriate specimens for bacteriological examination should be obtained, when indicated and feasible, in order to isolate and identify causative organisms and to determine their susceptibility to [name of product]. Therapy may be instituted while awaiting the results of these studies. Once these results become available, antimicrobial therapy should be adjusted accordingly.''

3. ''The efficacy of this drug has been demonstrated when it is used as directed for the indications and susceptible pathogens listed below. Use of this drug in other regimens or for other indications or pathogens may be ineffective. Inappropriate use of this or other antibacterials may increase the prevalence of drug resistant microorganisms. The prescription of antimicrobial therapy should be guided, when possible, by the results of local or regional susceptibility testing of causative pathogens typically isolated during the infection. When microbiological data are not available for an individual patient, the decision to prescribe an antibiotic should be based on the clinician's assessment of the most likely etiology and optimal therapy based on the available clinical, pharmacodynamic, and in vitro information provided from clinical trials and post-marketing experience with antimicrobial agents.''

(Response) The agency declines to adopt the specific wording in any of these suggestions. However, the revised statement for the ''Indications and Usage'' section incorporates many ideas from these suggestions. The idea that therapy may be initiated before obtaining culture results is captured by the statement that antibiotics may be

used to treat infections that are strongly suspected to be bacterial. The statement that culture and susceptibility information should be considered when available captures the idea expressed by such phrases as ''where applicable and practical'' and ''when indicated and feasible.'' FDA's statement also includes the idea that physicians may wish to modify antibiotic therapy after obtaining the results of susceptibility testing.

J. Practice of Medicine

(Comment 37) Many comments asserted that the proposal is outside the scope of labeling, the purpose of which is to provide the information necessary for the safe and effective use of drugs, not to tell physicians how to practice medicine. One such comment maintained that product labeling should not dictate medical practice, which requires individualized clinical assessment of the patient and the circumstances under which the patient is being treated, and that FDA's role does not include teaching medicine. Another comment asserted that the proposal interferes with the practice of medicine since the choice of antibiotic should be made by the physician after weighing the overall benefits and risks to the patient. Another comment stated that labeling should not impose a specific standard of care or practice that must be followed. Another comment maintained that there is no statutory basis for FDA to regulate physician conduct or train physicians and that the clinical knowledge gained from years of medical training and experience cannot be completely provided for in labeling.

Several comments expressed concern that the proposed labeling statements would result in legal liability for physicians because in many cases they would not be able to follow the standard of practice required by the labeling, that is, obtaining cultures to identify microorganisms and determine their susceptibility profiles.

(Response) The agency disagrees with comments maintaining that the proposed rule is outside the scope of labeling. As FDA has long recognized, its role is neither to regulate physician conduct, nor to train physicians. As FDA wrote in 1972:

> Throughout the debate leading to enactment (of the 1938 Act and the drug amendments of 1962), there were repeated statements that Congress did not intend the Food and Drug Administration to interfere with medical practice and referenced to the understanding that the bill did not purport to regulate the practice of medicine as between the physician and the patient . . . . 37 Fed. Reg. at 16503.

FDA's 1972 notice continues:

> {A}lthough it is clear that Congress did not intend the Food and Drug Administration to regulate or interfere with the practice of medicine, it is equally clear that it did intend that the Food and Drug Administration determine those drugs for which there exists substantial evidence of safety and effectivenss and thus will be available for prescribing by the medical profession, and additionally, what information about the drugs constitutes truthful, accurate, and full disclosure to permit safe and effective prescription by the physician. As the law now stands, therefore, the Food and Drug Administration is charged with the responsibility for judging the safety and effectiveness of drugs and the truthfulness of their labeling. The physician is then responsible for making the final judgment as to which, if any, of the available drugs his patient will receive in the light of the information contained in their labeling and other adequate scientific data available to him.
>
> Physicians have been concerned that the failure to follow the labeling of a drug may render them unduly liable for malpractice.
>
> Although labeling, along with medical articles, tests, and expert opinion, may constitute evidence of the proper practice of medicine, it is not controlling on this issue. The labeling is not intended either to preclude the physician from using his best judgment in the interest of the patient, or to impose liability if he does not follow the package insert. A physician should recognize, however, that the package insert represents a summary of the important information on the conditions under which the drug has been shown to be safe and effective by adequate scientific data submitted to the Food and Drug Administration.

Given this framework, it is appropriate to include in labeling information necessary for the safe and effective use of the drug, including information about the context of product use. For example, labeling for anesthetic agents often includes very specific recommendations about the conditions under which the products should be used and the training of the personnel who administer them. Furthermore, many approved antibiotics already recommend that appropriate culture and susceptibility tests be performed.

FDA has adopted revised statements to address concerns expressed in the comments that the proposed rule categorically dictated medical practice and held up a standard that physicians would be unable to meet. The revised statements take into account that culture and susceptibility information are not always available. In addition, rather than stating that local epidemiology and susceptibility patterns should help direct initial selection of antibiotic therapy, the final rule provides that information from these sources may contribute to the selection of therapy. With these changes, the agency believes that the statements required by the final rule cannot be interpreted as overly directive and thus do not interfere with the practice of medicine. The final rule is not intended to establish a standard of care. The rule is designed to provide information and context for health care providers to consider in prescribing certain medications.

K. Information for Patients

The proposed rule provided that the following statement appear in the ''Precautions'' section under the ''Information for patients'' subsection:

> Patients should be counseled that (*insert name of antibacterial drug product*) should only be used to treat bacterial infections. It does not treat viral infections (e.g., the common cold).
>
> Patients should also be told that the medication should be taken exactly as directed. Skipping doses and not completing the full course of therapy may (1) decrease the effectiveness of the immediate treatment and (2) increase the likelihood that bacteria will develop that will not be treatable by (*insert name of antibacterial drug product*) in the future.

(Comment 38) The comments were generally supportive of the proposal to educate patients. However, one comment stated that FDA's attempt to educate the public through labeling is misguided. The comment pointed to a study[1] evaluating a medication guide that found that less than 50 percent of the patients who received the guide read it; that of the patients who read the guide, only 50 percent could recall at least one issue discussed in it; and that only 20 percent of the patients who knew the contents of the guide said they had taken some action based on it. This comment stated that if the agency proceeded with the proposal to include a statement for patients, the statement should be: ''Patients should be counseled to take all medicinal products exactly as directed.''

(Response) The agency does not believe the medication guide study is relevant to the labeling proposal concerning antibiotic resistance because the agency has not proposed a medication guide or anything else for patients to read. The ''Information for patients'' subsection contains information that would be communicated to the patient by the prescriber. The agency disagrees with the suggestion that patient information be limited to advising patients to take all medications exactly as directed because that advice would not explain

[1] Chianese, C. P., ''An Overview of an Initial Experience With a Medication Guide,'' *Drug Information Journal*, vol. 34, pp. 855–859, 2000.

the specific consequences of failure to take antibiotics as directed.

(Comment 39) One comment asserted that, as written, the statement could suggest that patients are qualified and capable of diagnosing their own infections. Another comment stated that patient information should primarily reinforce the prescribed dosing because patients should not be expected to know how to distinguish between viral and bacterial infections. The comment also asserted that patients should be educated that at least one office visit is necessary to decide whether an antibiotic should be prescribed. Another comment stated that pharmacists should give patients the entire package insert rather than a summary, because patient demand for antibiotics often leads to unnecessary prescribing.

(Response) FDA does not agree that its proposed language suggests that patients are capable of diagnosing their own infections or are able to tell the difference between a viral and a bacterial infection. Generally, FDA expects that information concerning the use of antibiotics would be communicated to the patient in the doctor's office after the patient had already decided to seek medical care. However, because antibiotics are prescribed in hospitals as well as on an outpatient basis, FDA declines to adopt the suggestion that patients be told that at least one office visit is necessary. It is not clear how giving the package insert to patients who are prescribed antibiotics would reduce patient demand for antibiotics. In any event, FDA usually requires patient package inserts only when there is a need to communicate detailed risk information about a drug product or instructions for using the product. Neither of these circumstances apply to systemic antibacterial drug products.

(Comment 40) One comment stated that the patient information statement should not apply to any antibiotic administered solely via intravenous or intramuscular routes because patients do not self-administer by these routes.

(Response) FDA disagrees with the notion that patients never self-administer antibiotics by intravenous or intramuscular routes. Patients who are started on intravenous antibiotics in the hospital sometimes continue to use injectable antibiotics on an outpatient basis. Therefore, the patient information section must be included in the labeling of systemic antibacterials administered intravenously or intramuscularly.

(Comment 41) The agency received many specific suggestions for revisions to the proposed patient statement. One comment proposed the following language: ''Patients should be counseled about the differences between viral and bacterial infections.'' One comment suggested adding the phrase ''the oral antibiotic'' before the name of the product in the first sentence. Another suggestion was to add the words ''despite feeling better or 'totally' well'' after the phrase ''Skipping doses and not completing the full course of therapy.'' Another comment suggested using the phrase ''likelihood of selecting bacteria'' rather than the phrase ''likelihood that bacterial will develop.''

Two comments suggested adding either ''antibacterial drugs, including'' or ''antibacterial agents including'' before the product name in the first sentence. One comment suggested replacing the specific product name in the last sentence with the phrase ''antibacterial drugs,'' while another comment proposed to add ''or other antibacterials'' after the product name in the last sentence. In the sentence ''Skipping doses and not completing the full course of therapy may (1) decrease the effectiveness of the immediate treatment and (2) increase the likelihood that bacteria will develop that will not be treatable by (*insert name of antibacterial drug product*) in the future,'' one comment proposed to replace the first ''will'' with ''may,'' while another comment suggested replacing both instances of the word ''will'' with the word ''may.''

(Response) In the final rule, FDA has adopted a number of the suggestions made in the comments. FDA has adopted the suggestion to precede the name of the product in the first sentence with the phrase ''antibacterial drugs including'' because the information applies to all antibacterial drugs. The agency also agrees with the idea of adding the phrase ''or other antibacterials'' to the last sentence, but has altered the wording slightly to state ''or other antibacterial drugs.'' FDA agrees with the concept that patients should be told to continue therapy even after they feel better and has included the phrase ''Patients should be told that although it is common to feel better early in the course of therapy * * *'' in the statement.

FDA declines to adopt other suggestions. The agency believes that the suggestion that patients be counseled about the differences between bacterial and viral infections is not as direct as and, therefore, not preferable to FDA's revised language. FDA does not agree that the phrase ''the oral antibiotic'' should be added because the implication of this suggestion is that patients are never responsible for using injectable antibiotics. As discussed previously, there are circumstances where injectable antibiotics are self-administered. The agency rejects the suggestion to use the phrase ''likelihood of selecting bacteria'' because most lay people are not familiar with the concept of bacterial selection. The agency declines to adopt the suggestions to use ''may'' rather than ''will'' in the phrases ''will develop'' and ''will not be treatable.'' The concept of possibility rather than certainty is already expressed by the words ''may'' and ''likelihood'' earlier in the sentence.

IV. Environmental Impact

The agency has determined under 21 CFR 25.30(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

V. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Under the Regulatory Flexibility Act, if a rule has a significant economic impact on a substantial number of small entities, an agency must consider alternatives that would minimize the economic impact of the rule on small entities. Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement of anticipated costs and benefits before proposing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million in any one year (adjusted annually for inflation).

The agency believes that the final rule is consistent with the regulatory philosophy and principles identified in Executive Order 12866 and in these two statutes. The final rule will amend the content of the professional labeling for human prescription antibacterial drugs. Based on the analysis, summarized in table 1 of this document, FDA projects the annualized costs to comply with the final rule to be less than $600,000. The agency finds that if the revised labeling reduces direct and indirect costs attributable to resistant bacteria by 1

percent, the annual benefit will exceed $10 million. Thus, while it has been determined that the final rule is significant under the Executive order, the final rule will not be economically significant as defined by the Executive order, because the annual impacts on the economy are substantially below $100 million. With respect to the Regulatory Flexibility Act, the agency certifies that this final rule will not have a significant effect on a substantial number of small entities. The effect of small entities is discussed in more detail in section V.D of this document. The Unfunded Mandates Reform Act does not require FDA to prepare a statement of costs and benefits for the final rule because the rule will not result in any 1-year expenditure that would exceed $100 million adjusted for inflation. The current inflation-adjusted statutory threshold is about $110 million.

TABLE 1.—SUMMARY OF QUANTIFIABLE BENEFITS AND COSTS ($MILLION)

Benefits and Costs	One-Time	Annual	Total
Benefits[1]			
Avoided cost of hospital infections		3.8	3.8
Indirect cost of longer hospital stays		0.4	0.4
Indirect costs of mortality (discounted at 3% and 7%)		6.6–11.8	6.6–11.8
Total Benefits		10.8–16.0	10.8–16.0
Costs[2]			
One-time labeling revision	2.9		0.42
Annual incremental printing cost		0.02	0.02
Annual Physicians Desk Reference (PDR) Costs		0.123	0.123
Total Costs	2.9	0.146	0.568

[1] Assumes medical, productivity, and mortality costs now attributable to antibacterial resistance are reduced by 1 percent.
[2] May not sum to total because of rounding.

A. Objective of the Final Rule

Drug-resistant bacteria pose a public health risk by reducing the effectiveness of prescription antibacterial drug products. Some disease-producing bacteria can adapt and become resistant to newly developed drugs within a couple of years. For example, a report of infections resistant to linezolid, the first drug in a new class of antibiotics, was published just 1 year after its approval (Ref. 6). To stress the need for continued vigilance against the emergence of resistant bacteria, the final rule requires that labeling of systemic antibacterial drug products include statements that encourage the use of antibiotics in a way that reduces the risk of developing drug-resistant bacteria. The final rule requires that labeling for affected prescription drug products comply with the requirements by February 6, 2004.

B. Costs of Regulation

The agency received several comments about the costs of the proposed rule. One comment asked whether the economic analysis in the proposed rule included the cost of initial and followup doctor visits or the cost of culture and sensitivity tests. Because patients normally see a health care provider to obtain a prescription for an antibacterial drug, the agency's initial analysis of impacts did not include costs for health care visits.

The agency also did not estimate the number or cost of laboratory tests that might have been ordered because of the proposed labeling change. Many doctors and hospitals currently order susceptibility tests, especially when there is a high incidence of resistant bacterial infections locally. In any event, in response to comments, the agency has revised the wording of the proposed statement that suggested a general need for susceptibility testing. Instead, the final rule adds statements to antibacterial labeling that remind health care providers to consider laboratory results, if available, when selecting drug therapy. Because the final rule does not require additional laboratory tests or visits to health care providers, this analysis of impacts does not include these patient health care costs as regulatory costs.

Some comments questioned the cost-effectiveness of susceptibility testing. The agency did not evaluate the cost-effectiveness of laboratory tests. As stated elsewhere in the preamble, the agency has modified the language about susceptibility tests to clarify that initial drug therapy should be modified if available test results suggest the infection is caused by different microorganisms than initially suspected, not by testing each patient.

One comment stated that waiting to initiate drug therapy would lead to additional health care, morbidity, and mortality costs. While the agency agrees that any delay in starting therapy can increase the direct and indirect costs of infection, the final rule does not suggest that health care providers postpone treatment once they strongly suspect that an infection is caused by a bacteria. The agency agrees that costs increase when resistant bacteria are not initially identified as the cause of an infection. In one study on bloodstream infections, the length of hospital stay increased by 6.4 days and mortality increased from 11.9 percent to 29.9 percent with inadequate treatment (defined as either giving an incorrect drug for an infection-causing pathogen or giving the correct drug for an infection-causing pathogen that is resistant to the drug) (Ref. 7). The objective of the final rule is to reduce the prevalence of and costs associated with resistant bacteria and their associated costs. A more detailed discussion of avoided costs follows in section V.C of this document.

1. Affected Products

The final rule will affect all systemic antibacterial drug products except those primarily indicated to treat a mycobacterial infection. Antifungal, antiviral, antiparasitic, and topical antibacterial products will not be subject to the labeling requirements of the final rule. FDA estimates that manufacturers will be required to modify labeling of 669 antibacterial drug products.[2]

[2] Derived from FDA's *Approved Drug Products With Therapeutic Equivalence Evaluations*, 2002, and *2001 Drug Information*, American Hospital Formulary Service (AHFS). Products counted and active ingredients matching the AHFS lists of antibacterial agents, and a distinct manufacturer, active ingredient, or dosage form. Topical dosage forms were excluded. Products with different

Continued

2. Professional Labeling Design Costs

For a major revision in the content of professional labeling, FDA had estimated in its preliminary analysis that, on average, prescription drug manufacturers would incur costs of about $2,600 per product, including inventory loss, because the 12-month implementation period is shorter than the average useful life of pharmaceutical labeling. To derive this estimate, labeling costs for four categories of pharmaceutical manufacturers were weighted by their market share of all pharmaceutical products. Comments from a large pharmaceutical manufacturer, however, stated that labeling redesign costs to industry are more than three times FDA's estimate. In response, the agency has recalculated the market shares of the affected antibacterial products based on its current drug approval data (table 2). Adjusting for both inflation and market shares, FDA now estimates that manufacturers of antibacterial drugs will incur, on average, per product costs of approximately $4,380, including $1,040 in inventory loss. The weighted average cost to revise drug labeling is based on input from industry consultants on the time and materials required to modify the package insert accompanying pharmaceutical products. (Table 2a shows a breakdown, by firm size, of the labor and material costs used to derive the weighted average cost of $4,380.) While some firms may incur per product costs higher than the average estimate, the agency believes that the revised per product cost represents a reasonable estimate of industrywide costs.

TABLE 2.—MARKET SHARE OF AFFECTED ANTIBACTERIAL DRUG PRODUCTS BY CATEGORY OF FIRM

Category of Firm	Number of Firms	Number of Products	Market Share[1]
Innovator[2]			
Small[3]	10	18	2.69%
Medium	3	27	4.04%
Large	45	501	74.89%
Generic[4]	43	123	18.39%
Totals	101	669	100.00%

[1] May not sum to total because of rounding.
[2] Includes firms manufacturing both innovator and generic products.
[3] Includes 7 private firms without size data.
[4] Includes firms manufacturing only generic products and 26 private firms without size data.

TABLE 2A.—LABELING REVISION COSTS BY FIRM SIZE

Item	Generic Drug Manufacturers	Innovator Drug Manufacturers		
		Small	Medium	Large
Labor Cost	$830	$830	$1,242	$1,812
Material Cost	$740	$740	$2,230	$3,400
Total Cost to Revise Labeling	$1,570	$1,570	$3,472	$5,212

3. Incremental Printing Costs for Professional Labeling

No comments were received on FDA's estimate of incremental printing costs for longer labeling. Therefore, FDA maintains its estimate that an average of 100,000 package inserts are printed annually for each antibacterial drug product marketed in the United States.[3] Compared to the proposed rule, the final rule requires fewer statements in the labeling, thus reducing the costs to print longer labeling. Adding new information on prudent use of antibacterial drug products to professional labeling will increase the size of current package inserts by an estimated 3.3 percent or 3.3 square inches (in^2) for the average insert. Although few package inserts will change size, if all manufacturers had to increase the length of the package insert to accommodate the new statements, they would incur additional printing costs of about $37 per affected product.[4] If all affected products had longer labeling, printing costs for the industry would increase by less than $25,000 annually.

4. PDR Costs

No comments were received on the impact of the rule on PDR costs for manufacturers. According to its publisher, a page in the print version of the PDR costs an average of $9,500 in 2001.[5] Furthermore, according to the publisher of the electronic versions of the PDR, each full package insert published in the print version is also included in the Internet and CD-ROM versions of the PDR at no additional cost to the drug manufacturer. A search of the Internet version of the PDR showed that as many as 160 antibacterial drug products will have slightly longer descriptions in the PDR.[6] The additional

therapeutic equivalence codes for the same manufacturer were counted separately.

[3] In 1996, there were approximately 133 million prescriptions for antibacterial drugs written by physicians in office and hospital settings (Government Accounting Office, 1999). An estimated 45.3 million inserts were printed to accompany these drugs. (45.3 million = (106 retail prescriptions/3 prescriptions per container) + (19 million hospital emergency prescriptions/2 prescriptions per container) + (8 million hospital outpatient prescriptions/(500 units per container/(28 units per prescription))). An average of 56,767 inserts therefore accompanied each product (45.3 million ÷ 798 products). Also, we assume that 40,000 additional inserts per product are distributed annually by sales representatives as promotional material.

[4] Although the length of an average package insert will only increase by 3.3 in^2, we rounded to 4 in^2 to calculate costs. The 1997 estimated incremental printing cost of $ 0.0086 per 100 in^2 was adjusted for inflation by the producer price index for commercial printing (i.e., a 6 percent increase in costs between 1997 and April 2001). $36.53 = 100,000 inserts per product x 1.06 x $0.000086 per in^2 x 4 in^2.

[5] $9,500 is the estimated average industry cost. Per page charges to an individual firm will decrease as more PDR pages are purchased. The maximum per page charge listed on Medical Economics' 2001 rate card is $19,035 (i.e., less than eight pages purchased for the year).

[6] A search of the Internet version of the PDR by affected drug category and by indication found only 156 affected products. According to Micromedex (http://www.micromedex.com), all fully described

language will add less than one-tenth of a page to an average PDR listing and cost about $842 more per product.[7] The annual costs of printing the larger labels in the PDR, therefore, will increase by $0.13 million.

Over 10 years, the agency estimates that the annualized compliance costs of the final rule will be approximately $580,000. These costs are summarized in table 3.

TABLE 3.—COSTS TO REVISE PROFESSIONAL LABELING AND INCREMENTAL PRINTING COSTS

	One-Time Labeling Revision Costs	Annual Incremental Printing Costs	Annual PDR Costs
Per product cost[1]	$4,379	$37	$842
Number of affected products	669	669	160
Total	$2,929,228	$24,439	$134,720
Total annualized costs[2]	$417,056	$24,439	$134,720

[1] Rounding may affect totals.
[2] One-time costs are annualized over 10 years at 7 percent.

C. Benefits

Bacterial resistance to antibacterial drugs directly affects health care costs by requiring the use of newer and more expensive drugs and by requiring longer treatment and hospitalization periods for patients infected by resistant bacteria. The societal costs of the infections from these resistant bacteria include both the direct costs for additional drugs and medical care and the indirect costs of lost productivity for patients with extended illness and increased mortality. The agency did not receive any direct comments on the benefits estimate in the proposed rule. However, during the review of the proposed rule, the Office of Management and Budget (OMB) requested that the agency estimate mortality attributable to resistant bacteria for the final rule. Thus, the final analysis of impacts also includes an estimate of the number of lifeyears saved.

1. Direct Costs of Resistant Infections

Most studies on the cost of hospital infections in the United States have not separated infections caused by resistant bacteria from those caused by susceptible bacteria. Researchers from the CDC, examining summary reports of outbreak investigations for 1971 through 1980, as well as published and unpublished reports of infections caused by bacteria with known antibacterial resistance, found that infections from resistant bacteria were typically associated with substantially longer hospital stays. The examined studies, however, had too few subjects to allow statistical analysis (Ref. 8).

Two recent studies on the effects of methicillin-resistant *Staphylococcus aureus* (MRSA) reported significantly different lengths of stay for patients infected with resistant bacteria compared to controls. The studies included only patients with similar underlying diseases. One study found that patients with infections from resistant bacteria stayed an average of 9.5 days in an intensive care unit (ICU) while control patients stayed there 5 days (Ref. 9). The other study found that patients with infections from resistant bacteria stayed an average of 21 days in an ICU compared to 12.5 days for control patients (Ref. 10).

Three regional studies directly compared the costs of infections caused by resistant and susceptible bacteria. In the first study, using hospital discharge data from hospitals in New York City, researchers modeled differences between infections caused by MRSA and those caused by methicillin-susceptible *S. aureus* (MSSA). They estimated that each MRSA infection costs an additional $2,500 in direct medical costs and longer hospital stays (Ref. 11).

The second study, performed at a university teaching hospital in North Carolina, also measured length of hospital stay and direct costs of hospitalization for patients with hospital-acquired bloodstream infections caused by MRSA and MSSA bacteria (Ref. 12). Patients infected with resistant bacteria stayed 8 additional days in the hospital (i.e., 12 days with MRSA infections compared to 4 days with MSSA infections), costing approximately $17,000 more in direct hospital costs.

In the third study, conducted at a Boston hospital, researchers examined the economic impact of antibiotic resistance in *Pseudomonas aeruginosa* (Ref. 13). This study compared length of stay and costs for three groups: (1) Patients with susceptible bacteria, (2) patients with some baseline resistant bacteria, and (3) patients with resistance that emerged while hospitalized. Daily hospital charges of $2,059 were the same for all three groups. Also, the length of stay was similar for patients infected with susceptible bacteria and those with baseline resistant bacteria. However, patients in whom resistant bacteria emerged during hospitalization incurred additional costs of $7,340 for 3.5 extra days.

The total number of annual infections caused by resistant bacteria is uncertain. Although diagnosis codes exist for infections with drug-resistant microorganisms, the codes are intended only to supplement other codes for infectious conditions and are not always included in patient data. As a result, hospital patient records may provide only an estimate of the minimum number of cases of drug-resistant infections in a given year. The U.S. National Center for Health Statistics publishes annual estimates of the number of diagnoses (by diagnosis code) in nonfederal short-stay hospitals from the National Hospital Discharge Survey (NHDS). NHDS estimates about 18,000 and 43,000 cases of infections by resistant microorganisms for 1995 and 1997, respectively (Refs. 14 and 15). On the basis of data from a larger national sample of hospital patients, the Healthcare Cost and Utilization Project (HCUP) estimates 84,000 diagnoses of resistant infections in community hospitals for 1997 (Ref. 16). CDC hospital surveillance data for 5 known strains of resistant bacteria for 1995 suggest a much higher figure, approximately 279,000 cases (Ref. 17). For this analysis, FDA has assumed the average of the 1995 data, or that 150,000 hospital-acquired infections per year are attributable to resistant bacteria. Thus, if patients incur additional hospital charges of only $2,500 per resistant infection, the total hospital cost attributable to antibacterial resistance is estimated at $375 million annually. However, these costs are likely understated because the more recent

products in the print version of the PDR are also included in the CD–ROM and Internet version.

[7] $842 per product = ($9,500 per page ÷ columns per page) x 0.266 column.

1997 studies found even greater costs and longer hospital stays associated with infections from resistant bacteria than the 1995 studies.

2. Indirect Costs of Resistant Infections

a. *Morbidity*. In addition to direct medical costs, patients also incur indirect costs from lost productivity due to resistant bacterial infections. FDA does not know how long a typical hospital stay is extended due to antibacterial resistance. However, if just 1 extra day were needed for relatively simple cases, at an average hourly wage of $16 including benefits, each case would cost about $128 in lost productivity. For cases where few alternatives are effective against the disease-causing bacteria, as with *Pseudomonas*, patients might need an additional 3.5 days in the hospital, with lost productivity cost of about $448 per patient. Assuming the mean of these two estimates, 150,000 cases of resistant bacterial infections would cost the economy about $43 million per year in lost productivity.

b. *Mortality*. The threat of mortality appears to be greater from hospital-acquired infections than from community-acquired infections. According to the CDC, about 40 percent of all community-acquired infections from *S. pneumoniae* are penicillin-nonsusceptible (includes both intermediate-susceptible and resistant strains). These bacteria can cause infections such as bacteremia, pneumonia, meningitis, and otitis media. Until the mid–1990s, surveillance data for *S. pneumoniae* included few cases of resistant bacteria. Current surveillance data, however, show the incidence of resistant bacteria has dramatically increased, surpassing the incidence of intermediate-susceptible bacteria (Ref. 18). Several studies have reported higher crude mortality rates with infections caused by drug-resistant *S. pneumoniae* (DRSP) (Refs. 19, 20, 21, 22, and 23). However, once adjusted for age and severity of illness, mortality rates for patients with community-acquired infections from DRSP and drug-sensitive *S. pneumoniae* strains are statistically similar. As the incidence of community-acquired infections from resistant bacteria increases, the differences in mortality rates may become statistically significant.

In a report released last year, the World Health Organization estimated that 14,000 people die in the United States annually from drug-resistant infections acquired in hospitals (Ref. 24). Several published studies have reported higher crude mortality rates from hospital-acquired infections caused by resistant bacteria. However, direct comparison of the findings of these studies is difficult because of differences in definitions, base line mortality rates, and the characteristics of patients included in the studies. In most studies, age and severity of illness confound the mortality data. Furthermore, because the prevalence of resistant bacteria is not uniform throughout the United States, studies conducted in a specific hospital or region may not be representative of the whole country.

To develop a rough estimate of the mortality that might be attributable to resistant bacterial infections, FDA estimated base line in-hospital mortality rates by age cohort, using hospital discharge and diagnosis data from HCUP (table 4 of this document). The number of life-years lost due to resistant bacterial infections was then derived from this base line mortality rate and from a weighted measure of the deaths attributable to resistant bacteria (27.1 percent).

TABLE 4.—1997 IN-HOSPITAL MORTALITY RATES BY AGE COHORT

Age cohort	Population (000)[1]	Number of In-Hospital Deaths)[2]	In-Hospital Mortality as % of Population for Age Cohort
Birth–17	69,603	25,739	0.04%
18–44	108,553	49,687	0.05%
45–64	55,441	143,670	0.26%
65–84	30,272	462,465	1.53%
85+	3,913	185,868	4.75%
Total	267,782	867,429	

[1] U.S. Department of Commerce, Census Bureau, Statistical Abstract of the United States: 2000, Table 12.
[2] 1997 hospital discharge data from HCUPnet, Healthcare Cost and Utilization Project, Agency for Healthcare Research and Quality (AHRQ), Rockville, MD, http://www.ahrq.gov/data/hcup/hcupnet.htm.

Table 5 of this document shows the number and monetary value of the life-years lost from resistant bacteria. The monetary values shown in columns 6 and 7 are derived by amortizing the value of a statistical life of $5 million[8] over the average remaining life span of a 35-year-old, which is estimated to be 44.3 years. At zero discount rate, this would be the equivalent of receiving a payment of $112,867 per year. However, applying discount rates of 3 percent and 7 percent[9], to reflect more plausible rates of social time preference, results in life-year values equal to $205,493 and $368,404, respectively.

[8] The $5 million estimate is the aggregate amount society is willing to pay to save one life. Fisher, A., D. Violette, and L. Chestnut, ''The Value of Reducing Risks of Death: A Note on New Evidence,'' *Journal of Policy Analysis and Management*, vol. 8, pp. 88–100, 1989.

[9] The Panel on Cost-Effectiveness in Health and Medicine convened by the U.S. Public Health Service recommends using a discount rate of 3 percent to calculate health benefits (Weinstein, M. C. et al. ''Recommendations of the Panel on Cost-Effectiveness in Health and Medicine,'' *Journal of the American Medical Association*, vol. 276, p. 1253–1258). OMB requires agencies to use a discount rate of 7 percent when calculating regulatory impacts.

TABLE 5.—ESTIMATED NUMBER AND MONETARY VALUE OF LIFE-YEARS LOST FROM DEATHS DUE TO INFECTIONS WITH DRUG-RESISTANT BACTERIA[1]

Age cohort	Average Life Years Remaining for Each Cohort[2]	Number of In-Hospital Diagnoses With Drug-Resistant Infections[3, 4]	Number of Deaths From Drug-Resistant Infections[5]	Number of Life Years Lost From Drug-Resistant Infections	Monetary Value of Life Years Lost—3% Discount Rate ($ Mil)[6, 7]	Monetary Value of Life Years Lost—7% Discount Rate ($ Mil)[6, 8]
Birth–17	69.2	3,056	0.3	21.2	$4.4	$7.8
18–44	48.1	10,372	1.3	62.0	$12.7	$22.8
45–64	26.8	16,807	11.8	317.1	$65.2	$116.8
65–84	12.3	39,857	165.2	2,039.5	$419.1	$751.3
85+	4.2	13,838	178.4	750.6	$154.2	$276.5
Total		83,930	357.0	3,190.3	$655.6	$1,175.3

[1] Numbers may not sum or multiply due to rounding.
[2] Anderson, R. N., ''United States Life Tables, 1997,'' *National Vital Statistics Reports*, vol. 47, Table 1, 1999.
[3] 1997 hospital discharge data from HCUPnet, Healthcare Cost and Utilization Project, ''AHRQ, Rockville, MD (http://www.ahrq.gov/data/hcup/hcupnet.htm).
[4] Includes all reported ICD–9 V09 diagnoses (i.e., infection with drug-resistant microorganisms).
[5] Baseline mortality from table 4 of this document. The number of deaths from drug-resistant infections was derived from published reports and HCUP data. Drug resistance increased mortality rates across all age cohorts by a weighted average of 27.1 percent. The mean percent increase in mortality rates and the estimated share of infections caused by the bacteria (shown in parentheses) are: 88 percent (5.3 percent) for vancomycin resistant *Enterococci* (Refs. 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33); 103 percent (7.4 percent) for methicillin resistant *S. aureus* (Refs. 9, 10, 27, and 35); and 230 percent (6.5 percent) for *P. aeruginosa* (Refs. 12 and 36). No difference in mortality rates between resistant and susceptible strains was assumed for all other infection-causing bacteria. 27.1 percent = (0.053 x 0.88) + (0.074 x 1.03) + (0.065 x 2.30) + (0.808 x 0) (may not sum or multiply to total because of rounding.
[6] $5 million = value of statistical life saved; 34.9 years = median age of population in 1997; 44.3 years remaining from 1997 Life Table, used to amortize $5 million (see footnote 2 of this table).
[7] $205,493/life-year lost.
[8] $368,404/life-year lost.

3. Reduced Direct and Indirect Costs

Many factors can contribute to the development of antibiotic resistance, including the unnecessary use of antibiotics. The final rule adds statements to the professional labeling of these drugs that will encourage health care providers and patients to use antibiotics in a way that reduces the risk that antibiotic-resistant bacteria will develop, thus maintaining the effectiveness of these drugs.

As discussed elsewhere in this document, some comments to the agency questioned the effectiveness of labeling as an information tool. Health care organizations and government, however, can employ a variety of ways to inform stakeholders of the serious public health threat posed by resistant bacteria. Labeling that prompts health care providers and patients to use antibacterial drugs prudently will complement the educational efforts of organizations such as the AMA and CDC. The agency finds that while many health care providers infrequently consult the actual package insert, they often refer to the PDR for information about available drugs. Both the print and electronic versions of the PDR reproduce the professional labeling verbatim. Moreover, many patients use the PDR to obtain information about the drugs they are taking.

FDA cannot accurately quantify the magnitude of the impact that these changes in labeling will have on physician and patient behavior, or of its subsequent impact on the development of resistant bacteria and their societal costs. If, however, the changes avoid even 1 percent of the above estimated costs of antibacterial resistance, the annual cost savings will amount to $3.8 million in direct hospital costs, $0.4 million in lost productivity, and from $6.6 million to $11.8 million in life-years lost (discounted at 3 percent and 7 percent respectively), for a total benefit exceeding $10 to $16 million annually.

If the costs of increased antibiotic resistance were decreased as little as 0.01 percent, the benefits of this rule would exceed the compliance costs estimated in the previous paragraph. FDA believes it is extremely likely that the decrease in the excess cost of antibiotic resistance will be at least this large, and is likely to be significantly larger.

D. Impacts on Small Entities

No comments on the initial regulatory flexibility analysis were received by the agency. The final rule affects manufacturers of systemic antibacterial drug products. The 1997 Economic Census found approximately 700 pharmaceutical preparation manufacturing firms in the United States (i.e., North American Industry Classification System (NAICS) code 325412). The Small Business Administration (SBA) considers firms with fewer than 750 employees to be small. As seen in table 6 of this document, Census data classify firms in size categories that do not permit a precise determination of the number of pharmaceutical firms that have fewer than 750 employees. However, Census data do show that more than 90 percent of pharmaceutical manufacturers have fewer than 500 employees, and thus are small businesses (Ref. 12).

Approximately 101 large and small firms manufacture systemic antibacterial drug products[10] and thus would be affected by the rule. The estimated annualized costs of $861 per product[11] are relatively modest for most manufacturers of antibiotic drugs. Since small manufacturers of human prescription drugs already submit labeling to FDA, the labeling requirements of the rule will not require small firms to seek employees with additional special skills. As physicians and patients become more cautious in their use of antibiotics, some small antibiotic manufacturers could experience a decline in the demand for their products. The objective of the final rule is to safeguard the effectiveness of all antibiotic drug products. Thus, slowing the appearance of more resistant strains of bacteria will increase the demand for those antibiotic drugs that remain an effective treatment for those infections. More prudent use of

[10] Derived from FDA's *Approved Drug Products With Therapeutic Equivalence Evaluations*, 2001, and *2001 Drug Information*, American Hospital Formulary Service.

[11] Total annulaized costs per product: $417,056 + $24,439 + $134,720 = $576,216. Average annualized costs: $576,216/669 = $861.

antibiotics therefore will protect small, as well as large, manufacturers against the decline in demand that would otherwise follow a drop in product effectiveness.

Based on the previous analyses, any foreseeable significant adverse impacts of the rule would be incurred only by those small firms that manufacture many affected products and consequently would be required to change multiple package inserts at one time. We reviewed *FDA's Approved Drug Products With Therapeutic Equivalence Evaluations*, 2001, and identified only eight small domestic firms that manufacture more than three antibiotic products. These 8 small firms manufacture 11, 8, 8, 6, 5, 4, 4 and 4 products respectively, 95 percent of which are generic products. At least 2 of the 3 firms with over 6 products are multi-million dollar firms with over 400 employees. Three of the eight firms also manufacture one reference listed drug product.

Table 6 of this document compares the estimated annualized and first-year costs of compliance to reported average annual sales revenues for pharmaceutical firms of varying sizes and for the average firm that primarily manufactures antimicrobial drugs. Almost all manufacturers of antibiotic products in the United States have over 20 employees.[12] Thus, the last column of the table shows that the first-year costs will be less than two-tenths of one percent of sales revenues for almost all small firms. Based on the minimal impact implied by these data, FDA certifies that this final rule would not have a significant adverse economic effect on a substantial number of small entities.

[12] Derived from FDA's *Approved Drug Products With Therapeutic Equivalence Evaluations*, 2001, and *2001 Drug Information*, American Hospital Formulary Service.

TABLE 6.—EXAMPLES OF ANNUALIZED AND FIRST-YEAR COSTS TO MODIFY PROFESSIONAL LABELING AS A PERCENTAGE OF AVERAGE ANNUAL SHIPMENT VALUE BY NUMBER OF EMPLOYEES FOR NAICS 325412 AND 325412P[1]

No. of Employees	No. of Establishments	Value of Shipments (mil$)	Average Annual Per Establishment Shipment Value (mil$)	Annualized Cost to Modify One Product as a Percentage of Shipment Value[2]	Annualized Cost to Modify Two Products as a Percentage of Shipment Value[2]	Annualized Cost to Modify Three Products as a Percentage of Shipment Value[2]	First-Year Costs to Modify Three Products as a Percentage of Shipment Value[3]
NAICS 325412 (All Pharmaceutical Preparation Manufacturing) Small Businesses By SBA Size Standards (fewer than 750 employees)							
1–4	179	90.0	0.5	0.17%	0.34%	0.51%	2.76%
5–9	88	137.5	1.6	0.06%	0.11%	0.17%	0.89%
10–19	128	451.6	3.5	0.02%	0.05%	0.07%	0.39%
20–49	138	1,078.4	7.8	0.01%	0.02%	0.03%	0.18%
50–99	85	2,486.1	29.2	0.00%	0.01%	0.01%	0.05%
100–249	107	7,846.8	73.3	0.00%	0.00%	0.00%	0.02%
250–499	62	15,217.1	245.4	0.00%	0.00%	0.00%	0.01%
500–999	29	13,720.8	473.1	0.00%	0.00%	0.00%	0.00%
Large Businesses by SBA Size Standards (750 or more employees)							
1,000–2,499	15	9,163.3	610.9	0.00%	0.00%	0.00%	0.00%
2500 +	6	17,328.5	2,888.1	0.00%	0.00%	0.00%	0.00%
NAICS 325412P (Primary Product Class = pharmaceutical preparations for human parasitic and infective diseases)							
All	28	6,480.3	231.4	0.00%	0.00%	0.00%	0.01%

[1]U.S. Department of Commerce, Bureau of the Census, *Pharmaceutical Preparation Manufacturing: 1997 Economic Census of Manufacturing*, Industry Series, EC97M–3254B.
[2]Average annualized per product costs = $861.
[3]Average first-year per product costs = $4,616.

VI. Paperwork Reduction Act of 1995

FDA concludes that this final rule does not require information collections subject to review by OMB under the Paperwork Reduction Act of 1995 (the PRA) (Public Law 104–13). FDA received no comments on its determination concerning information collections.

FDA is amending its labeling regulations to require that the labeling for systemic antibacterial drug products include certain statements, specified by FDA, about the link between unnecessary use of antibiotics and the development of drug-resistant bacterial strains. These labeling statements are not subject to review by OMB because they are ''originally supplied by the Federal Government to the recipient for the purpose of disclosure to the public'' (5 CFR 1320.3(c)(2)) and therefore do not constitute a ''collection of information'' under the PRA of 1995.

Holders of approved new drug applications (NDAs) and abbreviated new drug applications (ANDAs) are required to submit supplements and holders of pending NDAs and ANDAs are required to submit amendments to comply with the new labeling requirements. The final rule also requires that all new NDAs and ANDAs for systemic antibacterial drug products comply with the new labeling requirements. FDA regulations governing the submission and approval of NDAs and ANDAs, including the submission of product labeling, are in part 314 (21 CFR part 314). Recordkeeping and reporting requirements included in part 314 are approved by OMB until March 31, 2005, under OMB control number 0910–0001.

VII. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies 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. Accordingly, the agency has concluded that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

VIII. References

The following references have been placed on display in the Dockets Management Branch (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

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List of Subjects in 21 CFR Part 201

Drugs, Labeling, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 201 is amended as follows:

PART 201—LABELING

1. The authority citation for 21 CFR part 201 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 358, 360, 360b, 360gg–360ss, 371, 374, 379e; 42 U.S.C. 216, 241, 262, 264.

2. Add § 201.24 to subpart A to read as follows:

§ 201.24 Labeling for systemic antibacterial drug products.

The labeling of all systemic drug products intended for human use indicated to treat a bacterial infection, except a mycobacterial infection, must bear the following statements:

(a) At the beginning of the label, under the product name, the labeling must state:

To reduce the development of drug-resistant bacteria and maintain the effectiveness of (*insert name of antibacterial drug product*) and other antibacterial drugs, (*insert name of antibacterial drug product*) should be used only to treat or prevent infections that are proven or strongly suspected to be caused by bacteria.

(b) In the ''Indications and Usage'' section, the labeling must state:

To reduce the development of drug-resistant bacteria and maintain the effectiveness of (*insert name of antibacterial drug product*) and other antibacterial drugs, (*insert name of antibacterial drug product*) should be used only to treat or prevent infections that are proven or strongly suspected to be caused by susceptible bacteria. When culture and susceptibility information are available, they should be considered in selecting or modifying antibacterial therapy. In the absence of such data, local epidemiology and susceptibility patterns may contribute to the empiric selection of therapy.

(c) In the ''Precautions'' section, under the ''General'' subsection, the labeling must state:

Prescribing (*insert name of antibacterial drug product*) in the absence of a proven or strongly suspected bacterial infection or a prophylactic indication is unlikely to provide benefit to the patient and increases the risk of the development of drug-resistant bacteria.

(d) In the ''Precautions'' section, under the ''Information for Patients'' subsection, the labeling must state:

Patients should be counseled that antibacterial drugs including (*insert name of antibacterial drug product*) should only be used to treat bacterial infections. They do not treat viral infections (e.g., the common cold). When (*insert name of antibacterial drug product*) is prescribed to treat a bacterial infection, patients should be told that although it is common to feel better early in the course of therapy, the medication should be taken exactly as directed. Skipping doses or not completing the full course of therapy may (1) decrease the effectiveness of the immediate treatment and (2) increase the likelihood that bacteria will develop resistance and will not be treatable by (*insert name of antibacterial drug product*) or other antibacterial drugs in the future.

Dated: October 4, 2002.

Mark B. McClellan,

Commissioner of Food and Drugs.

[FR Doc. 03–2969 Filed 2–5–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9022]

RIN 1545–BB40

Information Reporting Relating to Taxable Stock Transactions; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to temporary regulations.

SUMMARY: This document contains corrections to temporary regulations that were published in the **Federal Register** on November 18, 2002 (67 FR 69468). This document contains temporary regulations under section 6043(c) requiring information reporting by a corporation if control of the corporation is acquired or if the corporation has a recapitalization or other substantial change in capital structure.

DATES: This correction is effective November 18, 2002.

FOR FURTHER INFORMATION CONTACT: Nancy Rose at (202) 622–4910 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations that are the subject of this correction are under section 6043(c) of the Internal Revenue Code.

Need for Correction

As published, the temporary regulations (TD 9022) contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the temporary regulations (TD 9022), which is the subject of FR Doc. 02–29199, is corrected as follows:

1. On page 69469, column 2, in the preamble, under the paragraph heading ''Background and Explanation of Provisions'', line 5, the language ''regulations published in proposed rules'' is corrected to read ''regulations published in the proposed rules''.

§ 1.6043–4T [Corrected]

2. On page 69470, column 1, § 1.6043–4T, paragraph (a)(5), the last line in column one, the language ''shareholders who receive cash, stock or'' is corrected to read ''shareholders who receive cash, stock, or''.

3. On page 69472, column 1, § 1.6043–4T, paragraph (h), of *Example 2*, line 1, the language ''Example 2. C, a domestic corporation, and'' is corrected to read ''Example 2. C, a domestic corporation and''.

§ 1.6045–3T [Corrected]

4. On page 69473, column 1, § 1.6045–3T, paragraph (d), line 2, the language ''receives stock, cash or other property'' is corrected to read ''receives stock, cash, or other property''.

Cynthia E. Grigsby,

Chief, Regulations Unit, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 03–2802 Filed 2–5–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 254

Teacher and Teacher's Aide Placement Assistance Program

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This document removes information in Title 32 of the Code of Federal Regulations concerning the Teacher and Teacher's Aide Placement Assistance Program. This part has served the purpose for which it was intended in the CFR and is no longer necessary.

EFFECTIVE DATE: February 6, 2003.

FOR FURTHER INFORMATION CONTACT: L. Bynum or P. Toppings, 703–601–4722.

SUPPLEMENTARY INFORMATION:

List of Subjects in 32 CFR Part 254

Elementary and secondary education; Government contracts; Government employees; Grant programs-education; Military personnel; Teachers.

PART 254—[REMOVED]

Accordingly, by the authority of 10 U.S.C. 301, 32 CFR part 254 is removed.

Dated: January 29, 2003.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03–2821 Filed 2–5–03; 8:45 am]

BILLING CODE 5001–08–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 61

[FRL–7448–6]

RIN 2060–AJ87

National Emission Standards for Benzene Waste Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Partial withdrawal of direct final rule.

SUMMARY: On November 12, 2002, the EPA promulgated amendments to the national emission standards for benzene waste operations as a direct final rule, along with a parallel proposal to be used as a basis for final action in the event that we received any adverse comments on the direct final amendments. Because an adverse comment was received on one provision, we are withdrawing the corresponding parts of the direct final rule. We will address the adverse comments in a subsequent final rule based on the parallel proposal published on November 12, 2002.

DATES: As of February 6, 2003, the EPA withdraws 40 CFR 61.343(e), introductory text, and withdraws and reserves paragraph (e)(2) published on November 12, 2002 at 67 FR 68526. The remaining provisions published on November 12, 2002, will be effective on February 10, 2003.

ADDRESSES: Docket number A–2001–23, containing supporting information used in the development of this notice, is available for public inspection and copying between 8 a.m. and 5:30 p.m., Monday through Friday (except for Federal holidays) at the following address: U.S. Environmental Protection Agency, Air and Radiation Docket and Information Center (6102T), 1301 Constitution Avenue, NW., Room B108, Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Mr. Robert B. Lucas, Waste and Chemical Process Group (C439–03), Emission Standards Division, Office of Air Quality Planning and Standards, U.S. EPA, Research Triangle Park, NC 27711, telephone number (919) 541–0884, facsimile number (919) 541–0426, electronic mail address, *lucas.bob@epa.gov.*

SUPPLEMENTARY INFORMATION: On November 12, 2002, we published a direct final rule (67 FR 68526) and a parallel proposed rule (67 FR 68546) amending the national emission standards for benzene waste operations (40 CFR part 61, subpart FF). The amendments clarified the applicability of the standards with respect to fuel gas recovery systems and added new compliance options for tanks and containers based on the requirements in other similar EPA rules for hazardous waste treatment, storage, and disposal facilities (40 CFR parts 264 and 265, subparts CC).

We stated in the preamble to the direct final rule and parallel proposal that if we received significant adverse comment by December 12, 2002 (or by February 18, 2003, if a public hearing was requested), we would publish a timely notice in the **Federal Register** specifying which provisions will become effective and which provisions will be withdrawn due to adverse comment. We subsequently received an adverse comment from one commenter on the provisions related to control devices in the new compliance option for tanks equipped with an enclosure in 40 CFR 61.343(e).

Accordingly, we are withdrawing 40 CFR 61.343(e), introductory text, and withdrawing and reserving paragraph(e)(2). These amendments are withdrawn as of February 6, 2003. We will take final action on the proposed rule after considering the comments received. We will not institute a second comment period on this action. The provisions for which we did not receive adverse comment will become effective on February 10, 2003, as provided in the preamble to the direct final rule.

List of Subjects in 40 CFR Part 61

Environmental protection, Air pollution control, Reporting and recordkeeping requirements.

Dated: January 30, 2003.

Robert Brenner,

Acting Assistant Administrator for Air and Radiation.

[FR Doc. 03–2936 Filed 2–5–03; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03–143; MB Docket No. 02–321, RM–10583]

Radio Broadcasting Services; Oak Grove, LA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division, at the request of Charles Crawford, allots Channel 289A to Oak Grove, Louisiana, as the community's second local FM transmission service. *See* 67 FR 66377, October 31, 2002. Channel 289A can be allotted to Oak Grove in compliance with the Commission's minimum distance separation requirements with a site restriction 11.3 kilometers (7 miles) east to avoid short-spacing to the license site of Station KVVP, Channel 289C3, Leesville, Louisiana. The reference coordinates for Channel 289A at Oak Grove are 29–43–41 North Latitude and 93–00–05 West Longitude. A filing window for Channel 289A at Oak Grove, Louisiana, will not be opened at this time. Instead, the issue of opening a filing window for this channel will be addressed by the Commission in a subsequent order.

DATES: Effective March 3, 2003.

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

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket Nos. 02–321, adopted January 15, 2003, and released January 17, 2003. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com*.

Provisions of the Regulatory Flexibility Act of l980 do not apply to this proceeding.

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

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

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

PART 73—RADIO BROADCAST SERVICES

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

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

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Louisiana, is amended by adding Channel 289A at Oak Grove.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 03–2838 Filed 2–5–03; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Transportation Security Administration

49 CFR Parts 1570 and 1572

[Docket No. TSA–2003–14421]

RIN 2110–AA18

Transportation of Explosives From Canada to the United States Via Commercial Motor Vehicle and Railroad Carrier

AGENCY: Transportation Security Administration (TSA), DOT.

ACTION: Interim final rule; request for comments.

SUMMARY: This interim final rule addresses security issues regarding transportation of explosives by commercial motor vehicles and railroads. It establishes temporary requirements that all motor carriers, motor private carriers, and railroad carriers not using United States citizens or lawful permanent resident aliens as drivers or railroad crews to transport explosives to the United States must meet during the period while DOT develops the standards that will apply on a more permanent basis.

DATES: Effective on February 3, 2003. Submit comments by March 10, 2003.

ADDRESSES: Address your comments to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number TSA–2003–14421 at the beginning of your comments, and you should submit two copies of your comments. If you wish to receive confirmation that TSA received your comments, include a self-addressed, stamped postcard.

You may also submit comments through the Internet to *http://dms.dot.gov.* You may review the public docket containing comments to these regulations in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Dockets Office is on the plaza level of the NASSIF Building at the Department of Transportation at the above address. Also, you may review public dockets on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Benjamin Klein, Office of the Chief Counsel, Transportation Security Administration, 400 Seventh Street, SW., Washington, DC 20590–0001; telephone 202–385–1262; e-mail: *Benjamin.Klein@tsa.dot.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

This final rule is being adopted without prior notice and prior public comment. However, the Regulatory Policies and Procedures of the Department of Transportation (DOT) (44 FR 1134; February 26, 1979) provide that, to the maximum extent possible, operating administrations within DOT should provide an opportunity for public comment on regulations issued without prior notice. Accordingly, interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting this amendment. The most helpful comments reference a specific portion of the rule, explain the reason for any recommended change, and include supporting data. *See* **ADDRESSES** above for information on how to submit comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with TSA personnel concerning this rulemaking. The docket is available for public inspection before and after the comment closing date.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these rules in light of the comments we receive.

Electronic Access

You can get an electronic copy using the Internet by:

(1) Searching the Department of Transportation's electronic Docket Management System (DMS) web page (*http://dms.dot.gov/search*);

(2) Accessing the Government Printing Office's web page at *http://www.access.gpo.gov/su_docs/aces/aces140.html;* or

(3) Visiting the TSA's Laws and Regulations web page at *http://www.tsa.dot.gov/public/index.jsp.*

In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT.**

Background

The Safe Explosives Act, Public Law 107–296 (116 Stat. 2280, 11/25/2002), sections 1121–1123, amended section 842(i) of Title 18, United States Code (U.S.C.) by adding several categories to the list of persons who may not lawfully ''ship or transport any explosive in interstate or foreign commerce'' or ''receive or possess any explosive which

has been shipped or transported in interstate or foreign commerce.'' The Act added three new categories to the list of prohibited persons: aliens, persons dishonorably discharged from the armed forces, and former citizens of the United States who have renounced their citizenship. Under the Act, ''alien'' does not include lawful permanent resident aliens of the United States as defined in 8 U.S.C. 1101(a)(2). *See* 18 U.S.C. 845(a).

Section 845(a)(1) of Title 18, United States Code, provides in part that any aspect of the transportation of explosive materials that is regulated by DOT and that pertains to safety is exempt from § 842(i). Therefore, to the extent that DOT rules address matters in § 842(i) (such as by addressing the security risk posed by aliens), § 842(i) does not apply.

The Department of Transportation has statutory responsibility for the safe and secure transportation of hazardous materials, including explosives, in commerce. *See* 49 U.S.C. 5101 *et seq.* The Secretary of Transportation has delegated to RSPA, an agency within DOT, the authority to issue regulations governing the safe, including secure, transportation of hazardous materials (including explosives) in commerce. TSA has responsibility for security in all modes of transportation regulated under DOT, including coordinating countermeasures with appropriate departments, agencies, and instrumentalities of the United States government, and ensuring the adequacy of security measures for the transportation of cargo. 49 U.S.C. 114(d), (f)(4), (f)(10). Because this rule addresses the secure transportation of explosives in commerce, TSA has coordinated this rule with RSPA.

In addition, DOT works closely with other U.S. Government agencies to facilitate efficient international commerce, especially across our borders. Since the passage of the Safe Explosives Act, we have had extensive consultations with the Bureau of Alcohol, Tobacco and Firearms, the United States Customs Service, other interested U.S. Government agencies, and representatives of the Government of Canada.

DOT has evaluated the risk to security posed by aliens who transport commercial shipments of explosives into the United States from Canada and has determined that the requirements adopted in this Interim Final Rule are sufficient to mitigate that risk at this time. The focus of this rule is solely on the addition of aliens to the list of prohibited persons. This rulemaking only addresses the narrow issue regarding transportation of explosives by commercial motor vehicle carriers and railroad carriers and their drivers and train crew members in commerce crossing the border from Canada into the United States. It is intended as a temporary measure until the completion of consultations with Canada and other U.S. Government agencies, and issuance of more comprehensive regulations requiring background checks of persons transporting hazardous materials in commerce.

DOT is consulting with the Government of Mexico regarding a comparable regulatory regime for the transportation of explosives from Mexico to the United States.

USA PATRIOT Act and Related Rulemakings

Section 1012 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Public Law 107–56 (115 Stat. 272, 10/26/2001), provides that the States must submit to the Department of Justice (DOJ) for a background records check (including a check of criminal, Immigration and Naturalization Service (INS), and intelligence databases) the names of all commercial motor vehicle drivers applying for a hazardous materials endorsement to a commercial drivers license (CDL). DOJ is directed to report the results of the background check to the Department of Transportation, which will decide whether the driver poses ''a security risk warranting denial of the license.'' DOT plans to issue regulations in the near future to implement these provisions. The long-term solution will involve background checks of all persons transporting hazardous materials in commerce to help ensure that they do not pose a security risk to the American public.

DOT is considering a number of other regulatory actions to address the issue of security in the transportation of hazardous materials. For example, the Research and Special Programs Administration (RSPA) published a notice of proposed rulemaking (NPRM) on May 2, 2002, under Docket HM–232, to enhance the security of hazardous materials in transportation (67 FR 22028). The NPRM proposed to require shippers and carriers of hazardous material shipments that require placarding (which includes explosives) to adopt and implement security plans that would include measures to address personnel security, unauthorized access, and en route security vulnerabilities. As part of its security plan, a company would have to implement measures to confirm information provided by job applicants hired for positions that involve access to and handling of the hazardous materials. The NPRM is expected to be the first step in what will likely be a series of rulemakings that will examine the necessity for imposing more stringent security requirements on certain materials or classes of materials deemed to be significant security threats. RSPA expects to publish a final rule under Docket HM–232 in the very near future.

The Interim Final Rule

TSA is establishing temporary requirements applicable to motor carriers, motor private carriers, and railroad carriers transporting explosives in commerce from Canada to the United States using drivers and train crew members who are not United States Citizens or lawful permanent resident aliens. These interim rules will be effective only during the period while DOT develops the standards that will apply on a more permanent basis.

This rule creates a new subchapter in TSA regulations, Subchapter D, which will eventually contain a number of rules covering maritime and land transportation security. This rule also creates new part 1572, which will contain rules related to credentialing and background checks for maritime and land transportation security.

Section 1572.9 Transportation of Explosives From Canada to the United States via Commercial Motor Vehicle

New § 1572.9 covers transportation of explosives from Canada to the United States via commercial motor vehicle. This section provides procedures to ensure that the carrier, offeror of explosives, and driver of the motor vehicle are properly checked.

Under this section carriers must ensure that they are known carriers, and that their offeror of explosives and their driver are known before crossing the border into the United States. They will become known by submitting specified information to Transport Canada in advance. Transport Canada is an agency within the Government of Canada with responsibility to oversee safety and security of transportation. Transport Canada will conduct checks to ensure that the carrier and the shipper are legitimate entities and authorized to do business in Canada. Transport Canada will also check the drivers to ensure there are no known security concerns. Transport Canada will forward to TSA the information on the carriers, offerors, and drivers that it has determined to be known. TSA will make independent additional checks with such other U.S.

government agencies as may be appropriate and will forward the list of acceptable carriers, offerors, drivers, and train crew members to the United States Customs Service. TSA will not include on the list of known carriers, offerors, drivers, or train crew members any whose background check indicates that they are not truly known (such as they are not truly authorized to conduct business in Canada) or may present a security risk.

The United States Customs Service will conduct a number of checks at the border. It will check the driver's commercial driver's license, as well as shipping papers and other required documentation. The Customs Service will determine whether the carrier, offeror, driver, and train crew member are on the list of known persons. If a carrier attempts to enter the United States without having complied with this section, the Customs Service will deny entry of the explosives and take other appropriate action. The Customs Service may allow the driver or train crew member to return to Canada, hold the shipment until the carrier has corrected the problem (such as by providing a driver or train crew member who is on the list), or take whatever action the Customs Service deems appropriate under other laws that may apply.

If a person violates TSA regulations, including those adopted here, TSA may take civil enforcement action if appropriate, including seeking a civil penalty of up to $10,000 for each violation. *See* 49 U.S.C. 46301(a). TSA's enforcement procedures are in 49 CFR part 1503. In appropriate cases violations will be referred for criminal investigation and prosecution.

It should be noted that some U.S. citizens and lawful permanent resident aliens have Canadian commercial driver's licenses or are train crew members on operations subject to this rulemaking. Because such persons are not required to comply with this rule, they may not appear on the list of known drivers or train crew members provided by Transport Canada. To show to the Customs Service that they are eligible to serve as drivers, they may provide a valid U.S. passport or other U.S. Federal or State identification acceptable to the Customs Service.

Once a carrier, offeror, or driver is on the known list, they do not need to be submit their names again under this rule. Transport Canada and TSA will conduct additional checks on these persons as appropriate and will remove names from the list as necessary.

Section 1572.11 Transportation of Explosives From Canada to the United States via Railroad Carrier

New section 1572.11 covers transportation of explosives from Canada to the United States via railroad carrier. It closely parallels § 1572.9, with changes to reflect that crews rather than individual drivers operate trains and that the Customs Service sometimes directs trains to inspection points that are not precisely at the border.

Transportation by Maritime and Aviation

This rule does not cover transportation by maritime or aviation. The Coast Guard has extensive regulations relating to the security of transportation of explosives by aliens designed to discover and prevent entry to ports and places in the United States of those who present a threat to the United States on ships carrying explosives. *See* 33 CFR 160.T208 and 33 CFR part 6, and 33 CFR 160.111(a). DOT has determined that there is no need at this time to add further requirements. Similarly, TSA has extensive security requirements covering the security of flight crew and cargo on both foreign and U.S. air carriers. *See* 49 CFR parts 1544 and 1546. These requirements include criminal history checks and checks against other Federal databases of the flight crewmembers to ensure that they do not pose a security threat. DOT has determined that there is no need to add further requirements at this time. DOT has assessed the security risk posed by aliens transporting explosives by water and air and has determined that existing regulations are sufficient to mitigate the risk. Accordingly, these regulations exempt aliens transporting explosives in the United States by water and by air from liability for transportation offenses under 18 U.S.C. 845(a)(1).

Good Cause for Immediate Adoption

This action is being taken without providing the opportunity for notice and comment, and it provides for immediate effectiveness upon adoption. Under the Administrative Procedure Act (APA) an agency may forgo notice and comment rulemaking when ''the agency for good cause finds * * * that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b). TSA finds good cause under 5 U.S.C. 553 that notice and comment are impracticable and contrary to the public interest. This rule is designed to address an unanticipated impact of the Safe Explosives Act on the routine transportation of explosives in commerce across the U.S.-Canadian border. This rule has been developed after consultation with representatives of the Canadian government and the trucking and railroad industry.

Further, TSA has determined that this action is necessary to minimize security threats and potential security vulnerabilities. TSA and other federal security organizations have been concerned about the potential use of explosives to carry out terrorist acts in the United States since September 11, 2001. This rule provides additional assurance that explosives being carried into this country will be carried by authorized persons.

Further, the Under Secretary finds that good cause exists under 5 U.S.C. 553(d) for making this final rule effective immediately upon publication. Without an immediate effective date, there is a potential for a serious disruption of trans-border transportation.

Economic Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Order (E.O.) 12866 directs each Federal agency to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Office of Management and Budget directs agencies to assess the effect of regulatory changes on international trade. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation).

Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), provides for making determinations whether a regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and to the requirements of the Executive Order. The Order defines a ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or

adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This rule was reviewed under Executive Order 12866. It is significant within the meaning of the DOT's Regulatory Policies and Procedures. No regulatory analysis or evaluation accompanies this rule. When a rulemaking action does not include publication of a notice of proposed rulemaking, as is the case in this proceeding, economic assessments are not required for the final rule.

TSA recognizes that this rule will impose costs on affected carriers in Canada. These costs will stem from ensuring that the carrier, offeror, drivers, and train crew members are known to Transport Canada and to TSA. However, given the Act and the current security threat, TSA believes it is necessary to require these enhanced security measures, to avoid the potential of a serious disruption of trans-border transportation and to provide additional assurance that persons who transport explosives are authorized to do so. TSA will assess the costs and benefits of the rule as soon as possible and include the analysis in the docket of this rulemaking.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). No regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

TSA recognizes that this rule will impose costs on affected foreign carriers, offerors, drivers, and train crew members, and that some of these carriers are small businesses. However, given the Act and the current security threat, TSA believes it is necessary to require these enhanced security measures. In any event, when a rulemaking action does not include publication of a notice of proposed rulemaking, as is the case in this proceeding, economic assessments are not required for the final rule.

Unfunded Mandates Determination

The Unfunded Mandates Reform Act of 1995 (the Act), enacted as Public Law 104–4 on March 22, 1995, is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments.

Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.''

This final rule does not contain such a mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the TSA consider the impact of paperwork and other information collection burdens imposed on the public. A person is not required to respond to a collection of information unless it displays a current valid Office of Management and Budget (OMB) control number.

Under this rule, the Canadian Government will gather information from their carriers and railroads and share it with TSA as a part of Government-to-Government consultation and coordination. Persons operating from Canada transporting explosives across the border pursuant to this rule will not be subject to additional paperwork burdens. The information that they will present to Customs is already required under other international, statutory, and regulatory provisions. We note that this rule is an interim measure that must be issued quickly to prevent disruption of commerce. We are working closely with OMB to obtain expedited clearance under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) for the Government-to-Government paperwork collection.

International Trade Impact Statement

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety and security, are not considered unnecessary obstacles. The statute also requires consideration of international standards, and where appropriate, that they be the basis for U.S. standards. DOT has assessed the potential effect of this rulemaking in consultation with the Government of Canada, and has determined that it will not have a significant impact on foreign commerce and, therefore, has no effect on any trade-sensitive activity.

Executive Order 13132, Federalism

TSA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, or the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore does not have federalism implications.

Environmental Analysis

TSA has reviewed this action for purposes of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347) and has determined that this action will not have a significant effect on the human environment.

Energy Impact

The energy impact of this final rule has been assessed in accordance with the Energy Policy and Conservation Act (EPCA) Public Law 94–163, as amended (42 U.S.C. 6362). We have determined that this rulemaking is not a major regulatory action under the provisions of the EPCA.

List of Subjects in 49 CFR Part 1572

Motor carriers, Motor vehicle carriers, Railroads, Security measures.

The Interim Final Rule

In consideration of the foregoing, the Transportation Security Administration amends Chapter XII of Title 49, Code of Federal Regulations, by adding a new subchapter D to read as follows:

SUBCHAPTER D—MARITIME AND LAND TRANSPORTATION SECURITY

PART 1570—[Reserved]

PART 1572—CREDENTIALING AND BACKGROUND CHECKS FOR MARITIME AND LAND TRANSPORTATION SECURITY

Sec.

1572.1 Applicability.
1572.9 Transportation of explosives from Canada to the United States via commercial motor vehicle.
1572.11 Transportation of explosives from Canada to the United States via railroad carrier.

Authority: 49 U.S.C. 114, 40113, 46105.

§ 1572.1 Applicability.

This part prescribes regulations for credentialing and background checks in specified uses for maritime and land security.

§ 1572.9 Transportation of explosives from Canada to the United States via commercial motor vehicle.

(a) *Applicability.* This section applies to carriers that carry explosives from Canada to the United States using a driver who is not a United States citizen or lawful permanent resident alien of the United States.

(b) *Terms used in this section.* For purposes of this section:

Carrier means any ''motor carrier'' or ''motor private carrier'' as defined in 49 U.S.C. 13102(12) and (13), respectively.

Customs Service means the United States Customs Service.

Explosive means a material that has been examined by the Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, in accordance with 49 CFR 173.56, and determined to meet the definition for a Class 1 material in 49 CFR 173.50.

Known carrier means a person that has been determined by the Governments of Canada and the United States to be a legitimate business operating in accordance with all applicable laws and regulations governing the transportation of explosives.

Known driver means a driver of a motor vehicle who has been determined by the Governments of Canada and the United States to present no known security concern.

Known offeror means an offeror that has been determined by the Governments of Canada and the United States to be a legitimate business operating in accordance with all applicable laws and regulations governing the transportation of explosives.

Lawful permanent resident alien means a lawful permanent resident alien of the United States as defined by 8 U.S.C. 1101(a)(2).

Offeror means the person offering a shipment to the carrier for transportation from Canada to the United States, and may also be known as the ''consignor'' in Canada.

(c) *Prior approval of carrier, offeror, and driver.* (1) No carrier may transport in commerce any explosive into the United States from Canada via motor vehicle if the driver of the vehicle is a not a United States citizen or lawful permanent resident alien unless the carrier, offeror, and driver are identified on a TSA list as a known carrier, known offeror, and known driver, respectively.

(2) The carrier must ensure that it, its offeror, and its driver have been determined to be a known carrier, known offeror, and known driver, respectively. If any has not been so determined, the carrier must submit the following information to Transport Canada:

(i) The carrier must provide its:

(A) Official name;

(B) Business number;

(C) Any trade names; and

(D) Address.

(ii) The following information about any offeror of explosives whose shipments it will carry:

(A) Official name;

(B) Business number; and

(C) Address.

(iii) The following information about any driver the carrier may use to transport explosives into the United States from Canada who is neither a United States citizen nor lawful permanent resident alien of the United States:

(A) Full name;

(B) Canada Commercial Driver's License number; and

(C) Both current and most recent prior residential addresses.

(3) Transport Canada will determine that the carrier and offeror are legitimately doing business in Canada and will also determine that the drivers are properly licensed and present no known problems for purposes of this section. Transport Canada will notify TSA of these determinations by forwarding to TSA lists of known carriers, offerors, and drivers and their identifying information.

(4) TSA will update and maintain the list of known carriers, offerors, and drivers and forward the list to the Customs Service.

(5) Once included on the list, the carriers, offerors, and drivers need not obtain prior approval for future transport of explosives under this section.

(d) TSA checks. TSA may periodically check the data on the carriers, offerors and drivers to confirm their continued eligibility and may remove from the list any that TSA determines is not known or is a threat to security.

(e) *At the border*—(1) *Driver who is not a United States citizen or lawful permanent resident alien.* Upon arrival at the border, and prior to entry into the United States, the driver must provide a valid Canadian commercial driver's license to the Customs Service.

(2) *Driver who is a United States citizen or lawful permanent resident alien.* If the Customs Service cannot verify that the driver is on the list, and if the driver is a United States citizen or lawful permanent resident alien, the driver may be cleared by the Customs Service upon providing:

(i) A valid United States passport; or

(ii) One or more other document(s) including a form of United States federal or state government-issued identification with photograph, acceptable to the Customs Service.

(3) *Compliance.* If a carrier attempts to enter the United States without having complied with this section, the Customs Service will deny entry of the explosives and may take other appropriate action.

§ 1572.11 Transportation of explosives from Canada to the United States via railroad carrier.

(a) *Applicability.* This section applies to railroad carriers that carry explosives from Canada to the United States using a train crew member who is not a United States citizen or lawful permanent resident alien of the United States.

(b) *Terms under this section.* For purposes of this section:

Customs Service means the United States Customs Service.

Explosive means a material that has been examined by the Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, in accordance with 49 CFR 173.56, and determined to meet the definition for a Class 1 material in 49 CFR 173.50.

Known railroad carrier means a person that has been determined by the Governments of Canada and the United States to be a legitimate business operating in accordance with all applicable laws and regulations governing the transportation of explosives.

Known offeror means an offeror that has been determined by the Governments of Canada and the United States to be a legitimate business operating in accordance with all

applicable laws and regulations governing the transportation of explosives.

Known train crew member means an individual used to transport explosives from Canada to the United States who has been determined by the Governments of Canada and the United States to present no known security concern.

Lawful permanent resident alien means a lawful permanent resident alien of the United States as defined by 8 U.S.C. 1101(a)(2).

Offeror means the person offering a shipment to the railroad carrier for transportation from Canada to the United States, and may also be known as the ''consignor'' in Canada.

Railroad carrier means ''railroad carrier'' as defined in 49 U.S.C. 20102.

(c) *Prior approval of railroad carrier, offeror, and train crew member.* (1) No railroad carrier may transport in commerce any explosive into the United States from Canada via a train operated by a crew member who is not a United States citizen or lawful permanent resident alien unless the railroad carrier, offeror, and train crew member are identified on a TSA list as a known railroad carrier, known offeror, and known train crew member, respectively.

(2) The railroad carrier must ensure that it, its offeror, and each of its crew members have been determined to be a known railroad carrier, known offeror, and known train crew member, respectively. If any has not been so determined, the railroad carrier must submit the following information to Transport Canada:

(i) The railroad carrier must provide its:

(A) Official name;

(B) Business number;

(C) Any trade names; and

(D) Address.

(ii) The following information about any offeror of explosives whose shipments it will carry:

(A) Official name;

(B) Business number; and

(C) Address.

(iii) The following information about any train crew member the railroad carrier may use to transport explosives into the United States from Canada who is neither a United States citizen nor lawful permanent resident alien:

(A) Full name; and

(B) Both current and most recent prior residential addresses.

(3) Transport Canada will determine that the railroad carrier and offeror are legitimately doing business in Canada and will also determine that the train crew members present no known problems for purposes of this section. Transport Canada will notify TSA of these determinations by forwarding to TSA lists of known railroad carriers, offerors, and train crew members and their identifying information.

(4) TSA will update and maintain the list of known railroad carriers, offerors, and train crew members and forward the list to the Customs Service.

(5) Once included on the list, the railroad carriers, offerors, and train crew members need not obtain prior approval for future transport of explosives under this section.

(d) *TSA checks.* TSA may periodically check the data on the railroad carriers, offerors, and train crew members to confirm their continued eligibility and may remove from the list any that TSA determines is not known or is a threat to security.

(e) *At the border*—(1) *Train crew members who are not United States citizens or lawful permanent resident aliens.* Upon arrival at a point designated by the Customs Service for inspection of trains crossing into the United States, the train crew members of a train transporting explosives must provide sufficient identification to the Customs Service to enable that agency to determine if each crew member is on the list of known train crew members maintained by TSA.

(2) *Train crew members who are United States citizens or lawful permanent resident aliens.* If the Customs Service cannot verify that the crew member is on the list and the crew member is a United States citizen or lawful permanent resident alien, the crew member may be cleared by the Customs Service upon providing:

(i) A valid United States passport; or

(ii) One or more other document(s) including a form of United States federal or state government-issued identification with photograph, acceptable to the Customs Service.

(3) *Compliance.* If a carrier attempts to enter the United States without having complied with this section, the Customs Service will deny entry of the explosives and may take other appropriate action.

Issued in Washington, DC, on February 3, 2003.

Stephen J. McHale,

Deputy Administrator.

[FR Doc. 03–3005 Filed 2–3–03; 5:00 pm]

BILLING CODE 4910–62–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 021101264–3016–02; I.D. 101802D]

RIN 0648–AQ33

Fisheries of the Northeastern United States; Atlantic Herring Fishery

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

ACTION: Final rule, 2003 specifications.

SUMMARY: NMFS announces final specifications for the 2003 Atlantic herring fishery. There are two changes from the 2002 specifications approved by NMFS for the 2003 fishery: A transfer of 10,000 mt from Area 2 total allowable catch (TAC) reserve to the Area 3 TAC resulting in an Area 3 TAC of 60,000 mt and an Area 2 TAC reserve of 70,000 mt; and a restriction on U.S. at-sea processing (USAP) vessels to fish in Areas 2 and 3, only. The intent of this final rule is to promote the development and conservation of the Atlantic herring resource.

DATES: Effective February 6, 2003, through December 31, 2003.

ADDRESSES: Copies of supporting documents, including the Environmental Assessment (EA) and Regulatory Impact Review (RIR), Final Regulatory Flexibility Analysis (FRFA), and the Stock Assessment and Fishery Evaluation (SAFE) Report for the 2001 Atlantic Herring Fishing Year are available from Patricia A. Kurkul, Regional Administrator, Northeast Regional Office, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298. The EA/RIR/FRFA/SAFE are accessible via the Internet at *http://www.nero.nmfs.gov*.

FOR FURTHER INFORMATION CONTACT: Paul H. Jones, Fishery Policy Analyst, 978–281–9273, fax 978–281–9135, e-mail *paul.h.jones@noaa.gov*.

SUPPLEMENTARY INFORMATION: Regulations implementing the Atlantic Herring Fishery Management Plan (FMP) require the New England Fishery Management Council's (Council) Atlantic Herring Plan Development Team (PDT) to meet at least annually, no later than July each year, with the Atlantic States Marine Fisheries Commission's (Commission) Atlantic Herring Plan Review Team (PRT) to develop and recommend the following

specifications for consideration by the Council's Atlantic Herring Oversight Committee: Allowable biological catch (ABC), optimum yield (OY), domestic annual harvest (DAH), domestic annual processing (DAP), total foreign processing (JVPt), joint venture processing (JVP), internal waters processing (IWP), USAP, border transfer (BT), total allowable level of foreign fishing (TALFF), and reserve (if any). The PDT and PRT also recommend the total allowable catch (TAC) for each management area and subarea identified in the FMP. As the basis for its recommendations, the PDT reviews available data pertaining to: Commercial and recreational catch; current estimates of fishing mortality; stock status; recent estimates of recruitment; virtual population analysis results and other estimates of stock size; sea sampling and trawl survey data or, if sea sampling data are unavailable, length frequency information from trawl surveys; impact of other fisheries on herring mortality; and any other relevant information. Recommended specifications are presented to the Council for adoption and recommendation to NMFS. To the extent that these recommendations are adopted by NMFS, they serve as the basis for the allocations.

Proposed 2003 initial specifications were published on November 15, 2002 (67 FR 69181). Public comments were accepted through December 16, 2002. The final specifications are unchanged from those that were proposed.

2003 Final Initial Specifications

The following table contains the final initial specifications for the 2003 Atlantic herring fishery.

FINAL SPECIFICATIONS AND AREA TACS FOR THE 2003 ATLANTIC HERRING FISHERY

Specification	Final Allocation (mt)
ABC	300,000
OY	250,000
DAH	250,000
DAP	226,000
JVPt	20,000
JVP	10,000 (Area 2 and 3 only)
IWP	10,000
USAP	20,000 (Area 2 and 3 only)
BT	4,000
TALFF	0
Reserve	0
TAC-Area 1A	60,000
TAC-Area 1B	10,000
TAC-Area 2	50,000 (Area 2 and 3 only)
TAC-Area 3	60,000

There are two changes from the specifications approved by NMFS for the 2002 fishery: A transfer of 10,000 mt from the Area 2 TAC reserve to the Area 3 TAC resulting in an Area 3 TAC of 60,000 mt and an Area 2 TAC reserve of 70,000 mt; and a restriction on USAP vessels to fish in Areas 2 and 3 only. A complete discussion of the development of these changes appears in the recommendations from the Council and the preamble to the proposed rule and is not repeated here.

Comments and Responses

Three members of the public submitted comments on the proposed specifications. One of the three commenters submitted general comments about Atlantic herring management, which is not the subject of this rulemaking and will not be responded to here .

Comment 1: One commenter supported the proposed restriction of USAP activity from Area 1, the proposed increase in Area 3 TAC, and the proposed USAP specification of 20,000 mt.

Response 1: This final rule implements the proposed measures.

Comment 2: One commenter opposed restricting USAP activity to Areas 2 and 3. He argued USAP should be allowed throughout the management area and that allowing USAP vessels in the area provides fishing opportunities for vessels that lack refrigerated sea water and holding tanks needed to deliver fish to shore.

Response 2: There are no expected biological impacts on the Atlantic herring stock from restricting potential USAP vessel activity to Areas 2 and 3. If a USAP vessel has the opportunity to operate in or near Area 1 at a lower cost (for fuel, maintenance, or other operational expenses) than it would incur from fishing in Area 2 or 3, and it is restricted from doing so, then the economic profitability of the USAP vessel would be reduced. However, there has been no USAP activity, so such concern is hypothetical at this time. The prohibition on harvesting Area 1 fish for delivery to USAP vessels would leave more fish available to shoreside processors and bait dealers operating on the coasts of Maine, New Hampshire, and Massachusetts, the three states that border Area 1A (the inshore portion of Area 1). The quota in Area 1A was taken prior to the end of both the 2000 and 2001 fishing years, and the period 1 (January through June) quota implemented in 2002 was taken by April. Therefore, based on recent fishing activity in Area 1, restricting USAP activity from Area 1 seems to result in net benefits to the fishery.

As a result, the Council recommended, and NMFS is implementing, the restriction of USAP activity from Area 1.

Classification

This final rule has been determined to be not significant for purposes of E.O. 12866.

This action establishes TACs and related management measures for the Atlantic herring fishery. If implementation of the TACs and other management measures is delayed, NMFS will be prevented from carrying out its function of preventing overfishing of the species. The Atlantic herring fishery will begin making landings on January 1, 2003. If a delay in effectiveness is required, and a quota were to be harvested during a delayed effectiveness period, the lack of effective quota specifications would prevent NMFS from closing the fishery. Of particular concern would be the impact if the Area 1A TAC allocated for the period January-June is overharvested. NMFS must close Area 1A when 95 percent of the TAC allocated to the first seasonal period is reached or exceeded. The quota in Area 1A was taken prior to the end of the 2000, 2001, and 2002 fishing years. The Period 1 quota for 2002 was taken earlier (April) than in 2001, and that trend might continue in 2003. If Period 1 is not closed prior to reaching 95 percent of the TAC allocated to this period, then there would be distributional effects on the fishery for the remainder of the fishing year and would likely reduce economic gains for some of the industry participants who traditionally harvest Atlantic herring in Area 1A during Period 2 (June through December). Therefore, the Assistant Administrator for Fisheries, NOAA, finds good cause under 5 U.S.C. 553(d)(3) to waive the 30–day delayed effectiveness period for the quotas and other management measures.

NMFS prepared a FRFA for this action. The FRFA includes a summary of the analyses in support of these specifications. A copy of the FRFA is available from NMFS (see **ADDRESSES**).

A summary of the FRFA, which includes the IRFA and applicable sections of the 2003 specifications package, follows:

The reasons why this action is being taken by the agency, and the objectives of this final rule are explained in the preamble to the proposed rule and are not repeated here. This action does not contain any collection-of-information, reporting, recordkeeping, or other compliance requirements. This action is taken under authority of the Magnuson-Stevens Act and regulations at 50 CFR part 648.

Three comments were submitted on the proposed rule, but none of them were specific to the initial regulatory flexibility analysis. However, one individual commented on the economic impacts of the measures on the fishing industry; NMFS has responded to the comment (Comment 2) in the Comments and Responses section of the preamble to this final rule. No changes were made to the final rule as a result of the comments received.

All of the affected businesses (fishing vessels and dealers) are considered small entities under the standards described in NMFS guidelines because they have profits that do not exceed $3 million annually. The last full year of data available for the Atlantic herring fishery is for 2001. There were 146 vessels, 6 processors, and 190 dealers participating in the fishery in 2001. Given that vessels caught less than half the OY in 2001, the status quo OY should not result in a negative economic impact on the revenues of vessels, producer surplus, or consumer surplus.

The increase in the Area 3 TAC from 50,000 to 60,000 mt, and concomitant decrease in the Area 2 TAC reserve from 80,000 to 70,000 mt, should have a positive impact on vessels and processors. Landings from Area 3 increased from 12,884 mt in 2000 to 34,510 mt in 2001. The Council thus sought to provide additional opportunity for the industry to increase its activity in Area 3. The Council did not consider transferring any TAC from Area 1 because that is the area in which the fishery has historically concentrated its activity. In fact, in 2001, landings from Area 1A and Area 1B totaled 68,130 mt, nearly attaining the combined TAC for both areas of 70,000 mt. Landings from Area 2 in 2001 were only 15,388 mt out of a combined Area 2 TAC and Area 2 TAC Reserve of 120,000 mt. Thus, the transfer of 10,000 mt from the Reserve will still leave a substantial amount of TAC for the fishery to expand its activity in Area 2. If the TAC transfer is fully utilized, an additional 10,000 mt would produce additional revenues of $1.2M (assuming $120/mt) to vessels and a proportionate increase in profits to processors.

As noted above, landings from Area 1 in 2001 neared the total TAC for the area. The Council was concerned that future USAP activity, if allowed in Area 1, would have a negative impact on firms that have historically harvested Area 1 fish for sale to shoreside processors. If the Area 1 TACs were attained, harvesting vessels that sell their catch to shoreside processors would have to fish farther offshore, increasing their operating costs and potentially reducing their profitability. The economic impact on USAP vessels from the prohibition on receiving fish harvested in Areas 1A and 1B cannot be directly measured since there is no history of over-the-side purchases upon which to base economic impacts.

The Council considered a Committee recommendation to reduce USAP by 5,000 mt, but rejected it based on comments that a vessel may enter the fishery in 2003 that could fully utilize the 20,000 mt specification. The reduction of the specification to 15,000 mt would reduce potential profits of USAP operations when compared to the status quo specification of 20,000 mt, although as yet, no part of USAP has been utilized.

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

Dated: January 30, 2003.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 03–2798 Filed 1–31–03; 3:43 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 68, No. 25
Thursday, February 6, 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

National Highway Traffic Safety Administration

Federal Highway Administration

23 CFR Part 1225

[Docket No. NHTSA–2002–13680]

RIN 2127–AI44

Operation of Motor Vehicles by Intoxicated Persons

AGENCY: National Highway Traffic Safety Administration (NHTSA) and Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: This document proposes to implement a new program enacted by the Department of Transportation and Related Agencies Appropriations Act, 2001 (DOT Appropriations Act of FY 2001), which requires the withholding of Federal-aid highway funds, beginning in fiscal year (FY) 2004, from any State that has not enacted and is not enforcing a law that provides that any person with a blood alcohol concentration (BAC) of 0.08 percent or greater while operating a motor vehicle in the State shall be deemed to have committed a *per se* offense of driving while intoxicated or an equivalent *per se* offense. This document solicits comments on a proposed regulation to clarify what States must do to avoid the withholding of funds.

DATES: Comments must be received on or before April 7, 2003.

ADDRESSES: Submit written comments to the Docket Management Facility, DOT, 400 Seventh Street, SW., Room PL–401, Washington, DC 20590.

Alternatively, you may submit your comments electronically by logging onto the Docket Management System (DMS) Web site at *http://dms.dot.gov/submit.* Click on ''Help & Information'' or ''Help/Info'' to view instructions for filing your comments electronically. Regardless of how you submit your comments, you should mention the docket number of this proposed rule.

FOR FURTHER INFORMATION CONTACT: In NHTSA: Ms. Marlene Markison, Office of Injury Control Operations & Resources, NTI–200, telephone (202) 366–2121, fax (202) 366–7394; Ms. Heidi Coleman, Office of Chief Counsel, NCC–113, telephone (202) 366–1834, fax (202) 366–3820; or Ms. Tyler Bolden, Office of Chief Counsel, NCC–113, telephone (202) 366–1834, fax (202) 366–3820.

In FHWA: Mr. Randy Umbs, Office of Safety, HSA–1, telephone (202) 366–2177, fax (202) 366–3222; or Mr. Raymond W. Cuprill, Office of Chief Counsel, HCC–30, telephone (202) 366–0791, fax (202) 366–7499.

SUPPLEMENTARY INFORMATION: The DOT Appropriations Act of FY 2001 was signed into law on October 23, 2000. *See* Public Law 106–346—Appendix, sec. 351, 114 Stat. 1356A–34, 35. Section 351 of Public Law 106–346—Appendix (Section 351) provides that, beginning in FY 2004, the Secretary of Transportation shall withhold certain Federal-aid highway funds from any State that has not enacted and is not enforcing a 0.08 BAC law as described in 23 U.S.C. 163(a) (Section 163). Section 163 provides that 0.08 BAC laws must specify that any person with a BAC of 0.08 percent or greater while operating a motor vehicle in the State shall be deemed to have committed a *per se* offense of driving while intoxicated or an equivalent *per se* offense.

Background

The Problem of Impaired Driving

In the year 2000, the number of people who were killed in motor vehicle crashes reached 41,821. Alcohol use was linked to 16,653 of these crashes, an average of 1 alcohol-related fatality every 32 minutes. Although only about 8 percent of all motor vehicle crashes involve the use of alcohol, 40 percent of fatal crashes involve alcohol use.

Injuries caused by motor vehicle crashes are the leading cause of death for people aged 4 to 33. Each year, these injuries cost Americans an estimated $150 billion, including $19 billion in medical and emergency expenses, $42 billion in lost productivity, $52 billion in property damage, and $37 billion in other crash related costs. Alcohol-related crashes account for roughly 30 percent of these costs—more than $45 billion each year.

While alcohol-related fatalities have dropped significantly, from 22,084 in 1990 to 16,653 in 2000, a 25 percent decrease in ten years, alcohol involvement is still the single greatest factor in motor vehicle deaths and injuries. The 25 percent decrease in alcohol-related fatalities can be attributed to more effective laws, strong enforcement and highly visible public information and education. Four laws that have been proven effective in the fight against impaired driving are: illegal *per se* laws; administrative license revocation (ALR) laws; ''zero tolerance'' laws and 0.08 BAC laws. Both individually and collectively, these laws have played a crucial role in reducing the number of alcohol-related fatalities in this country. Indeed, it has been estimated that, if every State adopted a 0.08 BAC law, approximately 590 lives could be saved each year.

Support for 0.08 BAC Laws

As we stated in the final rule for the Section 163 Incentive Grant program (64 FR 35568, July 1, 1999), a number of studies sponsored by NHTSA support a legal limit of 0.08 BAC, copies of which have been placed in the docket. For example, the effect of California's 0.08 law was analyzed in a 1991 NHTSA study entitled ''The Effects Following the Implementation of an 0.08 BAC Limit and an Administrative Per Se law in California.'' The study found that 81 percent of the driving population knew that the BAC limit had become stricter (as the result of a successful public education effort). The State experienced a 12 percent reduction in alcohol-related fatalities, although some of the reduction may have resulted from a new ALR law that was enacted during the same year that the BAC standard was lowered. The State also experienced an increase in the number of impaired driving arrests.

Another study, ''Lowering State Legal Blood Alcohol Limits to 0.08%: The Effect on Fatal Motor Vehicle Crashes,'' reported in the September 1996 issue of the ''American Journal of Public Health,'' analyzed the effect of lowering BAC levels to 0.08 in multiple states. The study, conducted by Boston University's School of Public Health,

compared the first five States to lower their BAC limit to 0.08 (California, Maine, Oregon, Utah and Vermont) with five nearby States that retained the 0.10 BAC limit. The results of this study suggested that 0.08 BAC laws, particularly in combination with ALR laws, reduced the proportion of fatal crashes involving drivers and fatally injured drivers at blood alcohol levels of 0.08 percent and higher by 16 percent and those at a BAC of 0.15 percent and greater by 18 percent.

The immediate significance of these findings is that, the 0.08 BAC laws, particularly in combination with ALR laws, not only reduced the overall incidence of alcohol fatalities, but they also reduced fatalities at the *higher* BAC levels. The effect on the number of extremely impaired drivers was even greater than the overall effect. The study concluded that if all States lowered their BAC limits to 0.08, alcohol-related fatalities would decrease nationwide by 500–600 per year, which would result in an economic cost savings of approximately $1.5 billion.

More recently, additional studies have been conducted to determine the effectiveness of 0.08 BAC laws. For example, in August 1999, NHTSA sponsored a study conducted by the Pacific Institute for Research and Evaluation, entitled ''The Relationship of Alcohol Safety Laws to Drinking Drivers in Fatal Crashes,'' which analyzed the relationships between the passage of key alcohol safety laws and the number of drinking drivers in fatal crashes. Specifically, the study evaluated the extent to which the reduction in alcohol-related fatalities could be attributed to ALR laws, 0.10 BAC laws and/or 0.08 BAC laws. Study results indicated that all three laws were associated with significant reductions in fatal crashes involving drinking drivers. In particular, 0.08 BAC laws were associated with 8 percent reductions in the involvement of both high BAC and lower BAC drivers in fatal crashes. The study concluded that if all 50 States had 0.08 BAC laws in 1997, 590 lives could have been saved.

Also, Illinois' 0.08 BAC law, which was enacted in July 1997, was analyzed in a NHTSA-sponsored study conducted by the Pacific Institute for Research and Evaluation in December 2000. This study, entitled ''The Effectiveness of the Illinois .08 Law,'' found that after enactment of the 0.08 BAC law, the number of DUI arrests of offenders in the new 0.08 to 0.09 range increased statewide, while the average BAC of arrested drivers declined. In addition, the proportion of offenders with BACs higher than 0.15 decreased, and the proportion of offenders in the 0.10 to 0.14 range increased slightly. Moreover, the State experienced an overall reduction of 13.7 percent in the proportion of alcohol-related fatalities, whereas surrounding States without a 0.08 BAC law showed no similar decline. Illinois also experienced an increase, by almost 11 percent, in the number of total impaired driving arrests, and it was estimated that the 0.08 law may have saved 47 lives in 1998 alone. However, only 18 months of data were available for the report, so the above-mentioned reductions are limited somewhat by the relatively short period of post-0.08 law data available and the possible effects of other legislation implemented at the same time as the 0.08 law.

An update to the Illinois study was published in December 2001. The update, entitled ''Evaluation of the Illinois .08 Law: An Update with the 1999 FARS Data,'' concluded that Illinois' 0.08 law reduced the percentage of drinking drivers involved in fatal crashes by 13.65%. In addition, it was estimated that during a two-year period (1998 and 1999), the 0.08 law had saved approximately 105 lives.

Another recent study sponsored by NHTSA, entitled ''Relative Risk of Fatal Crash Involvement by BAC, Age, and Gender,'' provides further support for a 0.08 BAC limit. The study reported that the relative risk of involvement in a fatal passenger vehicle crash increased with higher driver BAC levels in every age and sex group, among both fatally injured and surviving drivers. Even a BAC increase of 0.02 percentage points among 16–20 year old male drivers was estimated to more than double the relative risk of a fatal single-vehicle crash injury. In addition, at the midpoint of the 0.08 to 0.10 BAC range, the relative risk of a fatal-single vehicle crash injury varied between 11.4 percent for drivers 35 and older to 51.9 percent for male drivers aged 16–20. The study concluded that drivers at non-zero BACs somewhat lower than 0.10 percent pose substantially elevated risks to themselves and to other road users.

In addition, the results of a study, entitled ''A Review of the Literature on the Effects of Low Doses of Alcohol on Driving-Related Skills,'' were published by NHTSA in 2000. The study indicated that alcohol impairs some driving skills, beginning with any significant departure from zero BAC. Moreover, significant impairment was reported at 0.05 BAC, and by 0.08 BAC, more than 94 percent of the reviewed studies showed impairment in measurable skills. The study concluded that all drivers can be expected to experience impairment in some driving-related skills by 0.08 BAC or less.

Also in 2000, NHTSA published a study conducted by the Southern California Research Institute, entitled ''Driver Characteristics and Impairment at Various BACs.'' The study reported that there is evidence of significant alcohol-related impairment throughout the range from 0.02 to 0.10 BAC. In addition, the study found that the percentage of people exhibiting impairment and the magnitude of that impairment grows as BAC levels increase. The study concluded that a majority of the driving population is impaired in some important measures at BACs as low as 0.02 BAC.

TEA–21, Section 163 Incentive Grant Program

On June 9, 1998, the Transportation Equity Act for the 21st Century (TEA–21) was signed into law. Section 1404 of the Act established a $500 million incentive grant program under 23 U.S.C. 163 to encourage States to adopt tough 0.08 BAC laws. Section 163 provides that the Secretary of Transportation shall make a grant to any State that has enacted and is enforcing a law that provides that any person with a BAC of 0.08 percent or greater while operating a motor vehicle in the State shall be deemed to have committed a *per se* offense of driving while intoxicated or an equivalent *per se* offense.

On September 3, 1998, NHTSA and the FHWA (the agencies) published a joint interim rule, establishing the criteria that States must meet and the procedures they must follow to qualify for an incentive grant. *See* 63 FR 46881. On July 1, 1999, the agencies published a final rule, implementing the Section 163 incentive grant program. *See* 64 FR 35568.

Effects of Section 163 Incentive Grant Program

Before the Section 163 program was implemented, only 16 States had enacted laws that established 0.08 BAC as their legal *per se* limit. Fifteen of these States had laws already in effect, so they were eligible to receive Section 163 incentive grant funds in FY 1998. One State, Washington, enacted a 0.08 BAC law on March 30, 1998, but the law did not become effective until January 1, 1999. Thus, Washington was not eligible to receive Section 163 incentive grant funds until FY 1999. Between June 1998 and October 2000, only two additional States (Washington and Texas) and the District of Columbia enacted and began enforcing 0.08 BAC laws that met all of the Section 163 criteria. Although both

Kentucky and the Commonwealth of Puerto Rico enacted 0.08 BAC laws in 2000, these laws did not become effective until October 1, 2000 and January 10, 2001 respectively. Thus, Kentucky and Puerto Rico were not eligible for Section 163 incentive grant funds until FY 2001. Rhode Island also adopted a 0.08 BAC law in 2000, but its 0.08 BAC law does not conform to all of the requirements of Section 163 and Rhode Island is not eligible to receive an incentive grant. *See* Table 1.

DOT Appropriations Act for FY 2001—Sanction Program

In an effort to further reduce drunk driving injuries and fatalities, Congress created a new 0.08 BAC program in the DOT Appropriations Act of FY 2001. *See* Public Law 106–346—Appendix, sec. 351, 114 Stat. 1356A–34, 35. Section 351 of Public Law 106–346—Appendix (Section 351) provides for the withholding of Federal-aid highway funds from any State that has not enacted and is not enforcing a 0.08 BAC law by the beginning of FY 2004. This legislation did not alter the incentive grant program, which was established in TEA–21 and will continue through FY 2003.

The DOT Appropriations Act of FY 2001 was signed into law on October 23, 2000. Since that date, fifteen additional States (Alaska, Arizona, Arkansas, Connecticut, Georgia, Indiana, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee and Wyoming) have enacted conforming 0.08 BAC laws. By October 2002, thirty-three States, the District of Columbia and the Commonwealth of Puerto Rico had established 0.08 BAC laws that met all of the requirements of Section 163. *See* Table 1.

Although, Louisiana enacted a 0.08 BAC law in June 2001, this 0.08 BAC law will not become effective until September 30, 2003. Thus, Louisiana will not be eligible to receive an incentive grant under the Section 163 program until FY 2003, but it will avoid the withholding of funds in FY 2004. Similarly, Tennessee enacted a 0.08 BAC law in June 2002, however, this law will not become effective until July 1, 2003. Thus, Tennessee will not be eligible to receive an incentive grant under the Section 163 program until FY 2003, but it will avoid the withholding of funds in FY 2004.

TABLE 1.—STATES WITH 0.08 BAC LAWS THAT MEET SECTION 163 CRITERIA (AS OF OCTOBER 2002)

State	Enactment Date	Effective Date
Alabama	07/31/95	10/01/95
Alaska	07/03/01	09/01/01
Arizona	04/11/01	08/31/01
Arkansas	03/06/01	08/13/01
California	1989	01/01/90
Connecticut	07/01/02	07/01/02
District of Columbia	12/01/98	04/13/99
Florida	04/27/93	01/01/94
Georgia	04/16/01	07/01/01
Hawaii	06/30/95	06/30/95
Idaho	03/17/97	07/01/97
Illinois	07/02/97	07/02/97
Indiana	05/09/01	07/01/01
Kansas	04/22/93	07/01/93
Kentucky	04/21/00	10/01/00
Louisiana	06/26/01	09/30/03
Maine	04/28/88	08/04/88
Maryland	04/10/01	09/30/01
Mississippi	03/11/02	07/01/02
Missouri	06/12/01	09/29/01
Nebraska	03/01/01	09/01/01
New Hampshire	04/15/93	01/01/94
New Mexico	03/19/93	01/01/94
North Carolina	07/05/93	10/01/93
Oklahoma	06/08/01	07/01/01
Oregon	08/04/83	10/15/83
Puerto Rico	01/10/00	01/10/01
South Dakota	02/27/02	07/01/02
Tennessee	06/27/02	07/01/03
Texas	05/28/99	09/01/99
Utah	03/19/83	08/01/83
Vermont	06/06/91	07/01/91
Virginia	04/06/94	07/01/94
Washington	03/30/98	01/01/99
Wyoming	03/11/02	07/01/02

Total: 33 States, plus the District of Columbia and Puerto Rico

Adoption of 0.08 BAC Law

Section 351 provides that the Secretary must withhold from apportionment a portion of Federal-aid highway funds from any State that does not meet the Section 163 requirements. To avoid such withholding, a State must enact and enforce a law that provides that any person with a BAC of 0.08 percent or greater while operating a motor vehicle in the State shall be deemed to have committed a *per se* offense of driving while intoxicated or an equivalent *per se* offense.

Any State that does not enact and enforce a conforming 0.08 BAC law will be subject to the withholding of a portion of its Federal-aid highway funds. In accordance with the statute, if any State has not enacted and is not enforcing a conforming 0.08 BAC law by October 1, 2003, two percent of its FY 2004 Federal-aid highway apportionment under 23 U.S.C. 104(b)(1), 104(b)(3) and 104(b)(4) shall be withheld on that date. These sections relate to the apportionments for the National Highway System, the Surface Transportation Program and the Interstate System (including resurfacing, restoring, rehabilitating and reconstructing the interstate system). The amount withheld would increase by two percent each year, until it reaches eight percent in FY 2007 and thereafter.

Compliance Criteria

To avoid the withholding from apportionment of Federal-aid highway funds, a State must enact and enforce a 0.08 BAC law that meets the criteria defined in the implementing regulations for the Section 163 incentive grant program. *See* 64 FR 35568. To conform to the requirements of Section 163, a law must contain the following elements:

1. Any Person

A State must enact and enforce a law that establishes a BAC limit of 0.08 or greater that applies to all persons. The law can provide for no exceptions.

2. Blood Alcohol Concentration (BAC) of 0.08 Percent

A State must set a level of no more than 0.08 percent as the legal limit for blood alcohol concentration, thereby making it an offense for any person to have a BAC of 0.08 or greater while operating a motor vehicle.

3. Per Se Law

A State must consider persons who have a BAC of 0.08 percent or greater while operating a motor vehicle in the State to have committed a *per se* offense of driving while intoxicated. In other words, States must establish a 0.08 ''*per se*'' law, that makes operating a motor vehicle with a BAC of 0.08 percent or above, in and of itself, an offense.

4. Primary Enforcement

A State must enact and enforce a 0.08 BAC law that provides for primary enforcement. Under a primary enforcement law, law enforcement officials have the authority to enforce the law without, for example, the need to show that they had probable cause or had cited the offender for a violation of another offense. Any State with a law that provides for secondary enforcement of its 0.08 BAC provision will not qualify for funds under this program.

5. Both Criminal and ALR Laws

A State must establish a 0.08 BAC *per se* level under its *criminal code.* In addition, if the State has an administrative license revocation or suspension (ALR) law, the State must

establish an illegal 0.08 BAC *per se* level under its *ALR law,* as well.

6. Standard Driving While Intoxicated Offense

The State's 0.08 BAC *per se* law must be deemed to be or be equivalent to the State's standard driving while intoxicated offense. That is the State's non-BAC *per se* driving while intoxicated offense in the State.

In States with multiple drinking and driving provisions, the final rule for the Section 163 incentive grant program stated that the agencies will consider a number of factors to determine whether the State's 0.08 BAC *per se* law has been deemed to be or is equivalent to the standard driving while intoxicated offense in the State. These factors include the treatment of these offenses, their relation to other offenses in the State and the sanctions and other consequences that result when persons violate these offenses. *See* 64 FR 35568.

A more detailed discussion of the six elements described above is contained in the interim final rule establishing the criteria for the Section 163 incentive grant program. See 63 FR at 46883–84.

During the agency's administration of the Section 163 incentive grant program, we have considered a number of proposed laws to determine whether a State's proposed 0.08 BAC offense was equivalent to the State's standard driving while intoxicated offense. In some reviews, these proposed laws were determined to be equivalent and in others they were determined not to be equivalent. Two examples are described below.

A. Rhode Island

Following our review of Rhode Island's new 0.08 BAC law (enacted in 2000), we concluded that the law did not make driving while intoxicated with a BAC of 0.08 the standard driving while intoxicated offense or equivalent to that offense in the State. Moreover, we determined that the Rhode Island law did not apply the 0.08 BAC legal limit to the State's criminal code.

Previously, Rhode Island's law provided that a person convicted of driving while intoxicated (with a BAC of 0.10 or more) had committed a misdemeanor and was subject to a fine of $100–$300, 10 to 60 hours of public community restitution and/or imprisonment for up to one year. Such person was subject also to a driver's license suspension of three to six months.

Rhode Island's new law creates a three-tiered penalty scheme that distinguishes between offenders with BACs of: (1) 0.08–0.09; (2) 0.10–0.14 and (3) 0.15 and above. Under the new law, a person convicted of driving while intoxicated with a BAC of 0.08 or 0.09 may receive the following sanctions: a fine of $100–$250; 10–60 hours of public community restitution; a special driving course; and suspension of their driver's license up to 45 days. Moreover, the new law treats a first time violation to the 0.08 offense only as a civil violation.

However, under Rhode Island's new law, a person convicted of driving while intoxicated with a BAC of 0.10–0.14 is subject to a fine of $100–$300, 10 to 60 hours of public community restitution and/or imprisonment for up to one year, and suspension of their driver's license for 3 to 6 months. Likewise, persons convicted of driving while intoxicated with a BAC level of 0.15 or more, would receive increased penalties of a fine of $500, 20–60 hours of public community restitution, imprisonment up to one year, and suspension of their driver's license for 3–6 months. Thus, the agency concluded that Rhode Island's new law subjected 0.08 offenders to less severe sanctions than those imposed on 0.10 offenders; and contained sanctions that were permissive, and not mandatory, as required by Section 163 and the agency's implementing regulations. In addition, violations to the 0.08 offense were only civil offenses and violations to the 0.10 offense were criminal. Accordingly, the agency determined that Rhode Island's law did not make driving while intoxicated with a BAC of 0.08 the standard driving while intoxicated offense or an equivalent offense.

B. Alaska

Following our review of Alaska's new law (enacted in 2001), the agency concluded that the 0.08 law was equivalent to the standard driving while intoxicated offense in the State.

Previously, Alaska's law provided that a person committed the crime of driving while intoxicated if the person operated or drove a motor vehicle while they were under the influence of intoxicating liquor or if a chemical test revealed a BAC of 0.10 or more (within four hours after the alleged offense). This offense was a Class A misdemeanor and was subject to at least 72 hours of imprisonment and a fine of not less than $250.

Under Alaska's new law, people commit the crime of driving while intoxicated if they operate or drive a motor vehicle while they are under the influence of intoxicating liquor or if a chemical test reveals a BAC of 0.08 or more (within four hours after the alleged offense). This offense is a Class A misdemeanor and is subject to not less than 72 hours of imprisonment and a fine of not less than $250.

In summary, Alaska's new 0.08 law retained the same penalties as those previously imposed on the State's 0.10 law. Indeed, the new law merely changed the State's legal limit from 0.10 to 0.08 BAC. Accordingly, the agency concluded that Alaska's new 0.08 BAC offense was equivalent to the standard driving while intoxicated offense in the State.

Demonstrating Compliance

A. Sanction Program

Section 351 provides that funds will be withheld from apportionment from noncomplying States beginning in FY 2004. To avoid the withholding, each State would be required by this proposed regulation to submit a certification. Under the agencies' proposal, States would be required to submit their certifications on or before September 30, 2003, to avoid the withholding from apportionment of FY 2004 funds on October 1, 2003. The agencies propose to permit (and strongly encourage) States to submit certifications in advance.

States that are found in noncompliance with these requirements in any fiscal year would be required to submit a certification to avoid the withholding of funds from apportionment in the following fiscal year. To avoid the withholding in that fiscal year, these States would be required to submit a certification demonstrating compliance before the last day (September 30) of the previous fiscal year.

Certifications submitted under this part would provide agencies with the basis for finding States in compliance with the Section 351 requirements. The agencies are proposing that the certification must consist of: (1) A statement from an appropriate State official that the State has enacted and is enforcing a 0.08 BAC *per se* law that conforms to 23 U.S.C. § 163 and 23 CFR Part 1225; and (2) citations to the State's conforming 0.08 BAC *per se* law, including all applicable definitions and provisions of the State's criminal code and, if the State has an ALR law, all applicable provisions of that law, as well.

Once a State is determined by the agencies to be in compliance with the requirements of Section 163, the agencies propose that the State would not be required to submit certifications in subsequent fiscal years, unless the State's law had changed. This proposal specifies that it would be the

responsibility of the States to inform the agencies of any such change in a subsequent fiscal year, by submitting an amendment or supplement to its certification.

B. Incentive Grant Program

In this notice, the agencies propose to simplify the certification process for the incentive grant program. States that are receiving their first grant under the incentive grant program, must submit a certification consisting of: (1) A statement from an appropriate State official that the State has enacted and is enforcing a 0.08 BAC *per se* law that conforms to 23 U.S.C. 163 and 23 CFR Part 1225; (2) a statement that the funds received by the State under this program will be used for projects eligible for assistance under title 23 of the United States Code, which include highway construction as well as highway safety projects and programs; and (3) citations to the State's conforming 0.08 BAC *per se* law, including all applicable definitions and provisions of the State's criminal code and, if the State has an ALR law, all applicable provisions of that law, as well.

To receive subsequent-year grants under this program, a State must submit a certification consisting of: (1) A statement from an appropriate State official, stating either that the State either has amended or has not changed its 0.08 BAC *per se* law; (2) a statement that the State is enforcing the law; and (3) a statement that the funds received by the State under this program will be used for projects eligible for assistance under title 23 of the United States Code, which include highway construction as well as highway safety projects and programs. Citations to the States' laws will not be required for subsequent-year certifications.

For all States in compliance with the requirements of Section 163 in FY 2003, certifications submitted for the incentive grant program will apply toward avoiding the withholding of apportionment funds in FY 2004. No further certification is necessary from these States. To qualify for an incentive grant in any fiscal year, the regulations would continue to provide that the certifications must be received by July 15.

Certification Requirements

As stated previously, under the agencies' proposal, States would be required to submit a conforming certification on or before July 15, to receive an incentive grant in a fiscal year; and on or before September 30, to avoid the withholding of funds in a fiscal year.

Advance Notice of Apportionments Under the Sanction Program

To avoid a sanction beginning in FY 2004, the agencies propose that States would be required to enact and make effective a conforming 0.08 BAC law and submit a conforming certification on or before the last day (September 30) of the previous fiscal year.

However, NHTSA and the FHWA expect that States will want to know well in advance of the September 30 deadline whether their laws meet the requirements of Section 163 and its implementing regulations. Accordingly, the agencies encourage States to submit their laws for review as quickly as they can. More importantly, the agencies encourage States that are considering proposed 0.08 BAC legislation to request reviews from the agencies while the legislation is still pending. The agencies will review the legislation and determine whether it would conform to the Federal requirements if enacted without change, thus avoiding a situation whereby a State unintentionally enacts a non-conforming 0.08 BAC law and then is unable to meet the Section 163 requirements. Requests should be submitted through NHTSA's Regional Administrators, who will refer the requests to appropriate NHTSA and FHWA offices for review.

To ensure that the States are advised of their status under the Section 163 program well in advance of any withholding, the agencies propose to notify States of their compliance or non-compliance with the requirements of Section 163 through FHWA's normal certification of apportionments process. Under this process, States are advised in advance of the amount of funds expected to be withheld from their apportionments in the upcoming fiscal year. The advance notice normally is issued not later than ninety days prior to the date on which the funds are to be apportioned. (Since funds normally are apportioned on October 1 of each year, the advance notice ordinarily is issued on or about July 1 of each year.)

Under the agencies' proposal, if the agencies have not received a law and certification from a State and determined that they conform with the requirements of Section 163 and its implementing regulations before June 15, the agencies would make an initial determination that the State is in non-compliance with Section 163, and the State would be advised in FHWA's advance notice of apportionments of the amount of funds expected to be withheld from the State in the following fiscal year.

Accordingly, if States wish to avoid receiving an advance notice of apportionments, based on an initial determination that the State is in non-compliance with Section 163, the State should submit a conforming law and certification to the agencies well in advance of June 30.

Each State that receives an advance notice of non-compliance with the requirements of Section 163 will have an opportunity to rebut the agencies' initial determination. In addition, these States will be notified of the agencies' final determination of compliance or non-compliance as part of the final notice of apportionments (which normally is issued on October 1 of each year).

Period of Availability for Funds

Section 351 provides an incremental approach to the withholding of funds from apportionment for noncompliance. If a State is found to be in noncompliance on October 1, 2003, the State would be subject to a two percent withholding of its FY 2004 apportionment on that date. If a State is found to be in noncompliance on October 1 of any subsequent fiscal year, the withholding percentage would increase by two percent each year, until it reaches eight percent in FY 2007 and thereafter. *See* Table 2.

In addition, if a State comes into compliance with the requirements of Section 163 on or before September 30, 2007, the funds withheld from apportionment would be restored to the State. Specifically, Section 351 provides that, ''If within four years from the date that the apportionment for any State is reduced in accordance with this section the Secretary determines that such State has enacted and is enforcing a provision described in section 163(a) of chapter 1 of title 23, United States Code, the apportionment of such State shall be increased by an amount equal to such reduction.''

However, if a State is not in compliance with the requirements of Section 163 on October 1, 2007, any funds withheld from apportionment to the State will begin to lapse and will no longer be available for apportionment. Section 351 provides that, ''If at the end of such four-year period, any State has not enacted and is not enforcing a provision described in section 163(a) of title 23, United States Code, any amounts so withheld shall lapse.''

TABLE 2.—EFFECTS OF THE 0.08 BAC SANCTION PROGRAM ON NON-COMPLYING STATES

Fiscal year	Withhold (percent)	Lapse
2004	2	
2005	4	
2006	6	
2007	8	
2008	8	2% withheld in FY04.
2009	8	4% withheld in FY05.
2010	8	6% withheld in FY06.
2011	8	8% withheld in FY07.
2012	8	8% withheld in FY08.

Comments

Interested persons are invited to comment on this notice of proposed rulemaking. It is requested, but not required, that two copies be submitted. All comments must be limited to 15 pages in length. Necessary attachments may be appended to those submissions without regard to the 15 page limit. *See* 49 CFR 553.21. This limitation is intended to encourage commenters to detail their primary arguments in a concise fashion.

You may submit your comments by one of the following methods:

(1) By mail to: Docket Management Facility, Docket No. NHTSA–01–XXXX, DOT, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590;

(2) By hand delivery to: Room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday;

(3) By fax to the Docket Management Facility at (202) 493–2251; or

(4) By electronic submission: log onto the DMS website at *http://dms.dot.gov* and click on ''Help and Information'' or ''Help/Info'' to obtain instructions.

All comments received before the close of business on the comment closing date will be considered and will be available for examination in the docket at the above address before and after that date. To the extent possible, comments filed after the closing date will also be considered. However, the rulemaking action may proceed at any time after that date. The agencies will continue to file relevant material in the docket as it becomes available after the closing date, and it is recommended that interested persons continue to examine the docket for new material.

You may review submitted comments in person at the Docket Management Facility located at Room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday. You may also review submitted comments on the Internet by taking the following steps:

(1) Go to the DMS web page at *http://dms.dot.gov/search/*.

(2) On that page, click on ''search''.

(3) On the next page (*http://dms.dot.gov/search/*) type in the four digit docket number shown at the beginning of this notice. Click on ''search''.

(4) On the next page, which contains docket summary information for the docket you selected, click on the desired comments. You may also download the comments. Although the comments are imaged documents, instead of word processing documents, the ''pdf'' versions of the documents are word searchable.

Those persons who wish to be notified upon receipt of their comments in the docket should enclose, in the envelope with their comments, a self-addressed stamped postcard. Upon receiving the comments, the docket supervisor will return the postcard by mail.

Regulatory Analyses and Notices

Executive Order 12988 (Civil Justice Reform)

This proposed rule would not have any preemptive or retroactive effect. 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 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), provides for making determinations whether a regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and to the requirements of the Executive Order.

The Order defines a ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations or recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The agency has considered the impact of this rulemaking action under Executive Order 12866 and the Department of Transportation's regulatory policies and procedures and determined that it is ''significant'' because it involves the withholding of Federal-aid highway funds to any State that has not enacted and is not enforcing a 0.08 BAC law by FY 2004, a matter of substantial interest to the public and to Congress. Further, there is a possibility that the State withholdings resulting from this proposed rule could total from $100 million to $400 million. *See* NHTSA, Preliminary Regulatory Evaluation, 0.08 Sanction Program 20. Thus, this rulemaking could be economically significant under Executive Order 12866, *i.e.,* have an annual effect on the economy of $100 million or more. Accordingly, a preliminary regulatory evaluation has been prepared to review costs and benefits imposed on States to enact a 0.08 BAC law. The preliminary regulatory evaluation has been placed in the docket for this proposed rule.

The preamble to this rulemaking indicates that the adoption of 0.08 BAC laws could save 590 lives each year. This ''benefit'' is based upon a research study published in 1999 that measured the effects of 0.08 BAC laws by reviewing the fatality numbers in States with conforming 0.08 BAC laws at the time this study was conducted (15 States). This study concluded that 0.08 BAC laws might reduce alcohol-related fatalities by approximately 8 percent.

The preliminary regulatory evaluation uses a slightly different measure to determine the ''benefit'' of adoption of 0.08 BAC laws. As explained in more detail below, the ''benefit'' was determined in the preliminary regulatory evaluation by measuring the fatality numbers for the States that had not enacted conforming 0.08 BAC laws before the creation of the 0.08 sanction program in October 2000 (32 States), using an estimate that 0.08 BAC laws might reduce alcohol-related fatalities by 7 percent. This estimate was derived from a recent Center for Disease Control (CDC)-sponsored independent task force study, which calculated 7 percent as the median effectiveness percentage for 0.08 BAC laws. Using these measures, the preliminary regulatory evaluation concludes that 616 lives (are being/could be) saved each year by the adoption of 0.08 BAC laws. *See* Preliminary Regulatory Evaluation, *supra,* at 1.

A. Benefits

The preliminary regulatory evaluation concludes that changing the level of

alcohol from 0.10 to 0.08 in State *per se* laws will result in fewer alcohol-related traffic crashes and fatalities. Specifically, the preliminary regulatory evaluation cites a review performed by a CDC-sponsored independent task force, to support the conclusion that 0.08 BAC laws may reduce alcohol-related fatalities by 7 percent each year. This 7 percent reduction could annually prevent 616 fatalities, over 13,800 non-fatal injuries, and over 50,000 damaged vehicles involved in over 30,000 property-damage only (PDO) crashes. *See* Preliminary Regulatory Evaluation, *supra,* at 23.

B. Costs

The regulatory evaluation concludes that the impact of 0.08 BAC laws will depend on drinking drivers' perceptions that they are more likely to be caught over the limit, and thereby reduce the amount they drink before driving. To successfully accomplish this goal, States will develop public information campaigns, both at the time of legislative debate to inform the public of the need for the law and later during enforcement and prosecution of the law to help achieve compliance. Typically, States will use unpaid media exposure, such as news stories and public service messages, however, some States will implement public information campaigns that involve paying for airtime on radio and television and/or advertising space in print media and billboards. Both approaches would require the time of State and local workers, especially in the State Highway Safety Office, to develop and manage these public information programs.

To mitigate costs incurred in educating the public, States may use Federal highway safety grant funds to pay for the development of public information programs and for airtime and print advertising space. In addition, NHTSA provides sample press release kits to aid communities in publicizing new programs through newspapers, TV and radio.

Aside from advertising costs, the preliminary regulatory evaluation expects that the costs for implementing this proposed rule will be minimal and consist of changes that States make as a matter of course when amending a State law (*e.g.,* updating driver handbooks and forms).

C. Conclusion

The preliminary regulatory evaluation notes that it is difficult to measure the effects of 0.08 BAC laws. This difficulty arises because impaired-driving laws are often passed concurrently or within the same year. In addition, the degree of the law's enforcement, and especially the publicity surrounding that enforcement, can vary significantly and such variability can influence the law's effectiveness. Nonetheless, the preliminary regulatory evaluation concludes that 616 lives (are being/could be) saved each year by the adoption of 0.08 BAC laws.

Regulatory Flexibility Act

The Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant impact on a substantial number of small entities. We hereby certify that the rule proposed in this notice of proposed rulemaking will not have a significant economic impact on a substantial number of small entities. As a sanction program, this rule will have different consequences depending on whether the States enact and enforce a conforming 0.08 BAC law or whether they choose to accept the sanction for not enacting and enforcing a conforming law.

In States that have passed 0.08 BAC laws, consumption of beer has dropped 3.5 percent on average. By contrast, consumption of wine and spirits do not correlate with the number of drinking drivers in fatal crashes. Thus, if a State passes a 0.08 law, all businesses, large and small, that sell and serve beer are likely to experience a small reduction in sales. However, most businesses sell other products, such as food or other beverages. Therefore, the overall impact on those businesses would be significantly less than 3.5 percent. For some businesses, such as beer distributors (where a small business is defined as 100 employees or less), the decline may approach the 3.5 percent range. *See* Preliminary Regulatory Evaluation, *supra,* at 21.

States that do not enact and enforce conforming 0.08 BAC laws will lose Federal-aid highway funds. This loss may impact highway construction firms, where a small business is defined as $28.5 million in annual gross income. The precise number of small businesses that may be affected cannot be determined, since it is assumed that any impact is just as likely to impact businesses of any size. In addition, the penalty affects only Federal highway funds, which make up, on average in the 17 States affected, only 16 percent of all State highway expenditures. Accordingly, even if the sanction was imposed at the highest rate of 8 percent, the maximum reductions in highway expenditures in the relevant States would be within a range of only 0.77 percent (in Massachusetts) to 3.62 percent (in Montana). Further, most of these businesses do not rely totally on highway construction contracts for their revenue. Based on these considerations, the preliminary regulatory evaluation finds that this action would not result in a significant impact on the small businesses involved. *See* Preliminary Regulatory Evaluation, *supra,* at 21.

Paperwork Reduction Act

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as implemented by the Office of Management and Budget (OMB) in 5 CFR Part 1320.

National Environmental Policy Act

The agencies have analyzed this proposed action for the purpose of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and have determined that it would not have any significant impact on the quality of the human environment.

The Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) requires agencies to prepare a written assessment of the costs, benefits and other effects of rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This proposed rule does not require an assessment under this law. The costs to States to enact and make effective conforming 0.08 BAC laws will not result in annual expenditures that exceed the $100 million threshold. Moreover, States that enact 0.08 BAC laws will avoid the loss of millions of dollars in Federal-aid highway funds.

Executive Order 13132 (Federalism)

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

Under Executive Order 13132, the agency may not issue a regulation with

Federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local officials early in the process of developing the proposed regulation. The agencies also may not issue a regulation with Federalism implications that preempts State law unless the agency consults with State and local officials early in the process of developing the proposed regulation.

We have analyzed this proposed rule in accordance with the principles and criteria set forth in Executive Order 13132 and have determined that this proposal may have Federal implications. We intend to consult with State and local officials about this proposal, and we will include a Federalism summary impact statement in the preamble to the final rule. NHTSA seeks comments on the federalism impact of this proposal.

Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

The agencies have analyzed this proposed rule under Executive Order 13175, and believe that the proposed action would not have a substantial direct effect on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal law. Therefore, a tribal summary impact statement is not required.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory section listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this section with the Unified Agenda.

List of Subjects in 23 CFR Part 1225

Alcohol and alcoholic beverages, Transportation, Highway safety.

In consideration of the foregoing, the agencies propose to revise 23 CFR part 1225 as follows:

PART 1225—OPERATION OF MOTOR VEHICLES BY INTOXICATED PERSONS

Sec.

1225.1 Scope.
1225.2 Purpose.
1225.3 Definitions
1225.4 Adoption of 0.08 BAC *per se* law.
1225.5 General requirements for incentive grant program.
1225.6 Award procedures for incentive grant program.
1225.7 Certification requirements for sanction program.
1225.8 Funds withheld from apportionment.
1225.9 Period of availability of withheld funds.
1225.10 Apportionment of withheld funds after compliance.
1225.11 Notification of compliance.
1225.12 Procedures affecting states in noncompliance.
Appendix A To Part 1225—Effects of the 0.08 BAC Sanction Program on Non-Complying States

Authority: 23 U.S.C. 163; sec. 351, Pub. L 106–346—Appendix, 114 Stat. 1356A–34, 35; delegation of authority at 49 CFR 1.48 and 1.50.

§ 1225.1 Scope.

This part prescribes the requirements necessary to implement 23 U.S.C. 163, which encourages States to enact and enforce 0.08 BAC *per se* laws through the use of incentive grants and section 351 of Public Law 106–346—Appendix, which requires the withholding of Federal-aid highway funds from any State that has not enacted and is not enforcing a 0.08 BAC *per se* law as described in 23 U.S.C. 163.

§ 1225.2 Purpose.

The purpose of this part is to specify the steps that States must take to qualify for incentive grant funds in accordance with 23 U.S.C. 163; and the steps that States must take to avoid the withholding of funds as required by Section 351 of Public Law 106–346—Appendix.

§ 1225.3 Definitions.

As used in this part:

(a) *Alcohol concentration* means either grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

(b) *ALR* means either administrative license revocation or administrative license suspension.

(c) *BAC* means either blood or breath alcohol concentration.

(d) *BAC* per se law means a law that makes it an offense, in and of itself, to operate a motor vehicle with an alcohol concentration at or above a specified level.

(e) *Citations to State law* means citations to all sections of the State's law relied on to demonstrate compliance with 23 U.S.C. 163, including all applicable definitions and provisions of the State's criminal code and, if the State has an ALR law, all applicable provisions of the State's ALR law.

(f) *Has enacted and is enforcing* means the State's law is in effect and the State has begun to implement the law.

(g) *Operating a motor vehicle* means driving or being in actual physical control of a motor vehicle.

(h) *Standard driving while intoxicated offense* means the non-BAC *per se* driving while intoxicated offense in the State.

(i) *State* means any one of the fifty States, the District of Columbia, or Puerto Rico.

§ 1225.4 Adoption of 0.08 BAC per se law.

In order to avoid the withholding of funds as specified in § 1225.8 of this part, and to qualify for an incentive grant under § 1225.5 of this part, a State must demonstrate that it has enacted and is enforcing a law that provides that any person with a blood alcohol concentration (BAC) of 0.08 percent or greater while operating a motor vehicle in the State shall be deemed to have committed a *per se* offense of driving while intoxicated or an equivalent *per se* offense. The law must:

(a) Apply to all persons;

(b) Set a BAC of not higher than 0.08 percent as the legal limit;

(c) Make operating a motor vehicle by an individual at or above the legal limit a *per se* offense;

(d) Provide for primary enforcement;

(e) Apply the 0.08 BAC legal limit to the State's criminal code and, if the State has an administrative license suspension or revocation (ALR) law, to its ALR law; and

(f) Be deemed to be or be equivalent to the standard driving while intoxicated offense in the State.

§ 1225.5 General requirements for incentive grant program.

(a) *Certification requirements.*

(1) To qualify for a first-year grant under 23 U.S.C. 163, a State must submit a certification by an appropriate State official, that the State has enacted and is enforcing a 0.08 BAC *per se* law that conforms to 23 U.S.C. 163 and §1225.4 of this part and that the funds will be used for eligible projects and programs.

(i) If the State's 0.08 BAC *per se* law is currently in effect and is being enforced, the certification shall be worded as follows:

(Name of certifying official), (position title), of the (State or Commonwealth) of _____, do hereby certify that the (State or Commonwealth) of _____ has enacted and is enforcing a 0.08 BAC *per se* law that conforms to 23 U.S.C. 163 and 23 CFR 1225.4, (citations to State law), and that the funds received by the (State or Commonwealth) of _____ under 23 U.S.C. 163 will be used for projects eligible

for assistance under title 23 of the United States Code, which include highway construction as well as highway safety projects and programs.

(ii) If the State's 0.08 BAC *per se* law is not currently in effect, but will become effective and be enforced before the end of the current fiscal year, the certification shall be worded as follows:

(Name of certifying official), (position title), of the (State or Commonwealth) of _____, do hereby certify that the (State or Commonwealth) of _____ has enacted a 0.08 BAC *per se* law that conforms to 23 U.S.C. 163 and 23 CFR 1225.4, (citations to State law), and will become effective and be enforced as of (effective date of the law), and that the funds received by the (State or Commonwealth) of _____ under 23 U.S.C. 163 will be used for projects eligible for assistance under title 23 of the United States Code, which include highway construction as well as highway safety projects and programs.

(2) To qualify for a subsequent-year grant under 23 U.S.C. 163, a State must submit a certification by an appropriate State official.

(i) If the State's 0.08 BAC *per se* law has not changed since the State last qualified for grant funds under this program, the certification shall be worded as follows:

(Name of certifying official), (position title), of the (State or Commonwealth) of _____, do hereby certify that the (State or Commonwealth) of _____ has not changed and is enforcing a 0.08 BAC *per se* law, which conforms to 23 U.S.C. 163 and 23 CFR 1225.4, and that the funds received by the (State or Commonwealth) of _____ under 23 U.S.C. 163 will be used for projects eligible for assistance under title 23 of the United States Code, which include highway construction as well as highway safety projects and programs.

(ii) If the State's 0.08 BAC *per se* law has changed since the State last qualified for grant funds under this program, the certification shall be worded as follows:

(Name of certifying official), (position title), of the (State or Commonwealth) of _____, do hereby certify that the (State or Commonwealth) of _____ has amended and is enforcing a 0.08 BAC *per se* law that conforms to 23 U.S.C. 163 and 23 CFR 1225.4, (citations to State law), and that the funds received by the (State or Commonwealth) of _____, under 23 U.S.C. 163 will be used for projects eligible for assistance under title 23 of the United States Code, which include highway construction as well as highway safety projects and programs.

(3) An original and four copies of the certification shall be submitted to the appropriate NHTSA Regional Administrator. Each Regional Administrator will forward the certifications it receives to appropriate NHTSA and FHWA offices.

(4) Each State that submits a certification will be informed by the agencies whether or not it qualifies for funds.

(5) To qualify for grant funds in a fiscal year, certifications must be received by the agencies not later than July 15 of that fiscal year.

(b) *Limitation on grants.* A State may receive grant funds, subject to the following limitations:

(1) The amount of a grant apportioned to a State under § 1225.4 of this part shall be determined by multiplying:

(i) The amount authorized to carry out section 163 of 23 U.S.C. for the fiscal year; by

(ii) The ratio that the amount of funds apportioned to each such State under section 402 for such fiscal year bears to the total amount of funds apportioned to all such States under section 402 for such fiscal year.

(2) A State may obligate grant funds apportioned under this part for any project eligible for assistance under title 23 of the United States Code.

(3) The Federal share of the cost of a project funded with grant funds awarded under this part shall be 100 percent.

§ 1225.6 Award procedures for incentive grant program.

(a) In each Federal fiscal year, grant funds will be apportioned to eligible States upon submission and approval of the documentation required by § 1225.5(a) and subject to the limitations in § 1225.5(b). The obligation authority associated with these funds are subject to the limitation on obligation pursuant to section 1102 of the Transportation Equity Act for the 21st Century (TEA–21).

(b) As soon as practicable after the apportionment in a fiscal year, but in no event later than September 30 of the fiscal year, the Governor's Representative for Highway Safety and the Secretary of the State's Department of Transportation for each State that receives an apportionment shall jointly identify, in writing to the appropriate NHTSA Regional Administrator and FHWA Division Administrator, the amounts of the State's apportionment that will be obligated to highway safety program areas and to Federal-aid highway projects.

§ 1225.7 Certification requirements for sanction program.

(a) Beginning with FY 2004, to avoid the withholding of funds, each State shall certify to the Secretary of Transportation, before the last day of the previous fiscal year, that it meets all of the requirements of 23 U.S.C. 163 and this part.

(b) The certification shall contain a statement from an appropriate State official that the State has enacted and is enforcing a 0.08 BAC *per se* law that conforms to 23 U.S.C. 163 and 23 CFR part 1225. The certifying statement should be worded as follows:

I, (name of certifying official), (position title), of the (State or Commonwealth) of _____, do hereby certify that the (State or Commonwealth) of _____, has enacted and is enforcing a 0.08 BAC *per se* law that conforms to the requirements of 23 U.S.C. 163 and 23 CFR 1225, (citations to State law).

(c) An original and four copies of the certification shall be submitted to the appropriate NHTSA Regional Administrator. Each Regional Administrator will forward the certifications it receives to appropriate NHTSA and FHWA offices.

(d) Once a State has been determined to be in compliance with the requirements of 23 U.S.C. 163 and this part, it is not required to submit additional certifications, except that the State shall promptly submit an amendment or supplement to its certification provided under paragraphs (a) and (b) of this section if the State's 0.08 BAC *per se* law changes.

(e) FY 2003 Certifications.

(1) Any State that submits a certification of compliance in conformance with the requirements of 23 U.S.C. 163 on or before July 15, 2003, will qualify for an incentive grant in FY 2003 and will avoid the withholding of funds in FY 2004. All certifications submitted in conformance with the incentive grant program will meet the certification requirements of the sanction program. No further certification is necessary from these States.

(2) Any State that submits a certification of compliance in conformance with the requirements of 23 U.S.C. 163 between July 16, 2003 and September 30, 2003, will not qualify for an incentive grant in FY 2003, but will meet the certification requirements of the sanction program, thereby avoiding the withholding of funds in FY 2004. No further certification is necessary from these States.

§ 1225.8 Funds withheld from apportionment.

(a) Beginning in fiscal year 2004, the Secretary shall withhold two percent of the amount required to be apportioned for Federal-aid highways to any State under each of paragraphs (1), (3), and (4) of section 104(b) of title 23, United

States Code, if a State has not enacted and is not enforcing a law that meets the requirements of 23 U.S.C. 163 and § 1225.4 of this part.

(b) In fiscal year 2005, the Secretary shall withhold four percent of the amount required to be apportioned for Federal-aid highways to any State under each of paragraphs (1), (3), and (4) of section 104(b) of title 23, United States Code, if a State has not enacted and is not enforcing a law that meets the requirements of 23 U.S.C. 163 and § 1225.4 of this part.

(c) In fiscal year 2006, the Secretary shall withhold six percent of the amount required to be apportioned for Federal-aid highways to any State under each of paragraphs (1), (3), and (4) of section 104(b) of title 23, United States Code, if a State has not enacted and is not enforcing a law that meets the requirements of 23 U.S.C. 163 and § 1225.4 of this part.

(d) In fiscal year 2007, and in each fiscal year thereafter, the Secretary shall withhold eight percent of the amount required to be apportioned for Federal-aid highways to any State under each of paragraphs (1), (3), and (4) of section 104(b) of title 23, United States Code, if a State has not enacted and is not enforcing a law that meets the requirements of 23 U.S.C. 163 and § 1225.4 of this part.

§ 1225.9 Period of availability of withheld funds.

If a State meets the requirements of 23 U.S.C. 163 and § 1225.4 of this part within four years from the date that a State's apportionment is reduced under § 1225.8, the apportionment for such State shall be increased by an amount equal to the reduction, as illustrated by appendix A of this part.

§ 1225.10 Apportionment of withheld funds after compliance.

If a State has not met the requirements of 23 U.S.C. 163 and § 1225.4 of this part by October 1, 2007, the funds withheld under § 1225.8 shall begin to lapse and will no longer be available for apportionment to the State, in accordance with appendix A of this part.

§ 1225.11 Notification of compliance.

(a) Beginning with FY 2004, NHTSA and FHWA will notify States of their compliance or noncompliance with the statutory and regulatory requirements of 23 U.S.C. 163 and this part, based on a review of certifications received. States will be required to submit their certifications on or before September 30, to avoid the withholding of funds in a fiscal year.

(b) This notification of compliance will take place through FHWA's normal certification of apportionments process. If the agencies do not receive a certification from a State or if the certification does not conform to the requirements of 23 U.S.C. 163 and this part, the agencies will make an initial determination that the State is not in compliance.

§ 1225.12 Procedures affecting states in noncompliance.

(a) Each fiscal year, beginning with FY 2004, based on a preliminary review of certifications received, States that are determined to be in noncompliance with 23 U.S.C. 163 and this part, will be advised of the amount of funds expected to be withheld through FHWA's advance notice of apportionments, normally not later than ninety days prior to final apportionment.

(b) If NHTSA and FHWA determine that any State is not in compliance with 23 U.S.C. 163 and this part, based on the agencies' preliminary review, the State may, within 30 days of its receipt of the advance notice of apportionments, submit documentation showing why it is in compliance. Documentation shall be submitted through NHTSA's Regional Administrators, who will refer the requests to appropriate NHTSA and FHWA offices for review.

(c) Each fiscal year, each State determined not to be in compliance with 23 U.S.C. 163 and this part, based on NHTSA's and FHWA's final determination, will receive notice of the funds being withheld under § 1225.8 from apportionment, as part of the certification of apportionments required under 23 U.S.C. 104(e), which normally occurs on October 1 of each fiscal year.

Appendix A to Part 1225—Effects of the 0.08 BAC Sanction Program on Non-Complying States

EFFECTS OF THE 0.08 BAC SANCTION PROGRAM ON NON-COMPLYING STATES

Fiscal year	Withhold (percent)	Lapse (percent)
2004	2	
2005	4	
2006	6	
2007	8	
2008	8	2% withheld in FY04.
2009	8	4% withheld in FY05.
2010	8	6% withheld in FY06.
2011	8	8% withheld in FY07.
2012	8	8% withheld in FY08.

Issued on: January 31, 2003.

Mary E. Peters,

Administrator, Federal Highway Administration.

Jeffrey W. Runge,

Administrator, National Highway Traffic Safety Administration.

[FR Doc. 03–2790 Filed 2–5–03; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD05–02–065]

RIN 2115–AE47

Drawbridge Operation Regulations; Raccoon Creek, NJ

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to change the regulations that govern the operation of the Consolidated Rail Corporation (CONRAIL) Railroad Bridge across Raccoon Creek at mile 2.0, in Bridgeport, New Jersey. The proposed rule would increase openings and eliminate the need for a bridge tender by allowing the bridge to be operated by a train crewmember. This change will provide for the reasonable needs of navigation.

DATES: Comments and related material must reach the Coast Guard on or before April 7, 2003.

ADDRESSES: You may mail comments and related material to Commander (Aowb), Fifth Coast Guard District, Federal Building, 4th Floor, 431 Crawford Street, Portsmouth, Virginia 23704–5004, or they may be hand delivered to the same address between 8 a.m. and 4 p.m., Monday through Friday, except Federal Holidays. The telephone number is (757) 398–6222. The Commander (Aowb), Fifth Coast Guard District 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, will become part of this docket and will be available for inspection or copying at the above address.

FOR FURTHER INFORMATION CONTACT: Ann B. Deaton, Bridge Administrator, Fifth Coast Guard District, at (757) 398–6222.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting

comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CCGD5–02–065), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to the Commander, Fifth Coast Guard District at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

CONRAIL, who owns and operates this movable (swing-type) bridge, requested changes to the operating procedure for the drawbridge located at mile 2.0 across Raccoon Creek, in Bridgeport, New Jersey. Currently, Title 33 Code of Federal Regulations (CFR) Part 117.741 requires the bridge to open on signal from March 1 through November 30 from 7 a.m. to 11 p.m. At all other times, the draw must open on signal if at least four hours notice is given. The draw must open at all times as soon as possible for passage of a public vessel of the United States.

In late September 2002, CONRAIL will be installing a new Programmable Logic Controller and associated mechanical, electrical and signal apparatus on the CONRAIL Railroad Bridge over Raccoon Creek in Bridgeport, New Jersey. The proposal would allow a radio-controlled system to operate the opening and closing of the swing span, which would be controlled from the cab of the locomotive. From March 1 through November 30, the swing bridge will normally be left in the fully opened position displaying flashing green channel lights indicating that vessels may pass through. At all other times, the draw the CONRAIL Railroad Bridge need only open on signal if at least four hours notice is given by calling (856) 231–2393.

When a train approaches the bridge, it will stop and a train crewmember will observe the waterway for approaching craft, which will be allowed to pass. The train crewmember will then enter a prearranged code number using a radio keypad. The radio code will send a radio signal to the Programmable Logic Controller attached to the bridge, which will begin the process of closing the bridge. At that time, the bridge channel lights will change from flashing green to flashing red, a horn blast will sound four times, followed by a pause, then the four horn blasts will be repeated and the bridge will close. Once closed, the train will proceed across the bridge. After the train has cleared the swing span, which is approximately 300 feet from the bridge, the horn will automatically sound five times to indicate the span of the bridge is about to return to the full open position. Channel traffic lights would change from flashing green to flashing red any time the bridge is not in the full open position. In the full open position, the channel traffic lights will turn from flashing red to flashing green.

This change is being requested to make the closure process of the CONRAIL Railroad Bridge be more efficient during train crossings and periodic maintenance and to save operational costs by eliminating bridge tenders while providing greater bridge operating capabilities.

Discussion of Proposed Rule

The Coast Guard proposes to revise 33 CFR 117.741, which governs the Route 130 highway bridge, mile 1.8 and the CONRAIL Railroad bridge at mile 2.0, both across Raccoon Creek in Bridgeport, New Jersey. From March 1 through November 30 from 7 a.m. to 11 p.m., the draw of both bridges currently open on signal. At all other times, the draws shall open on signal if at least four hours notice is given. The draws shall open at all times as soon as possible for passage of a public vessel of the United States.

The current paragraph would be divided into paragraphs (a) and (b). Paragraph (a) would contain the existing rule for the Route 130 highway bridge, mile 1.8, at Bridgeport and would state that the draw of shall open on signal from March 1 to November 30. At all other times, the draw shall open on signal if at least four hours notice is given.

Paragraph (b) would contain the proposed rule for the CONRAIL Railroad Bridge, mile 2.0, at Bridgeport. The proposed rule would require the draw of the CONRAIL Railroad Bridge, mile 2.0, at Bridgeport, to be operated by a train crewmember. From March 1 through November 30, the bridge would be left in the open position and would only close for the passage of trains and to perform periodic maintenance authorized in accordance with subpart A of this part.

At all other times, the draw of the CONRAIL Railroad Bridge need only open on signal if at least four hours notice is given by calling (856) 231–2393.

When the CONRAIL Railroad Bridge closes for any reason, a train crewmember will assist in observing the waterway for approaching craft, which will be allowed to pass. The train crewmember will then operate the bridge by control radiophone.

The CONRAIL Railroad Bridge would only be closed if the train crewmember's visual inspection shows that the channel is clear and there are no vessels transiting in the area.

While the CONRAIL Railroad Bridge is moving from the full open position to the full closed position, the train crewmember will maintain constant surveillance of the navigation channel to ensure no conflict with maritime traffic exists. In the event of failure or obstruction, the train crewmember will stop and return to the full open position.

The CONRAIL Railroad Bridge channel traffic lights would change from flashing green to flashing red any time the bridge is not in the full open position. During span movement, the channel traffic lights would change from flashing green to flashing red, the horn will sound four times, followed by a pause, then the four blasts will be repeated and the bridge will close.

When the rail traffic has cleared, the horn will automatically sound five times to indicate that the draw of the CONRAIL Railroad Bridge is about to return to its full open position. During the open span movement, the channel traffic lights would turn from flashing green to flashing red, the horn will sound four times, followed by a pause, then four repeat blasts of the horn until the bridge is in the full open position. In the full open position, the bridge channel traffic lights will turn from flashing red to flashing green. After the train has cleared the bridge by leaving the track circuit, any delay in opening of the draw shall not exceed ten minutes except as provided in 33 CFR 117.31(b).

The surplus language currently stated in 33 CFR 117.741 would be removed to be consistent with the general operating regulations under 33 CFR 117.31. The Coast Guard intends to delete the phrase ''the draws shall open on signal as soon as possible for passage of a public vessel of the United States.'' This requirement is currently published in 33 CFR

117.31(a)(1) and is no longer required to be published in each specific bridge regulation.

Regulatory Evaluation

This proposed 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, l979).

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary. We reached this conclusion based on the fact that the proposed changes for the CONRAIL Railroad Bridge regulation will provide for greater flow of vessel traffic than the current regulations of the drawbridge.

Under the current regulations, the CONRAIL Railroad Bridge remains closed and open after proper signal March 1 through November 30 from 7 a.m. to 11 p.m. The proposed regulation will require the bridge to remain in the open position from March 1 through November 30, permitting vessels to pass freely. The bridge will close only for train crossings and bridge maintenance. This proposed regulation will provide for the reasonable needs of navigation.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed 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 proposed rule would not have a significant economic impact on a substantial number of small entities.

This proposed rule would not have a significant economic impact on a substantial number of small entities for the following reasons. The proposed rule will provide for the CONRAIL Railroad Bridge to remain in the open position from March 1 through November 30, allowing the free flow of vessel traffic. The bridge would only close for the passage of trains and maintenance.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed 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 Ann B. Deaton, Bridge Administrator, Fifth Coast Guard District, (757) 398–6222.

Collection of Information

This proposed rule would call 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 governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have 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 proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would 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.

Civil Justice Reform

This proposed 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 proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would 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.

To help the Coast Guard establish regular and meaningful consultation and collaboration with Indian and Alaskan Native tribes, we published a notice in the **Federal Register** (66 FR 36361, July 11, 2001) requesting comments on how to best carry out the Order. We invite your comments on how this proposed rule might impact tribal governments, even if that impact may not constitute a ''tribal implication'' under the Order.

Energy Effects

We have analyzed this proposed 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. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs 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 proposed rule and concluded that, under figure 2–1, paragraph (32)(e), of Commandant Instruction M16475.lD, 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 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATIONS REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05–1(g); Section 117.255 also issued under authority of Pub.L. 102–587, 106 Stat. 5039.

2. Section 117.741 is revised to read as follows:

§ 117.741 Raccoon Creek.

(a) The draw of the Route 130 highway bridge, mile 1.8 at Bridgeport, shall open on signal:

(1) March 1 through November 30, from 7 a.m. to 11 p.m.

(2) At all other times, if at least four hours notice is given.

(b) The draw of the CONRAIL Railroad Bridge, mile 2.0 at Bridgeport, shall operate as follows:

(1) From March 1 through November 30, the draw shall be left in the open position at all times and will only be close for the passage of trains and to perform periodic maintenance authorized in accordance with subpart A of this part.

(i) Trains shall be controlled so that any delay in opening of the draw shall not exceed ten minutes except as provided in § 117.31(b).

(ii) Before the bridge closes for any reason, a train crewmember will observe the waterway for approaching craft, which will be allowed to pass. A train crewmember will then operate the bridge by radiophone. The bridge shall only be closed if a train crewmember's visual inspection shows that the channel is clear and there are no vessels transiting in the area.

(iii) While the CONRAIL Railroad Bridge is moving from the full open to the full closed position, a train crewmember will maintain constant surveillance of the navigational channel to ensure no conflict with maritime traffic exists. In the event of failure or obstruction, the train crewmember will stop the bridge and return the bridge to the open position.

(iv) The CONRAIL Railroad channel traffic lights will change from flashing green to flashing red anytime the bridge is not in the full open position.

(v) During closing of the span, the channel traffic lights will change from flashing green to flashing red, the horn will sound four times, followed by a pause, then the four blasts will be repeated and the bridge will close. When the rail traffic has cleared the swing span, the horn will automatically sound five times to signal the draw of the CONRAIL Railroad Bridge is about to return to its full open position.

(vi) During open span movement, the channel traffic lights will be flashing red, the horn will sound four times, followed by a pause, then four blasts will be repeated until the bridge is in the full open position. In the full open position, the channel traffic lights will then turn from flashing red to flashing green.

(2) At all other times, the draw may be left in the closed position and opened on signal if at least four hours notice is given by telephone at (856) 231–2393.

Dated: January 28, 2003.

James D. Hull,

Vice Admiral, USCG, Commander, Fifth Coast Guard District.

[FR Doc. 03–2930 Filed 2–5–03; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 030124019–3019–01; I.D. 010703B]

RIN 0648–AQ67

Pacific Halibut Fisheries; Catch Sharing Plan

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

ACTION: Proposed rule; proposed changes to the Catch Sharing Plan and to sport fishing management.

SUMMARY: NMFS proposes, under authority of the Northern Pacific Halibut Act (Halibut Act), to approve and implement changes to the Area 2A Pacific Halibut Catch Sharing Plan (Plan) to: implement closed areas for the Washington North Coast sport fishery subarea and the nontreaty commercial halibut fishery to protect yelloweye rockfish; allocate subarea halibut quota between the May and June sport seasons in Washington's North Coast subarea; cap the incidental halibut retention allocation for the primary sablefish fishery at 70,000 lb (31.8 kg) when halibut is available to that fishery; move the season ending date for Oregon sport fisheries in the North Central and South Central areas from September 30 to October 31; provide more flexibility for inseason sport fishery management; and revise the names of Oregon sport seasons. These actions are intended to enhance the conservation of Pacific halibut and to protect yelloweye rockfish, and overfished groundfish species, from incidental catch in the halibut fisheries.

DATES: Comments on the proposed changes to the Plan and on the proposed sport fishery regulations must be received by February 18, 2003.

ADDRESSES: Send comments or requests for a copy of the Plan and/or the EA/RIR to D. Robert Lohn, Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115. Electronic copies of the Plan, including proposed changes for 2003, and of the draft EA/RIR are also available at the NMFS Northwest Region Web site: *http://www.nwr.noaa.gov*, click on ''Pacific Halibut.'' Comments will not be accepted if submitted via email or the Internet.

FOR FURTHER INFORMATION CONTACT: Yvonne deReynier or Jamie Goen (Northwest Region, NMFS), phone: 206–526–6140; fax: 206–526–6736 and; e-mail: *yvonne.dereynier@noaa.gov* or *jamie.goen@noaa.gov*.

SUPPLEMENTARY INFORMATION: The Halibut Act of 1982, at 16 U.S.C. 773c, gives the Secretary of Commerce (Secretary) general responsibility for implementing the provisions of the Halibut Convention between the United States and Canada. It requires the Secretary to adopt such regulations as may be necessary to carry out the purposes and objectives of the Convention and the Halibut Act. Section 773c(c) of the Halibut Act authorizes the Regional Fishery Management Councils to develop regulations governing the Pacific halibut catch in their corresponding U.S. Convention waters that are in addition to, but not in conflict with, regulations of the International Pacific Halibut Commission (IPHC). Each year between 1988 and 1995, the Pacific Fishery Management Council (Pacific Council) developed a catch sharing plan in accordance with the Halibut Act to allocate the total allowable catch (TAC) of Pacific halibut between treaty Indian and non-treaty harvesters and among non-treaty commercial and sport

fisheries in IPHC statistical Area 2A (off Washington, Oregon, and California).

In 1995, NMFS implemented the Pacific Council-recommended long-term Plan (60 FR 14651, March 20, 1995). In each of the intervening years between 1995 and the present, minor revisions to the Plan have been made to adjust for the changing needs of the fisheries. The Plan allocates 35 percent of the Area 2A TAC to Washington treaty Indian tribes in Subarea 2A–1 and 65 percent to non-Indian fisheries in Area 2A. The allocation to non-Indian fisheries is divided into three shares, with the Washington sport fishery (north of the Columbia River) receiving 36.6 percent, the Oregon/California sport fishery receiving 31.7 percent, and the commercial fishery receiving 31.7 percent. The commercial fishery is further divided into a directed commercial fishery that is allocated 85 percent of the commercial allocation and an incidental catch in the salmon troll fishery that is allocated 15 percent of the commercial allocation. The directed commercial fishery in Area 2A is confined to southern Washington (south of 46°53′18″ N. lat.), Oregon, and California. North of 46°53′18″ N lat. (Pt. Chehalis), the Plan allows for incidental halibut retention in the primary limited entry sablefish fishery when the overall Area 2A TAC is above 900,000 lb (408.2 mt). The Plan also divides the sport fisheries into seven geographic subareas, each with separate allocations, seasons, and bag limits.

Pacific Council Recommended Changes to the Plan

Each year, the states and tribes consider whether changes to the Plan are needed or desired by their fishery participants. Fishery managers from the states and tribes hold public meetings before both the September and November Pacific Council meetings to get public input on revisions to the Plan. At the September 2002 Pacific Council meeting, the states recommended several changes to the Plan and the tribes announced that they had no proposal for revising the Plan in 2003. Following the September 2002 Pacific Council meeting, the states again reviewed their proposals with the public and drafted their recommended revisions for review by the Pacific Council.

At its October 29 through November 1, 2002, meeting, the Pacific Council considered the results of State-sponsored workshops on the proposed changes to the Plan and public comments, and made the final recommendations for modifications to the Plan as follows:

(1) Divide the Washington North Coast subarea recreational quota such that 78 percent of the quota for that subarea is available to a May fishery and 22 percent is available for a late June fishery. Revise the closed area within this sport fishery subarea to better protect yelloweye rockfish, an overfished groundfish species.

(2) Require non-treaty commercial vessels operating in the directed commercial fishery for halibut to fish offshore of 100 fm (184 m) to protect yelloweye rockfish.

(3) Cap the incidental halibut retention allocation for the primary sablefish fishery at 70,000 lb (31.8 kg) when halibut is available to that fishery so that the fishery is maintained as an incidental, not directed, opportunity.

(4) Change the season ending date for Oregon sport fisheries in the North Central and South Central areas from September 30 to October 31.

(5) Revise the inseason management provisions to allow more flexibility for managers making inseason adjustments to fishery openings and closures to ensure that the available quota may be taken.

(6) Change the names of the Oregon North Central and South Central all-depth fisheries from the ''May'' and ''August'' fisheries to the ''Spring'' and ''Summer'' fisheries.

Proposed Changes to the Catch Sharing Plan

NMFS is proposing to approve and to make the following changes to the Plan:

In section (e) of the Plan, Non-Indian Commercial Fisheries, insert a new third sentence in paragraph (2) to read as follows:

This fishery may also be managed with closed areas designed to protect overfished groundfish species. Any such closed areas will be described annually in Federal halibut regulations and published in the **Federal Register**.

In section (e) of the Plan, Non-Indian Commercial Fisheries, add a sentence at the end of the first paragraph of paragraph (3) to read as follows:

The amount of halibut allocated to the sablefish fishery will be shared as follows: up to 70,000 lb (31.8 kg) of halibut to the primary sablefish fishery north of Pt. Chehalis. Any remaining allocation will be distributed to the Washington sport fishery among the four subareas according to the sharing described in the Plan, Section (f)(1).

In section (f) of the Plan, Sport Fisheries, revise the third sentence through the end of the paragraph of paragraph (1)(ii) to read from the third sentence as follows:

The management objective for this subarea is to provide a quality recreational fishing opportunity during May and the latter part of June. To meet this objective, the north coast subarea quota will be allocated as follows: 72 percent for the month of May and 28 percent for the latter part of June. The fishery will open on May 1, and continue 5 days per week (Tuesday through Saturday) until the May allocation is projected to be taken. If May 1 falls on a Sunday or Monday, the fishery will open on the following Tuesday. The fishery will then reopen on the third Wednesday in June and continue until the remaining quota is projected to be taken, 5 days per week (Tuesday through Saturday.) No sport fishing for halibut is allowed after September 30. The daily bag limit in all fisheries is one halibut per person, with no size limit. A ''C-shaped'' yelloweye rockfish conservation area that is closed to recreational groundfish and halibut fishing is defined by the following coordinates in the order listed:

48°18' N. lat.; 125°18' W. long.;
48°18' N. lat.; 124°59' W. long.;
48°11' N. lat.; 124°59' W. long.;
48°11' N. lat.; 125°11' W. long.;
48°04' N. lat.; 125°11' W. long.;
48°04' N. lat.; 124°59' W. long.;
48°00' N. lat.; 124°59' W. long.;
48°00' N. lat.; 125°18' W. long.;
and connecting back to 48°18' N. lat.; 125°18' W. long.

In section (f) of the Plan, Sport Fisheries, revise the third through the thirteenth sentence of paragraph (1)(v) to read from the third sentence as follows:

The structuring objectives for this subarea are to provide two periods of fishing opportunity in spring and in summer in productive deeper water areas along the coast, principally for charterboat and larger private boat anglers, and provide a period of fishing opportunity in the summer for nearshore waters for small boat anglers. Fixed season dates will be established preseason for the spring and summer openings and will not be modified inseason except that the summer openings may be modified inseason if the combined Oregon all-depth quotas are estimated to be achieved. Recent year catch-rates will be used as a guideline for estimating the catch rate for the spring and summer fisheries each year. The number of fixed season days established will be based on the projected catch per day with the intent of not exceeding the subarea season subquotas. Oregon Department of Fish and Wildlife (ODFW) will monitor landings and provide a postseason estimate of catch within 2 weeks of the

end of the fixed season. If sufficient catch remains for an additional day of fishing after the spring season or the summer season, the fishery may be reopened between May and June or August and October respectively. Additional opening dates for both the spring and summer seasons will be announced preseason. If a decision is made inseason to allow fishing on one or more additional days, notice of the opening will be announced on the NMFS hotline (206) 526–6667 or (800) 662–9825. No all-depth halibut fishing will be allowed on the additional dates unless the opening date has been announced on the NMFS hotline. If preseason catch and effort estimates determine catch rates and quotas allocated to the Oregon North Coast and South Coast subareas will result in spring seasons of differing durations, quota may be shifted pre- or inseason to ensure that the two subareas have the same number of fishing days. Any poundage remaining unharvested in the spring all-depth subquota will be added to the summer all-depth subquota. Any poundage that is not needed to extend the inside 30–fathom fishery through to October 31 will be added to the summer all-depth season if it can be used, and any poundage remaining unharvested from the summer all-depth fishery will be added to the inside 30–fathom fishery subquotas.

In section (f) of the Plan, Sport Fisheries, paragraph (1)(v)(A) is revised to read as follows:

The first season opens on May 1, only in waters inside the 30–fathom (55 m) curve, and continues daily until the combined subquotas for the North Central and South Central inside 30–fathom fisheries (7 percent of the North Central subarea quota plus 20 percent of the South Central subarea quota) are taken, or until October 31, whichever is earlier. Poundage that is estimated to be above the amount needed to keep this season open through October 31 will be transferred to the summer all-depth fishery if it can be used. Any overage in the all-depth fisheries would not affect achievement of allocation set aside for the inside 30–fathom curve fishery.

In section (f) of the Plan, Sport Fisheries, revise the fourth through the thirteenth sentence of paragraph (1)(vi) to read from the third sentence as follows:

Fixed season dates will be established preseason for the spring and summer openings and will not be modified inseason except that the summer openings may be modified inseason if the combined Oregon all-depth quotas are estimated to be achieved. Recent year catch rates will be used as a guideline for estimating the catch rate for the spring fishery and summer fishery each year. The number of fixed season days established will be based on the projected catch per day with the intent of not exceeding the subarea season subquotas. ODFG will monitor landings and provide a postseason estimate of catch within 2 weeks of the end of the fixed season. If sufficient quota remains for an additional day of fishing after the spring season or the summer season, the fishery may be reopened from May to July and August to October respectively. Additional opening dates for both the spring and summer seasons will be announced preseason. If a decision is made inseason to allow fishing on one or more additional days, notice of the opening will be announced on the NMFS hotline (206) 526–6667 or (800) 662–9825. No all-depth halibut fishing will be allowed on the additional dates unless the opening date has been announced on the NMFS hotline. If preseason catch and effort estimates determine catch rates and quotas allocated to the Oregon North Coast and South Coast subareas will result in spring seasons of differing durations, quota may be shifted preseason to ensure that the two subareas have the same number of fixed season days. Any poundage remaining unharvested in the spring all-depth subquota will be added to the summer all-depth sub-quota. Any poundage that is not needed to extend the inside 30–fathom fishery through to October 31 will be added to the summer all-depth season, if it can be used, and any poundage remaining unharvested from the August all-depth fishery will be added to the inside 30–fathom fishery subquotas.

In section (f) of the Plan, Sport Fisheries, paragraph (1)(vi)(A) is revised to read as follows:

The first season opens on May 1, only in waters inside the 30–fathom (55 m) curve, and continues daily until the combined subquotas for the North Central and South Central inside 30–fathom fisheries (7 percent of the North central subarea quota plus 20 percent of the South Central subarea quota) are taken, or until October 31, whichever is earlier. Poundage that is estimated to be above the amount needed to keep this season open through October 31 will be transferred to the summer all-depth fishery if it can be utilized. Any overage in the all-depth fisheries would not affect achievement of allocation set aside for the inside 30–fathom curve fishery.

In section (f) of the Plan, Sport Fisheries, paragraph (5)(i)(C) is revised to read as follows:

If any of the sport fishery subareas north of Cape Falcon, OR are not projected to utilize their respective quotas by September 30, NMFS may take inseason action to transfer any projected unused quota to another Washington sport subarea.

In section (f) of the Plan, Sport Fisheries, paragraph (5)(i)(D) is added to read as follows:

If any of the sport fishery subareas south of Leadbetter Point, WA are not projected to utilize their respective quotas by their season ending dates, NMFS may take inseason action to transfer any projected unused quota to another Oregon sport subarea.

In section (f) of the Plan, Sport Fisheries, paragraph (5)(ii)(E) is revised to read as follows:

Modification of subarea quotas north of Cape Falcon, OR.

Proposed 2003 Sport Fishery Management Measures

NMFS is proposing sport fishery management measures that are necessary to implement the Plan in 2003. The 2003 TAC for Area 2A was determined by the IPHC at its annual meeting January 21–24, 2003, to be 1,310,000 lb (594 mt), the same as in 2002. The proposed 2003 sport fishery regulations based on the Area 2A TAC of 1,310,000 lb (594 mt) are as follows:

Washington Inside Waters (Subarea Puget Sound and Straits)

This subarea would be allocated 63,278 lb (28.7 mt) at an Area 2A TAC of 1,310,000 lb (594 mt) in accordance with the Plan. According to the Plan, the structuring objective for this subarea is to provide a stable sport fishing opportunity and to maximize the season length. In 2002, the fishery in this subarea was 49 days long, from May 23 through July 26, held for 5 days per week (Thursday through Monday). For the 2003 fishing season, the fishery in this subarea would be set to meet the structuring objectives described in the Plan, possibly with separate seasons in eastern and western Puget Sound. The final determination of the season dates would be based on the allowable harvest level, projected 2003 catch rates and on recommendations developed in a public workshop sponsored by Washington Department of Fish and Wildlife after the 2003 TAC is set by the IPHC. The daily bag limit would be one halibut of any size per day, per person.

Washington North Coast Subarea (North of the Queets River)

This subarea would be allocated 113,915 lb (52 mt) at an Area 2A TAC of 1,310,000 lb (594 mt) in accordance

with the Plan. According to the Plan, the management objective for this subarea is to provide a quality recreational fishing opportunity during May and the latter part of June. The fishery opens on May 1, and continues 5 days per week (Tuesday through Saturday) until 72 percent of the quota for the subarea has been taken, 82,019 lb (37 mt). The fishery will re-open on the third Wednesday in June, which is June 18th, until the remaining quota for the subarea is taken, 31,896 lb (14 mt). The daily bag limit would be one halibut of any size per day per person. A portion of this subarea would be closed to sport fishing for halibut as a yelloweye rockfish conservation area bounded by the following coordinates:

48°18′ N. lat.; 125°18′ W. long.;
48°18′ N. lat.; 124°59′ W. long.;
48°11′ N. lat.; 124°59′ W. long.;
48°11′ N. lat.; 125°11′ W. long.;
48°04′ N. lat.; 125°11′ W. long.;
48°04′ N. lat.; 124°59′ W. long.;
48°00′ N. lat.; 124°59′ W. long.;
48°00′ N. lat.; 125°18′ W. long.;

and connecting back to 48°18′ N. lat.; 125°18′ W. long.

Washington South Coast Subarea

This subarea would be allocated 48,623 lb (22 mt) at an Area 2A TAC of 1,310,000 lb (594 mt) in accordance with the Plan. The fishery would open on May 1 and continue 5 days per week (Sunday through Thursday) until September 30, or until the quota is achieved, whichever occurs first. According to the Plan, the structuring objective for this subarea is to maximize the season length, while maintaining a quality fishing experience. The fishery would be open Sunday through Thursday in all areas, except where prohibited, and the fishery will be open 7 days per week in the area from the Queets River south to 47°00′00″ N lat. and east of 124°40′00″ W long. Subsequent to the closure of the Washington South Coast subarea, if any remaining quota is sufficient for a nearshore fishery, the area from the Queets River south to 47°00′00″ N lat. and east of 124°40′00″ W long. would be allowed 7 days per week until either the remaining subarea quota is estimated to have been taken and the season is closed by the IPHC, or until September 30, whichever occurs first. The daily bag limit would be one halibut of any size per day, per person.

Columbia River Subarea

This subarea would be allocated 11,923 lb (5.4 mt) at an Area 2A TAC of 1,310,000 lb (594 mt) in accordance with the Plan. The fishery would open on May 1 and continue 7 days per week until the quota is reached or September 30, whichever occurs first. The daily bag limit would be the first halibut taken, per person, of 32 inches (81.3 cm) or greater in length.

Oregon North Central Coast Subarea

This subarea would be allocated 230,639 lb (104.6 mt) at an Area 2A TAC of 1,310,000 lb (594 mt) in accordance with the Plan. The structuring objectives for this subarea are to provide two periods of fishing opportunity in spring (May-June) and in summer (August-October) in productive deeper water areas along the coast, principally for charterboat and larger private boat anglers, and to provide a period of fishing opportunity during the summer in nearshore waters for small boat anglers. The May all-depth season would be allocated 156,835 lb (71 mt). Based on an observed catch per day trend in this fishery, an estimated 24,000 - 29,000 lb (10.9–13.1 mt) would be caught per day in 2003, resulting in a 5 to 6 day fixed season. In accordance with the Plan, the season dates could be May 8, 9, 10, 15, 16, and 17. An appropriate number of additional fishing days will be scheduled for late May or early June and fishing will be allowed on those days if the quota has not already been taken. The restricted depth fishery inside 30 fathoms for the North Central and South Central coast subareas combined would be allocated 19,797 lb (9 mt), starting May 1 through October 31 or until the TAC is attained, whichever occurs first. The August coastwide all-depth fishery (Cape Falcon to Humbug Mountain) would be allocated 57,660 lb (26 mt), which may be sufficient for a 3–day or 2–day opening, starting August 1, based on the expected catch per day. If sufficient quota remains after this season for additional days of fishing, the dates for an all-depth fishery would be in mid-August. The final determination of the season dates will be based on the allowable harvest level, projected catch rates, and recommendations developed in a public workshop sponsored by Oregon Department of Fish and Wildlife after the 2003 TAC is set by the IPHC. The daily bag limit would be the first halibut taken, per person, of 32 inches (81.3 cm) or greater in length.

Oregon South Central Coast Subarea

This subarea would be allocated 18,261 lb (8.3 mt) at an Area 2A TAC of 1,310,000 lb (594 mt) in accordance with the Plan. The May all-depth season would be allocated 14,609 lb (6.6 mt) and, based on the observed catch per day trend in this fishery, an estimated 2,400 - 2,900 lb (1.1–1.3 mt) would be caught per day in 2003, resulting in a 5 to 6 day fixed season. In accordance with the Plan, the season dates could be May 8, 9, 10, 15, 16 and 17. An appropriate number of additional fishing days will be scheduled for late May or early June and fishing will be allowed on those days if the quota has not already been taken. The restricted depth fishery inside 30 fathoms is combined for the North Central and South Central coast subareas and would be allocated 19,797 lb (9 mt), starting May 1 through October 31 or until the TAC is attained, whichever occurs first. The August coastwide all-depth fishery (Cape Falcon to Humbug Mountain) would be allocated 57,660 lb (26 mt), which may be sufficient for a 3–day opening, starting August 1, based on the expected catch per day. If sufficient quota remains for additional fishing days after this season, the dates for an all-depth fishery would be in mid-August. The final determination of the season dates would be based on the allowable harvest level, projected catch rates, and recommendations developed in an ODFW-sponsored public workshop after the IPHC sets the 2003 TAC. The daily bag limit would be the first halibut taken, per person, of 32 inches (81.3 cm) or greater in length.

Humbug Mountain, OR, through California Subarea

This subarea would be allocated 7,860 lb (3.6 mt) at an Area 2A TAC of 1,310,000 lb (594 mt) in accordance with the Plan. The proposed 2003 sport season for this subarea would be the same as last year, with a May 1 opening and continuing 7 days per week until September 30. The daily bag limit would be the first halibut taken, per person, of 32 inches (81.3 cm) or greater in length.

NMFS requests public comments on the Pacific Council's recommended modifications to the Plan and the proposed sport fishing regulations. The Area 2A TAC were set by the IPHC at its annual meeting on January 21–24, 2003, in Victoria, British Columbia. NMFS requests comments on the proposed changes to the Plan and sport fishing regulations by February 18, 2003, after the annual meeting, so that the public will have the opportunity to consider the final Area 2A TAC before submitting comments on the proposed changes. The States of Washington and Oregon will conduct public workshops shortly after the IPHC meeting to obtain input on the sport season dates. After the Area 2A TAC is known and after NMFS reviews public comments and comments from the States, NMFS will issue final rules for the Area 2A Pacific

halibut sport fishery concurrent with the IPHC regulations for the 2003 Pacific halibut fisheries.

Housekeeping Revision to Halibut Regulations

With this rule, NMFS is proposing a minor housekeeping revision to the Federal halibut regulations at 50 CFR 300.63, which authorizes vessels with IPHC licenses that are operating in the primary sablefish longline fishery north of Pt. Chehalis to land halibut taken incidentally in that fishery. The housekeeping revision would alter the regulations to more clearly state that no halibut taken in this fishery may be landed south of Pt. Chehalis, an action that would be contrary to the Plan. This is a minor clarification and has no effect on the environment.

Classification

NMFS has prepared a draft EA/RIR on the proposed changes to the Plan. Copies of the Draft Environmental Assessment and Regulatory Impact Review of Changes to the Catch Sharing Plan for Pacific Halibut in Area 2A are available from NMFS (see **ADDRESSES**) Comments on the EA/RIR are requested by February 18, 2003.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities as follows:

The Regulatory Flexibility Act (RFA), 5 U.S.C. 603 *et seq.*, requires government agencies to assess the effects that various regulatory alternatives would have on small entities, including small businesses, and to determine ways to minimize those effects. A fish-harvesting business is considered a ''small'' business by the SBA if it has annual receipts not in excess of $3.5 million. For related fish-processing businesses, a small business is one that employs 500 or fewer persons. For marinas and charter/party boats, a small business is one with annual receipts not in excess of $5.0 million. All of the businesses that would be affected by this action are considered small businesses under SBA guidance.

The proposed changes to the Area 2A Catch Sharing Plan (Plan), which allocates the catch of Pacific halibut among users in Washington, Oregon and California, would: (1) Allocate the Washington North Coast sport fishery sub-area quota, 78 percent for a May fishery and 22 percent for a late June fishery; (2) Revise the closed area within the Washington north coast subarea so that it is better situated to protect yelloweye rockfish, an overfished groundfish species; (3) Require non-treaty commercial vessels operating in the directed commercial fishery for halibut to fish offshore of 100 fm to protect yelloweye rockfish; (4) Set the incidental halibut retention allocation for the primary sablefish fishery at 70,000 lb; (5) Move the season ending date for Oregon sport fisheries in the North Central and South Central areas to October 31; (6) Revise the inseason management measures provisions to allow more flexibility for managers making inseason adjustments to fishery openings and closures.

Setting a more clear allocation between the May and late June fisheries in the Washington north coast fishery subarea is primarily intended to recognize the historical but informal allocation between these two fisheries. A formal allocation is also intended to reduce inseason pressure from anglers asking managers to move quota from May to June or vice versa. The Yelloweye Rockfish Conservation Area within the Washington North Coast and the closure of nontreaty commercial fishing opportunities in depths inshore of the 100 fm (184 m) depth contour are intended to protect yelloweye rockfish, an overfished species, from being incidentally caught in directed halibut fisheries. Specifying a 70,000 lb (31.8 mt) cap on the allocation to the primary sablefish longline fishery when the overall Area 2A TAC is over 900,000 lb (408 mt) is intended to maintain this fishery as an incidental catch fishery and to return halibut quota to the sport halibut fisheries, where it is more likely to be taken. Other proposed changes to the Plan are either editorial or intended to provide managers with more flexibility for adjusting fisheries inseason in order to ensure the available quota is taken. These changes are authorized under the Pacific Halibut Act and implementing regulations at 50 CFR 300.60–65.

Proposed changes to the Plan will affect charter fishing operations and anglers who operate off the north coast of Washington state and participants in the nontreaty directed commercial fishery. In 2002, approximately 1,888 anglers participated in the Washington north coast sport fishery from charterboats and 4,875 anglers participated from private boats. In 2002, IPHC issued 252 licenses to participate in either the directed commercial fishery or the primary longline sablefish fishery. Revisions to the plan affecting the Washington north coast sport fishery subarea are expected to have either no economic effect or a modest positive effect based on fuel and maintenance savings from having more open fishing areas closer to shore while setting the closed area farther offshore. The revision to the Plan to set the primary longline sablefish fishery allocation at 70,000 lb (31.8 mt) is not expected to have any effect on this fishery, which caught less than that amount in 2001 and 2002, the only years this incidental halibut fishing opportunity was open. The revision to the Plan to require nontreaty directed commercial vessels to operate offshore of a boundary line approximating the 100 fm (184 m) is expected to have no economic effect or a modest negative effect based on greater fuel and maintenance costs associated with having to fish farther offshore.

The proposed changes to the Plan are expected to result in a modest increase in fishery and regulatory convenience for sport fisheries and/or a modest decrease in fishery convenience for the nontreaty directed commercial fishery. The proposed sport management measures for 2003 implement the Plan by managing the recreational fishery to meet the differing fishery needs of the various areas along the coast according to the Plan's objectives. The measures for 2003 will be very similar to last year's management measures. These changes do not include any reporting or recordkeeping requirements. These changes will also not duplicate, overlap or conflict with other laws or regulations. Consequently, these changes to the Plan are not expected to meet any of the RFA tests of having a ''significant'' economic impact on a ''substantial number'' of small entities.

As a result, an initial regulatory flexibility analysis was not prepared.

This action has been determined to be not significant for purposes of Executive Order 12866.

Pursuant to Executive Order 13175, the Secretary of Commerce recognizes the sovereign status and co-manager role of Indian tribes over shared Federal and tribal fishery resources. At section 302(b)(5), the Magnuson-Stevens Fishery Conservation and Management Act reserves a seat on the Pacific Council for a representative of an Indian tribe with federally recognized fishing rights from California, Oregon, Washington, or Idaho.

The U.S. government formally recognizes that the thirteen Washington Tribes have treaty rights to fish for Pacific halibut. In general terms, the quantification of those rights is 50 percent of the harvestable surplus of Pacific halibut available in the tribes' usual and accustomed (U and A) fishing areas (described at 50 CFR 660.324). Each of the treaty tribes has the discretion to administer their fisheries and to establish their own policies to achieve program objectives. Accordingly, tribal allocations and regulations, including the proposed changes to the Plan, have been developed in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus.

List of Subjects in 50 CFR Part 300

Fisheries, Fishing, Indians, Reporting and recordkeeping requirements, Treaties.

Dated: January 30, 2003.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 300 is proposed to be amended as follows:

PART 300 INTERNATIONAL FISHERIES REGULATIONS, SUBPART E—PACIFIC HALIBUT FISHERIES

1. The authority citation for 50 CFR part 300, subpart E continues to read as follows:

Authority: 16 U.S.C. 773–773k.

2. In § 300.63, paragraph (a)(3)(ii) is revised to read as follows:

§ 300.63 Catch sharing plans, local area management plans, and domestic management measures.

* * * * *

(a) * * *

(3) * * *

(ii) It is unlawful for any person to possess or land halibut south of 46°53′8″ N. lat. that were taken and retained as incidental catch authorized by this section in the directed longline sablefish fishery.

* * * * *

[FR Doc. 03–2806 Filed 2–5–03; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 68, No. 25
Thursday, February 6, 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

Food Safety and Inspection Service

[Docket No. 03–005N]

Listeria Risk Assessment Technical Meeting—Notice of Availability and Public Meeting

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of availability and announcement of public meeting.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing the availability of, and requesting public comment on, its draft risk assessment for *Listeria* in deli- and hot dog-type meat and poultry products that are exposed to the environment post-lethality. FSIS conducted this risk assessment, addressing both *Listeria monocytogenes* and *Listeria* species (spp), to examine the effectiveness of testing food contact surfaces and sanitation on product contamination and the subsequent risk of illness, and to evaluate the effectiveness of other interventions (*e.g.,* post-processing interventions). In addition, the frequency of testing food contact surfaces, as proposed in the proposed rule on Performance Standards for the Production of Processed Meat and Poultry Products, was specifically addressed.

FSIS also is holding a public meeting to discuss the technical design and assumptions that were used to create this draft risk assessment.

DATES: The public meeting is scheduled for Wednesday, February 26, 2003. The meeting will be held from 9 a.m. to 4:30 p.m. The draft risk assessment will be available in the FSIS docket room (address below) and will be posted to the FSIS Web site at *http://www.fsis.usda.gov* on or before February 14, 2003.

Submit written comments on the draft risk assessment on or before February 21, 2003.

ADDRESSES: The public meeting will be held at the Washington Plaza Hotel, 10 Thomas Circle, Washington, DC 20005. Telephone: (202) 842–1300.

A tentative agenda is available in the FSIS docket room (address below) and on the FSIS Web site at *http://www.fsis.usda.gov/OPPDE/rdad/Notices02.htm*

Please send written comments on the draft risk assessment to the FSIS Docket Room, Docket 03–005N, U.S. Department of Agriculture, Food Safety and Inspection Service, Room 102 Cotton Annex, 300 12th Street, SW., Washington, DC 20250–3700. All comments and the official transcript of the meeting, when they become available, will be available for viewing in the FSIS docket room.

FOR FURTHER INFORMATION CONTACT: Moshe Dreyfuss at (202) 205–0260. Registration for the meeting will be on-site. No pre-registration will be accepted. Persons requiring a sign language interpreter should notify Ms. Sheila Johnson by February 12, 2003 at (202) 690–6498. Notify Ms. Johnson as soon as possible if other special accommodations are required.

SUPPLEMENTARY INFORMATION:

Background

FSIS administers the Federal Meat Inspection Act, the Poultry Products Inspection Act, and the Egg Products Inspection Act. The Agency's activities are intended to prevent the distribution in domestic and foreign commerce, as human food, of unwholesome, adulterated, or misbranded meat, poultry, and egg products, including products that may transmit diseases or that may be otherwise injurious to health.

On February 27, 2001, (66 FR 12589) FSIS issued proposed regulations to require that each establishment that produces ready-to-eat meat and poultry products test food contact surfaces for *Listeria* spp., in order to verify the efficacy of its sanitation standard operating procedures, unless it has incorporated one or more controls for *Listeria monocytogenes* into its HACCP plan. Under the proposed regulations, food contact surface positives for *Listeria* would trigger mandatory product testing. In November 2002, FSIS issued a directive outlining additional steps to be taken by U.S. Department of Agriculture inspectors to ensure that establishments producing ready-to-eat meat and poultry products are taking the necessary steps to prevent contamination with *Listeria.*

FSIS has recently completed an extensive, scientific risk assessment on *Listeria* to determine how the pathogen may contaminate meat and poultry products during production and packaging processes. The draft risk assessment will provide important additional data that the Agency will use in developing a final regulation concerning the reduction and control of *Listeria* in processing plants producing ready-to-eat products, and a new directive to replace Directive 10,240.3 (Microbial Sampling of Ready To Eat Products for the FSIS Verification Testing Program), if appropriate, as a consequence of the final rule.

FSIS requests comment on this draft risk assessment and will hold a public meeting to discuss and seek input on it on February 26, 2003, at the Washington Plaza Hotel (See **ADDRESSES** above).

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to better ensure that minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it and make copies of this **Federal Register** publication available through the FSIS Constituent Update. FSIS provides a weekly Constituent Update, which is communicated via Listserv, a free e-mail subscription service. In addition, the update is available on-line through the FSIS web page located at *http://www.fsis.usda.gov/oa/update/update.htm.* The update is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, recalls, and any other types of information that could affect or would be of interest to our constituents/stakeholders. The constituent Listserv consists of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals that have requested to be included. Through the Listserv and web page, FSIS is able to provide information to a much broader, more diverse audience.

For more information, contact the Congressional and Public Affairs Office, at (202) 720–9113. To be added to the free e-mail subscription service (Listserv) go to the ''Constituent Update'' page on the FSIS Web site at *http://www.fsis.usda.gov/oa/update/update.htm.* Click on the ''Subscribe to the Constituent Update Listserv'' link, then fill out and submit the form.

Done at Washington, DC, on: January 31, 2003.

Linda M. Swacina,

Associate Administrator.

[FR Doc. 03–2942 Filed 2–5–03; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Forest Service

Flagtail Fire Recovery Project; Malheur National Forest, Grant County, OR

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The USDA, Forest Service will prepare an Environmental Impact Statement (EIS) on a proposal to assist the recovery of the area burned in 2002 by the Flagtail Fire. This will include proposals to salvage fire-killed and fire-damaged timber, implement reforestation, and implement projects to alleviate the potential for future damage to wildlife habitat, and aquatic resources as a result of the Flagtail Fire. The 7,250-acre project area is located on the Blue Mountain Ranger District, approximately 25 miles southwest of John Day, Oregon, within the Silvies Watershed.

DATES: Comments concerning the scope of the analysis must be received by February 28, 2003.

ADDRESSES: Send written comments to Michael Montgomery, District Ranter, Blue Mountain Ranger District, P.O. Box 909, John Day, OR 97845.

FOR FURTHER INFORMATION CONTACT: Linda Batten, Flagtail Fire Recovery Project Team Leader, Blue Mountain Ranger District. Phone: (541) 575–3000. E-mail *lbatten@fs.fed.us* or the Malheur National Forest website at *http://www.fs.fed.us/r6/malheur.*

SUPPLEMENTARY INFORMATION: In July 2002, the Flagtain Fire burned approximately 8,200 acres, of which 7,250 occur on the Malheur National Forest. The remainder of the fire includes approximately 950 acres of private land. The 7,250-acre decision area for the Flagtail Fire Recovery Project includes those portions of the Flagtail Fire that burned within the Silvies Watershed on National Forest System lands.

Purpose and Need for Action

The purposes and needs for action in the project planning area are to:

- Reduce fuel loadings,
- Reduce the risk of insect infestation in surviving stands,
- Capture economic value of the killed and damaged trees,
- Provide safe and adequate roaded access in the fire area,
- Reduce the effects of roads on wildlife and water quality,
- Re-establish upland vegetation, and
- Designate suitable dedicated and replacement old growth areas to replace those degraded by the fire.

Proposed Action

The proposed project could include the following activities:

—Salvage harvest approximately 5,200 acres, in the Silvies watershed;

—Decommission approximately 13 miles and close approximately 13 miles of road;

—Reforest areas that sustained high tree mortality with appropriate species;

—Replace Dedicated Old Growth that is now unsuitable due to the fire (resulting in a Forest Plan amendment).

About 80% of the proposed timber salvage units would be harvested using ground-based logging systems. Access for the salvage activities would require construction of less than 1 mile of road, construction of approximately 60 miles of road. The temporary roads would be decommissioned after completion of project activities. Approximately 20% of the area to be salvaged would be harvested using helicopter based logging systems. Connected actions in association with salvage include water barring and erosion control measures such as scattering of slash on skid trails and treatment of slash.

Approximately 5,200 acres would be planted with tree seedlings following site preparation. Fuels, including those created by the fire, by salvage activity, and by site preparation, would be reduced to meet the range of historic levels throughout the project area. A variety of fuel treatment methods would be used including removing marketable timber through salvage harvest, burning in place, piling and burning, and whole tree yarding.

All proposed activities are responsive to the stated purpose and need for this project.

Possible Alternatives

A full range of alternatives will be considered, including a ''no action'' alternative in which none of the activities proposed above would be implemented. Based on the issues gathered through scoping, the action alternatives could differ in the silvicultural and post-harvest treatments prescribed, the amount and location of harvest, or the amount and location of fuels reduction activity. Tentative alternatives to the proposed action could include an alternative that does not require the construction of additional temporary or permanent roads, other than temporary re-opening of existing roads. Another alternative could emphasize removal (or other fuels treatment options) of dead timber in the size classes most likely to reburn. Currently available science on snag and coarse woody debris dependent species habitat will be a factor in alternative development and could result in a proposal of a site-specific Forest Plan amendment to update standards and guidelines for these species. Consideration of various regeneration strategies including planting at relatively low stocking levels could also be a factor that differentiates alternatives.

Scoping Process

The public will have an opportunity to participate at several points during the analysis including the scoping period after publication of the notice of intent, and during the comment period after publication of the draft EIS. Notification of these opportunities will appear in subsequent issues of the Malheur National Forest's Schedule of Proposed Activities; letters to agencies, organizations, and individuals who have previously indicated their interest in such activities; and a legal notice in the *Blue Mountain Eagle.* Public meetings may be scheduled during the winter/spring of 2002–2003. The scoping process will include identifying potential issues, identifying major issues to be analyzed in depth, eliminating non-significant issues or those previously covered by a relevant environmental analysis, considering additional alternatives based on themes which will be derived from issues recognized during scoping activities, and identifying potential environmental effects of the proposed action and alternatives (*i.e.* direct, indirect, and cumulative effects and connected actions).

Preliminary Issues

Preliminary issues include snag and downed wood habitat; noxious weeds; effects of proposed activities on soils exposed by the fire; effects of proposed activities on the recovery of water quality and resident fisheries resource; ability of proposed activities to contribute to restoration of historic vegetation composition, structures, and patterns; potential loss of commercial timber value; and economic viability of timber salvage.

Public comments about this proposal are requested in order to assist in properly scoping issues, to determine how to best manage the resources, and to fully analyze environmental effects. Comments received to this notice, including names and addresses of those who comment, will be considered part of the public record on this proposed action and will be available for public inspection. Comments submitted anonymously will be accepted and considered; those who submit anonymous comments will not have standing to appeal the subsequent decision under 36 CFR parts 215 and 217. Additionally, pursuant to 7 CFR 1.27(d), any person may request the agency to withhold a submission from the public record by showing how the Freedom of Information Act (FOIA) permits such confidentiality. Persons requesting such confidentiality should be aware that under FOIA, confidentiality may be granted in only very limited circumstances, such as to protect trade secrets. The Forest Service will inform the requester of the agency's decision regarding the request for confidentiality and, where the request is denied, the agency will return the submission and notify the requester that the comments may be resubmitted with or without name and address within a specific number of days.

Early Notice of Importance of Public Participation in Subsequent Environmental Review

The comment period on the draft EIS will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register** the draft EIS is expected in May 2003 and the final EIS is expected in September 2003.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of a draft EIS must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft EIS stage but that are not raised until after completion of the final EIS may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45 day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final EIS.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft EIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft EIS. Comments may also address the adequacy of the draft EIS or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

The Forest Service is the lead agency. The Responsible Official is the Forest Supervisor, Malheur National Forest, 431 Pattern Bridge Road, John Day, Oregon 97845. The Responsible Official will decide which, if any, of the proposed projects will be implemented. The Responsible Official may also decide on site-specific Forest Plan amendments regarding standards and guidelines for snag and coarse woody debris, as well as big game habitat, if warranted by the analysis of those components in light of recent science.

The Responsible Official will document the Flagtail Fire Recovery Project decision and reasons for the decision in the Record of Decision. That decision will be subject to Forest Service Appeal Regulations (36 CFR part 215).

Dated: January 27, 2003.

Roger W. Williams,

Forest Supervisor.

[FR Doc. 03–2836 Filed 2–5–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Ravalli County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Ravalli County Resource Advisory Committee will be meeting to discuss project development for 2003. Agenda topics will include project form submittals and a public forum (question and answer session). The meeting is being held pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393). The meeting is open to the public.

DATES: The meeting will be held on February 25, 2003, 6:30 p.m.

ADDRESSES: The meeting will be held at the Ravalli County Administration Building, 215 S. 4th Street, Hamilton, Montana. Send written comments to Jeanne Higgins, District Ranger, Stevensville Ranger District, 88 Main Street, Stevensville, MT 59870, by facsimile (406) 777–7423, or electronically to *jmhiggins@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Jeanne Higgins, Stevensville District Ranger and Designated Federal Officer, Phone: (406) 777–5461.

Dated: January 30, 2003.

David T. Bull,

Forest Supervisor.

[FR Doc. 03–2835 Filed 2–5–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Interim Direction for Commercial Filming and Still Photography Activities on National Forest System Lands

AGENCY: Forest Service, USDA.

ACTION: Notice of issuance of agency interim directives.

SUMMARY: The Forest Service is issuing interim directives to guide its employees in the permitting and administration of authorizations and the collection of land use fees for commercial filming and still photography on National Forest System lands. These interim directives make Forest Service policy and procedures in Forest Service Manual chapter 2720 and in Forest Service Handbook 2709.11, chapter 30, consistent with the

provisions of the Act of May 26, 2000, which provides authority for the Secretary of the Interior and the Secretary of Agriculture to authorize and set conditions on the use of Federal lands for commercial filming and still photography and to establish, retain, and spend without further appropriation land use fees collected for those uses. A primary purpose of the act is to promote consistent permitting and land use fee practices among the Federal land management agencies.

DATES: These interim directives are effective February 6, 2003.

ADDRESSES: These interim directives (ID 2700–2003–1 and ID 2709.11–2003–2) are available electronically from the Forest Service via the World Wide Web/Internet at *http://www.fs.fed.us/im/directives.* Single paper copies of the IDs are also available by contacting Melissa Hearst, Lands Staff (Mail Stop 1124), Forest Service, 1400 Independence Avenue, SW., Washington, DC 20250–1124 (telephone 202–205–1196).

FOR FURTHER INFORMATION CONTACT: Melissa Hearst, Lands Staff (202–205–1196).

SUPPLEMENTARY INFORMATION: The Forest Service is issuing interim directives (IDs) to Forest Service Manual (FSM) chapter 2720 and Forest Service Handbook (FSH) 2709.11, chapter 30 to guide its employees in the permitting and administration of authorizations and the collection of land use fees for commercial filming and still photography consistent with the provisions of the Act of May 26, 2000 (16 U.S.C. 460l–6d).

Prior to this act, the Forest Service's authority to issue permits for commercial filming and still photography and to collect land use fees for these uses was the Organic Act of 1897 (16 U.S.C. 551) and implementing regulations at title 36, Code of Federal Regulations, part 251, subpart B. Legislative history for the Act of May 26, 2000, states that the act is intended to supplement the Forest Service's existing authorities to regulate commercial filming and still photography.

The interim directive to FSM 2720 provides a definition for ''commercial filming'' that establishes the types of filming activities for which a special use permit is required. This definition specifically excludes ''breaking news'' as an activity for which a special use permit is required, because the need for commercial filming and still photography to cover breaking news arises suddenly, may evolve quickly, and may cease to be newsworthy by the time a permit is issued. The ID also sets out definitions of other terms common to commercial filming and still photography. A clear understanding of these definitions is essential so that agency personnel can correctly determine under what situation or condition a special use permit is required.

The Act of May 26, 2000, also provides the Forest Service with the authority to collect, retain, and spend without further appropriation the land use fees collected for commercial filming and still photography. The ID to FSH 2709.11, chapter 30, instructs agency personnel to continue to use current Regional and Forest fee schedules established for these activities and provides direction for the accounting and expenditure of these funds.

The interim directive to FSM 2720 is issued as ID number 2700–2003–1 and the interim directive to FSH 2709.11, chapter 30, is issued as ID number 2709.11–2003–2.

Dated: January 30, 2003.

Sally Collins,

Associate Chief.

[FR Doc. 03–2968 Filed 2–5–03; 8:45 am]

BILLING CODE 3410–11–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Connecticut Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a meeting of the Connecticut Advisory Committee to the Commission will convene at 1:30 p.m. and adjourn at 5:30 p.m. on Thursday, March 6, 2003, at the Bridgeport Holiday Inn, 1070 Main Street, Bridgeport, Connecticut. 06604. The Advisory Committee will hold new member orientation, be briefed by invited guests on civil rights issues in Bridgeport, and plan future activities.

Persons desiring additional information, or planning a presentation to the Committee, should contact Ki-Taek Chun, Director of the Eastern Regional Office, 202–376–7533 (TDD 202–376–8116). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, January 31, 2003.

Ivy L. Davis,

Chief, Regional Programs Coordination Unit.

[FR Doc. 03–2944 Filed 2–5–03; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Illinois Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a planning meeting of the Illinois Advisory Committee to the Commission will convene at 1 p.m. and adjourn at 5 p.m. on Thursday, February 27, 2003, at 55 West Monroe Street, Suite 525, Chicago, Illinois 60603. The purpose of the meeting is to discuss civil rights issues and plan future activities.

Persons desiring additional information, or planning a presentation to the Committee, should contact Constance M. Davis, Director of the Midwestern Regional Office, 312–353–8311 (TDD 312–353–8362). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, January 31, 2003.

Ivy L. Davis,

Chief, Regional Programs Coordination Unit.

[FR Doc. 03–2943 Filed 2–5–03; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

National Infrastructure Advisory Council; Amended Notice of Open Meeting

The time of the meeting of the National Infrastructure Advisory Council (NIAC) scheduled for Friday, February 7, 2003, notice of which previously appeared in the **Federal Register** (*see* 68 FR 4167, January 28, 2003), has changed. The meeting will now commence at 11:15 a.m., rather than at 12 p.m.

As previously announced, the meeting will be open to interested members of the public via conference call-in line. Members of the public interested in attending by telephone should call (toll free) 1–888–899–7785

or (toll) 1–913–312–4169 and, when prompted, enter pass code 1468517.

The Council advises the President of the United States on the security of information systems for critical infrastructure supporting other sectors of the economy, including banking and finance, transportation, energy, manufacturing, and emergency government services.

Agenda

I. Formal Opening of Meeting—Nancy J. Wong, Acting Director, Critical Infrastructure Assurance Office, U.S. Department of Commerce; Designated Federal Officer, NIAC
II. Introduction of NIAC Members [Roll Call]
III. Welcoming remarks—Howard A. Schmidt, Vice Chairman, President's Critical Infrastructure Protection Board; Acting Executive Director, NIAC; Kenneth I. Juster, Under Security of Commerce for Industry and Security, U.S. Department of Commerce
IV. Welcoming remarks—Richard K. Davidson, Chairman, NIAC; John T. Chambers, Vice Chairman, NIAC
V. Briefing Concerning National Security Telecommunications Advisory Committee (NSTAC) Activities and Responsibilities
  a. Introduction of NSTAC Chairman and Vice Chairman—Mr. Schmidt
  b. Briefing—Dr. Vance D. Coffman, Chairman and CEO, Lockheed Martin, and Chairman, NSTAC; and Mr. F. Duane Ackerman, President, Chairman & CEO, BellSouth, and Vice Chairman, NSTAC
  c. Question and Answer Session—Dr. Coffman, Mr. Ackerman, NIAC Members
VI. Introduction and Discussion of Possible Topics for Future NIAC Study:
  a. Internet Protocol Version 6.0 (IPv6)—Vice Chairman Chambers
  b. Responsible Disclosure of Cyber Vulnerabilities, Attacks/Incidents—Vice Chairman Chambers; and John W. Thompson, Chairman and CEO, Symantec Corporation, Member of the NIAC
VII. Adjournment

Written comments may be submitted at any time before or after the meeting. Please direct them to the following address: Ms. Wanda Rose, Critical Infrastructure Assurance Office, Bureau of Industry and Security, U.S. Department of Commerce, Room 6095, 14th Street & Constitution Avenue, NW., Washington, DC 20230.

For more information contact Wanda Rose on (202) 482–7481.

Dated: February 4, 2003.

Eric T. Werner,

Council Liaison Officer.

[FR Doc. 03–3107 Filed 2–4–03; 3:35 pm]

BILLING CODE 3510–JT–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–804]

Ball Bearings and Parts Thereof From Japan; Notice of Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of extension of time limit for preliminary results of antidumping duty administrative review.

SUMMARY: The Department of Commerce is extending the time limit for the preliminary results of the administrative review of the antidumping duty order on ball bearings and parts thereof from Japan. The preliminary results of this review are now due March 3, 2003.

EFFECTIVE DATE: February 6, 2003.

FOR FURTHER INFORMATION CONTACT: Sochieta Moth, (202) 482–0168, or Richard Rimlinger, (202) 482–4477, AD/CVD Enforcement 3, Import Administration, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230.

Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review

The Department has received requests to conduct an administrative review of the antidumping duty order on ball bearings and parts thereof from Japan. On June 25, 2002, the Department initiated this administrative review covering the period May 1, 2001, through April 30, 2002. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in Part*, 67 FR 42753.

Because of the complexity of certain issues and the large number of respondents in the review, it is not practicable to complete this review within the time limits mandated by section 751(a)(3)(A) of the Tariff Act of 1930, as amended. Therefore, in accordance with that section, the Department is extending the time limit for the preliminary results of this administrative review until March 3, 2003.

Dated: January 31, 2003.

Laurie Parkhill,

Acting Deputy Assistant Secretary for AD/CVD Enforcement I.

[FR Doc. 03–2956 Filed 2–5–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-557–805]

Extruded Rubber Thread from Malaysia; Rescission of Antidumping DutyAdministrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Rescission of the Antidumping Duty Administrative Review for the Period October 1, 2001, through September 30, 2002.

EFFECTIVE DATE: February 6, 2003.

FOR FURTHER INFORMATION CONTACT: Irina Itkin or Elizabeth Eastwood, Office of AD/CVD Enforcement Group I, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0656 or (202) 482–3874, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 2, 2002, the Department published in the **Federal Register** (67 FR 61849) a notice of opportunity to request an administrative review of the antidumping order regarding extruded rubber thread from Malaysia for the period October 1, 2001, through September 30, 2002. In accordance with 19 CFR 351.213(b)(2), on October 31, 2002, one producer/exporter of extruded rubber thread (i.e., Heveafil Sdn. Bhd. and Filmax Sdn. Bhd. (collectively ''Heveafil'')) requested a review of the antidumping duty order on extruded rubber thread from Malaysia.

On November 22, 2002, the Department initiated an administrative review for this company (67 FR 70402) and issued it a questionnaire. Heveafil requested an extension to respond to the questionnaire on December 10, 2002, which the Department granted.

On January 13, 2003, Heveafil withdrew its request for review.

Rescission of Review

Heveafil withdrew its request for an administrative review for the above-referenced period on January 13, 2003. Therefore, because no other interested party requested a review for this period

of review, in accordance with 19 CFR 351.213(d)(1) and consistent with our practice, we are rescinding this review of the antidumping duty order on extruded rubber thread from Malaysia for the period of October 1, 2001, through September 30, 2002. This notice is published in accordance with section 751 of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: January 31, 2003.

Laurie Parkhill,

Acting Deputy Assistant Secretary Import Administration.

[FR Doc. 03–2957 Filed 2–5–03; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–357–812]

Honey From Argentina: Initiation of New Shipper Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: February 6, 2003.

FOR FURTHER INFORMATION CONTACT: Phyllis Hall or Donna Kinsella at (202) 482–1398 or (202) 482–0194, respectively; Antidumping and Countervailing Duty Enforcement Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

The Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the Tariff Act of 1930, as amended. In addition, unless otherwise indicated, all citations to the Department's regulations are references to the provisions codified at 19 CFR part 351 (2002).

Background

The Department received a timely request from Nutrin, S.A., the exporter and Nutrin Corporation, its affiliated U.S. company (collectively, Nutrin) in accordance with 19 CFR 351.214(c), for a new shipper review of the antidumping duty order on honey from Argentina, which has a December annual anniversary month. See Notice of Antidumping Duty Order; Honey from Argentina, 66 FR 63672 (December 10, 2001). As required by 19 CFR 351.214(b)(2)(i), (ii) and (iii)(A), the company identified above and its supplier of subject merchandise have certified that they did not export honey to the United States during the period of investigation (POI), and that neither have been affiliated with any exporter or producer which did export honey during the POI. Pursuant to the Department's regulations at 19 CFR 351.214(b)(2)(iv)(A), Nutrin submitted documentation establishing the date on which it first shipped the subject merchandise to the United States, the volume of that first shipment, and the date of the first sale to an unaffiliated customer in the United States.

In accordance with section 751(a)(2)(B) of the Act, as amended, and 19 CFR 351.214(d)(i), and based on information on the record, we are initiating a new shipper review for Nutrin S.A.

Scope

The merchandise under review is honey from Argentina. For purposes of this review, the products covered are natural honey, artificial honey containing more than 50 percent natural honey by weight, preparations of natural honey containing more than 50 percent natural honey by weight, and flavored honey. The subject merchandise includes all grades and colors of honey whether in liquid, creamed, comb, cut comb, or chunk form, and whether packaged for retail or in bulk form.

The merchandise under review is currently classifiable under subheadings 0409.00.00, 1702.90.90, and 2106.90.99 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and U.S. Customs Service (Customs) purposes, the Department's written description of the merchandise under this order is dispositive.

Initiation of Review

In accordance with section 751(a)(2)(B)(ii) of the Act and 19 CFR 351.214(d)(1), we are initiating a new shipper review of the antidumping duty order on honey from Argentina. Therefore, we intend to issue the preliminary results of this review not later than 180 days after the date on which the review is initiated. We intend to issue the final results of this review within 90 days after the date on which the preliminary results were issued.

Pursuant to 19 CFR 351.214(g)(1)(ii)(A) of the Department's regulations, the period of review (POR) for a new shipper review initiated in the month immediately following the annual anniversary month, the review will normally cover as appropriate entries, exports or sales during the period from the date of suspension of liquidation under this part to the end of the month immediately preceding the first anniversary month. Therefore, the POR for this new shipper review is:

Antidumping duty proceeding	Period to be reviewed
Nutrin, S.A.	05/11/01—11/30/02

We will instruct the Customs Service to allow, at the option of the importer, the posting, until the completion of the review, of a single entry bond or security in lieu of a cash deposit for each entry of the merchandise exported by the above-listed company. This action is in accordance with 19 CFR 351.214(e). Interested parties that need access to proprietary information in this new shipper review should submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305 and 351.306. This initiation and notice are in accordance with section 751(a) of the Act (19 U.S.C. 1675(a)) and 19 CFR 351.214(d).

Dated: January 31, 2003.

Joseph A. Spetrini,

Deputy Assistant Secretary for Import Administration, Group III.

[FR Doc. 03–2955 Filed 2–5–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–485–806]

Certain Hot-Rolled Carbon Steel Flat Products From Romania: Notice of Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of rescission of antidumping duty administrative review.

EFFECTIVE DATE: February 6, 2003.

SUMMARY: On December 26, 2002, the Department of Commerce (the Department) published in the **Federal Register** (67 FR 78772) a notice announcing the initiation of an administrative review of the antidumping duty order on certain hot-rolled carbon steel flat products from Romania, covering the period May 3, 2001, through October 31, 2002, and three manufacturer/exporters of the subject merchandise: Sides Trading, SRL and Sidex International PLC;

Metanef, S.A. and Metagrimex, S.A.[1] We are now rescinding this review as a result of the petitioners' withdrawal of their request for an administrative review.

FOR FURTHER INFORMATION CONTACT: Charles Riggle at (202) 482–0650 or Magd Zalok at (202) 482–4162, Import Administration, Room 1870, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On November 27, 2002, Bethlehem Steel Corporation, National Steel Corporation, and U.S. Steel Corporation (Bethlehem Steel *et al.*), the petitioners in the original investigation in this case, in accordance with 19 CFR 351.213(b), requested an administrative review of the antidumping duty order on certain hot-rolled carbon steel flat products from Romania. On December 19, 2002, in accordance with 19 CFR 351.221(c)(1)(i), we initiated an administrative review of this order for the period May 3, 2001, through October 31, 2002. *See Notice of Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 67 FR 78772 (December 26, 2002). On December 24, 2002, Bethlehem Steel *et al.* withdrew their request for this review.

Rescission of Review

The Department's regulations at 19 CFR 351.213(d)(1) provide that the Department will rescind an administrative review if the party that requested the review withdraws its request for review within 90 days of the date of publication of the notice of initiation of the requested review, or withdraws its request at a later date if the Department determines that it is reasonable to extend the time limit for withdrawing the request. Bethlehem Steel *et al.* were the only parties to request this review and they withdrew their request within the 90-day period. Accordingly, this review is rescinded.

This notice is issued and published in accordance with section 751 of the Tariff Act of 1930, as amended (19 U.S.C. 1675), and 19 CFR 351.213(d)(4).

[1] The petitioners requested a review of a fourth company, Metalexportimport, S.A., which the Department inadvertently failed to include in its notice of initiation. In their December 24, 2002, letter, the petitioners withdrew their review request for this company, as well.

Dated: January 29, 2003.

Bernard T. Carreau,

Deputy Assistant Secretary for Group II, Import Administration.

[FR Doc. 03–2954 Filed 2–5–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Call for Applications for Representatives and Alternates to the Northewestern Hawaiian Islands Coral Reef Ecosystem Reserve Advisory Council for the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve

AGENCY: National Marine Sanctuary Program (NMSP), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: The Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve is seeking applicants for the following vacant seats on its Reserve Advisory Council (Council): (1) Conservation, (2) Research, (1) Ocean-Related Tourism, (1) Recreational Fishing, (1) Education, (1) Citizen-At-Large. Council Representatives and Alternates are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the Sanctuary. Applicants who are chosen as Representatives or Alternates should expect to serve three-year terms, pursuant to the Council's Charter. Persons who are interested in applying for membership on the Council as either a Representative or Alternate may obtain an application from the person or website identified under the **ADDRESSES** section below.

DATES: Completed applications must be postmarked no later than February 28, 2003.

ADDRESSES: Applications may be obtained from Moani, Pai, 6700 Kalanianaole Highway, Suite 215, Honolulu, Hawaii 96825, (808) 397–2661 or online at *http://hawaiireef.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Aulani Wilheim, 6700 Kalanianaole Highway, Suite 215, Honolulu, Hawaii 96825, (808) 397–2657, *Aulani.Wilhelm@noaa.gov.*

SUPPLEMENTARY INFORMATION: The NWHI Coral Reef Ecosystem Reserve is a new marine protected area to conserve and protect the coral reef ecosystem and related natural and cultural resources of the area. The Reserve was established by Executive Order pursuant to the National Marine Sanctuaries Amendments Act of 2000 (Pub. L. 106–513). The NWHI Reserve was established by Executive Order 13178 (December 2000) and Executive Order 13196 (January 2001).

The Reserve encompasses an area of the marine waters and submerged lands of the Northwestern Hawaiian Islands, extending approximately 1200 nautical miles long and 100 nautical miles wide. The Reserve is adjacent to and seaward of the seaward boundary of Hawaii State waters and submerged lands and the Midway Atoll National Wildlife Refuge, and includes the Hawaiian Islands National Wildlife Refuge to the extent it extends beyond Hawaii State waters and submerged lands. The Reserve is managed by the Secretary of Commerce pursuant to the National Marine Sanctuaries Act and the Executive Orders. The Secretary has also initiated the process to designate the Reserve as a National Marine Sanctuary. The management principles and implementation strategy and requirements for the Reserve are found in the enabling Executive Orders, which are part of the application kit and can be found on the website listed above.

In designating the Reserve, the Secretary of Commerce was directed to establish a Coral Reef Ecosystem Reserve Advisory Council, pursuant to section 315 of the National Marine Sanctuaries Act, to provide advice and recommendations on the development of the Reserve Operations Plan and the designation and management of a Northwestern Hawaiian Islands National Marine Sanctuary by the Secretary.

The National Marine Sanctuary Program (NMSP) has established the Reserve Advisory Council and is now accepting applications from interested individuals for Council Representatives and Alternates for the following seven citizen/constituent positions on the Council:

1. Two (2) representatives from the non-Federal science community with experience specific to the Northwestern Hawaiian Islands and with expertise in at least one of the following areas:

A. Marine mammal science.
B. Coral reef ecology.
C. Native marine flora and fauna of the Hawaiian Islands.
D. Oceanography.

E. Any other scientific discipline the Secretary determines to be appropriate.

2. One (1) representative from a non-governmental wildlife/marine life, environmental, and/or conservation organization.

3. One (1) representative from the recreational fishing industry that conducts activities in the Northwestern Hawaiian Islands.

4. One (1) representative from the ocean-related tourism industry.

5. One (1) representative from the non-Federal community with experience in education and outreach regarding marine conservation issues.

6. One (1) citizen-at-large representative.

Current Reserve Council Representatives and Alternates may re-apply for these vacant seats.

The Council consists of 25 members, 15 of which are non-government voting members and 10 of which are government non-voting members. The voting members are representatives of the following constituencies: Conservation, Citizen-At-Large, Ocean-Related Tourism, Recreational Fishing, Research, Commercial Fishing, Education, State of Hawaii and Native Hawaiian. The government non-voting seats are represented by the following agencies: Department of Defense, Department of the Interior, Department of State, Marine Mammal Commission, NOAA's Hawaiian Islands Humpback Whale National Marine Sanctuary, NOAA's National Marine Fisheries Service, National Science Foundation, U.S. Coast Guard, Western Pacific Regional Fishery Management Council, and NOAA's National Ocean Service.

Authority: 16 U.S.C. 1431, *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: January 29, 2003.

Jamison S. Hawkins,

Acting Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 03–2837 Filed 2–5–03; 8:45 am]

BILLING CODE 3510–08–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 121902A]

Small Takes of Marine Mammals Incidental to Specified Activities; Installation of a New Floating Dock at the U.S. Coast Guard Pier, Monterey, CA

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

ACTION: Notice of receipt of application and proposed authorization for a small take exemption; request for comments.

SUMMARY: NMFS has received an application from the United States Coast Guard (USCG) for an Incidental Harassment Authorization (IHA) to take small numbers of marine mammals, by harassment, incidental to the installation of a floating dock in Monterey, CA. Under the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue a small take authorization to the USCG to incidentally take, by harassment, small numbers of Pacific harbor seals and California sea lions for 1 year.

DATES: Comments and information must be received no later than March 10, 2003.

ADDRESSES: Comments on the application should be addressed to James Lecky, Assistant Regional Administrator for Protected Resources, NMFS - Southwest Regional Office, 501 West Ocean Blvd. Suite 4200, Long Beach, CA 90802–4213. A copy of the application may be obtained by writing to this address or by telephoning the contact listed here. Comments cannot be accepted if submitted via e-mail or the Internet.

FOR FURTHER INFORMATION CONTACT: Christina Fahy, Southwest Regional Office, NMFS, (562) 980–4023.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Permission may be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses and that the permissible methods of taking and requirements pertaining to the monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Subsection 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. The MMPA defines ''harassment'' as:

> ...any act of pursuit, torment, or annoyance which (a) has the potential to injure a marine mammal or marine mammal stock in the wild; or (b) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to migration, breathing, nursing, breeding, feeding, or sheltering.

Subsection 101(a)(5)(D) establishes a 45–day time limit for NMFS review of an application followed by a 30–day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

Summary of Request

On August 16, 2002, NMFS received a letter from the USCG requesting an IHA for the possible harassment of small numbers of California sea lions (*Zalophus californianus*) and Pacific harbor seals (*Phoca vitulina*), incidental to the installation of a new floating dock.

The installation of a new floating dock is needed to provide better and safer access to an 87–ft (26.6–m) Coastal Patrol Boat, USCGC Hawksbill (Hawksbill). Currently, the Hawksbill moors at a fixed wharf which does not meet the Coast Guard's minimum standards for mooring a patrol boat. The tidal range causes severe chafing to the mooring lines and difficulties with the access gangway. The Coast Guard estimates that the cost of mooring line replacement is approximately $10,000 a year. When the patrol boat is at the dock, a crewmember is required to be continually present to adjust mooring lines and the gangway about every 40 minutes. The Hawksbill has a 10–person crew, which is not designed to have one person awake the entire night while in port. Finally, several locally produced gangways, mounted from the wharf, have failed to give adequate access to the Hawksbill during the entire tidal cycle. The installation of a floating dock will eliminate the excessive cost to mooring lines and gangway

replacement, as well as, any unnecessary burden on the crew.

Project Description

The project is located at 100 Lighthouse Avenue in the city and county of Monterey, California. The fixed pier extends east into Monterey Bay. The floating dock will be located on the south side near the end of the fixed wharf. The installation of the new floating dock will consist of installing a new 10 ft x 100 ft (3.05 x 30.5 m) pier, including the driving of five new piles.

The pile driving work will be completed from a welded steel barge equipped with a pedestal mounted revolving crane that has a 105–foot (32–meter) boom with a 30–ton (27,216–kg) capacity and 25–ft (7.62–m) radius. The barge will be mobilized, moved, and tended by a barge tender/work boat. The pile driving will be completed using a ''DELMAG D19–32 Pile Hammer,'' which is a single piston internal combustion type hammer powered by diesel fuel. The pile hammer motor has a single piston, which is attached to a 2,000 lb (907 kg) weight. The weight is used to drive the piles. The pile design was completed with the existing conditions (5 ft (1.5 m) of mud over approximately 5 to 10 ft (1.5 to 3.05 m) of 500 lbs. (227 kgs) rock over decomposed granite) in mind. The new pile will consist of a 12–in (0.3–m) I-beam driven to refusal. It is anticipated that the I-beam will penetrate the mud through the rock and a firm toe will be established in the decomposed granite. This I-beam will be covered with a 24–in (0.6–m) round pile that will be driven to refusal creating a seal with the ocean floor. This second pile will be attached to the existing pier with metal braces and drained of seawater. After the pile is drained and stabilized, the 24–in (0.6 m) pile will be filled with concrete using a pump truck.

The manufacturer of the pile hammer has stated that the maximum in-air noise level under extreme driving conditions and at maximum refusal will be between 90 and 100 decibels (dB)(re 20 microPascal-m) at the source; however during this project, extreme conditions will not be encountered, and anticipated in-air noise levels should be between 60 and 85 dB. The manufacturer was not able to estimate the underwater noise level. However, acoustic monitoring of pile driving operations on the Noyo River (Fort Bragg, CA) using a similar size hammer under similar conditions (2 m (6.6 ft) water, mud bottom) and a 12–in (0.3 m) I-beam pile measured noise levels of 169 dB (dB re 1 microPascal-meter) at 100 m. The closest measurement to the hammer was 30 m, with an underwater noise level of approximately 170 dB.

The pile driving and in water work for this project is expected to last 10 days, while the entire project should be completed within 30 days. Because the site is adjacent to a haul-out for California sea lions and near a small colony of Pacific harbor seals, the potential exists that these marine mammals may be harassed by the action; therefore, an IHA is warranted.

Description of Habitat and Marine Mammals Affected by the Activity

A description of the Monterey Harbor and its associated marine mammals can be found in the USCG application (USCG, 2002) which is available upon request (see **ADDRESSES**).

Marine Mammals

The marine mammals under NMFS' jurisdiction likely to be found in the project area are limited to the California sea lion and the Pacific harbor seal. General information on harbor seals and California sea lions found in Central California waters can be found in Caretta et al. (2001).

California sea lions

The California sea lion primarily uses the Central California area to feed during the non-breeding season. Following the breeding season on the Channel Islands, most adult and sub-adult males migrate northward to central and northern California and to the Pacific Northwest, while most females and young animals either remain on or near the breeding grounds throughout the year or move southward or northward, as far as Monterey Bay.

California sea lions are regularly observed in the Monterey Harbor area in the autumn, winter, and into the early spring. They regularly haul out on the Coast Guard Jetty. Based on ground surveys conducted from June 1997 through October 1999, an average of between 143.3 (standard deviation (SD) = 51.5) and 425 (SD=130.5) sea lions hauled out on the jetty during the autumn. Mean number of sea lions observed during the winter season (1997–98) was 628 (SD=238.5) animals (Weise 2000). During ground counts from 1997 to 1999, Weise (2000) estimated that approximately 74 percent (SD=18.1 percent) of the sea lions observed were juveniles, 14.9 percent were adults (SD=15.3 perecent), and 10.5 percent (SD=6.7 percent) were sub-adult males or females. No pupping occurs in the project area.

Harbor seals

A small number of harbor seals are also expected to be found in the project area. Harbor seals are distributed throughout the west coast of California. In general, they do not migrate, preferring instead to forage within several miles of their haul-out sites. In Monterey Harbor, harbor seals haul out on a rocky outcropping located approximately 300 m (984 ft) inshore of the proposed project site and approximately 100 m (328 ft) from a small beach and the Monterey Fisherman's Wharf. Based on surveys conducted in the Monterey Harbor, less than 20 harbor seals are expected to be found on this site within the harbor. The presence of all size classes of animals are possible. Harbor seals do not pup on this haulout, although several pupping sites are located around the Monterey Peninsula within 3 to 20 km (1.9 to 12.4 mi)of the project site.

Potential Effects on Marine Mammals

It is possible that California sea lions and harbor seals swimming in the vicinity of the project during pile driving may be subject to elevated sound pressure levels that could produce a temporary shift in the animal's hearing threshold. Construction and human activity around the site could also potentially result in behavioral changes in nearby pinnipeds. California sea lions and harbor seals may temporarily cease normal activities, such as feeding, or pop their heads up above water in response to the noise. They may also be curious and choose to investigate the project site. However, existing evidence shows that most marine mammals tend to avoid loud noises and will likely move away from the project site (Richardson et al., 1995). Disturbance from these activities is expected to have a short-term negligible impact to a number of sea lions and harbor seals. These disturbances will be reduced to the lowest level practicable by implementation of the proposed work restrictions and mitigation measures (see Mitigation).

During the installation of the floating dock, the incidental harassment of California sea lions is expected to occur on a daily basis upon initiation of the pile driving. Sea lions are also likely to be initially harassed by the barge tender moving the barge into place. If the animals no longer perceive construction noise and activity as being threatening, they are likely to resume their regular hauling out behavior. The number of sea lions disturbed will vary daily, but animals in the water near the project

site or hauled out closest to the project site are more likely to be disturbed than animals hauled out at the farther end of the jetty. Based on past ground surveys, the number of California sea lions that may potentially be harassed could range from 200 to 400, and possibly as many as 600 animals may move each day as a result of the project activities.

Whether harbor seals will react to construction noise and associated activity and move away from the rock outcropping during construction activities (especially pile driving) is unknown. While seals are generally thought to be less tolerant of human activities than sea lions, the location of their haulout from the project site may be far enough away that disturbances may be less likely. Seals that are swimming near the project site may be harassed during construction activity, especially pile driving, and may swim away from the immediate area.

Potential Effects on Habitat

The activity will take place on a part of the Monterey USCG pier that is not used directly by any marine mammal species. Short-term impacts of the activities are expected to result in a temporary reduction in utilization of the rock jetty at the end of the USCG pier by California sea lions and perhaps of the nearby rocky outcropping by Pacific harbor seals while work is in progress or until pinnipeds acclimate to the disturbance. This will not likely result in any permanent reduction in the number of sea lions or seals at these haulouts. Sea lions are regularly disturbed by boats and human activities in Monterey Harbor. In addition, approximately 4 to 5 m (13.2 to 16.4 ft) above the harbor seal haul-out, there is a busy bike path and pedestrian walkway. Seals are frequently disturbed year-round due to their proximity to the bike path, particularly during the daytime. The abandonment of either haulout is not anticipated since existing foot traffic, commercial and recreational boating, and human activity currently occurring within the area have not caused long-term abandonment.

Therefore, other than the potential, short-term abandonment by California sea lions and harbor seals of part of their existing haulouts in Monterey Harbor during floating dock installation, no impacts on the habitat or food sources of marine mammals are likely from this project.

Mitigation

Several mitigation measures to reduce the potential for harassment from installation of the floating dock will be implemented by USCG as part of their activity. General restrictions include: the work will be performed during daylight hours only so that potential impacts can be detected more easily and steps can taken to avoid them; shouting, loud noises, fast movements, and other activities that would disturb the haul-out sites will be minimized (considering human safety concerns foremost); the number of people and the amount of equipment on the USCG pier in close proximity to the sea lion haulout will be restricted to the minimum required to effectively perform the work; all equipment will be kept on the west side of the USCG pier and, as much as possible, out of sight of the sea lion haulout site; a NMFS-approved biological monitor will be on site at all times during the project operations to monitor marine mammal disturbances and to advise personnel on ways to minimize or avoid disturbances.

General restrictions during pile driving will include: no piles will be driven between the hours of 5 pm and 8 am. Based on a recommendation from NMFS, the USCG will avoid exposing pinnipeds to unsafe noise levels (greater than 190 dB re 1 microPascal-m). Given the acoustic monitoring from pile driving exercises for the Noyo River Bridge, the USCG will establish an initial safety zone of 50 m (164 ft) around the pile-driving site. The marine mammal monitor will scan the safety zone continuously for 5 minutes just prior to, and during, pile driving to determine whether marine mammals are present. Pile driving will not begin until the safety zone is clear. If an animal is in the safety zone before initiation of the pile driving activity on any given work day, operations will be delayed until the animal has moved a safe distance away. If an animal enters the safety zone while pile driving is occurring, operations will be stopped immediately until the animal has moved beyond the range of the safety zone. In consultation with NMFS, the safety zone may be increased if animals beyond 50 m (164 ft)show excessive behavioral changes in response to pile driving operations. If pile driving stops for less than 45 minutes, another 5–minute scan will not be necessary; if it stops for longer than 45 minutes, another scan will be performed.

In order to provide further protection to pinnipeds hauled out near the project area, the USCG also proposes to ''dry fire'' the hammer prior to operating at full capacity. A ''dry fire'' occurs when the hammer is raised and dropped with no compression of the pistons which produces approximately 50 percent of the maximum in-air noise level, or 45–55 dB (dB re 20 microPascal-meter). This dry-firing should allow pinnipeds in the area to voluntarily move from the area and should expose fewer animals to loud sounds both underwater and above water.

Monitoring

NMFS will require USCG to monitor the impact of the floating dock installation activities on California sea lions and harbor seals in Monterey Harbor. Monitoring will be conducted by one or more NMFS-approved monitors.

In general, the marine mammal monitor(s) will record the date, time of arrival and departure of the monitor and work crew. The monitor will also conduct counts of sea lions on the jetty and counts of pinnipeds in the water near the project site every hour, commencing 1 hour before the start of project activity each day and ending 15 minutes after all project activities have ceased. Data on size classes and sex (when possible) of sea lions on the jetty will be collected. Counts of harbor seals will be obtained at the beginning and the end of each work day. If possible, data on size class and sex of animals will be collected. The monitor(s) will also collect information on disturbance reactions, including the number of animals disturbed, the source (including type, location, timing, and duration of disturbance). The monitor will also record environmental conditions, including date, time, cloud cover, visibility, wind direction and velocity, swell direction and height, and tides.

During pile driving operations, the monitor will monitor the 50–meter safety zone, as described above (see Mitigation). The safety zone will be marked with temporary buoys in order to facilitate monitoring efforts.

Reporting

The USCG will provide weekly reports to the Southwest Regional Administrator (Regional Administrator), NMFS, including a summary of the previous week's monitoring activities and an estimate of the number of California sea lions and harbor seals that may have been disturbed as a result of floating dock installation activities. These reports will include data collected during daily monitoring.

A draft final report must be submitted to the Regional Administrator within 60 days after the conclusion of the project. A final report must be submitted to the Regional Administrator within 30 days after receiving comments from the Regional Administrator on the draft final report. If no comments are received from NMFS, the draft final report will be considered to be the final report.

Endangered Species Act (ESA)

Under section 7 of the ESA, NMFS has begun consultation on the proposed issuance of an IHA for this project. Consultation will be concluded upon completion of the comment period and consideration of those comments in the final determination on issuance of an authorization.

National Environmental Policy Act (NEPA)

In conjunction with the promulgation of regulations implementing section 101(a)(5)(D) of the MMPA, NMFS completed an Environmental Assessment (EA) on May 9, 1995 that addressed the impacts on the human environment from issuance of IHAs and the alternatives to that action. NMFS' analysis resulted in a Finding of No Significant Impact (FONSI). In addition, this proposed action, including pile driving, will use pile driving equipment that is less intense and will, therefore, have a lower impact on the marine environment than pile driving equipment used in other surveys for which EAs and resulting FONSIs have been prepared previously. Accordingly, this proposed action qualifies for a categorical exclusion under NEPA and, therefore, a new EA will not be prepared.

Preliminary Conclusions

NMFS has preliminarily determined that the short-term impact of the floating dock installation, as described in this document and in USCG (2002), should result, at worst, in the temporary modification in behavior by California sea lions and Pacific harbor seals. While behavioral modifications, including temporarily vacating the haulout, may be made by these species to avoid the resultant visual and acoustic disturbance, this action is expected to have a negligible impact on the animals. In addition, no take by injury and/or death is anticipated, and harassment takes will be at the lowest level practicable due to incorporation of the mitigation measures mentioned previously in this document.

Proposed Authorization

NMFS proposes to issue an IHA to the USCG for the potential harassment of small numbers of harbor seals and California sea lions incidental to floating dock installation, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. NMFS has preliminarily determined that the proposed activity would result in the harassment of only small numbers of harbor seals and California sea lions and will have no more than a negligible impact on these marine mammal stocks.

Information Solicited

NMFS requests interested persons to submit comments, information, and suggestions concerning this request (see **ADDRESSES**).

Dated: January 31, 2003.

Laurie K. Allen,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 03–2953 Filed 2–5–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 012903F]

Mid-Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (Council) Demersal Species Committee and the Atlantic States Marine Fisheries Commission's (ASMFC) Summer Flounder, Scup and Black Sea Bass Board, will hold a public meeting.

DATES: The meeting will be held on Tuesday, February 25, 2003, from 1 p.m. to 3 p.m.

ADDRESSES: The meeting will be held at the Doubletree Hotel, Crystal City, 300 Army Navy Drive, Arlington, VA; telephone: 703–416–4100 or 800–222–8733.

Council address: Mid-Atlantic Fishery Management Council, 300 S. New Street, Dover, DE 19904; telephone: 302–674–2331.

FOR FURTHER INFORMATION CONTACT: Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council; telephone: 302–674–2331, ext. 19.

SUPPLEMENTARY INFORMATION: The main agenda item for this meeting is to discuss 2003 planning priorities for summer flounder, scup, and black sea bass.

Although non-emergency issues not contained in this agenda may come before the Council and ASMFC for discussion, these issues can not be the subject of formal Council action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Joanna Davis at the Council (see **ADDRESSES**) least 5 days prior to the meeting date.

Dated: January 29, 2003.

Theophilus R. Brainerd,

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

[FR Doc. 03–2807 Filed 2–5–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 012903E]

Mid-Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (MAFMC) Atlantic Mackerel, Squid, and Butterfish Committee, together with Industry Advisors, will hold a public meeting.

DATES: The meeting will be held on Thursday, February 20, 2003, from 10 a.m. until 4 p.m.

ADDRESSES: This meeting will be held at the Renaissance Hotel Philadelphia Airport, 500 Stevens Drive, Philadelphia, PA; telephone: 610–521–8954.

Council address: Mid-Atlantic Fishery Management Council, Room 2115, 300 S. New Street, Dover, DE 19904.

FOR FURTHER INFORMATION CONTACT: Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council; telephone: 302–674–2331, ext. 19.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to discuss possible management measures to address over-capacity in the *Loligo* fishery including additional limited entry provisions, seasonal allocation of quota, trip limits, and individual fishing quotas for inclusion in Amendment 10

to the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the MAFMC's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Joanna Davis at the Mid-Atlantic Council Office (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: January 29, 2003.

Theophilus R. Brainerd,

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

[FR Doc. 03–2808 Filed 2–5–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. 2002–C–001]

Patent and Trademark Office Acquisition Guidelines (PTAG)

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Notice of promulgation of guidelines.

SUMMARY: The United States Patent and Trademark Office (USPTO) is publishing guidelines which will apply to its acquisitions.

EFFECTIVE DATE: The guidelines will be adopted on March 10, 2003.

FOR FURTHER INFORMATION CONTACT: Ms. Susan Messina, Procurement Analyst, USPTO, Office of Procurement, at 703–305–8014.

SUPPLEMENTARY INFORMATION:

Background

The USPTO published the proposed guidelines and requested comments on October 23, 2002 (67 FR 65092). No comments were received in response to this notice and request for comments.

Nature of Guidelines

Neither the Federal Acquisition Regulation (FAR) nor the procedures set forth in this notice will be binding on USPTO contracting officers or other USPTO employees involved in the procurement process. However, USPTO employees may assume that following either the FAR procedures or, to the extent applicable, the alternate procedures set forth in this notice will ensure compliance with applicable legal requirements and result in fair and appropriate decisions. USPTO employees may use procedures other than those set forth in the FAR and this notice so long as these procedures comply with all applicable statutes, Executive Orders and regulations, will further the legitimate interests of the USPTO and are calculated to result in fair decisions.

Neither the FAR nor the alternate guidance provided in this notice is binding on USPTO vendors or any other member of the public, except to the extent provisions therefrom are incorporated in legally enforceable contracts. Instructions set forth in solicitations or other procurement documents are also binding in that they may establish conditions on an offeror's continued participation in the procurement process.

The alternate procedures set forth in this notice are intended to incorporate brevity of content, streamlined procedures, innovation in process, flexibility, and discretion to the acquisition process while ensuring objectivity and maximum reasonable competition. The following are highlights of the benefits the USPTO hopes to achieve through this alternate guidance:

- Increase the competitive threshold from $2500 to $5000 to decrease processing time and costs.
- Use ''maximum reasonable competition'' instead of ''full and open competition'' for a more efficient procurement process.
- Reflect the USPTO's increased flexibility in procuring printing services.
- Increase the threshold for the use of simplified acquisition procedures for commercial items from $5 million to $10 million to reduce the lead time for processing requirements and decrease acquisition costs.
- Provide guidance on the use of an Alternative Streamlined Contracting Approach. This process involves the early identification of highly qualified vendors, which will reduce the investment of vendor time and resources, provide greater flexibility, and establish better partnerships with the vendor community. The use of a pre-set number of firms for the competitive range also reduces unreasonable contractor expectations.
- Permit limited discussions after the establishment of the competitive range in lieu of making an award without discussions. USPTO hopes to reduce processing time and administrative burdens associated with proposal revisions.
- Permit use of contract types not included in the FAR (*i.e.*, contract types that combine elements of the various contract types listed in the FAR (Labor Hour Award Fee, for one example). This provides greater flexibility to improve mission accomplishment and improved partnering relationships with vendors.

Guidelines

Expanded Use of Electronic Commerce

Recognizing that the Internet provides a valuable means of disseminating information, USPTO intends to continue and expand its use of electronic commerce to facilitate streamlining of the acquisition process. While the USPTO will continue to synopsize proposed actions and contract awards, the objective is to use the USPTO Office of Procurement web site as the foremost method of publicizing requirements, business opportunities, and providing procurement information to the business community.

Competition

The USPTO will endeavor to acquire products and services to the maximum extent possible in all acquisitions on a competitive basis; however, it is exempt from the requirement to meet the test of ''full and open competition'' as defined in FAR part 6.

The USPTO will use competition as a principal tool in achieving results and intends to adopt means of affording competition that it determines will effectually serve the performance goals established for particular acquisitions.

It is the policy of the USPTO to promote competition to the maximum extent possible. Competition reduces the risk of having to rely on only one source for critical goods or services and reduces costs. USPTO intends to balance these considerations with the program benefits that can be gained from developing a reduced supplier base and building strategic alliances with its suppliers. The degree of competition sought will be influenced by knowledge of the marketplace and successful past performance records, with competition in most cases limited to a reasonable number of capable sources.

Under the USPTO process, all firms will be apprised of opportunities, but

only those judged to be the most viable will commit the resources to fully participate. USPTO intends to have an open interchange with industry about USPTO potential requirements and contractor capabilities long before any formal solicitation is issued. It is the policy of the USPTO to inform all firms of opportunities and seek to ensure only the most viable will need to commit resources to fully participate.

Where justifications for limiting competition are prepared, they will be approved at the following levels:

a. Justifications of procurements $1,000,000 or less will be approved by the Contracting Officer.

b. Justifications over $1,000,000 and less than $10,000,000 will be approved by the Director, Office of Procurement.

c. Justifications greater than $10,000,000 will be approved by the Agency Competition Advocate.

Simplified Acquisition Procedures

Competitive quotations need not be sought for purchases under $5,000 provided that the Contracting Officer can readily determine the price to be fair and reasonable. Written solicitations should only be utilized when appropriate given the complexity of the requirement.

The USPTO contracting officer may use procedures similar to those set forth at subpart 13.5 of the FAR for acquisitions of commercial items not in excess of $10 million.

Alternative Streamlined Contracting Approach

The Contracting Officer may utilize the streamlined process described below to solicit offers. The characteristics of this process include:

a. Early identification of the most highly qualified contractors;

b. Establishing a pre-set number of firms for the competitive range to limit the investment of contractor time and resources and to reduce the administrative burden of the procurement process; and

c. Conducting negotiations only where it is practical and efficient to do so and without the requirement for a common cut-off date for concluding negotiations.

The USPTO intends to use a project team to conduct acquisitions under the alternative streamlined contracting approach. The project team will be a multi-disciplinary team that consists of a warranted contracting officer, representatives from the program office whose requirement is the subject of the procurement, the Office of Corporate Planning, and the Office of the General Counsel. The project team will possess the necessary authority needed to conduct all aspects of the acquisition. No further approvals will be required to conduct the acquisition.

The Alternative Streamlined Contracting Process is conducted as follows:

a. A project team conducts all aspects of the acquisition.

b. The team employs strategies and methods that best fulfill the needs of the acquisition.

c. When using the streamlined Alternative Streamlined Contracting Approach, USPTO may employ announcements of opportunities rather than announcement of individual actions over $25,000.

d. Initially, a high-level solicitation document is used. It should solicit basic and essential information such as offeror qualifications, broad-based product data, proposed technical concept, past performance, and pricing. The solicitation document will typically consist of:

1. Information on goals and objectives of the requirement,

2. Specific procedures related to conducting the acquisition,

3. Instructions to offerors on preparing a response,

4. Information on how responses will be evaluated,

5. Budget information on the value of the acquisition, where appropriate, and

6. Project and acquisition timeframes and schedules.

e. A competitive range will be established after initial evaluation of responses. Respondents judged as not being among the most highly rated will be eliminated from further consideration.

f. After establishment of the competitive range, a detailed Statement of Need is issued to solicit additional information and obtain a more complete offer from all firms. The Statement of Need will incorporate the principles of performance-based contracting to permit offerors the opportunity to propose the best solution to meet the USPTO's needs.

g. Oral presentations may be used. The Contracting Officer should maintain an adequate record of oral presentations.

Based on responses to the Statement of Need, the Contracting Officer may negotiate or conduct discussions only with the highest ranked offeror based on the evaluation factors set forth in the solicitation. If the USPTO Contracting Officer is unable to reach agreement with this offeror, negotiations will be initiated with the next highest-ranked firm. This process will continue until those firms remaining in the competitive range have been considered. If agreement cannot be reached, negotiations may be reopened with all firms in the competitive range or the solicitation may be canceled.

Selecting Contract Types

Where appropriate, the USPTO may use any contract type (*e.g.*, fixed price or labor hour) provided for in the FAR without regard to any limitations specified therein, and in addition may use hybrid or other contract types not provided for in the FAR.

Indefinite-Delivery Contracts

Because it is exempt from the Federal Property and Administrative Services Act (FPAS), the USPTO is not required to make multiple awards for indefinite-quantity contracts under any circumstances, or, where multiple awards are made, to use any specific procedures for placing task or delivery orders. Contracting Officers are encouraged, however, to consider the use of multiple awards where doing so would result in benefits to the USPTO. A solicitation contemplating multiple awards should address the procedures the USPTO will use for selecting between contractors when awarding task or delivery orders. Where a specific procurement includes procedures for seeking task or delivery order proposals from multiple contractors, applying these procedures to individual requirements below $5,000 normally will not be in the best interest of the USPTO.

Options

Because of the USPTO's exemption from FPAS, it may make award on the basis of unpriced options contained in an existing contract without seeking further competition. The USPTO intends to consider the use of this technique in connection with performance-based contracting under the following circumstances:

a. The award of additional option periods to the incumbent contractor without competition is used as an incentive and reward for good contract performance;

b. The solicitation notifies offerors that unpriced options will be used as a performance incentive; and

c. The contract includes provisions for measuring contract performance and the pricing, negotiation, and exercise of additional option periods.

Acquisition Plans

Acquisition planning serves two important purposes: it establishes how an agency will meet programmatic requirements within the agency's

budgetary goals and it serves as a guideline for the acquisition.

Annual Acquisition Plans—As a means of funds control, prioritization, and workload scheduling, USPTO intends to continue to utilize yearly acquisition plans that are tied to the budget process. The plans should be updated as priorities and funding changes occur to ensure accuracy and currency. Plans will be concise. All planned acquisitions for a given fiscal year should be included on the yearly acquisition plan.

Separate Project Agreements—The USPTO may use a separate project agreement for individual or multiple actions that utilize the Alternative Streamlined Contracting Approach. Project Agreement documents tailored to the size and complexity of the various acquisitions will be developed.

Individual Acquisition Plans—The content of the individual acquisition plan shall be left to the discretion of the Contracting Officer. At a minimum, acquisitions plans should contain the following:

a. Statement of need.
b. Applicable conditions.
c. Cost.
d. Risks.
e. Plan of action.
f. Milestones.

Printing Requirements

The Patent and Trademark Efficiency Act, 35 U.S.C. 2(b)(4)(B), exempts the USPTO from requirements for printing by the Government Printing Office. Accordingly the USPTO intends to acquire printing by the most economic and efficient means available, which may in particular acquisitions include the Government Printing Office.

Market Research

The purpose of USPTO's approach to market research is to identify and determine the availability of products or services that will satisfy its requirements. The USPTO will use such research, as appropriate, to help it ascertain the most efficient acquisition strategy—with consideration of the range of potential sources, availability of commercial items, and identification of standard commercial practices. Accordingly, the USPTO intends to conduct market research that, to the extent possible, is based upon clear statements of an acquisition's intended outcome and does not foreclose, before research is conducted, the consideration of any reasonable solution or technology for accomplishing its goal. The best result of market research will be achieved when there is a clear statement of the acquisition's intended outcome.

Market research is the responsibility of the entire acquisition team. USPTO Contracting Officers should work closely with technical/program staff to ensure that appropriate market research is conducted. The extent and results of market research efforts should be documented in acquisition planning documents and/or project agreements when the Alternative Streamlined Contracting Approach is utilized.

Bid Protests

The USPTO continues to be subject to the bid protest jurisdiction of the General Accounting Office and of the Court of Federal Claims. The USPTO is also subject to Executive Order 12979 concerning protests to the agency. Its procedures for considering such protests are available at: *http://www.uspto.gov/web/offices/ac/comp/proc/protest.htm*.

Dated: January 31, 2003.

James E. Rogan,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 03–2921 Filed 2–5–03; 8:45 am]

BILLING CODE 3510–16–P

CONSUMER PRODUCT SAFETY COMMISSION

Request for Comments Concerning Proposed Extension of Approval of a Collection of Information—Safety Standard for Walk-Behind Power Lawn Mowers

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: As required by the Paperwork Reduction Act (44 U.S.C. Chapter 35), the Consumer Product Safety Commission requests comments on a proposed request for an extension of approval of a collection of information from manufacturers and importers of walk-behind power lawn mowers. This collection of information consists of testing and recordkeeping requirements in certification regulations implementing the Safety Standard for Walk-Behind Power Lawn Mowers (16 CFR part 1205). The Commission will consider all comments received in response to this notice before requesting an extension of approval of this collection of information from the Office of Management and Budget.

DATES: The Office of the Secretary must receive written comments not later than April 7, 2003.

ADDRESSES: Written comments should be captioned ''Walk-Behind Power Lawn Mowers'' and mailed to the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207, or delivered to that office, room 502, 4330 East-West Highway, Bethesda, Maryland 20814. Written comments may also be sent to the Office of the Secretary by facsimile at (301) 504–0127 or by e-mail at *cpsc-os@cpsc.gov.*

FOR FURTHER INFORMATION CONTACT: For information about the proposed extension of approval of the collection of information, or to obtain a copy of 16 CFR part 1205, call or write Linda L. Glatz, Office of Planning and Evaluation, Consumer Product Safety Commission, Washington DC 20207; telephone (301) 504–7671.

SUPPLEMENTARY INFORMATION: In 1979, the Commission issued the Safety Standard for Walk-Behind Power Lawn Mowers (16 CFR part 1205) under provisions of the Consumer Product Safety Act (CPSA) (15 U.S.C. 2051 *et seq.*) to eliminate or reduce risks of amputations, avulsions, lacerations, and other serious injuries which have resulted from the accidental contact of some part of an operator's body with the rotating blade of a power lawn mower. The standard contains performance and labeling requirements for walk-behind power lawn mowers to address risks of blade-contact injuries.

A. Certification Requirements

Section 14(a) of the CPSA (15 U.S.C. 2063(a)) requires manufacturers, importers, and private labelers of a consumer product subject to a consumer product safety standard to issue a certificate stating that the product complies with all applicable consumer product safety standards. Section 14(a) of the CPSA also requires that the certificate of compliance must be based on a test of each product or upon a reasonable testing program.

Section 14(b) of the CPSA authorizes the Commission to issue regulations to prescribe a reasonable testing program to support certificates of compliance with a consumer product safety standard. Section 16(b) of the CPSA (15 U.S.C 2065(b)) authorizes the Commission to issue rules to require that firms ''establish and maintain'' records to permit the Commission to determine compliance with rules issued under the authority of the CPSA.

The Commission has issued regulations prescribing requirements for a reasonable testing program to support certificates of compliance with the standard for walk-behind power mowers. These regulations also require manufacturers, importers, and private labelers of walk-behind power mowers

to establish and maintain records to demonstrate compliance with the requirements for testing to support certification of compliance. 16 CFR part 1205, subpart B.

The Commission uses the information compiled and maintained by manufacturers and importers of walk-behind power mowers to protect consumers from risks of injuries associated with walk-behind power lawn mowers. More specifically, the Commission uses this information to determine whether the mowers produced and imported comply with the applicable standard. The Commission also uses this information to obtain corrective actions if walk-behind power mowers fail to comply with the standard in a manner which creates a substantial risk of injury to the public.

The Office of Management and Budget (OMB) approved the collection of information requirements for walk-behind mowers under control number 3041–0091. OMB's most recent extension of approval will expire on March 31, 2003. The Commission proposes to request an extension of approval without change for these collection of information requirements.

B. Estimated Burden

The Commission staff estimates that about 20 firms are subject to the testing and recordkeeping requirements of the certification regulations. The Commission staff estimates further that the annual testing and recordkeeping burden imposed by the regulations on each of these firms on average is approximately 390 hours. Thus, the total annual burden imposed by the certification regulations on all manufacturers and importers of walk-behind power mowers is about 7,800 hours.

The Commission staff estimates that the hourly wage for the time required to perform the required testing and to maintain the required records is about $26.46, and that the annual total cost to the industry is approximately $206,388.

C. Request for Comments

The Commission solicits written comments from all interested persons about the proposed collection of information. The Commission specifically solicits information relevant to the following topics:

—Whether the collection of information described above is necessary for the proper performance of the Commission's functions, including whether the information would have practical utility;

—Whether the estimated burden of the proposed collection of information is accurate;

—Whether the quality, utility, and clarity of the information to be collected could be enhanced; and

—Whether the burden imposed by the collection of information could be minimized by use of automated, electronic or other technological collection techniques, or other forms of information technology.

Dated: January 30, 2003.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 03–2803 Filed 2–5–03; 8:45 am]

BILLING CODE 6355–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Request for Comments Concerning Proposed Extension of Approval of a Collection of Information—Electrically Operated Toys and Children's Articles

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: As required by the Paperwork Reduction Act (44 U.S.C. Chapter 35), the Consumer Product Safety Commission requests comments on a proposed extension of approval of a collection of information from manufacturers and importers of certain electrically operated toys and children's articles. The collection of information consists of testing and recordkeeping requirements in regulations entitled ''Requirements for Electrically Operated Toys or Other Electrically Operated Articles Intended for Use by Children,'' codified at 16 CFR part 1505.

The Commission will consider all comments received in response to this notice before requesting an extension of this collection of information from the Office of Management and Budget.

DATES: The Office of the Secretary must receive written comments not later than April 7, 2003.

ADDRESSES: Written comments should be captioned ''Electrically Operated Toys'' and mailed to the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207, or delivered to that office, room 502, 4330 East-West Highway, Bethesda, Maryland 20814. Written comments may also be sent to the Office of the Secretary by facsimile at (301) 504–0127 or by e-mail at *cpsc-os@cpsc.gov.*

FOR FURTHER INFORMATION CONTACT: For information about the proposed extension of the collection of information, or to obtain a copy of 16 CFR part 1505, call or write Linda L. Glatz, Office of Planning and Evaluation, Consumer Product Safety Commission, Washington DC 20207; telephone (301) 504–7671.

SUPPLEMENTARY INFORMATION: In 1973, the Commission issued safety requirements for electrically operated toys and children's articles to protect children from unreasonable risks of injury from electric shock, electrical burns, and thermal burns. These regulations are codified at 16 CFR part 1505 and were issued under the authority of sections 2 and 3 of the Federal Hazardous Substances Act (15 U.S.C. 1261, 1262).

A. Requirements for Electrically Operated Toys

These regulations are applicable to toys, games, and other articles intended for use by children that are powered by electrical current from a 120 volt circuit. Video games and articles designed primarily for use by adults that may be incidentally used by children are not subject to these regulations.

The regulations prescribe design, construction, performance, and labeling requirements for electrically operated toys and children's articles. The regulations also require manufacturers and importers of those products to develop and maintain a quality assurance program. Additionally, section 1505.4(a)(3) of the regulations requires those firms to maintain records for three years containing information about: (1) Material and production specifications; (2) the quality assurance program used; (3) results of all tests and inspections conducted; and (4) sales and distribution of electrically operated toys and children's articles.

The Office of Management and Budget (OMB) approved the collection of information requirements in the regulations under control number 3041–0035. OMB's most recent extension of approval expires on April 30, 2003. The Commission now proposes to request an extension of approval without change for the information collection requirements in the regulations.

The safety need for this collection of information remains. Specifically, if a manufacturer or importer distributes products that violate the requirements of the regulations, the records required by section 1505.4(a)(3) can be used by the firm and the Commission (i) to identify specific lots or production lines of products which fail to comply with applicable requirements, and (ii) to notify distributors and retailers in the event the products are subject to recall.

B. Estimated Burden

The Commission staff estimates that about 40 firms are subject to the testing and recordkeeping requirements of the regulations. Each one may have an average of ten products each year for which testing and recordkeeping would be required. The Commission staff estimates that the tests required by the regulations can be performed on one product in 16 hours and that recordkeeping and maintenance can be performed for one product in four hours. Thus, the total annual burden imposed by the regulations on all manufacturers and importers is about 8,000 hours. Using the rate of $42.30 per hour as the average total compensation (Total Compensation, Private Goods-Producing Section, Managerial, Executive, and Administrative Category, Bureau of Labor Statistics), the estimated annualized cost is $338,400.

C. Request for Comments

The Commission solicits written comments from all interested persons about the proposed collection of information. The Commission specifically solicits information relevant to the following topics:

—Whether the collection of information described above is necessary for the proper performance of the Commission's functions, including whether the information would have practical utility;

—Whether the estimated burden of the proposed collection of information is accurate;

—Whether the quality, utility, and clarity of the information to be collected could be enhanced; and

—Whether the burden imposed by the collection of information could be minimized by use of automated, electronic or other technological collection techniques, or other forms of information technology.

Dated: January 30, 2003.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 03–2804 Filed 2–5–03; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense (Personnel and Readiness), DoD.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of the paperwork reduction Act of 1995, The Office of the Under Secretary of Defense (Personnel and Readiness) announces the following proposed reinstatement of a public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the function 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 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 before April 7, 2003.

ADDRESSES: Written comments and recommendation on the proposed information collection should be sent to the Office of the Under Secretary of Defense (Personnel and Readiness) (Military Personnel Policy/Access Policy) ATTN: Major Brenda K. Leong, 4000 Defense Pentagon, Washington, DC 20301–4000.

FOR FURTHER INFORMATION CONTACT: To request additional information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the above address or call (703) 695–5529.

Title, Associated Form, and OMB Control Number: Medical Screening of Military Personnel, DD Form 2807–1 and DD Form 2807–2, OMB Control Number 0704–0413.

Needs and Uses: Title 10, USC Chapter 31: Section 504 and 505, and Chapter 33, Section 532, require applicants to meet accession medical standards prior to enlistment into the Armed Forces (including the Coast Guard). If applicants' medical history reveals a medical condition that does not meet the accession medical standards, they are medically disqualified for military entrance. This form also will be used by all Service members not only in their initial medical examination but also for required periodic medical examinations.

Affected Public: Individuals or households, not-for-profit institutions.

Annual Burden Hours: 135,833.

Number of Respondents: 850,000.

Responses per Respondent: 1.

Average Burden per Response: 9.6 mins.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

These forms obtain medical information which affects entrance physical examinations, routine in-service physical examinations, separation physical examinations, and other medical examinations as required. The respondents are all applicants for enlisted, induction or commissioning. The applicant(s) completes the medical history information recorded on the form. This information collected provides the Armed Services and the medical history of applicants. The DD Forms 2807–1 and 2807–2 are the method of collecting and verifying medical data on applicants applying for entrance. These DD Forms are the official DoD medical documents used by the Services through which historical medical information is collected, reviewed and maintained.

Dated: January 30, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03–2815 Filed 2–5–03; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense (Personnel and Readiness), DoD.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of the paperwork reduction Act of 1995, The Office of the Under Secretary of Defense (Personnel and Readiness) announces the following proposed reinstatement of a public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the function 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 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 before April 7, 2003.

ADDRESSES: Written comments and recommendation on the proposed information collection should be sent to the Office of the Under Secretary of Defense (Personnel and Readiness), (Military Personnel Policy/Accession Policy) ATTN: Major Brenda K. Leong, 4000 Defense Pentagon, Washington, DC 20301–4000.

FOR FURTHER INFORMATION CONTACT: To request additional information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the above address or call (703) 695–5529.

Title, Associated Form, and OMB Control Number: Record of Military Processing, Armed Forces of the United States, DD Form 1966, OMB Control Number: 0704–0173.

Needs and Uses: This information collection is necessary to obtain data on individuals applying for enlistment in the Armed Forces of the United States to determine eligibility for enlistment. The information collected accompanies the applicant throughout the enlistment process. It also is used for establishing personnel records on those who enlist.

Affected Public: Individuals or households.

Annual Burden Hours: 170,000.

Number of Respondents: 510,000.

Responses per Respondent: 1.

Average Burden per Response: 20 minutes.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

Title 10 U.S.C., Sections 504, 505, 508, 12102 and 520a, Title 14 U.S.C., Sections 351 and 632, and Title 50 U.S.C., Section 451, require applicants to meet standards for enlistment into the Armed Forces. This information collection is the basis for determining eligibility of applicants for enlistment in the Armed Forces and is needed to verify data given by the applicant and to determine his/her qualification of enlistment. The information collected aids in the determination of qualifications, term of service, and grade in which a person, if eligible, will enter active duty or reserve status.

Dated: January 30, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03–2816 Filed 2–5–03; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Proposed Collection; Comment Request

AGENCY: Real Estate and Facilities Directorate, Federal Facilities Division, Washington Headquarters Services, Department of Defense.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, Washington Headquarters Services announces the proposed 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 proposed 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 April 7, 2003.

ADDRESSES: Written comments and recommendations on the proposed information collection should be sent to Washington Headquarters Services, Real Estate and Facilities Directorate, Federal Facilities Division, Technical Staff, Integrated Environmental Management Support, ATTN: Jennifer Judd, Room RDF1J702, 1155 Defense Pentagon, Washington, DC 20301–1155. Consideration will be given to all comments received within 60 days of the date of publication of this notice.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the above address, or call WHS, RE&F, FFD, Technical Staff Branch at (703) 695–8004.

Title and OMB Number: Exposure and Medical Surveillance Program for the Pentagon in the Aftermath of 9–11–01; OMB Number 0704—[To be determined].

Needs and Uses: The information collection requirement is necessary to obtain and record the temporal and spatial location of those present at the Pentagon on 9–11–01 and in the three month time period that followed, and to obtain and record known or perceived exposures or symptoms of same population. The recorded information will be used to estimate possible exposure to hazardous contaminants, and to individually recommend appropriate medical follow-up.

Affected Public: Individuals, State and local governments and other responders to crash scene, visitors, construction and clean-up contractors.

Annual Burden Hours: 950 hours.

Number of Respondents: 1900.

Responses per Respondent: 1.

Average Burden per Response: 30 minutes.

Frequency: One time.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The terrorist activity at the Pentagon on September 11, 2001, resulted in the destruction of a large amount of building materials and equipment in a devastating manner. The catastrophe has raised concerns of possible health effects, ranging from acute and temporary to longer-term and permanent, resulting from exposures to hazardous materials and air contaminants of the building occupants and first responders on September 11th, and, for some contaminants, continuing since that date. This program will enumerate potentially affected individuals, estimate their exposures on and since September 11, 2001, and based on these exposure estimates, make recommendations on an individual basis for their appropriate medical follow-up. Collecting symptomatic and location information from individuals at and near the crash site is essential in executing a thorough and accurate medical surveillance program.

Dated: January 31, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03–2819 Filed 2–5–03; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Dates: Consideration will be given to all comments received by March 10, 2003.

Title, Form Number, and OMB Number: CHAMPUS Claims Patient's Request for Medical Payment; DD Form 2642; OMB Number 0720–0006.

Type of Request: Reinstatement.

Number of Respondents: 1,035,000.

Responses per Respondent: 1.

Annual Responses: 1,035,000.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 258,750.

Needs and Uses: This form is used solely by beneficiaries claiming reimbursement for medical expenses under the TRICARE Program [formerly the Civilian Health and Medical Program of the Uniformed Services (TRICARE/CHAMPUS)]. The information collected will be used by TRICARE/CHAMPUS to determine beneficiary eligibility, other health insurance liability, certification that the beneficiary received the care, and reimbursement for the medical services received.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Cristal Thomas.

Written comments and recommendations on the proposed information collection should be sent to Ms. Thomas at the Office of Management and Budget, Desk Officer for DoD Health Affairs, Room 10235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: January 30, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03–2817 Filed 2–5–03; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of Paperwork Reduction Act (44 U.S.C. Chapter 35).

Dates: Consideration will be given to all comments received by March 10, 2003.

Title and OMB Number: Evaluation of Army Benefits Center-Civilian (ABC–C) Retirement System; Survey; OMB Number 0702-[To Be Determined].

Type of Request: New collection.

Number of Respondents: 1,500.

Responses per Respondent: 1.

Annual Responses: 1,500.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 375.

Needs and Uses: To assess the utility and efficiency of the Army Benefits Center-Civilian (ABC–C) retirement system. To this end, recently retired Army civilian employees whose retirements were processed by the Army Benefits Centers will be surveyed. The purpose of the survey is to determine the degree of customer satisfaction with the current system and to make recommendations for improvements.

Affected Public: Individuals or households.

Frequency: One time.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jacqueline Zeiher.

Written comments and recommendations on the proposed information collection should be sent to Ms. Zeiher at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: January 30, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03–2818 Filed 2–5–03; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board

AGENCY: Department of Defense.

ACTION: Notice of advisory committee meeting date change.

SUMMARY: On November 29, 2002 (67 FR 71144), the Department of Defense announced closed meetings of the Defense Science Board (DSB) Task Force on Unexploded Ordnance. The meeting originally scheduled for March 12–13, 2003, has been moved to March 11–12, 2003. This meeting will be held at SAIC, 4001 N. Fairfax Street, Arlington, VA.

Dated: January 30, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03–2820 Filed 2–5–03; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before April 7, 2003.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will

this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: January 30, 2003.

John D. Tressler,

Leader, Regulatory Management Group, Office of the Chief Information Officer.

Office of Educational Research and Improvement

Type of Review: New Collection.

Title: National Assessment of Educational Progress: Foreign Language Assessment, field test 2003 and full scale 2004.

Frequency: Other: One-time.

Affected Public: Individuals or household (primary), State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 50250.

Burden Hours: 14252.

Abstract: The National Assessment of Educational Progress Foreign Language assessment will assess the current status of the foreign language skills of high school seniors in the U.S. as well as collecting information about foreign language programs, instructional practices, and attitudes towards learning foreign languages.

Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or to the e-mail address *Vivian.reese@ed.gov.* Requests may also be faxed to 202–708–9346. *Please specify the complete title of the information collection when making your request.*

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at her e-mail address *Kathy.axt@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 03–2825 Filed 2–5–03; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Recognition of Accrediting Agencies, State Agencies for the Approval of Public Postsecondary Vocational Education, and State Agencies for the Approval of Nurse Education

AGENCY: National Advisory Committee on Institutional Quality and Integrity, Department of Education (The Advisory Committee).

What Is the Purpose of This Notice?

The purpose of this notice is to invite written comments on accrediting agencies and State approval agencies whose applications to the Secretary for initial or renewed recognition or whose interim reports will be reviewed at the Advisory Committee meeting to be held on June 9–10, 2003.

Where Should I Submit My Comments?

Please submit your written comments by March 24, 2003 to Carol Griffiths, Chief, Accrediting Agency Evaluation, Accreditation and State Liaison. You may contact her at the U.S. Department of Education, room 7105, MS 8509, 1990 K Street, NW., Washington, DC 20006, telephone: (202) 219–7011. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service at 1–800–877–8339.

What is the Authority for the Advisory Committee?

The National Advisory Committee on Institutional Quality and Integrity is established under section 114 of the Higher Education Act (HEA), as amended, 20 U.S.C. 1011c. One of the purposes of the Advisory Committee is to advise the Secretary of Education on the recognition of accrediting agencies and State approval agencies.

Will This Be My Only Opportunity to Submit Written Comments?

Yes, this notice announces the only opportunity you will have to submit written comments. However, a subsequent **Federal Register** notice will announce the meeting and invite individuals and/or groups to submit requests to make oral presentations before the Advisory Committee on the agencies that the Committee will review. That notice, however, does not offer a second opportunity to submit written comment.

What Happens to the Comments That I Submit?

We will review your comments, in response to this notice, as part of our evaluation of the agencies' compliance with the Secretary's Criteria for Recognition of Accrediting Agencies and State Approval Agencies. The Criteria are regulations found in 34 CFR part 602 (for accrediting agencies) and in 34 CFR part 603 (for State approval agencies) and are found at the following site: *http://www.ed.gov/offices/OPE/accreditation/index.html.* We will also include your comments with the staff analyses we present to the Advisory Committee at its June 2003 meeting. Therefore, in order for us to give full consideration to your comments, it is important that we receive them by March 24, 2003. In all instances, your comments about agencies seeking initial or continued recognition must relate to the Criteria for Recognition. In addition, your comments for any agency whose interim report is scheduled for review must relate to the issues raised and the Criteria for Recognition cited in the Secretary's letter that requested the interim report.

What Happens to Comments Received After the Deadline?

We will review any comments received after the deadline. If such comments, upon investigation, reveal that the accrediting agency is not acting in accordance with the Criteria for Recognition, we will take action either before or after the meeting, as appropriate.

What Agencies Will the Advisory Committee Review at the Meeting?

The Secretary of Education recognizes accrediting agencies and State approval agencies for public postsecondary vocational education and nurse education if the Secretary determines that they meet the Criteria for Recognition. Recognition means that the Secretary considers the agency to be a reliable authority as to the quality of education offered by institutions or programs that are encompassed within the scope of recognition he grants to the agency. The following agencies will be reviewed during the June 2003 meeting of the Advisory Committee:

Nationally Recognized Accrediting Agencies

Petition for Initial Recognition

1. Commission on English Language Program Accreditation (Requested scope of recognition: The accreditation of postsecondary English language programs and institutions in the United States).

2. Council on Naturopathic Medical Education (Requested scope of recognition: The accreditation and pre-accreditation throughout the United States of graduate-level, four-year

naturopathic medical educational programs leading to the Doctor of Naturopathic Medicine (N.D. or N.M.D.) or Doctor of Naturopathy (N.D.) degree.

3. Teacher Education Accreditation Council (Requested scope of recognition: The accreditation throughout the United States of professional education programs in institutions offering baccalaureate and graduate degrees for the preparation of teachers K–12)

Petitions for Renewal of Recognition

1. Montessori Accreditation Council for Teacher Education (Current scope of recognition: The accreditation of Montessori teacher education institutions and programs throughout the United States evaluated by the following review committees: the American Montessori Society Review Committee and the Independent Review Committee only.)

2. Western Association of Schools and Colleges, Accrediting Commission for Schools (Current scope of recognition: the accreditation and preaccreditation (''Candidate for Accreditation'') of adult and postsecondary schools that offer programs below the degree level in California, Hawaii, the United States territories of Guam and American Samoa, the Republic of Palau, the Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, and the Republic of the Marshall Islands.)

Interim Reports (An interim report is a follow-up report on an accrediting agency's compliance with specific criteria for recognition that was requested by the Secretary when the Secretary granted renewed recognition to the agency.)

1. Accrediting Association of Bible Colleges, Commission on Accreditation

2. American Academy for Liberal Education

3. Association for Clinical Pastoral Education, Inc., Accreditation Commission

4. American Physical Therapy Association, Commission on Accreditation in Physical Therapy Education

5. American Veterinary Medical Association, Council on Education

6. Distance Education and Training Council, Accrediting Commission

7. National League for Nursing Accrediting Commission *Progress Report:* A report on the agency's implementation of its new accreditation process.

1. Western Association of Schools and Colleges, Accrediting Commission for Senior Colleges and Universities.

State Agencies Recognized for the Approval of Public Postsecondary Vocational Education

Petition for Renewal of Recognition

1. Missouri State Board of Education

State Agencies Recognized for the Approval of Nurse Education

Petition for Renewal of Recognition

1. Missouri State Board of Nursing

Where Can I Inspect Petitions and Third-Party Comments Before and After the Meeting?

All petitions and those third-party comments received in advance of the meeting, will be available for public inspection and copying at the U.S. Department of Education, room 7105, MS 8509, 1990 K Street, NW., Washington, DC 20006, telephone (202) 219–7011 between the hours of 8 a.m. and 3 p.m., Monday through Friday, until May 16, 2003. They will be available again after the June 9–10 Advisory Committee meeting. An appointment must be made in advance of such inspection or copying.

How May I Obtain 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*.

Authority: 5 U.S.C. Appendix 2

Dated: January 31, 2003.

Sally L. Stroup,

Assistant Secretary for Postsecondary Education.

[FR Doc. 03–2834 Filed 2–5–03; 8:45 am]

BILLING CODE 4000–01–U

DEPARTMENT OF ENERGY

Office of Science Financial Assistance Program Notice 03–17: Theory, Modeling and Simulation in Nanoscience

AGENCY: Department of Energy.

ACTION: Notice inviting research grant applications.

SUMMARY: The Office of Advanced Scientific Computing Research (ASCR) and the Office of Basic Energy Sciences (BES) of the Office of Science (SC), U.S. Department of Energy (DOE), hereby announce their interest in receiving applications for projects in the area of theory and modeling in nanoscience. Partnerships among universities, National Laboratories, and industry are encouraged. The full text of Program Notice 03–17 is available via the Internet using the following Web site address: *http://www.science.doe.gov/production/grants/grants.html.*

DATES: Preapplications referencing Program Notice 03–17 should be received by February 18, 2003.

Formal applications in response to this notice should be received by 4:30 p.m., E.S.T., April 9, 2003, to be accepted for merit review and funding in Fiscal Year 2003.

ADDRESSES: Preapplications referencing Program Notice 03–17 should be sent via e-mail using the following address: *nanoscience.preposal@science.doe.gov*.

Formal applications referencing Program Notice 03–17 must be sent electronically by an authorized institutional business official through DOE's Industry Interactive Procurement System (IIPS) at: *http://e-center.doe.gov* (see also *http://www.sc.doe.gov/production/grants/grants.html*) IIPS provides for the posting of solicitations and receipt of applications in a paperless environment via the Internet. In order to submit applications through IIPS your business official will need to register at the IIPS Website. The Office of Science will include attachments as part of this notice that provide the appropriate forms in PDF fillable format that are to be submitted through IIPS. Color images should be submitted in IIPS as a separate file in PDF format and identified as such. These images should be kept to a minimum due to the limitations of reproducing them. They should be numbered and referred to in the body of the technical scientific application as Color image 1, Color image 2, etc. Questions regarding the operation of IIPS may be E-mailed to the IIPS Help Desk at: *HelpDesk@pr.doe.gov* or you may call the help desk at: (800) 683–0751. Further information on the

use of IIPS by the Office of Science is available at: *http://www.sc.doe.gov/production/grants/grants.html.*

If you are unable to submit the application through IIPS, please contact the Grants and Contracts Division, Office of Science at: (301) 903–5212, in order to gain assistance for submission through IIPS or to receive special approval and instruction on how to submit printed applications.

FOR FURTHER INFORMATION CONTACT: Dr. William Kirchhoff, U.S. Department of Energy, Office of Science, SC–14/Germantown Building, 1000 Independence Avenue, SW., Washington, DC 20585–1290, telephone: (301) 905–5809, E–mail: *William.Kirchhoff@Science.doe.gov*; Dr. Dale Koelling, U.S. Department of Energy, Office of Science, SC–13/Germantown Building, 1000 Independence Avenue, SW., Washington, DC 20585–1290, telephone: (301) 903–2187, E–mail; *Dale.Koelling@Science.doe.gov*; or Dr. Charles H. Romine, U.S. Department of Energy, Office of Science, SC–31/Germantown Building, 1000 Independence Avenue, SW., Washington, DC 20585–1290, telephone: (301) 903–5800, E–mail: *Romine@er.doe.gov*, fax: (301) 903–7774.

SUPPLEMENTARY INFORMATION: In May of 2002, a workshop on Theory and Modeling in Nanoscience was held in San Francisco, sponsored by the Basic Energy Sciences and Advanced Scientific Computing Research Advisory Committees to the Office of Science of the U.S. Department of Energy. The charge to the workshop was to identify challenges and opportunities for theory, modeling and simulation in nanoscience and nanotechnology, and to investigate the growing and promising role of applied mathematics and computer science in meeting those challenges. The final report of the workshop can be found at *http://www.sc.doe.gov/bes/Theory_and_Modeling_in_Nanoscience.pdf.*

Background: The Revolution in Theory, Modeling and Simulation

The past two decades have seen the fundamental techniques of theory, modeling and simulation undergo a revolution that paralles the experimental advances on which the new field of nanoscience is based. This period has seen the development of density functional algorithms, quantum Monte Carlo techniques, *ab initio* molecular dynamics, advances in classical Monte Carlo methods and mesoscale methods for soft matter and fast-multipole and multigrid algorithms. The application of these and other new theoretical capabilities are providing quantitative understanding of the novel behavior of nanoscale systems. The same two decades have also seen dramatic advances in computing hardware, which have increased raw computing power by four orders of magnitude. The combination of new theoretical and computational methods with increased computing power has made it now possible to simulate systems with millions of degrees of freedom.

The application of new experimental tools to nanosystems has created a concurrent need for a quantitative, predictive understanding of matter at the nanoscale. The absence of quantitative models that describe newly observed phenomena increasingly limits progress in the field. Without reliable, robust predictive tools and models for the quantitative description of structure and dynamics at the nanoscale, the research community will miss important scientific opportunities in nanoscience. The lack of such tools inhibits widespread applications in fields of nanotechnology ranging from molecular electronics to biomolecular materials. New investments in both human and computational resources are required to maintain the creative pace of nanoscience and nanotechnology.

The Opportunity and the Challenge

The nanoscale is not just another step towards miniaturization. It is a qualitatively new scale where materials properties depend on size and shape, as well as composition, and differ significantly from the same properties in the bulk or in insolated molecules. It is at this scale where one crosses over from the smallest scales, where a quantum mechanical description is required, to the larger scales, where a classical description in often adequate. All approximations and assumptions used previously are suspect for systems at this scale and must be reexamined. Fundamental methods for theory, modeling and simulation developed for larger of smaller scales will need to be modified, extended, and sometimes combined into a more complete description.

Completely new methods may be required. Synergism created within a team of researchers from nanoscience, computational science and applied mathematics can accelerate progress and broaden insight. Thus, the current solicitation for applications allows for and encourages the building of teams of theorists, computational scientists, applied mathematicians, and experts in high-performance computing. There are many theory, modeling and simulation challenges in the broad topical areas of: (1) Nano building blocks (nanotubes, quantum dots, clusters and nanoparticles); (2) complex structures and interfaces involving such building blocks; and (3) the assembly and growth of nanostructures, including (but not limited to):

- Determining the essential science of transport mechanisms at the nanoscale.
- Devising theoretical and simulation approaches to study nanointerfaces, which dominate many nanoscale systems and are highly complex and heterogeneous.
- Simulating, with reasonable accuracy, the optical properties of nanoscale structures and modeling nanoscale opto-electronic devices.
- Simulating complext nanostructures involving ''soft'' biological or organic structures, and ''hard'' inorganic ones, as well as nanointerfaces between hard and solt matter.
- Simulating self-assembly and directed self-assembly.
- Bringing from length- and time-scales appropriate for electronic motion to those needed for larger scale phenomena—all the way up to macroscopic properties.
- Devising theoretical and simulation approaches to quantum coherence, decoherence, and spintronics.
- Devising self-validating and benchmarking methods.

Each of these challenges represents an opportunity for theory, modeling and simulation to provide new insights into the dynamic behavior of nanoscale systems.

Investment Plan of the Office of Science

A new investment in theory, modeling and simulation in nanoscience will have a major impact on the national nanoscience initiative, by stimulating the formation of alliances and teams of experimentalists, theorists, applied mathematicians and computer and computational scientists to meet the challenge of developing a broad quantitative understanding of structure and dynamics at the nanoscale. The Department of Energy is uniquely situated to build such a program in theory, modeling and simulation in nanoscience. First, DOE currently supports much of the nation's experimental work in nanoscience, and new facilities dedicated to nanoscience research are currently being built at the DOE national laboratories. Second, the Department maintains an internationally renowned program in applied mathematical sciences research,

a program that has been responsible for must of the fundamental research that forms the foundation of mathematical modeling and computational science. Third, the Department provides unique resources and more than two decades of experience in high performance computing and algorithms. The combination of these three capabilities makes the Department a natural home for nanoscience theory, modeling and simulation. This solicitation of strengths by stimulating new research efforts in theory, modeling and simulation in nanoscience, built around strong teams of interdisciplinary reseachers.

Solicitation Emphasis

This solicitation is to accelerate computional nanoscience. Nanoscience is considered to be the study of the properties and processes unique to nanoscale and of the larger systems that incorporate nanoscale objects, so long as one or more nanoscale-driven properties remain significant. A nanoscale object is one in which two dimensions are in the range between a few and a few hundred nanometers. Applications are sought which seek to establish new capabilities in nanoscience that incorporate, and thereby elucidate, its special features. Applications may involve any of the broad topical areas or any combination thereof:

(1) Nano building blocks (nanotubes, quantum dots, clusters and nanoparticles)
(2) Complex structures and interfaces involving such building blocks
(3) Assembly and growth of nanostructures

Addressing prediction of properties and dynamical behavior. Nanotechnology, which is the design of specific devices, is not directly a part of this solicitation.

It is expected that a responsive project will progress beyond current limitations and will require serious development. This joint solicitation anticipates the necessity of a closely interacting team of researchers composed of people from the nanoscience field(s), computer experts, and applied mathematicians. Applied mathematics research applicable to theory, modeling and simulation in nanoscience includes (but is not limited to):

• Fast algorithms—new algorithms or variants of algorithms that lower the asymptotic computational complexity of a computation. Examples include fast multipole methods, fast Poisson solvers in complex geometries, fast eigensolvers, fast linear solvers, Monte Carlo (including improvements in variants such as Quantum Monte Carlo and Kinetic Monte Carlo), fast data exploration techniques, and fast computational geometry.

• Optimization and Predictability—energy minimization problems of unprecedented size and complexity, optimization methods that incorporate domain knowledge, optimization methods for understanding self-assembly processes, optimal control methods for design of nanosystems, predictability analysis and uncertainty quantification.

• Multiscale mathematics—that is, new mathematical techniques for effectively transferring quantitative information across a wide range of length- and time-scales, for merging atomistic and continuum modeling, new adaptive methods, separation of scales, and for coping with models where complex interactions between scales makes separation impossible. Here, it should be pointed out that nanoscience offers two separate opportunities. In the individual building blocks, the number of interacting scales is significantly reduced permitting addressing fundamental issues. The composites, on the other hand, exhibit greater interactions between different scales but with special constraints.

Applications to the BES and ASCR base programs through the Continuing Solicitation for all Office of Science Programs Notice 03–01, found at: *http://www.science.doe.gov/production/grants/grants.html,* which may have the potential for contributing to the nanoscience theory, modeling and simulation activities, should so indicate.

Collaboration

Applicants are encouraged to collaborate with researchers in other institutions, such as: universities, industry, non-profit organizations, federal laboratories and Federally Funded Research and Development Centers (FFRDCs), including the DOE National Laboratories, where appropriate, and to include cost sharing wherever feasible. Additional information on collaboration is available in the Application Guide for the Office of Science Financial Assistance Program that is available via the Internet at: *http://www.sc.doe.gov/production/grants/Colab.html.*

Program Funding

It is anticipated that up to $4 million annually will be available for multiple awards for this program. Initial awards will be made late in Fiscal Year 2003 or early Fiscal Year 2004, in the categories described above, and applications may request project support for up to five years. All awards are contingent on the availability of funds and programmatic needs. Annual budgets for successful projects are expected to range from $1,000,000 to $2,000,000 per project although smaller projects of exceptional merit may be considered. Annual budgets may increase in the out-years but should remain within the overall annual maximum guidance. Any proposed effort that exceeds the annual maximum in the out-years should be separately identified for potential award increases if additional funds become available.

Preapplications

Preapplications are strongly encouraged but not required prior to submission of a full application. However, notification of a successful preapplication is not an indication that an award will be made in response to the formal application. The preapplication should identify on the cover sheet the institution, Principal Investigator name(s), address(s), telephone, and fax number(s) and E-mail address(es), and the title of the project. A brief (one-page) vitae should be provided for each Principal Investigator. The preapplication should consist of a two to three page narrative describing the research project objectives, the approach to be taken, and a description of any research partnerships.

Merit Review

Applications will be subjected to scientific merit review (peer review) and will be evaluated against the following evaluation criteria listed in descending order of importance as codified at 10 CFR 605.10(d):

1. Scientific and/or Technical Merit of the Project,

2. Appropriateness of the Proposed Method or Approach,

3. Competency of Applicant's Personnel and Adequacy of Proposed Resources,

4. Reasonableness and Appropriateness of the Proposed Budget.

The evaluation of applications under item 1, Scientific and Technical Merit, will pay particular attention to:

(a) The potential of the proposed projects to make a significant impact in nanoscience research;

(b) The demonstrated capabilities of the applicants to perform basic research related to nanoscience and transform these research results into software that can be widely deployed;

(c) The likelihood that the algorithms, methods, mathematical libraries, and software components that result from this effort will have a substantial impact

on the nanoscience research community outside of the projects;

The evaluation under item 2, Appropriateness of the Proposed Method of Approach, will also consider the following elements related to Quality of Planning:

(a) Quality of the plan for effective coupling of nanoscience researchers, computational scientists and applied mathematicians;

(b) Quality and clarity of proposed work schedule and deliverables.

Note that external peer reviewers are selected with regard to both their scientific expertise and the absence of conflict-of-interest issues. Non-federal reviewers may be used, and submission of an application constitutes agreement that this is acceptable to the investigator(s) and the submitting institution. Reviewers will be selected to represent expertise in the technology areas proposed, applications groups that are potential users of the technology, and related programs in other Federal Agencies or parts of DOE, such as the Advanced Strategic Computing Initiative (ASCI) within DOE's National Nuclear Security Administration.

Information about the development and submission of applications, eligibility, limitations, evaluation, selection process, and other policies and procedures including detailed procedures for submitting applications from multi-institution partnerships may be found in 10 CFR part 605, and in the Application Guide for the Office of Science Financial Assistance Program. Electronic access to the Guide and required forms is made available via the World Wide Web at: *http://www.science.doe.gov/production/grants/grants.html.* The Project Description must be 20 pages or less, including tables and figures, but exclusive of attachments. The application must contain an abstract or project summary, letters of intent from collaborators, and short vitae. DOE is under no obligation to pay for any costs associated with the preparation or submission of applications if an award is not made.

(The Catalog of Federal Domestic Assistance number for this program is 81.049, and the solicitation control number is ERFAP 10 CFR part 605).

Issued in Washington, DC, on January 30, 2003.

John Rodney Clark,

Associate Director of Science for Resource Management.

[FR Doc. 03–2909 Filed 2–5–03; 8:45 am]

BILLING CODE 6450–01–M

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

State Energy Program (SEP) Special Projects

AGENCY: Golden Field Office, Department of Energy.

ACTION: Notice of issuance of the 2003 State Energy Program Special Projects Solicitation.

SUMMARY: The Office of Energy Efficiency and Renewable Energy of the Department of Energy (DOE) is anticipating the availability of financial assistance to the States for a group of special project activities. Funding is being provided by a number of programs in the Office of Energy Efficiency and Renewable Energy. States may apply to undertake any of the projects being offered by these programs. Financial Assistance will be awarded to the States separately for each special project, with activities to be carried out in conjunction with their efforts under SEP. The special projects' funding and activities are tracked separately so that the DOE Program Offices may follow the progress of individual projects.

DATES: The program solicitation is anticipated to be posted on the Industry Interactive Procurement System (IIPS) Web site in mid-February, 2003. Applications will be due in early to mid-May, 2003.

ADDRESSES: To obtain a copy of the solicitation, interested parties should access the DOE Golden Field Office Home Page at *http://www.golden.doe.gov/businessopportunities.html,* and click on the ''Solicitations'' button. The Golden Home Page will provide a link to the Solicitation in the IIPS Web site and provide instructions on using IIPS. The Solicitation can also be obtained directly through IIPS at *http://e-center.doe.gov* by browsing opportunities by Contract Activity, for those solicitations issued by the Golden Field Office. DOE will not issue paper copies of the solicitation.

IIPS provides the medium for disseminating solicitations, receiving financial assistance applications, and evaluating the applications in a paperless environment. The application must be submitted to IIPS by an eligible State applicant. For questions regarding the operation of IIPS, contact the IIPS Help Desk at *IIPS_HelpDesk@e-center.doe.gov* or at (800) 683–0751.

FOR FURTHER INFORMATION CONTACT: Andrea Lucero, DOE Golden Field Office, 1617 Cole Boulevard, Golden, CO 80401–3393 or via facsimile to Andrea Lucero at (303) 275–4788, or electronically to *andrea_lucero@nrel.gov.*

SUPPLEMENTARY INFORMATION: The projects must meet the relevant requirements of the program providing the funding, as well as of the SEP as specified in the 2003 State Energy Program Special Projects Solicitation. The goals of the special projects activities are to assist States accelerate deployment of energy efficiency and renewable energy technologies; facilitate the acceptance of emerging and underutilized energy efficiency and renewable energy technologies; and increase the responsiveness of Federally funded technology development efforts to private sector needs.

Fiscal Year 2003 is the eighth year special project activities have been funded in conjunction with the State Energy Program (10 CFR part 420). Most of these special projects are related to or based on similar efforts that have been funded by other DOE programs.

Availability of Fiscal Year 2003 Funds

With this publication, DOE is anticipating the availability of an estimated $16.3 million in new financial assistance awards from Fiscal Year 2003 appropriations. DOE's obligation for performance of this Solicitation is contingent upon the availability of appropriated funds from which financial assistance awards can be made.

The awards will be made through a competitive process. The programs that are participating in the State Energy Program Special Projects for Fiscal Year 2003, with the estimated amount of funding available for each, are as follows:

- *Clean Cities:* The program will provide funds to support the deployment of alternative fuels and alternative fuel vehicles (AFV) in the following four categories: (1) Projects that promote acquisition of commercially-available AFVs that maximize alternative fuel use, especially when those vehicles support an AFV niche market activity center or niche deployment strategy; (2) projects that promote AFV infrastructure development; (3) Projects that promote the acquisition of AFV school buses; (4) Projects that support coalition activities ($5,000,000).
- *Industrial Technology Program:* The objective is to broaden the impact of investments in advanced industrial technologies and practices geared toward energy savings and waste reduction. This will be done through

increased partnerships composed of State agencies, universities and local small and mid-sized manufacturing entities ($2,000,000).

• *Building Codes and Standards:* Support States' actions to adopt, update, implement, enforce and evaluate the effectiveness of their residential and commercial building energy codes ($1,650,000).

• *Rebuild America:* Support Rebuild America State Programs which are consistent with the Rebuild America Strategic Plan that identifies specific and measurable building and related energy saving projects. The goal is for 50% of the partnerships to have completed at least one major building renovation project by 2005. The partnerships must define a program and process that would show a significant opportunity for completion of building projects ($3,000,000).

• *Building America:* Applications should include research that coordinates with Building America's goal of creating building system performance packages that make new houses 40% to 70% more energy efficient than those built to local building code standards. Existing houses should be 30% more energy efficient than the local building code ($300,000).

• *Federal Energy Management Program:* Applications should promote and facilitate sustainable design and construction, energy efficient operations and maintenance, distributed and renewable energy, renewable energy purchases, siting of renewable power on Federal sites, and assessment and implementation of load and energy reduction techniques ($500,000).

• *Solar Technology Program:* To determine if islanding is a reasonable concern for distributed energy resources, grants are available to utilities to conduct measurements of the actual watts, Volt-Amp Reactives (VARs), and harmonics present on 12 distribution lines ($250,000).

• *State Wind Energy Support:* Applications are sought for (1) State outreach and technical assistance, and (2) regional consortia on transmissions ($400,000).

• *Distributed Energy and Electric Reliability—Transmission Reliability, Energy Storage, and Interconnection:* Applications are sought for (1) Energy Storage, Renewable Generation Dispatch, and Transmission Stability, and (2) Electrical Interconnection Regulatory Education and Outreach ($205,000).

• *Distributed Energy and Electric Reliability—Regional Combined Cooling Heating and Power Applications Centers:* The objectives of the Regional Application Centers will be to provide essential and appropriate applied research and development support, focused on the technology transfer and deployment of advanced Combined Heat and Power (CHP) technologies. The Regional Application Centers will achieve this objective through targeted education and outreach programs as well as project assistance ($1,200,000).

• *Distributed Energy and Electric Reliability—High Temperature Superconductivity, State Outreach Centers:* Project requests are for the development and facilitation of State meetings and workshops designed to disseminate information on the technical, economic, environmental feasibility, and effectiveness of High Temperature Superconductivity (HTS) technologies and their systems integration approach ($400,000).

• *Geothermal Outreach:* Program funding will be provided for outreach and information sharing with State-based agricultural/rural sectors in States with direct use geothermal resources. Additional funding will be provided for projects that update the inventory of geothermal resources in a given State (300,000).

• *Biomass:* To foster significant penetration of biomass-based technologies and products, cost-shared proposals are sought under two broad categories (1) outreach and information transfer to consumers, farmers, and industry; or (2) Development of innovative State or local incentives that facilitate increased market penetration of bio-based products and biomass-based technologies ($600,000).

• *Residential Deployment:* The goal of this solicitation is to develop self-sustaining energy efficiency programs for the existing home market that incorporate marketing efforts, builder training/certification, home inspections, and quality assurance of contractor work ($500,000).

Restricted Eligibility

Eligible Applicants under this solicitation are limited to the 50 States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U. S. Virgin Islands. Applications must be submitted by the State Energy Office or other agency responsible for administering the State Energy Program pursuant to 10 CFR part 420, although States may work in collaboration with non-State partners. For convenience, the term ''State'' in this solicitation refers to all eligible Applicants.

The Catalog of Federal Domestic Assistance number assigned to the State Energy Program Special Projects is 81.119.

Requirements for cost sharing contributions are addressed in each category. Cost sharing contributions beyond any required percentage is desirable.

Evaluation Review and Criteria

A first tier review for compliance will occur at the appropriate DOE Regional Office. Applications found to be in compliance will undergo a merit review process by panels comprised of members representing the participating programs at DOE's Office of Energy Efficiency and Renewable Energy. The program offices recommend projects to the Office of Weatherization and Intergovernmental Program Manager who is the designated selecting official. DOE reserves the right to fund, in whole or in part, any, all or none of the applications submitted in response to this notice.

Issued in Golden, Colorado, on January 29, 2003.

Jerry L. Zimmer,

Director, Office of Acquisition and Financial Assistance.

[FR Doc. 03–2910 Filed 2–5–03; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP03–41–000 and CP03–43–000]

Dominion Transmission, Inc.; Texas Eastern Transmission, LP; Notice of Filings

January 30, 2003.

Take notice that on January 24, 2003, Dominion Transmission, Inc. (Dominion), Docket No. CP03–41–000, 445 West Main Street, Clarksburg, West Virginia 26301; and Texas Eastern Transmission, LP (Texas Eastern), Docket No. CP03–43–000, 5400 Westheimer Court, Houston, Texas 77056–5310, filed with the Federal Energy Regulatory Commission (Commission) abbreviated applications for certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act and part 157 of the Commission's Rules and Regulations. Dominion requests authorization to lease, construct, own, operate, and maintain certain facilities in Pennsylvania, Virginia, and West Virginia; and to provide certain firm transportation and storage services. Texas Eastern requests authorization to construct, own, operate and maintain

proposed facilities that will increase the firm transportation capacity on Texas Eastern's system by 223,000 dekatherms per day (Dth/d), and lease this incremental capacity to Dominion. The applications are on file with the Commission and open for public inspection. These filings are 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 for TTY, contact (202) 502–8659.

Dominion

Dominion requests authority to lease capacity of 223,000 Dth/d of firm transportation service from Texas Eastern on CRP pipeline system located in Pennsylvania, and 5.6 Bcf of firm storage service. In addition, Dominion proposes to construct and place in service the following compressor station additions, and new compressor stations:

- At a new compressor station, Mockingbird Hill, located in Wetzel County, West Virginia: installing a 5,000 hp gas-fired turbine;
- At the existing Crayne station, located in Green County, Pennsylvania: replacing the existing #1 unit, a 5,500 hp gas-fired turbine, with a 7,800 hp gas-fired turbine, and the existing #2 unit would be reconfigured from a 6,500 hp gas-fired turbine to a 7,800 hp gas-fired turbine;
- At the existing Chambersburg station, located in Franklin County, Pennsylvania: upgrading the 2 existing electric powered units from 4,000 hp to 4,600 hp, and installing 2 new 7,800 hp gas-fired turbines;
- At the existing Leesburg station, located in Loudoun County, Virginia: installing an additional 7,800 hp gas-fired turbine;
- At a new compressor station, Quantico station, located in Fauquier County, Virginia: installing a 6,000 hp gas-fired turbine; and
- Also installing non-jurisdictional facilities as associated appurtenant facilities with each compressor installation and conducting non-jurisdictional work associated with abandoned oil wells at its Fink-Kennedy/Lost Creek Storage Reservoir to insure the integrity of the reservoir.

The estimated cost of the proposed project is $83.0 million. Dominion will pay Texas Eastern a monthly Lease Payment of $1,085,341 for the leased capacity. Dominion proposes incrementally priced transportation services at rates that are designed to recover the costs of both Dominion's incremental transmission facilities and the capacity that is to be leased from Texas Eastern.

Dominion proposes to roll in the storage service costs at its next general Section 4 rate case, since incremental cost-based storage rates would be less than the existing storage rates. In addition to the transportation rate, a reservation-based compression charge is being proposed in order to recover the cost of the new Quantico compressor station.

Texas Eastern

In order to provide the 223,000 Dth/d of lease capacity to Dominion, Texas Eastern requests authorization to construct, install, own, operate, and maintain four new 36-inch diameter pipeline loops totaling approximately 34.64 miles. Texas Eastern proposes to replace certain segments of the existing 24-inch diameter pipeline, which is currently abandoned in place, with new 36-inch diameter pipeline. The new 36-inch diameter sections of pipeline looping will be constructed in the same location as the currently existing abandoned 24-inch diameter pipeline looping. Texas Eastern will remove the existing pipe and relay the 36-inch diameter pipe in the same right-of-way. In addition, Texas Eastern proposes to replace the existing aerodynamic assembly on the 11,000 HP electric drive compressor unit at the Uniontown (Station 21-A) Compressor station in Uniontown, Pennsylvania, to accommodate the increased throughput. The estimated cost of the proposed project is $82.855 million. This cost will be fully reimbursed by Dominion under the Lease Agreement with no subsidization by Texas Eastern's existing customers.

Any questions regarding the applications are to be directed to Sean R. Sleigh, Certificates Manager, Dominion Transmission, Inc., 445 West Main Street, Clarksburg, WV 26301, or Steven E. Tillman, General Manager, Regulatory Affairs, Texas Eastern Transmission, LP, P.O. Box 1642, Houston, Texas 77251–1642.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the below listed comment date, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission may issue a preliminary determination on non-environmental issues prior to the completion of its review of the environmental aspects of the project. This preliminary determination typically considers such issues as the need for the project and its economic effect on existing customers of the applicant, on other pipelines in the area, and on landowners and communities. For example, the Commission considers

the extent to which the applicant may need to exercise eminent domain to obtain rights-of-way for the proposed project and balances that against the non-environmental benefits to be provided by the project. Therefore, if a person has comments on community and landowner impacts from this proposal, it is important either to file comments or to intervene as early in the process as possible.

Motions to intervene, protests and comments may be filed electronically via the internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

If the Commission decides to set the application for a formal hearing before an Administrative Law Judge, the Commission will issue another notice describing that process. At the end of the Commission's review process, a final Commission order approving or denying a certificate will be issued. *Comment Date:* February 20, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–2874 Filed 2–5–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RP00–411–006 and RP01–44–008]

Iroquois Gas Transmission System, L.P.; Notice Compliance Filing

January 30, 2003.

Take notice that on January 28, 2003, Iroquois Gas Transmission System, L.P. (Iroquois) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, Substitute Original Sheet No. 65C, proposed to become effective November 1, 2002.

Iroquois states that copies of this filing were served on all jurisdictional customers and interested state regulatory agencies and all parties to the proceeding.

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 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. 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.

Protest Date: February 10, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–2885 Filed 2–5–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–241–000]

KeySpan LNG, LP and Algonquin ALNG, LP; Notice of Tariff Filing

January 29, 2003.

Take notice that on January 27, 2003, KeySpan LNG, LP (KLNG) and Algonquin LNG, LP (ALNG) tendered for filing its FERC Gas Tariff, Third Revised Volume No. 1, the tariff sheets attached to Appendix A to the filing, with an effective date of January 27, 2003.

KLNG and ALNG state that the filing is being filed to reflect a corporate name change that became effective January 24, 2003.

KLNG and ALNG state that copies of its filing have been mailed to all affected 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 10, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–2887 Filed 2–5–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL98–6–001]

Old Dominion Electric Cooperative, Complainant v. Public Service Electric and Gas Company, Respondent; Notice of Amended Complaint

January 29, 2003.

Take notice that on January 24, 2003, pursuant to Rules 206, 212 and 716 of the Federal Power Act, Old Dominion Electric Cooperative (Old Dominion) filed with the Federal Energy Regulatory Commission (Commission) an amended complaint against Public Service Electric and Gas Company (PSE&G) requesting that the Commission: consider Old Dominion's previously-filed complaint action against PSE&G, as amended; on its merits; find that the rate pancaking to Old Dominion under a bundled power sales contract between Old Dominion and PSE&G is unjust, unreasonable, and unduly discriminatory; order and direct that the transmission component in the bundled rate of PSE&G under the contract be eliminated; and on a fast-track basis, direct that PSE&G defer any claim or demand for payment of past due amounts prior to final Commission determination of the matters and proceedings discussed in Old Dominion's motion or grant a stay pending final Commission determination on such matters.

Old Dominion states that copies of the filing were served upon PSE&G, PJM, Delmarva Power & Light Company, and

the Delaware Public Service Commission. Old Dominion is not aware of any other parties that may be expected to be affected by the complaint.

Any person desiring to be heard 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. The answer to the complaint and all comments, interventions or protests must be filed on or before the comment date . 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 for TTY, contact (202)502–8659. The answer to the complaint, 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.

Comment Date: February 14, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–2876 Filed 2–5–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP93–618–014]

PG&E Gas Transmission, Northwest Corporation; Notice of Annual Report

January 30, 2003.

Take notice that on January 28, 2003, PG&E Gas Transmission, Northwest Corporation (GTN) tendered for filing its ''Annual Report on Deferred Revenue Recovery Mechanism and Revenue Reconciliation for the Year Ending October 31, 2002'' for its Medford, Oregon Lateral.

GTN asserts that the purpose of this filing is to comply with the Commission's Order of January 12, 1995 in Docket Nos. CP93–618, *et al.* That Order requires GTN to file an annual report concerning its deferred revenue recovery mechanism and detailing the cost of service for GTN's Medford Lateral and the status of its deferred revenue recovery mechanism.

GTN further states that a copy of this filing has been served on GTN's jurisdictional customers and interested state regulatory agencies, and on the parties listed on the Commission's service list for this proceeding.

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: February 6, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–2875 Filed 2–5–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP03–40–000]

Sid Richardson Energy Services, Ltd.; Notice of Application

January 30, 2003.

On January 21, 2003, Sid Richardson Energy Services, Ltd. (Richardson), 201 Main Street, Suite 3000, Fort Worth, Texas 76102, filed an application in Docket No. CP03–40–000, pursuant to Rule 207(a)(2) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission) 18 CFR 385.207(a)(2), for a declaratory order declaring that Richardson's ownership and operation of certain facilities to be purchased from Northern Natural Gas Company (Northern) will not subject Richardson or its rates, services, facilities, or operations, to the Commission's jurisdiction under the Natural Gas Act. 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, contact FERC at FERCOnline Support@ferc.gov or call toll-free, (866) 208–3676, or for TTY, (202) 502–8659.

Richardson states that it is purchasing from Northern 26.82 miles of 16-inch pipeline between the outlet of Richardson's Jal Processing Plant (at Northern's block value #836BBB02) and Northern's Kermit compressor station, which will allow Richardson to use its processing/treating plants and gathering systems more efficiently.

Richardson further states that it will operate the subject pipeline as part of its non-jurisdictional gathering and processing operations. Accordingly, Richardson states that under the Commission's primary function test, the subject facilities should be declared exempt from the Commission's jurisdiction pursuant to Section 1(b) of the Natural Gas Act. Richardson states that Northern will be abandoning the subject facilities pursuant to its Subpart F blanket certificate authority and the automatic abandonment provisions of 18 CFR 157.216.

Any questions regarding this application may be directed to Richard Moncrief, Sid Richardson Energy Services, Ltd., 201 Main Street, Suite 3000, Fort Worth, Texas 76102 at (817) 339–7480 or Joseph S. Koury, Wright & Talisman, P.C., 1200 G Street, NW., Suite 600, Washington, DC 20005 at (202) 393–1200.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and

Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

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.

If the Commission decides to set the application for a formal hearing before an Administrative Law Judge, the Commission will issue another notice describing that process. At the end of the Commission's review process, a final Commission order approving or denying a certificate will be issued.

Comment Date: February 19, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–2873 Filed 2–5–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP02–17–004, *et al.*]

Texas Eastern Transmission, LP; Notice of Compliance Filing

January 29, 2003.

Take notice that on December 31, 2002, Texas Eastern Transmission, LP (Texas Eastern) tendered for filing as part of its FERC Gas Tariff, Seventh Revised Volume No. 1, the following tariff sheet to be effective February 1, 2003.

Second Revised Sheet No. 51B

Texas Eastern states that the purpose of this filing is to comply with the Commission's letter order issued on October 31, 2002 in Docket Nos. CP02–17–002 and CP02–45–002 (October 31 Order). Texas Eastern states that the October 31 Order accepted initial rates for Texas Eastern's Hanging Rock Lateral to become effective on the later of November 1, 2002 or the in-service date of the Hanging Rock Lateral.

Texas Eastern states that the Hanging Rock Lateral is expected to commence service on February 1, 2003. Texas Eastern states that the instant filing is being made to reflect the rates for service on the Hanging Rock Lateral, effective on the February 1, 2003 in-service date as provided in the October 31 Order.

Texas Eastern states that copies of its filing have been mailed to all affected customers of Texas Eastern, interested state commissions, and all parties listed on the Official Service Lists compiled by the Secretary of the Commission in these proceedings.

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: February 5, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–2872 Filed 2–5–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–240–000]

Transcontinental Gas Pipe Line Corporation; Notice of Tariff Filing

January 29, 2003.

Take notice that on January 24, 2003, Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, Eighth Revised Twenty-First Revised Sheet No. 28, to be effective February 1, 2003.

Transco states that the purpose of the instant filing is to track rate changes attributable to storage service purchased from Texas Eastern Transmission Corporation (TETCO) under its Rate Schedule X–28, the costs of which are included in the rates and charges payable under Transco's Rate Schedule S–2. Transco states that this filing is being made pursuant to tracking provisions under section 26 of the general terms and conditions of Transco's Third revised Volume No. 1 Tariff.

Transco states that included in Appendix A attached to the filing is the explanation of the rate changes and details regarding the computation of the revised S–2 rates.

Transco states that copies of the filing are being mailed to affected 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 5, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–2886 Filed 2–5–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER00–644–001, *et al.*]

Calpine Philadelphia, Inc., *et al.*; Electric Rate and Corporate Filings

January 28, 2003.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Calpine Philadelphia, Inc.

[Docket No. ER00–644–001]

Take notice that on January 23, 2003, Calpine Philadelphia, Inc. submitted for filing with the Federal Energy Regulatory Commission (Commission) its triennial market power analysis in compliance with the Commission order issued in this docket on January 12, 2000.

Comment Date: February 13, 2003.

2. PJM Interconnection, L.L.C.

[Docket No. ER02–1326–005]

Take notice that on January 24, 2003, PJM Interconnection, L.L.C. (PJM) amended its January 21, 2003, filing made in compliance with the Commission's December 19, 2002, order in PJM Interconnection, L.L.C., 101 FERC ¶ 61,308. PJM amends its January 21, 2003, compliance filing to include retroactive sheets of the PJM Open Access Transmission Tariff and the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C., in accordance with Designation of Electric Rate Schedule Sheets, Order No. 614.

PJM states that copies of this filing have been served on all parties listed on the official service list compiled by the Secretary in this proceeding, all PJM members, and each state electric utility regulatory commission in the PJM region.

Comment Date: February 14, 2003.

3. PJM Interconnection, L.L.C.

[Docket No. ER02–2491–001]

Take notice that on January 24, 2003, in compliance with the Federal Energy Regulatory Commission's (Commission) October 16, 2002, letter order in this proceeding, PJM Interconnection, L.L.C. (PJM) submitted for filing five substitute interim interconnection service agreements between PJM and Handsome Lake Energy L.L.C., PPL Martins Creek LLC, and Pennsylvania Electric Company d/b/a GPU Energy, one substitute interconnection service agreement between PJM and Pennsylvania Electric Company, and three notices of cancellation.

PJM states that copies of this filing were served upon all the persons on the official service list and the parties to the agreements.

Comment Date: February 14, 2003.

4. The Detroit Edison Company

[Docket No. ER03–19–001]

Take notice that on January 24, 2003, The Detroit Edison Company submitted its response to the letter issued by FERC staff in the captioned proceeding on November 27, 2002. FERC staff requested additional information about Detroit Edison's October 4, 2002, filing.

Comment Date: February 14, 2003.

5. Mirant Delta, LLC; Mirant Potrero, LLC

[Docket No. ER03–215–001]

Take notice that on January 24, 2003, Mirant Delta, LLC and Mirant Potrero, LLC (collectively, Mirant) submitted a filing with the Federal Energy Regulatory Commission (Commission) in compliance with the Commission's directives in its Order Accepting for Filing and Suspending Proposed Revisions to Reliability Must-Run Agreements, issued in the captioned docket on January 16, 2003, 102 FERC ¶ 61,040 (2003).

Comment Date: February 14, 2003.

6. Progress Energy Service Company on behalf of Progress Energy Carolinas, Inc.

[Docket Nos. ER03–433–000, ER03–441–000 and ER03–442–000]

Take notice that on January 24, 2003, Progress Energy Service Company on behalf of Progress Energy Carolinas, Inc. (Progress Carolinas) tendered for filing a notice of withdrawal of its service agreements under Market Based Rate Tariff in the above-captioned dockets. Consistent with Order No. 2001, the company is no longer required to file its market-based service agreements in paper form with the Commission.

Progress Carolinas state that copies of the filing were served upon the counterparties to the agreements and the relevant state commissions.

Comment Date: February 14, 2003.

Standard Paragraph

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.

Magalie R. Salas,

Secretary.

[FR Doc. 03–2877 Filed 2–5–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER95–1586–012, *et al.*]

Citizens Utilities Company, *et al.*; Electric Rate and Corporate Filings

January 29, 2003.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Citizens Utilities Company

[Docket Nos. ER95–1586–012, EL96–17–006, OA96–184–009 and EL01–20–002]

Take notice that on January 21, 2003, Citizens Utilities Company (Citizens) tendered for filing with the Federal Energy Regulatory Commission (Commission) a summary and details showing both the refunds due to and repayments due from each customer under each of the relevant transmission services, and the total refunds due to and repayments due from each customer.

Comment Date: February 11, 2003.

2. PPL Brunner Island, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC

[Docket No. ER00–744–001]

Take notice that on January 27, 2003, PPL Brunner Island, LLC, PPL Holtwood, LLC, PPL Martins Creek, LLC, PPL Montour, LLC, and PPL Susquehanna, LLC filed an updated market power analysis pursuant to the Commission's order in Southaven Power, LLC, 90 FERC ¶ 61,063.

The Companies state that a copy of this filing has been served on the parties on the Commission's official service list for this docket.

Comment Date: February 18, 2003.

3. Sussex Rural Electric Cooperative

[Docket No. ER02–2001–000]

Take notice that on January 27, 2003, Sussex Rural Electric Cooperative (Sussex) filed a request for waiver of the requirements of Order No. 2001 pursuant to 18 CFR 385.207 of the Federal Energy Regulatory Commission (Commission) regulations. Sussex's filing is available for public inspection at its offices in Sussex, New Jersey.

Comment Date: February 19, 2003.

4. Idaho Power Company

[Docket No. ER03–66–002]

Take notice that on January 27, 2003, Idaho Power Company submitted its compliance filing in the above-captioned docket.

Comment Date: February 18, 2003.

5. Termoelectrica U.S., LLC

[Docket No. ER03–175–002]

Take notice that on January 27, 2003, in compliance with the Federal Energy Regulatory Commission's (Commission) order, 102 FERC ¶ 61,024, Termoelectrica U.S., LLC (Termoelectrica US) tendered for filing a revised Rate Schedule FERC No. 1 to (1) prohibit sales between Termoelectrica U.S. and its affiliate San Diego Gas & Electric Company; and (2) to remove language allowing Termoelectrica U.S. to sell ancillary services into markets not operated by the California Independent System Operator Corporation, New England Power Pool, New York Power Pool, and Pennsylvania-New Jersey-Maryland Interconnection.

Comment Date: February 18, 2003.

6. PJM Interconnection, L.L.C.

[Docket No. ER03–331–002]

Take notice that on January 27, 2003, PJM Interconnection, L.L.C. (PJM) amended its December 24, 2002, and January 3, 2003, filings in this proceeding. In its December 24, 2002, and January 3, 2003, filings, PJM submitted for filing amendments to the Appendix of Attachment K of the PJM Open Access Transmission Tariff and Schedule 1 of the Amended and Restated Operating Agreement to modify the provisions relating to the determination of eligibility to receive Operating Reserves credits during Maximum Generation Emergency conditions. PJM amends the December 24, 2002, and January 3, 2003, filings to reflect more accurately the original intent of the amendments and to correct a mistake in the previously filed amendments.

Consistent with its December 24, 2002, and January 3, 2003, filings, PJM requests an effective date of February 23, 2003, for the amended filing.

PJM states that copies of this filing were served upon all parties listed on the official service list compiled by the Secretary in this proceeding, all PJM members, and each state electric utility regulatory commission in the PJM region.

Comment Date: February 18, 2003.

7. Soyland Power Cooperative, Inc.

[Docket No. ER03–357–001]

Take notice that on January 27, 2003, Soyland Power Cooperative, Inc. (Soyland) tendered for filing an amendment to its notice of cancellation of its all-requirements service contract with M.J.M. Electric Cooperative, Inc. (MJM). Soyland states that MJM has withdrawn from membership in Soyland, and Soyland will no longer provide all-requirements electric service to MJM. Soyland requests an effective date of December 31, 2002, for the notice of cancellation. Accordingly, Soyland requests waiver of the Commission's regulations. Soyland states that a copy of the filing has been served on MJM.

Comment Date: February 18, 2003.

8. Black Oak Energy, LLC

[Docket No. ER03–447–000]

Take notice that on January 27, 2003, Black Oak Energy, LLC (Seller) petitioned the Commission for an order: (1) Accepting Seller's proposed FERC rate schedule for market-based rates; (2) granting waiver of certain requirements under Subparts B and C of part 35 of the regulations; (3) granting the blanket approvals normally accorded sellers permitted to sell at market-based rates; and (4) granting waiver of the 60-day notice period.

Comment Date: February 18, 2003.

9. Metropolitan Edison Company

[Docket No. ER03–448–000]

Take notice that on January 27, 2003, Metropolitan Edison Company, a FirstEnergy Company, (MetEd) submitted a Notice of Cancellation for Service Agreement No. 584 between MetEd and The Bentech Group of Delaware, Inc. (Bentech).

MetEd states that a copy of this filing has been served upon Bentech, PJM Interconnection, L.L.C. and state regulators in Pennsylvania.

Comment Date: February 18, 2003.

10. Sussex Rural Electric Cooperative

[Docket No. ER03–449–000]

Take notice that on January 27, 2003, Sussex Rural Electric Cooperative (Sussex) submitted for filing and acceptance an agreement for mutual use of facilities with Jersey Central Power & Light pursuant to 205 of the Federal Power Act (FPA), 16 U.S.C. 824d, and 35.12 of the regulations of the Federal Energy Regulatory Commission (Commission), 18 CFR 35.12. Sussex's filing is available for public inspection at its offices in Sussex, New Jersey.

Sussex requests that the Commission accept the agreement with an effective date of July 26, 2002.

Comment Date: February 18, 2003.

11. Pleasants Energy, LLC

[Docket No. ER03–451–000]

Take notice that on January 28, 2003, Pleasants Energy, LLC (Pleasants or the Company) respectfully tendered for filing a rate schedule for reactive power and voltage control from Generation Sources Service. The Company respectfully requests an effective date of April 1, 2003.

Copies of the filing were served upon the PJM Interconnection, L.L.C., Virginia State Corporation Commission, and the North Carolina Utilities Commission.

Comment Date: February 18, 2003.

12. Conjunction LLC

[Docket No. ER03–452–000]

Take notice that on January 27, 2003, on behalf of a yet to be formed subsidiary, submitted for filing an application for authority to sell transmission rights at negotiated rates (application). The application also includes a request for certain limited waivers of the Commission's regulations, as well as a request for Commission action on or before April 15, 2003. The application concerns a proposed transmission facility that will help integrate the upstate and downstate power markets in New York and improve reliability in New York City. The facility will be placed in service in 2005.

Comment Date: February 18, 2003.

13. Valley Electric Association, Inc.

[Docket No. ES03–21–000]

Take notice that on January 23, 2003, Valley Electric Association, Inc. (Valley Electric) submitted an application pursuant to section 204 of the Federal Power Act seeking authorization to make long-term borrowing under the loan agreement with the National Rural Utilities Cooperative Finance Corporation (CFC) in the amount of $39.3 million and to issue its debt under a line of credit with CFC of up to $15 million.

Valley Electric also requests a waiver from the Commission's competitive bidding and negotiated placement requirements at 18 CFR 34.2.

Comment Date: February 18, 2003.

Standard Paragraph

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 filed to access the document. For assistance, 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.

Magalie R. Salas,

Secretary.

[FR Doc. 03–2879 Filed 2–5–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER01–3001–005, *et al.*]

New York Independent System Operator, Inc., *et al.*; Electric Rate and Corporate Filings

January 30, 2003.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. New York Independent System Operator, Inc.

[Docket No. ER01–3001–005]

Take notice that on January 29, 2003, the New York Independent System Operator, Inc. (NYISO) filed revisions to its Open Access Transmission Tariff and its Market Administration and Control Area Services Tariff pertaining to temporary extraordinary procedures, pursuant to the Commission's Order issued on July 19, 2002, in the above-captioned proceeding. The NYISO has requested that the proposed revisions be made effective as of November 1, 2001.

The NYISO has served a copy of this filing upon parties on the official service list maintained by the Commission for the above-captioned proceeding. The NYISO has also served this filing upon all parties that have executed service agreements under the NYISO's Open Access Transmission Tariff or the Market Administration and Control Area Services Tariff and upon the New York State Public Service Commission.

Comment Date: February 19, 2003.

2. Oklahoma Gas and Electric Company

[Docket No. ER02–1420–003, ER02–1420–004, ER02–1402–006]

Take notice that on January 15, 2003, Oklahoma Gas and Electric Company (Company) filed a status report regarding its plans to participate in the regional transmission organization (RTO) to be formed by the proposed merger of the Midwest Independent Transmission System Operator, Inc., (Midwest ISO) and the Southwest Power Pool, Inc., (SPP), to comply with the Federal Energy Regulatory Commission's December 19, 2002, Order in the above-captioned proceeding.

The Company states that a copy of the filing has been served on all parties to this proceeding, and on the Arkansas Public Service Commission and the Oklahoma Corporation Commission.

Comment Date: February 10, 2003.

3. Westar Energy, Inc.

[Docket No. ER02–1420–003, ER02–1420–004, ER02–1420–006]

Take notice that on January 16, 2003, Westar Energy, Inc., and its wholly owned subsidiary, Kansas Gas and Electric Company (collectively referred to as Westar Energy) filed a status report regarding its plans to participate in the regional transmission organization (RT)) to be formed by the proposed merger of the Midwest Independent Transmission System Operator, Inc., (Midwest ISO) and the Southwest Power Pool, Inc., (SPP), to comply with the Federal Energy Regulatory Commission's December 19, 2002, Order in the above-captioned proceeding.

Westar Energy states that a copy of the filing has been served on all parties to the proceeding.

Comment Date: February 11, 2003.

4. Cleco Power LLC

[Docket No. ER03–450–000]

Take notice that on October 29, 2002, Cleco Power, LLC, tendered for filing Third Revised Sheet Nos. 77 and 78, an Attachment E, from Cleco Power's open access transmission tariff, titled ''Index

of Point-to-Point Transmission Service Customers'', to include Reliant Energy Services, Inc., as a short-term firm and non-firm transmission customer. Cleco Power will provide short-term firm point-to-point transmission service and non-firm point-to-point transmission service to Reliant Energy Services, Inc., under its Open Access Transmission Tariff.

Comment Date: February 18, 2003.

5. Allegheny Power System, Inc.

[Docket No. ER03–453–000]

Take notice that on January 28, 2003, Allegheny Power System, Inc., on behalf of certain of its operating companies, filed a notice of termination of Schedule 9 under the Interconnection Facilities Agreement among Pennsylvania Electric Company and Metropolitan Edison Company, subsidiaries of General Public Utilities Energy, Inc. (now FirstEnergy Corporation) and West Penn Power Company and The Potomac Edison Company, operating companies of the Allegheny Power.

Comment Date: February 18, 2003.

6. Southern Company Services, Inc.

[Docket No. ER03–454–000]

Take notice that on January 29, 2003, Southern Company Services, Inc. (SCS), acting on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company (collectively Southern Companies), filed three rollover transmission service agreements under the Open Access Transmission Tariff of Southern Companies (FERC Electric Tariff, Fourth Revised Volume No. 5) (Tariff). Specifically, these agreements are for firm point-to-point transmission service for rollover service with Carolina Power & Light Company (First Revised Service Agreement No. 444), Calpine Energy Services, LP (First Revised Service Agreement No. 441), and Duke Energy Corporation (First Revised Service Agreement No. 446).

Comment Date: February 19, 2003.

7. Duke Energy Corporation

[Docket No. ER03–455–000]

Take notice that on January 29, 2003, Duke Energy Corporation filed an amendment to Appendix B to its contract with the Southeastern Power Administration.

Comment Date: February 19, 2003.

8. Westar Energy, Inc.

[Docket No. OA03–2–000]

Take notice that on January 27, 2003, Westar Energy, Inc. (Westar), filed with the Federal Energy Regulatory Commission (Commission), pursuant to section 37.4 of the Commission's regulations, proposed revisions to its standards of conduct on file with the Commission as required by Order 889, Open Access Same-time Information Systems (Formerly Real-time Information Network) and Standards of Conduct, FERC Stats. & Regs. (Regulations Preambles 1991–1996) ¶ 31,035 (1996), Order 889-A, III FERC Stats. & Regs. (Regulations Preambles) ¶ 31,049, Order 889-B, 81 FERC ¶ 61,253 (1997).

Comment Date: February 26, 2003.

Standard Paragraph

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 filed to access the document. For assistance, 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.

Magalie R. Salas,

Secretary.

[FR Doc. 03–2878 Filed 2–5–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Soliciting Comments, Motions to Intervene, and Protests

January 30, 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.:* 12356–000. c. *Date filed*: August 21, 2002. d. *Applicant:* Universal Electric Power Corporation. e. *Name and Location of Project*: The Kentucky L&D #10 Hydroelectric Project would be located on the Kentucky River in Madison County, Kentucky. The project would utilize the U.S. Army Corps of Engineers' existing Kentucky River Lock and Dam No. 10. f. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791(a)—825(r). g. *Applicant Contact:* Mr. Raymond Helter, Universal Electric Power Corporation, 1145 Highbrook Street, Akron, OH 44301, (330) 535–7115. h. *FERC Contact:* James Hunter, (202) 502–6086. i. *Deadline for filing comments, protests, and motions to intervene*: 60 days from the issuance date of this notice.

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 Project*: The proposed project, using the Corps' existing Kentucky River Lock and Dam No. 10, would consist of: (1) two 50-foot-long, 8-foot-diameter steel penstocks, (2) a powerhouse containing two generating units with a total installed capacity of 2.55 megawatts, (3) a 300-foot-long, 14.7-kilovolt transmission line connecting to an existing power line, and (4) appurtenant facilities. The project would have an average annual generation of 16 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'', or ''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 sending an original and eight copies 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.

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–12356–000) on any comments or motions filed. 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. 03–2880 Filed 2–5–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Soliciting Comments, Motions to Intervene, and Protests

January 30, 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.:* 12364–000. c. *Date filed*: September 12, 2002. d. *Applicant:* Rough River Hydro, LLC. e. *Name and Location of Project*: The Rough River Dam Hydroelectric Project is proposed to be located at the U.S. Army Corps of Engineers' existing Rough River Dam on the Rough River in Grayson County, Kentucky. f. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791(a)—825(r). g. *Applicant Contact:* Mr. Brent L. Smith, Northwest Power Services, Inc., P.O. Box 535, Rigby, ID 83442, (208) 745–0834. h. *FERC Contact:* James Hunter, (202) 502–6086. i. *Deadline for filing comments, protests, and motions to intervene*: 60 days from the issuance date of this notice.

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 Project*: The proposed project, using the Corps' existing Rough River Dam, would consist of: (1) a 200-foot-long, 72-inch-diameter steel penstock, (2) a powerhouse containing one generating unit with an installed capacity of 2.3 megawatts, (3) a 1-mile-long, 15-kilovolt transmission line connecting to an existing power line, and (4) appurtenant facilities. The project would have an average annual generation of 15 gigawatthours. k. These filings are 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, (202) 502–8659. Copies are also available for inspection and

reproduction at: Ecosystems Research Institute, Inc., 975 South State Highway, Logan, UT 84321. 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'', or ''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 an original and eight copies 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.

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–12364–000) on any comments or motions filed. 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. 03–2881 Filed 2–5–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Soliciting Comments, Motions to Intervene, and Protests

January 30, 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.:* 12403–000. c. *Date filed*: October 30, 2002. d. *Applicant:* Universal Electric Power Corporation. e. *Name and Location of Project*: The Hildebrand L&D Hydroelectric Project would be located on the Monongahela River in Monongalia County, West Virginia. The project would utilize the U.S. Army Corps of Engineers' existing Hildebrand Lock and Dam. f. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791(a)—825(r). g. *Applicant Contact:* Mr. Raymond Helter, Universal Electric Power Corporation, 1145 Highbrook Street, Akron, OH 44301, (330) 535–7115. h. *FERC Contact:* James Hunter, (202) 502–6086. i. *Deadline for Filing Comments, Protests, and Motions to intervene*: 60 days from the issuance date of this notice.

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 Project*: The proposed project, using the Corps' existing Hildebrand Lock and Dam, would consist of: (1) five 50-foot-long, 96-inch-diameter steel penstocks, (2) a powerhouse containing a turbine generating system with a total installed capacity of 6.5 megawatts, (3) a 400-yard-long, 14.7-kilovolt transmission line connecting to an existing power line, and (4) appurtenant facilities. The project would have an average annual generation of 40 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'', or ''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 an original and eight copies 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.

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–12403–000) on any comments or motions filed. 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. 03–2882 Filed 2–5–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application to Amend License and Soliciting Comments, Motions to Intervene, and Protests

January 30, 2003.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection: a. *Application Type*: Change in project boundary. b. *Project No.*: 1984–092. c. *Date Filed:* December 5, 2002; January 7, 2003 (supplement). d. *Applicant:* Wisconsin River Power Company (WRPC). e. *Name of Project:* Petenwell and Castle Rock Hydroelectric Project. f. *Location:* The project is located on the Wisconsin River in Adams, Wood, and Juneau Counties, Wisconsin. The land that would be excluded from the project by the proposed boundary change is located adjacent to Plank Hill Lane on the Petenwell Flowage in Wood County. g. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791(a)-825(r). h. *Applicant Contact:* Shawn Puzen, P.O. Box 19001, Green Bay, Wisconsin 54307–9001. Phone: (920) 433–1094. i. *FERC Contact:* Steve Naugle, *steven.naugle@ferc.gov*, 202–502–6061. j. *Deadline for Filing Comments and or Motions*: February 21, 2003. k. *Description of the Application*: WRPC requests Commission approval to change the project boundary to remove a 4.37-acre parcel of land from the project. WRPC intends to convey the land parcel to Mr. Richard Skibba, an adjacent landowner, for the construction of a home. l. *Locations of the Application*: This filings are available for review at the Commission in the Public Reference Room or may 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. A copy is also available for inspection and reproduction at the address in item h above. m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission. n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of rules of practice and procedure, 18 CFR 385.210, .211, .214.

In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application. o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by sending an original and eight copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the applicant specified in the particular application. p. 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. Please reference ''Petenwell and Castle Rock Project, FERC Project No.1984–092'' on any comments or motions filed. q. 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. 03–2883 Filed 2–5–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Request to Use Alternative Procedures in Preparing a License Application

January 30, 2003.

Take notice that the following request to use alternative procedures to prepare a license application has been filed with the Commission. a. *Type of Application:* Request to use alternative procedures to prepare a new license application. b. *Project No.:* 659. c. *Date filed*: January 22, 2003. d. *Applicant:* Crisp County Power Commission. e. *Name of Project:* Lake Blackshear. f. *Location:* On the Flint River, in Worth, Lee, Sumter, Dooly, and Crisp Counties, Georgia. The project does not occupy federal lands. g. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791(a)—825(r). h. *Applicant Contact:* Steve Rentfrow, General Manager, Crisp County Power Commission, P.O. Box 1218, Cordele, GA 31010; phone (229) 273–3811; e-mail *srentfrow@crispcountypower.com*. i. *FERC Contact:* Janet Hutzel at (202) 502–8675; e-mail *janet.hutzel@ferc.gov*. j. *Deadline for Comments*: 30 days from the 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 may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link. k. The existing 15.2 MW project consists of: (1) A 415-foot-long, 49-foot-high gated spillway; (2) a 630-foot-long auxiliary spillway; (3) a 3,410-foot-long north embankment; (4) a 680-foot-long south embankment; (5) a 8,700-acre impoundment at a full pool elevation of 237 feet mean sea level; (6) a powerhouse containing four turbines; (7) a 1,400-foot-long, 46-kV transmission line; and (8) appurtenant facilities. No new facilities are proposed. l. A copy of the request to use alternative procedures 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, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above. m. Crisp County Power Commission (CCPC) has demonstrated that it has made an effort to contact all Federal and State resources agencies, non-governmental organizations (NGO), and others affected by the project. CCPC has also demonstrated that a consensus exists that the use of alternative procedures is appropriate in this case. CCPC has submitted a communications protocol that is supported by the stakeholders.

The purpose of this notice is to invite any additional comments on CCPC's request to use the alternative procedures, pursuant to section 4.34(i) of the Commission's regulations. Additional notices seeking comments on the specific project proposal, interventions and protests, and recommended terms and conditions will be issued at a later date. CCPC will complete and file a preliminary Environmental Assessment, in lieu of Exhibit E of the license application. This differs from the traditional process, in which an applicant consults with agencies, Indian tribes, NGOs, and other parties during preparation of the license application and before filing the application, but the Commission staff performs the environmental review after the application is filed. The alternative procedures are intended to simplify and expedite the licensing process by combining the pre-filing consultation and environmental review processes into a single process, to facilitate greater participation, and to improve communication and cooperation among the participants.

Magalie R. Salas,

Secretary.

[FR Doc. 03–2884 Filed 2–5–03; 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 and Agenda for Technical Conference

January 30, 2003.

As announced, 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).

Attached is the Agenda for this conference. This one-day conference will begin at 9 a.m. and will conclude at about 4:30 p.m.

This conference will provide education on potential credit solutions, particularly clearing. It will cover clearing fundamentals, clearing regulation, clearing alternatives, other

credit solutions and implementation. Speakers include representatives of clearing providers and other experts who will discuss the issues in depth, as well as FERC and CFTC staff. All interested parties are invited to attend. There is no registration fee.

Interested parties wishing to file comments may do so under this Docket Number by February 26, 2003. Filings will be placed in the Federal Energy Regulatory Record Information System (FERRIS) data base which is accessible to everyone through the FERC Web site.

As previously announced, 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.* Also, 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.

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.

Commodity Futures Trading Commission

Credit Issues in Energy Markets Clearing & Other Solutions

February 5, 2003.

Agenda for Technical Conference

Welcoming Remarks: 9–9:30 a.m.

Pat Wood III, Chairman of the Federal Energy Regulatory Commission (FERC)

James E. Newsome, Chairman of the Commodity Futures Trading Commission (CFTC)

Overview:

Bill Hederman, Director of the Office of Market Oversight and Investigations (OMOI)—FERC Jane Kang Thorpe, Director of Division of Clearing & Intermediary Oversight (DCIO)—CFTC Panel I: Clearing Fundamentals & Oversight 9:30–11:30 am Moderator: Jane Kang Thorpe, Director of Division of Clearing & Intermediary Oversight (DCIO)

This panel will focus on issues such as the benefits of centralized clearing, the process of clearing and how derivatives clearing organizations are regulated by the CFTC.

John Davidson, Managing Director, Morgan Stanley

Ananda Radhakrishnan, Special Counsel, CFTC–DCIO

John Lawton, Deputy Director, CFTC–DCIO

Lunch 11:30 a.m-12:30 p.m.

Panel II: Clearing Models in the Energy Markets 12:30–2:30 p.m.

Moderator: Jane Kang Thorpe, Director of Division of Clearing & Intermediary Oversight (DCIO)

This panel will discuss their clearing models and the protections they provide.

Neal Wolkoff, Chief Operating Officer and Executive Vice President, New York Mercantile Exchange (NYMEX)

Andrew Lamb, Deputy Chief Executive and Managing Director of Risk, The London Clearing House, Ltd.

Dennis Dutterer, President and Chief Executive Officer, Board of Trade Clearing Corporation

Dennis Earle, President, EnergyClear Corporation

David Goone, Senior Vice President, InterContinental Exchange (ICE)

Robert Stewart, President, Merchant's Exchange

Break 2:30–2:45 p.m.

Panel III: Other Credit Solutions & Implementation2:45–4:30 p.m.

This panel will explore different industry proposed solutions to mitigate credit risk.

Steven Bunkin, Vice President and Associate General Counsel, Goldman Sachs/ J. Aron, and Co-Chair of ISDA's North American Energy & Developing Products Committee

Harold Loomis, Credit Manager, PJM Interconnection, L.L.C.

Vincent Kaminski, Managing Director, Citadel Investment Group

Robert Stibolt, Senior Vice President, Risk Management & Trade Coordination, Tractebel North America, and Co-Chair of Credit Committee, Committee of Chief Risk Officers (CCRO)

Edward Comer, Vice President and General Counsel, Edison Electric Institute (EEI)

Carol St. Clair, Director and Senior Counsel, UBS Warburg Energy, L.L.C.

Craig Goodman, President, National Energy Marketers Association

[FR Doc. 03–2871 Filed 2–5–03; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[Docket ID Number 2002–0011; FRL–7448–5]

Agency Information Collection Activities; Submission of EPA ICR Number 1156.09 (OMB Control Number 2060–0059) 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: NSPS for Synthetic Fiber Production Facilities (40 CFR part 60, subpart HHH) (OMB Control Number 2060–0059 and EPA ICR Number 1156.09). 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 March 10, 2003.

ADDRESSES: Follow the detailed instructions in the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: María Malavé, Compliance Assessment and Media Program Division (Mail Code 2223A), Office of Compliance, United States Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–7027; fax number: (202) 564–0050; e-mail address: *malave.maria@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 Number OECA–2002–0011, which is available for public viewing at the Enforcement and Compliance Docket Information Center (ECDIC), in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Avenue, 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

Docket 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 Avenue, 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: NSPS for Synthetic Fiber Production Facilities (40 CFR part 60, subpart HHH) (OMB Control Number 2060–0059 and EPA ICR Number 1156.09). This is a request to renew an existing approved collection that is scheduled to expire on January 31, 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: The NSPS for Synthetic Fiber Production Facilities, published at 40 CFR part 60, subpart HHH, were proposed on November 23, 1982, and promulgated on April 5, 1984. These standards apply to affected facilities at synthetic fiber production facilities including: each solvent-spun synthetic fiber process that produces more than 500 megagrams of fiber per year and that commenced construction or reconstruction after November 23, 1982. The provisions of this subpart do not apply to any facility that uses the reaction spinning process to produce spandex fiber or the viscose process to produce rayon fiber, nor to facilities that commence modification but not reconstruction after November 23, 1982. Volatile organic compounds (VOCs) are the pollutants regulated under this subpart. This information is being collected to assure compliance with 40 CFR part 60, subpart HHH.

Owners or operators of the affected facilities described must make one-time-only initial notifications and report on the results of the initial performance test. Owners or operators also are required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Monitoring requirements specific to synthetic fiber production facilities provide information on VOC emissions. Owners or operators of affected facilities are required to install, calibrate, maintain, and operate a continuous monitoring system for the measurement of makeup solvent and solvent feed. These values shall be used in calculating monthly VOC emissions. Section 60.603(b)(1) provides three options for determining solvent feed.

Each owner or operator calculates VOC emissions every month from the amount of solvent feed and makeup solvent used in each affected facility. These values are used to calculate compliance with the emission limitations on a six-month rolling average basis.

Also required are semiannual reports, and quarterly reports of instances of excess emissions. The owner or operator subject to the provisions of this part shall maintain a file of these measurements, and retain the file for at least two years following the date of such measurements. Responses to this collection of information are mandatory and are being collected to assure compliance with 40 CFR part 60, subpart HHH. All reports are sent to the delegated State or Local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA Regional Office. These notifications, reports, and records are essential in determining compliance. 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 approximately 29 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: Synthetic fiber production facilities.

Estimated Number of Respondents: 25.

Frequency of Response: Initial, quarterly and semiannual.

Estimated Total Annual Hour Burden: 1,838.

Estimated Total Annualized Cost: $293,000 of which $188,000 are O&M annual costs.

There is a decrease of 848 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This is due to a decrease in the number of sources and the assumption that no new sources will become subject to the standard. The estimate on the number of sources was based on the most recent data on major sources subject to the NSPS program for the corresponding SIC codes subject to this rule available on the EPA AFS database.

Dated: January 29, 2003.

Doreen Sterling,

Acting Director, Collection Strategies Division.

[FR Doc. 03–2937 Filed 2–5–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7448–4]

Proposed Settlement Agreement, Clean Air Act Petition for Review

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed settlement agreement; request for public comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended (''Act''), 42 U.S.C. 7413(g), notice is hereby given of a proposed Settlement Agreement. On December 18, 2001, the Sierra Club (''Sierra Club'') and Group Against Smog and Pollution, Inc. (''GASP'') filed a petition in the United States Court of Appeals for the Third Circuit for review of the Environmental Protection Agency's (''EPA'') final action redesignating the Pittsburgh-Beaver Valley Ozone Nonattainment Area (the ''Pittsburgh area'') to attainment of the one-hour National Ambient Air Quality Standard (''NAAQS'') for ground-level ozone, and approving the maintenance plan for the Pittsburgh area as a revision to the Pennsylvania State Implementation Plan (SIP) pursuant to the Act. *Sierra Club* v. *EPA*, No. 01–4426 (3rd Cir.). On January 22, 2003, the respondents EPA and EPA Administrator Christine T. Whitman and the petitioners Sierra Club and GASP executed the proposed Settlement Agreement. The Settlement Agreement provides for holding the petition for review in abeyance while the Commonwealth of Pennsylvania has an opportunity to adopt and EPA has an opportunity to approve revisions to the contingency measures portion of the Pittsburgh area maintenance plan. Adoption and approval of the revisions described in Attachment A to the proposed Settlement Agreement will result in a joint motion to dismiss the petition. The agreement further provides for payment in settlement of claims for costs of litigation, including reasonable attorney's fees and expenses.

DATES: Written comments on the proposed settlement agreement must be received by March 10, 2003.

ADDRESSES: Written comments should be sent to Kendra Sagoff, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20004. Copies of the proposed Settlement Agreement are available from Phyllis J. Cochran, (202) 564–5566.

FOR FURTHER INFORMATION CONTACT: Kendra Sagoff at (202) 564–5566.

SUPPLEMENTARY INFORMATION: On October 19, 2001, EPA published a **Federal Register** notice redesignating the Pittsburgh area to attainment for the one-hour ozone standard, and approving a revision to the area's maintenance plan as a revision to the SIP. 66 FR 53094. On December 18, 2001, Sierra Club and GASP filed a petition for review of this action in the United States Court of Appeals for the Third Circuit, contending that the redesignation did not meet statutorily-required prerequisites for redesignation. *Sierra Club* v. *EPA*, No. 01–4426. The Commonwealth of Pennsylvania and the Southwestern Pennsylvania Growth Alliance were granted leave to participate as intervenors. Briefing was stayed pending settlement discussions.

The proposed Settlement Agreement, which was executed on January 22, 2003, provides for a stay of proceedings to allow the Commonwealth of Pennsylvania to submit to EPA, not later than May 1, 2003, a revision to the Pennsylvania contingency measures portion of the maintenance plan SIP that adds additional contingency measures and procedures for implementing them. The contingency measures are outlined in Attachment A to the proposed Settlement Agreement. The Agreement further allows EPA an opportunity to sign a final approval of the revision no later then February 1, 2004, to be forwarded within five business days for publication in the **Federal Register**, and to sign a final approval of the final rule in finally adopted form, that is referenced in paragraph 1(b) of Attachment A, no later than November 1, 2004. EPA must also provide status reports at 120-day intervals. (In an order dated January 2, 2003, the Court unilaterally changed the interval to 60-days from the date of the Court's order until the settlement agreement has been finalized and implemented.) Petitioners agree not to challenge in any court or administrative proceeding the validity of any EPA action fully approving these revisions. Within 30 days of November 1, 2004, the parties will file a joint stipulation dismissing the petition in accordance with Rule 42 of the Federal Rules of Appellate Procedure if EPA has published the final rulemakings fully approving the revisions and the stay of the litigation has not been lifted. Finally, EPA agrees to pay, and the Petitioners agree to accept, the sum of $30,987.00 in full settlement of all claims by Petitioners for their costs of litigation (including reasonable attorney's fees and expenses).

For a period of thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the proposed Settlement Agreement from persons who were not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed Settlement Agreement if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determine, following the comment period, that consent is inappropriate, the Settlement Agreement will be final.

Dated: January 28, 2003.

Lisa K. Friedman,

Associate General Counsel.

[FR Doc. 03–2934 Filed 2–5–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2002–0018; FRL–7289–4]

Pesticide Product; Registration Applications

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register pesticide products containing new active ingredients not included in any previously registered products pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

DATES: Written comments, identified by the docket ID number OPP–2002–0018, must be received on or before March 10, 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: The Regulatory Action Leader, Biopesticides and Pollution Prevention Division (7511C), listed in the table in this unit:

Regulatory Action Leader	Office address/telephone no.	E-mail address
Leonard Cole	1921 Jefferson Davis Highway, CM 2; Arlington, VA 22202; 703.305.5412	*cole.leonard@epa.gov*

SUPPLEMENTARY INFORMATION:

I. General Information

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

Categories	NAICS codes	Examples of potentially affected entities
Industry	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. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in. 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–2002–0018. 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. 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.1. 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–2002–0018 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–2002–0018. 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–2002–0018.

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–2002–0018. 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. Offer alternative ways to improve the registration activity.

7. Make sure to submit your comments by the deadline in this notice.

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. Registration Applications

EPA received applications as follows to register pesticide products containing active ingredients not included in any previously registered products pursuant to the provision of section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

Products Containing Active Ingredients not Included in any Previously Registered Products

File Symbol: 68467–G. Applicant: Dow AgroSciences, 9330 Zionsville Road, Indianapolis, IN 46268–1054. Product Name: Bacillus Thuringiensis Cry 1F(Synpro)/Cry 1Ac(synpro constuct 281/3006 Insectical Crystal Protein As Expressed in Cotton. Proposed Classification/Use: Plant-Incorporated Protectant.

List of Subjects

Environmental protection, Pesticides and pest.

Dated: January 26, 2003.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 03–2935 Filed 2–5–03; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7449–3]

Emergency Planning and Notification; Hazardous Chemical Reporting: Community Right-to-Know; Request for Comment on Change of Contractor Handling Trade Secret Claims

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces a change in location and contractor designated to manage the trade secret claims submitted for reports under Emergency Planning and Notification and Hazardous Chemical Reporting for Community Right-to-Know pursuant to 40 CFR part 350. In compliance with 40 CFR part 350 (''Trade Secrecy Claims for Emergency Planning and Community Right-to-Know Information'') facilities providing emergency planning notification and relevant information to the State Emergency Response Commission and Local Emergency Planning Committee under section 303(d)(2) and (d)(3) of EPCRA; facilities submitting Material Safety Data Sheets or lists of those chemicals submitted in place of the MSDSs under section 311 of EPCRA; facilities submitting Emergency and Hazardous Chemical Inventory Forms under section 312 of EPCRA may be eligible to claim Trade

Secret for the specific chemical identity of a chemical that is reported in these reports. Pursuant to 40 CFR 350.23 (''Disclosure to authorized representatives''), information entitled to trade secret or confidential treatment may not be disclosed by the Agency to the Agency's authorized representative until each affected submitter has been furnished notice of the contemplated disclosure by the EPA program office and has been afforded a period found reasonable by that office (not less than five working days) to submit its comments. Pursuant to this **Federal Register** Notice, comments are limited to the change of contractor handling trade secret and confidential information submitted under 40 CFR part 350. The new mailing address will soon be announced in a **Federal Register** Notice and also will be posted on the Chemical Emergency Preparedness and Prevention Office Web site *http://www.epa.gov/ceppo/.*

DATES: Comments, identified by the docket control number SFUND–2003–0002, must be submitted on or before February 11, 2003.

ADDRESSES: Comments may be submitted by mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit III of the Supplementary Information section of this notice.

FOR FURTHER INFORMATION CONTACT: For general information, contact the Emergency Planning and Community Right-to-Know Hotline at (800) 424–9346, TDD (800) 553–7672, *http://www.epa.gov/epaoswer/hotline/.* For technical information about this change in contractor and location for submitting trade secrets, contact: Dorothy McManus, Chemical Emergency Preparedness and Prevention Office (5104A), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington DC 20460, Telephone: 202–564–8606; Fax: 202–564–8222; email: *mcmanus.dorothy@epa.gov.* For questions on the applicability of provisions contained in 40 CFR part 350, 40 CFR part 355, and 40 CFR part 370, contact: Sicy Jacob, Chemical Emergency Preparedness and Prevention Office (5104A), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington DC 20460, Telephone: 202–564–8019; Fax: 202–564–8233; email: *jacob.sicy@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does This Notice Apply to Me?

A. Affected Entities: Entities that will be affected by this section are those facilities subject to 40 CFR 355.30 Emergency Planning and 40 CFR part 370 Hazardous Chemical Reporting: Community Right-to-Know.

To determine whether your facility is affected by this action, you should carefully examine the applicability provisions at 40 CFR part 350, 40 CFR part 355, and 40 CFR part 370. If you have any questions regarding the applicability of this action to a particular entity, consult the person(s) listed in the **FOR FURTHER INFORMATION CONTACT** section.

II. 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 ID No. SFUND–2003–0002.

The public docket includes information considered by EPA in developing this action, including the documents listed below, which are physically located in the docket. In addition, interested parties should consult documents that are referenced in the documents that EPA has placed in the docket, regardless of whether these referenced documents are physically located in the docket. For assistance in located documents that are referenced in documents that EPA has placed in the docket, but that are not physically located in the docket, please consult the person(s) in the preceding **FOR FURTHER INFORMATION CONTACT** section. 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) EPA West, Room B102, 1301 Constitution Avenue, 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) 566–0274.

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 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 section II.A. of this document. Once in the system, select ''search,'' then key in the appropriate docket identification number.

III. How Can I Respond to This Notice?

A. How and to Whom Do I Submit Comments?

You may submit comments through the mail, in person, or electronically. Be sure to identify the appropriate docket control number (*i.e.*, SFUND–2003–0002) in your correspondence.

1. *By Mail.* All comments should be sent in triplicate to : Chemical Emergency Preparedness and Prevention Office, Mail code 5104 A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Ariel Rios Building, Washington DC 20460.

2. *In person or by courier.* Comments may be delivered in person or by courier to: EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Avenue, NW., Washington DC 20460. The Docket Center is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the docket is (202) 566–1744.

3. *Electronically.* Submit your comments electronically by e-mail to: *''superfund.docket@epa.gov''.* Please note that you should not submit any information electronically that you consider to be CBI. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on standard computer disks in WordPerfect 6.1/8.0 or ASCII file format. All comments and data in electronic form must be identified by the docket control number SFUND–2003–0002. Electronic comments on this document may also be filed online at many Federal Depository Libraries.

B. How Should I Handle CBI Information That I Want To Submit to the Agency?

All comments which contain information claimed as CBI must be clearly marked as such. Three sanitized copies of any comments containing information claimed as CBI must also be submitted and will be placed in the public record for this document. Persons submitting information on any portion of which they believe is entitled to treatment as CBI by EPA must assert a business confidentiality claim in

accordance with 40 CFR 2.203(b) for each such portion. This claim must be made at the time that the information is submitted to EPA. If a submitter does not assert a confidentiality claim at the time of submission, EPA will consider this as a waiver of any confidentiality claim and the information may be made available to the public by EPA without further notice to the submitter.

IV. What Is the General Background for This Action?

The Emergency Planning Notification (codified in 40 CFR part 355) and the Hazadous Chemical Reporting (codified in 40 CFR part 370) are mandated by the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA). EPCRA established a program designed to require state and local planning and preparedness for spills or releases of hazardous substances and to provide the public and local governments with information concerning potential chemical hazards in their communities. Under EPCRA section 303, (codified in 40 CFR part 355) a facility which has present an Extremely Hazardous Substance in excess of its threshold planning quantity (TPQ) must notify the State emergency response commission and local emergency planning committee as well as participate in local emergency planning activities. Under EPCRA sections 311 and 312, (codified in 40 CFR part 370), a facility is required to submit an inventory of hazardous chemicals present at their site at or above the specified threshold quantities.

Under section 322 of EPCRA (codified in 40 CFR part 350), facilities submitting reports under sections 303, 311 and 312 of EPCRA, may be eligible to claim Trade Secret for the specific chemical identity of the extremely hazardous substance or the hazardous chemical being reported. Pursuant to 40 CFR 350.23 (''Disclosure to authorized representatives''), information entitled to trade secret or confidential treatment may not be disclosed by the Agency to the Agency's authorized representative until each affected submitter has been furnished notice of the contemplated disclosure by the EPA program office and has been afforded a period found reasonable by that office (not less than five working days) to submit its comments. Such notice shall include a description of the information to be disclosed, the identity of the contractor, subcontractor, or grantee, the contract, subcontract, or grant number, if any, and the purposes to be served by the disclosure. This notice may be published in the **Federal Register** or may be sent to individual submitters.

The contract to manage the trade secret submissions under sections 303, 311, 312 and 313 was recompeted in 1998 and was awarded to the Computer Based Systems Incorporated, now known as Titan Systems, Inc. This contract ended on January 31, 2003. The new contract was transitioned to Computer Sciences Corporation (CSC) (GSA Contract GSOOT99ALD0203) at the end of December 2002. This new facility is located in New Carrollton, MD. All trade secret submissions for sections 303, 311, 312 and 313 pursuant to 40 CFR part 350 will be managed by CSC. (*See* 67 FR 65566, Oct. 25, 2002, for notice authorized representative to receive claims of trade secrecy under EPCRA section 313.)

In accordance with 40 CFR 350.23, EPA has determined that CSC and their subcontractors require access to trade secret and confidential information submitted under 40 CFR part 350 in order to receive, manage, process, and safely store such information. The contractor's and subcontractor's personnel will be required to sign a ''Confidentiality Agreement'' prior to being permitted access to trade secret and confidential information submitted under 40 CFR part 350. All contractor and subcontractor access to trade secrets and confidential information filed for sections 303, 311, 312 and 313 of EPCRA will take place at the contractor's facility in New Carrollton, MD. The contractor will have appropriate procedures and facilities in place to safeguard these trade secrets and confidential information submissions to which the contractor and subcontractors have access during the term of this contract.

Dated: February 3, 2003.

Deborah Y. Dietrich,

Director, Chemical Emergency Preparedness and Prevention Office.

[FR Doc. 03–3062 Filed 2–5–03; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[Report No. AUC–02–48–B (Auction No. 48); DA 02–3560]

Lower and Upper Paging Bands Auction Scheduled for May 13, 2003; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document announces the procedures and minimum opening bids for the upcoming auction of licenses for the lower and upper paging bands scheduled for May 13, 2003. This document is intended to familiarize prospective bidders with the procedures and minimum opening bids for this auction.

DATES: Auction No. 48 is scheduled to begin on May 13, 2003.

FOR FURTHER INFORMATION CONTACT: *Auctions and Industry Analysis Division:* Rosemary Cabral, Legal Branch, at (202) 418–0660; Roy Knowles or Barbara Sibert, Auctions Operations Branch, at (717) 338–2888, *Media Contact:* Lauren Kravetz at (202) 418–7944, *Commercial Wireless Division:* Amal Abdallah, Policy and Rules Branch, at (202) 418–7307; Bettye Woodward or Dwain Livingston, Licensing and Technical Analysis Branch, at (202) 418–0620.

SUPPLEMENTARY INFORMATION: This is a summary of the *Auction No. 48 Procedures Public Notice* released on December 20, 2002. The complete text of the *Auction No. 48 Procedures Public Notice,* including attachments and statements, is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The *Auction No. 48 Procedures Public Notice* may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (202) 863–2893, facsimile (202) 863–2898, or via e-mail *qualexint@aol.com.*

I. General Information

A. Introduction

1. By the *Auction No. 48 Procedures Public Notice,* the Wireless Telecommunications Bureau (''Bureau'') announces the procedures and minimum opening bids for the upcoming auction of licenses for the lower and upper paging bands (Auction No. 48) scheduled for May 13, 2003. In accordance with the Balanced Budget Act of 1997, the Bureau released a public notice on November 7, 2002, seeking comment on reserve prices or minimum opening bids and the procedures to be used in Auction No. 48. The Bureau received two comments and no reply comments in response to the *Auction No. 48 Comment Public Notice,* 67 FR 72683 (December 6, 2002).

i. Background of Proceeding

2. In the *Paging Second Report and Order,* 62 FR 11616 (March 12, 1997), the Commission adopted rules governing geographic licensing for exclusive channels in the 35 MHz, 43 MHz, 152 and 158 MHz, 454 MHz and 459 MHz, 929 MHz, and 931 MHz bands allocated for paging, and competitive bidding procedures for granting mutually exclusive applications for non-nationwide geographic area licenses in those bands. In order to facilitate geographic licensing, the Commission dismissed all pending mutually exclusive paging applications and all non-mutually exclusive paging applications filed after July 31, 1996. In part, the Commission developed a standard methodology for providing protection to incumbent licensees from co-channel interference for the 929–930 MHz and 931–932 MHz paging bands to supplement the existing formulas for determining interference contours on other paging bands.

ii. Licenses To Be Auctioned

3. The licenses available in Auction No. 48 include 8,874 lower paging bands (35 MHz, 43 MHz, 152 and 158 MHz, 454 MHz and 459 MHz, 929 MHz, 931 MHz bands) licenses, as well as 1,328 upper paging bands (929–931 MHz) licenses that remained unsold from a previous auction or were defaulted on by a winning bidder in a previous auction. The lower bands licenses will be offered in each of the 175 geographic areas known as Economic Areas (EAs) and the upper bands licenses will be offered in all but three of the 51 geographic areas known as Major Economic Areas (MEAs). These EAs and MEAs both encompass the United States, Guam and Northern Mariana Islands, Puerto Rico and the United States Virgin Islands, and American Samoa. The tables contain the block/frequency cross-reference list for the paging bands. Due to the large volume of licenses in Auction No. 48, the complete list of licenses available for this auction will be provided in electronic format only, available as ''Attachment A'' of the *Auction No. 48 Procedures Public Notice* at *http://wireless.fcc.gov/auctions/48/.*

35 MHz Lower Band Paging—20 kHz Per Block, Unpaired Channels

Block	Center frequency (MHz)	Block	Center frequency (MHz)	Block	Center frequency (MHz)	Block	Center frequency (MHz)
CA	35.20	CE	35.30	CI	35.46	CM	35.58
CB	35.22	CF	35.34	CJ	35.50	CN	35.60
CC	35.24	CG	35.38	CK	35.54	CO	35.62
CD	35.26	CH	35.42	CL	35.56	CP	35.66

Each frequency listed in this chart is the center frequency of the channel to be auctioned in each block.

43 MHz Lower Band Paging—20 kHz Per Block, Unpaired Channels

Block	Center frequency (MHz)	Block	Center frequency (MHz)	Block	Center frequency (MHz)	Block	Center frequency (MHz)
DA	43.20	DE	43.30	DI	43.46	DM	43.58
DB	43.22	DF	43.34	DJ	43.50	DN	43.60
DC	43.24	DG	43.38	DK	43.54	DO	43.62
DD	43.26	DH	43.42	DL	43.56	DP	43.66

Each frequency listed in this chart is the center frequency of the channel to be auctioned in each block.

152 and 158 MHz Lower Bands Paging—20 kHz Per Block, Unpaired Channels

Block	Center frequency (MHz)	Block	Center frequency (MHz)
EA	152.24	EC	158.10
EB	152.84	ED	158.70

Each frequency listed in this chart is the center frequency of the channel to be auctioned in each block.

152 and 158 MHz Lower Bands Paging—40 kHz Per Block, Paired 20 kHz Channels

Block	Center frequencies (MHz)	Block	Center frequencies (MHz)
FA	152.03 / 158.49	FJ	152.57 / 157.83
FB	152.06 / 158.52	FK	152.60 / 157.86
FC	152.09 / 158.55	FL	152.63 / 157.89
FD	152.12 / 158.58	FM	152.66 / 157.92
FE	152.15 / 158.61	FN	152.69 / 157.95
FF	152.18 / 158.64	FO	152.72 / 157.98
FG	152.21 / 158.67	FP	152.75 / 158.01
FH	152.51 / 157.77	FQ	152.78 / 158.04
FI	152.54 / 157.80	FR	152.81 / 158.07

Each frequency listed in this chart is the center frequency of the channels to be auctioned in each block.

454 MHz AND 459 MHz LOWER BANDS PAGING—40 kHz PER BLOCK, PAIRED 20 kHz CHANNELS

Block	Center frequencies (MHz)	Block	Center frequencies (MHz)
GA	454.025 / 459.025	GN	454.350 / 459.350
GB	454.050 / 459.050	GO	454.375 / 459.375
GC	454.075 / 459.075	GP	454.400 / 459.400
GD	454.100 / 459.100	GQ	454.425 / 459.425
GE	454.125 / 459.125	GR	454.450 / 459.450
GF	454.150 / 459.150	GS	454.475 / 459.475
GG	454.175 / 459.175	GT	454.500 / 459.500
GH	454.200 / 459.200	GU	454.525 / 459.525
GI	454.225 / 459.225	GV	454.550 / 459.550
GJ	454.250 / 459.250	GW	454.575 / 459.575
GK	454.275 / 459.275	GX	454.600 / 459.600
GL	454.300 / 459.300	GY	454.625 / 459.625
GM	454.325 / 459.325	GZ	454.650 / 459.650

Each frequency listed in this chart is the center frequency of the channels to be auctioned in each block.

929 MHz UPPER BAND PAGING—20 kHz PER BLOCK, UNPAIRED CHANNELS

Block	Center frequency (MHz)	Block	Center frequency (MHz)
A	929.0125	G	929.4625
B	929.1125	H	929.6375
C	929.2375	I	929.6875
D	929.3125	J	929.7875
E	929.3875	K	929.9125
F	929.4375	L	929.9625

Each frequency listed in this chart is the center frequency of the channel to be auctioned in each block.

931 MHz UPPER BAND PAGING—20 kHz PER BLOCK, UNPAIRED CHANNELS

Block	Center frequency (MHz)	Block	Center frequency (MHz)	Block	Center frequency (MHz)
AA	931.0125	AN	931.3375	BA	931.6625
AB	931.0375	AO	931.3625	BB	931.6875
AC	931.0625	AP	931.3875	BC	931.7125
AD	931.0875	AQ	931.4125	BD	931.7375
AE	931.1125	AR	931.4375	BE	931.7625
AF	931.1375	AS	931.4625	BF	931.7875
AG	931.1625	AT	931.4875	BG	931.8125
AH	931.1875	AU	931.5125	BH	931.8375
AI	931.2125	AV	931.5375	BI	931.8625
AJ	931.2375	AW	931.5625	BJ	931.9625
AK	931.2625	AX	931.5875	BK	931.9875
AL	931.2875	AY	931.6125		
AM	931.3125	AZ	931.6375		

Each frequency listed in this chart is the center frequency of the channel to be auctioned in each block.

Note: In Auction No. 48, for each block listed in the tables, licenses are not available in every market. The complete list of licenses available for Auction No. 48 will be provided in electronic format only, available as ''Attachment A'' of the *Auction No. 48 Procedures Public Notice* at *http://wireless.fcc.gov/auctions/48/*. The format of the frequency tables has been modified from the tables presented in the *Auction No. 48 Comment Public Notice*, however, the spectrum represented by the tables is the same.

B. Rules and Disclaimers

i. Relevant Authority

4. Prospective bidders must familiarize themselves thoroughly with the Commission's rules relating to the paging services, contained in title 47, part 22 and part 90 of the Code of Federal Regulations, and those relating to application and auction procedures, contained in title 47, part 1 of the Code of Federal Regulations. Prospective bidders must also be thoroughly familiar with the procedures, terms and conditions (collectively, ''Terms'') contained in the *Auction No. 48 Procedures Public Notice;* the *Auction No. 48 Comment Public Notice;* the *Part 1 Fifth Report and Order* 65 FR 52401 (August 29, 2000), (as well as prior and subsequent Commission proceedings regarding competitive bidding procedures); the *Paging Notice;* the *Paging First Report and Order;* the *First Paging Reconsideration Order;* the *Paging Second Report and Order;* the *Second Paging Reconsideration Order;* the *Paging Third Report and Order;* and the *Third Paging Reconsideration Order.*

5. The terms contained in the Commission's rules, relevant orders, and public notices are not negotiable. The Commission may amend or supplement the information contained in our public notices at any time, and will issue public notices to convey any new or supplemental information to bidders. It is the responsibility of all prospective bidders to remain current with all Commission rules and with all

public notices pertaining to this auction. Copies of most Commission documents, including public notices, can be retrieved from the FCC Auctions Internet site at *http://wireless.fcc.gov/auctions.* Additionally, documents are available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC, 20554 or may be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.* When ordering documents from Qualex, please provide the appropriate FCC number (for example, FCC 99–98 for the *Paging Third Report and Order*).

ii. Prohibition of Collusion

6. To ensure the competitiveness of the auction process, the Commission's rules prohibit applicants for the same geographic license area from communicating with each other during the auction about bids, bidding strategies, or settlements. This prohibition begins at the short-form application filing deadline and ends at the down payment deadline after the auction. Bidders competing for licenses in the same geographic license areas are encouraged not to use the same individual as an authorized bidder. A violation of the anti-collusion rule could occur if an individual acts as the authorized bidder for two or more competing applicants, and conveys information concerning the substance of bids or bidding strategies between the bidders he or she is authorized to represent in the auction. A violation could similarly occur if the authorized bidders are different individuals employed by the same organization (*e.g.*, law firm or consulting firm). In such a case, at a minimum, applicants should certify on their applications that precautionary steps have been taken to prevent communication between authorized bidders and that applicants and their bidding agents will comply with the anti-collusion rule.

7. However, the Bureau cautions that merely filing a certifying statement as part of an application will not outweigh specific evidence that collusive behavior has occurred, nor will it preclude the initiation of an investigation when warranted. The Commission's anti-collusion rules allow applicants to form certain agreements during the auction, provided the applicants have not applied for licenses covering the same geographic areas. Note that in Auction No. 48, applicants for licenses in overlapping EAs and MEAs will not be able to take advantage of these rule provisions, even though the licenses are not completely co-extensive. For example, assume that one applicant applies for several lower paging bands licenses, *i.e.*, licenses covering EAs, in its Auction No. 48 FCC Form 175 and that a second applicant applies for licenses in the upper paging bands, *i.e.*, licenses covering MEAs, in its Auction No. 48 FCC Form 175. If the first applicant selects licenses for EAs that are within MEAs covered by licenses selected by the second applicant, the two parties will have applied for licenses covering the same geographic areas. Consequently, unlike applicants who have applied for licenses that do not cover the same geographic areas, these two applicants will not be permitted to form a consortium or bid jointly for licenses after they file FCC Form 175. However, all applicants may enter into bidding agreements before filing FCC Form 175, as long as they disclose the existence of the agreement(s) in their FCC Form 175. If parties agree in principle on all material terms prior to the short-form filing deadline, those parties must be identified on the short-form application pursuant to § 1.2105(c), even if the agreement has not been reduced to writing. If the parties have not agreed in principle by the filing deadline, an applicant would not include the names of those parties on its application, and may not continue negotiations with other applicants for licenses covering the same geographic areas. By signing their FCC Form 175 short-form applications, applicants are certifying their compliance with § 1.2105(c).

8. In addition, § 1.65 of the Commission's rules requires an applicant to *maintain* the accuracy and completeness of information furnished in its pending application and to notify the Commission within 30 days of any substantial change that may be of decisional significance to that application. Thus, §§ 1.65 and 1.2105 require an auction applicant to notify the Commission of any violation of the anti-collusion rules upon learning of such violation. Bidders therefore are required to make such notification to the Commission immediately upon discovery.

9. A summary listing of documents from the Commission and the Bureau addressing the application of the anti-collusion rules may be found in Attachment F of the *Auction No. 48 Procedures Public Notice.*

iii. Incumbent Licensees

10. Incumbent (non-geographic) paging licensees operating under their existing authorizations are entitled to full protection from co-channel interference. Geographic area licensees are likewise afforded co-channel interference protection from incumbent licensees. Adjacent geographic area licensees are obligated to resolve possible interference concerns of adjacent geographic area licensees by negotiating a mutually acceptable agreement with the neighboring geographic licensee. Incumbency issues are further discussed.

iv. Due Diligence

11. Potential bidders are reminded that there are a number of incumbent licensees already licensed and operating on frequencies that will be subject to the upcoming auction. Geographic area licensees in accordance with the Commission's rules must protect such incumbents from harmful interference. *See* 47 CFR 22.503(i). These limitations may restrict the ability of such geographic area licensees to use certain portions of the electromagnetic spectrum or provide service to certain areas in their geographic license areas.

12. In addition, potential bidders seeking licenses for geographic areas adjacent to the Canadian and Mexican border should be aware that the use of some or all of the channels they acquire in the auction could be restricted as a result of current or future agreements with Canada or Mexico. Licensees on the lower paging channels must submit a Form 601 to obtain authorization to operate stations north of Line A or east of Line C because these channels are subject to the *Above 30 Megacycles per Second Agreement* with Industry Canada. Although the upper paging channels do not require coordination with Canada, the *U.S.-Canada Interim Coordination Considerations for the Band 929–932 MHz, as amended,* assigns specific 929 and 931 MHz frequencies to the United States for licensing along certain longitudes above Line A, and assigns other specific 929 and 931 MHz frequencies to Canada for licensing along certain longitudes along the U.S.-Canada border. In addition, the 929 and 931 MHz frequencies assigned to Canada are unavailable for use by U.S. licensees above Line A as set out in the agreement. Also, licensees in some EAs and MEAs may be required to protect quiet zones.

13. Potential bidders should also be aware that certain applications (including those for modification), petitions for rulemaking, requests for

special temporary authority (''STA''), waiver requests, petitions to deny, petitions for reconsideration, and applications for review may be pending before the Commission and relate to particular applicants or incumbent licensees. In addition, certain judicial proceedings that may relate to particular applicants or incumbent licensees, on the licenses available in Auction No. 48 may be commenced, or may be pending, or may be subject to further review. We note that resolution of these matters could have an impact on the availability of spectrum in Auction No. 48. Some of these matters (whether before the Commission or the Courts) may not be resolved by the time of the auction.

14. Potential bidders are solely responsible for identifying associated risks, and investigating and evaluating the degree to which such matters may affect their ability to bid on, otherwise acquire, or make use of licenses available in Auction No. 48.

15. To aid potential bidders, Attachment G of the *Auction No. 48 Procedures Public Notice* lists paging matters pending before the Commission that relate to licenses or applications in the bands being auctioned. The Commission makes no representations or guarantees that the listed matters are the only pending matters that could affect spectrum availability in these bands.

16. Copies of pleadings from pending cases relating to paging matters identified in Attachment G of the *Auction No. 48 Procedures Public Notice* are available for public inspection and copying during normal reference room hours at: Office of Public Affairs (OPA), Reference Operations Division, 445 12th Street, SW., Room CY–C314, Washington, DC 20554.

17. In addition, potential bidders may research the Bureau's licensing database on the Internet in order to determine which frequencies are already licensed to incumbent licensees. The Commission makes no representations or guarantees regarding the accuracy or completeness of information in its databases or any third party databases, including, for example, court docketing systems. Furthermore, the Commission makes no representations or guarantees regarding the accuracy or completeness of information that has been provided by incumbent licensees and incorporated into the database. Potential bidders are strongly encouraged to physically inspect any sites located in, or near, the EA or MEA for which they plan to bid.

18. Licensing records for paging are contained in the Bureau's Universal Licensing System (ULS) and may be researched on the Internet at *http://wireless.fcc.gov/uls.* Potential bidders may query the database online and download a copy of their search results if desired. Detailed instructions on using License Search (including frequency searches and the GeoSearch capability) and downloading query results are available online by selecting the ''?'' button at the upper right-hand corner of the License Search screen.

19. Potential bidders should direct questions regarding the search capabilities to the FCC Technical Support hotline at (202) 414–1250 (voice) or (202) 414–1255 (TTY), or via e-mail at *ulscomm@fcc.gov.* The hotline is available to assist with questions Monday through Friday, from 8 a.m. to 6 p.m. e.t. In order to provide better service to the public, *all calls to the hotline are recorded.*

v. Bidder Alerts

20. All applicants must certify on their FCC Form 175 applications under penalty of perjury that they are legally, technically, financially and otherwise qualified to hold a license, and not in default on any payment for Commission licenses (including down payments) or delinquent on any non-tax debt owed to any Federal agency. Prospective bidders are reminded that submission of a false certification to the Commission is a serious matter that may result in severe penalties, including monetary forfeitures, license revocations, exclusion from participation in future auctions, and/or criminal prosecution.

21. The FCC makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that an FCC auction represents an opportunity to become an FCC licensee in this service, subject to certain conditions and regulations. An FCC auction does not constitute an endorsement by the FCC of any particular services, technologies or products, nor does a FCC license constitute a guarantee of business success. Applicants and interested parties should perform their own due diligence before proceeding, as they would with any new business venture.

22. As is the case with many business investment opportunities, some unscrupulous entrepreneurs may attempt to use Auction No. 48 to deceive and defraud unsuspecting investors. Common warning signals of fraud include the following:

- The first contact is a ''cold call'' from a telemarketer, or is made in response to an inquiry prompted by a radio or television infomercial.
- The offering materials used to invest in the venture appear to be targeted at IRA funds, for example, by including all documents and papers needed for the transfer of funds maintained in IRA accounts.
- The amount of investment is less than $25,000.
- The sales representative makes verbal representations that: (a) The Internal Revenue Service (''IRS''), Federal Trade Commission (''FTC''), Securities and Exchange Commission (''SEC''), FCC, or other government agency has approved the investment; (b) the investment is not subject to State or Federal securities laws; or (c) the investment will yield unrealistically high short-term profits. In addition, the offering materials often include copies of actual FCC releases, or quotes from FCC personnel, giving the appearance of FCC knowledge or approval of the solicitation.

23. Information about deceptive telemarketing investment schemes is available from the FTC at (202) 326–2222 and from the SEC at (202) 942–7040. Complaints about specific deceptive telemarketing investment schemes should be directed to the FTC, the SEC, or the National Fraud Information Center at (800) 876–7060. Consumers who have concerns about specific proposals regarding Auction No. 48 may also call the FCC Consumer Center at (888) CALL–FCC ((888) 225–5322).

vi. National Environmental Policy Act (''NEPA'') Requirements

24. Licensees must comply with the Commission's rules regarding the National Environmental Policy Act (NEPA). The construction of a wireless antenna facility is a Federal action and the licensee must comply with the Commission's NEPA rules for each such facility. The Commission's NEPA rules require, among other things, that the licensee consult with expert agencies having NEPA responsibilities, including the U.S. Fish and Wildlife Service, the State Historic Preservation Office, the Army Corp of Engineers and the Federal Emergency Management Agency (through the local authority with jurisdiction over floodplains). The licensee must prepare environmental assessments for facilities that may have a significant impact in or on wilderness areas, wildlife preserves, threatened or endangered species or designated critical habitats, historical or archaeological sites, Indian religious sites, floodplains, and surface features. The licensee must also prepare environmental assessments for facilities that include high intensity white lights in residential neighborhoods or excessive radio frequency emission.

C. Auction Specifics

i. Auction Date

25. The auction will begin on Tuesday, May 13, 2003. The initial schedule for bidding will be announced by public notice at least one week before the start of the auction. Unless otherwise announced, bidding on all licenses will be conducted on each business day until bidding has stopped on all licenses.

ii. Auction Title

26. Auction No. 48—Lower and Upper Paging.

iii. Bidding Methodology

27. The bidding methodology for Auction No. 48 will be simultaneous multiple round bidding. The Commission will conduct this auction over the Internet. Telephonic bidding will also be available. As a contingency, the FCC Wide Area Network will be available as well. Qualified bidders are permitted to bid telephonically or electronically.

iv. Pre-Auction Dates and Deadlines

28. Listed are important dates associated with Auction No. 32:

Auction seminar: March 6, 2003.

Short-form application (FCC Form 175): March 21, 2003; 6 p.m. e.t.

Upfront payments (via wire transfer): April 14, 2003; 6 p.m. e.t.

Mock auction: May 8, 2003.

Auction begins: May 13, 2003.

v. Requirements for Participation

29. Those wishing to participate in the auction must:

- Submit a short-form application (FCC Form 175) electronically by 6 p.m. e.t., March 21, 2003.
- Submit a sufficient upfront payment and an FCC Remittance Advice Form (FCC Form 159) by 6 p.m. e.t., April 14, 2003.
- Comply with all provisions outlined in the *Auction No. 48 Procedures Public Notice.*

vi. General Contact Information

30. The following is a list of general contact information relating to Auction No. 32.

General Auction Information: General Auction Questions, Seminar Registration.

FCC Auctions Hotline, (888) 225–5322, Press Option #2, or direct (717) 338–2888. Hours of service: 8 a.m.—5:30 p.m. e.t.

Auction Legal Information: Auction Rules, Policies, Regulations.

Auctions and Industry Analysis Division, Legal Branch (202) 418–0660.

Licensing Information: Rules, Policies, Regulations, Licensing Issues, Due Diligence, Incumbency Issues.

Commercial Wireless Division (202) 418–0620.

Technical Support: Electronic Filing, Automated Auction System.

FCC Auctions Technical Support Hotline, (202) 414–1250 (Voice), (202) 414–1255 (TTY). Hours of service: Monday through Friday 8 a.m. to 6 p.m. e.t.

Payment Information: Wire Transfers, Refunds.

FCC Auctions Accounting Branch, (202) 418–0578 or (202) 418–0496, (202) 418–2843 (Fax).

Telephonic Bidding: Will be furnished only to qualified bidders.

FCC Copy Contractor: Additional Copies of Commission Documents.

Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. (202) 863–2893, (202) 863–2898 (Fax), *qualexint@aol.com* (E-mail).

Press Information: Lauren Kravetz (202) 418–7944.

FCC Forms: (800) 418–3676 (outside Washington, DC), (202) 418–3676 (in the Washington Area), *http://www.fcc.gov/formpage.html.*

FCC Internet Sites: http://www.fcc.gov. http://wireless.fcc.gov/auctions. http://wireless.fcc.gov/uls.

II. Short-Form (FCC Form 175) Application Requirements

31. Guidelines for completion of the short-form (FCC Form 175) are set forth in Attachment D of the *Auction No. 48 Procedures Public Notice*. The short-form application seeks the applicant's name and address, legal classification, status, small business bidding credit eligibility, identification of the license(s) sought, the authorized bidders and contact persons. Applicants must certify on their FCC Form 175 applications under penalty of perjury that they are legally, technically, financially and otherwise qualified to hold a license and, as discussed in section II.E (Provisions Regarding Defaulters and Former Defaulters), that they are not in default on any payment for Commission licenses (including down payments) or delinquent on any non-tax debt owed to any Federal agency.

A. License Selection

32. In Auction No. 48, Form 175 will include a mechanism that allows an applicant to filter the 10,202 licenses by paging service, frequency band, market area, and/or channel block/license suffix to create customized lists of licenses. The applicant will make selections for one or more of the filter criteria and the system will produce a list of licenses satisfying the specified criteria. The applicant may apply for all the licenses in the customized list by using the ''Select All'' option; select individual licenses separately from the list; or create a second customized list without selecting any of the licenses from the first list. Applicants also will be able to select licenses from one customized list and then create a second customized list to select additional licenses.

B. Ownership Disclosure Requirements (FCC Form 175 Exhibit A)

33. All applicants must comply with the uniform part 1 ownership disclosure standards and provide information required by §§ 1.2105 and 1.2112 of the Commission's rules. Specifically, in completing FCC Form 175, applicants will be required to file an ''Exhibit A'' providing a full and complete statement of the ownership of the bidding entity. The ownership disclosure standards for the short-form are set forth in § 1.2112 of the Commission's rules.

C. Consortia and Joint Bidding Arrangements (FCC Form 175 Exhibit B)

34. Applicants will be required to identify on their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate in any way to the licenses being auctioned, including any agreements relating to post-auction market structure. Applicants will also be required to certify on their short-form applications that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bids, bidding strategies, or the particular licenses on which they will or will not bid. As discussed, if an applicant has had discussions, but has not reached a joint bidding agreement by the short-form deadline, it would not include the names of parties to the discussions on its applications and may not continue discussions with applicants after the deadline. Where applicants have entered into consortia or joint bidding arrangements, applicants must submit an ''Exhibit B'' to the FCC Form 175.

35. A party holding a non-controlling, attributable interest in one applicant will be permitted to acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with other competing applicants provided that (i)

the attributable interest holder certifies that it has not and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, or with which it has formed a consortium or entered into a joint bidding arrangement; and (ii) the arrangements do not result in a change in control of any of the applicants. While the anti-collusion rules do not prohibit non-auction related business negotiations among auction applicants, bidders are reminded that certain discussions or exchanges could touch upon impermissible subject matters because they may convey pricing information and bidding strategies.

D. Eligibility

i. Small Business Bidding Credit Eligibility (FCC Form 175 Exhibit C)

36. In the *Paging Second Report and Order*, the Commission adopted small business bidding credits to promote and facilitate the participation of small businesses in competitive bidding for licenses in the paging service. In the *Second Paging Reconsideration Order*, the Commission subsequently increased the size of the bidding credits.

37. Bidding credits are available to small businesses, or consortia thereof, (as defined in 47 CFR 1.2110(c) and 22.217(a)). A bidding credit represents the amount by which a bidder's winning bids are discounted. The size of the bidding credit depends on the average of the aggregated annual gross revenues for each of the preceding three years of the bidder, its affiliates, its controlling interests, and the affiliates of its controlling interests:

- A bidder with attributed average annual gross revenues of not more than $15 million for the preceding three years receives a 25 percent discount on its winning bids for paging licenses;
- A bidder with attributed average annual gross revenues of not more than $3 million for the preceding three years receives a 35 percent discount on its winning bids for paging licenses.

38. Bidding credits are not cumulative; a qualifying applicant receives either the 25 percent or the 35 percent bidding credit on its winning bids, but not both.

ii. Tribal Land Bidding Credit

39. To encourage the growth of wireless services in federally recognized tribal lands the Commission has implemented a tribal land bidding credit. *See* part V.D. of the *Auction No. 48 Procedures Public Notice*.

iii. Applicability of Part 1 Attribution Rules

40. *Controlling interest standard*. On August 14, 2000, the Commission released the *Part 1 Fifth Report and Order*, in which the Commission, *inter alia*, adopted a ''controlling interest'' standard for attributing to auction applicants the gross revenues of their investors and affiliates in determining small business eligibility for future auctions. The Commission observed that the rule modifications adopted in the various part 1 orders would result in discrepancies and/or redundancies between certain of the new part 1 rules and existing service-specific rules, and the Commission delegated to the Bureau the authority to make conforming edits to the Code of Federal Regulations (CFR) consistent with the rules adopted in the part 1 proceeding. Part 1 rules that superseded inconsistent service-specific rules will control in Auction No. 48. Accordingly, the ''controlling interest'' standard as set forth in the part 1 rules will be in effect for Auction No. 48.

41. *Control*. The term ''control'' includes both *de facto* and *de jure* control of the applicant. Typically, ownership of at least 50.1 percent of an entity's voting stock evidences de jure control. *De facto* control is determined on a case-by-case basis. The following are some common indicia of *de facto* control:

- The entity constitutes or appoints more than 50 percent of the board of directors or management committee;
- The entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; or
- The entity plays an integral role in management decisions.

42. *Attribution for small business eligibility*. In determining which entities qualify as small businesses, the Commission will consider the gross revenues of the applicant, its affiliates, its controlling interests, and the affiliates of its controlling interests. The Commission does not impose specific equity requirements on controlling interest holders. Once the principals or entities with a controlling interest are determined, only the revenues of those principals or entities, the affiliates of those principals or entities, the applicant and its affiliates, will be counted in determining small business eligibility.

43. A consortium of small businesses is a ''conglomerate organization formed as a joint venture between or among mutually independent business firms,'' each of which individually must satisfy the definition of small business in §§ 1.2110(f) and 22.223(b). Thus, each consortium member must disclose its gross revenues along with those of its affiliates, its controlling interests, and the affiliates of its controlling interests. The Bureau notes that although the gross revenues of the consortium members will not be aggregated for purposes of determining eligibility for small business credits, this information must be provided to ensure that each individual consortium member qualifies for any bidding credit awarded to the consortium.

iv. Supporting Documentation

44. Applicants should note that they will be required to file supporting documentation to their FCC Form 175 short-form applications to establish that they satisfy the eligibility requirements to qualify as small businesses (or consortia of small businesses) for this auction.

45. Applicants should further note that submission of an FCC Form 175 application constitutes a representation by the certifying official that he or she is an authorized representative of the applicant, has read the form's instructions and certifications, and that the contents of the application and its attachments are true and correct. Submission of a false certification to the Commission may result in penalties, including monetary forfeitures, license forfeitures, ineligibility to participate in future auctions, and/or criminal prosecution.

46. *Small business eligibility (Exhibit C)*. Entities applying to bid as small businesses (or consortia of small businesses) will be required to disclose on Exhibit C to their FCC Form 175 short-form applications, *separately and in the aggregate*, the gross revenues for the preceding three years of each of the following: (i) the applicant, (ii) its affiliates, (iii) its controlling interests, and (iv) the affiliates of its controlling interests. Certification that the average annual gross revenues for the preceding three years do not exceed the applicable limit is not sufficient. A statement of the total gross revenues for the preceding three years is also insufficient. The applicant must provide separately for itself, its affiliates, its controlling interests, and the affiliates of its controlling interests, a schedule of gross revenues for each of the preceding three years, as well as a statement of total average gross revenues for the three-year period. If the applicant is applying as a consortium of small businesses, this information must be provided for each consortium member.

E. Provisions Regarding Defaulters and Former Defaulters (FCC Form 175 Exhibit D)

47. Each applicant must certify on its FCC Form 175 application that it is not in default on any Commission licenses and that it is not delinquent on any non-tax debt owed to any Federal agency. In addition, each applicant must attach to its FCC Form 175 application a statement made under penalty of perjury indicating whether or not the applicant, its affiliates, its controlling interests, or the affiliates of its controlling interest have ever been in default on any Commission licenses or have ever been delinquent on any non-tax debt owed to any Federal agency. The applicant must provide such information for itself, its affiliates, its controlling interests, and the affiliates of its controlling interests, as defined by § 1.2110 of the Commission's rules (as amended in the *Part 1 Fifth Report and Order*). Applicants must include this statement as Exhibit D of the FCC Form 175. Prospective bidders are reminded that the statement must be made under penalty of perjury and, further, submission of a false certification to the Commission is a serious matter that may result in severe penalties, including monetary forfeitures, license revocations, exclusion from participation in future auctions, and/or criminal prosecution.

48. ''Former defaulters''—*i.e.*, applicants, including their attributable interest holders, that in the past have defaulted on any Commission licenses or been delinquent on any non-tax debt owed to any Federal agency, but that have since remedied all such defaults and cured all of their outstanding non-tax delinquencies—are eligible to bid in Auction No. 48, provided that they are otherwise qualified. However, as discussed *infra* in section III.D.iii, former defaulters are required to pay upfront payments that are fifty percent more than the normal upfront payment amounts.

F. Installment Payments

49. Installment payment plans will not be available in Auction No. 48.

G. Other Information (FCC Form 175 Exhibits E and F)

50. Applicants owned by minorities or women, as defined in 47 CFR 1.2110(c)(2), may attach an exhibit (Exhibit E) regarding this status. This applicant status information is collected for statistical purposes only and assists the Commission in monitoring the participation of ''designated entities'' in its auctions. Applicants wishing to submit additional information may do so, on Exhibit F (Miscellaneous Information) to the FCC Form 175.

H. Minor Modifications to Short-Form Applications (FCC Form 175)

51. After the short-form filing deadline (March 21, 2003), applicants may make only minor changes to their FCC Form 175 applications. Applicants will not be permitted to make major modifications to their applications (*e.g.*, change their license selections or proposed service areas, change the certifying official, change control of the applicant or change bidding credits). *See* 47 CFR 1.2105. Permissible minor changes include, for example, deletion and addition of authorized bidders (to a maximum of three) and revision of exhibits. Applicants must make these modifications to their FCC Form 175 electronically and should submit a letter, briefly summarizing the changes, by electronic mail to the attention of Margaret Wiener, Chief, Auctions and Industry Analysis Division, at the following address: *auction48@fcc.gov*. The electronic mail summarizing the changes should include a subject or caption referring to Auction No. 48. The Bureau requests that parties format any attachments to electronic mail as Adobe® Acrobat® (pdf) or Microsoft® Word documents.

52. A separate copy of the letter should be faxed to the attention of Kathryn Garland at (717) 338–2850. Questions about other changes should be directed to Rosemary Cabral of the Auctions and Industry Analysis Division at (202) 418–0660.

I. Maintaining Current Information in Short-Form Applications (FCC Form 175)

53. Applicants have an obligation under 47 CFR 1.65, to maintain the completeness and accuracy of information in their short-form applications. Amendments reporting substantial changes of possible decisional significance in information contained in FCC Form 175 applications, as defined by 47 CFR 1.2105(b)(2), will not be accepted and may in some instances result in the dismissal of the FCC Form 175 application.

III. Pre-Auction Procedures

A. Auction Seminar

54. On Thursday, March 6, 2003, the FCC will sponsor a free seminar for Auction No. 48 at the Federal Communications Commission, located at 445 12th Street, SW., Washington, DC. The seminar will provide attendees with information about pre-auction procedures, conduct of the auction, the FCC Automated Auction System, and the paging and auction rules. The seminar will also provide an opportunity for prospective bidders to ask questions of FCC staff.

55. To register, complete the registration form found in Attachment B of the *Auction No. 48 Procedures Public Notice* and submit it by Tuesday, March 4, 2003. Registrations are accepted on a first-come, first-served basis.

B. Short-Form Application (FCC Form 175)—Due March 21, 2003

56. In order to be eligible to bid in this auction, applicants must first submit a FCC Form 175 application. This application must be submitted electronically and received at the Commission no later than 6 p.m. e.t. on March 21, 2003. Late applications will not be accepted.

57. There is no application fee required when filing an FCC Form 175. However, to be eligible to bid, an applicant must submit an upfront payment. *See* Part III.D.

i. Electronic Filing

58. Applicants must file their FCC Form 175 applications electronically. Applications may generally be filed at any time beginning at noon ET on March 6, 2003, until 6 p.m. e.t. on March 21, 2003. Applicants are strongly encouraged to file early and are responsible for allowing adequate time for filing their applications. Applicants may update or amend their electronic applications multiple times until the filing deadline on March 21, 2003.

59. Applicants must press the ''SUBMIT Application'' button on the ''Submission'' page of the electronic form to successfully submit their FCC Form 175s. Any form that is not submitted will not be reviewed by the FCC. Information about accessing the FCC Form 175 is included in Attachment C of the *Auction No. 48 Procedures Public Notice*. Technical support is available at (202) 414–1250 (voice) or (202) 414–1255 (text telephone (TTY)); hours of service Monday through Friday, from 8 a.m. to 6 p.m. e.t. In order to provide better service to the public, *all calls to the hotline are recorded*.

60. Applicants can also contact Technical Support via e-mail. To obtain the address, click the Support tab on the Form 175 Homepage.

ii. Completion of the FCC Form 175

61. Applicants should carefully review 47 CFR 1.2105, and must complete all items on the FCC Form

175. Instructions for completing the FCC Form 175 are in Attachment D of the *Auction No. 48 Procedures Public Notice*. Applicants are encouraged to begin preparing the required attachments for FCC Form 175 prior to submitting the form. Attachments C and D of the *Auction No. 48 Procedures Public Notice* provide information on the required attachments and appropriate formats.

iii. Electronic Review of FCC Form 175

62. The FCC Form 175 electronic review system may be used to locate and print applicants' FCC Form 175 information. Applicants may also view other applicants' completed FCC Form 175s after the filing deadline has passed and the FCC has issued a public notice explaining the status of the applications. **Note:** Applicants should not include sensitive information (*i.e.*, TIN/EIN) on any exhibits to their FCC Form 175 applications. There is no fee for accessing this system. *See* Attachment C of the *Auction No. 48 Procedures Public Notice* for details on accessing the review system.

C. Application Processing and Minor Corrections

63. After the deadline for filing the FCC Form 175 applications has passed, the FCC will process all timely-submitted applications to determine which are acceptable for filing, and subsequently will issue a public notice identifying: (i) Those applications accepted for filing; (ii) those applications rejected; and (iii) those applications which have minor defects that may be corrected, and the deadline for filing such corrected applications.

64. As described more fully in the Commission's rules, after the March 21, 2003, short-form filing deadline, applicants may make only minor corrections to their FCC Form 175 applications. Applicants will not be permitted to make major modifications to their applications (*e.g.*, change their license selections, change the certifying official, change control of the applicant, or change bidding credit eligibility).

D. Upfront Payments—Due April 14, 2003

65. In order to be eligible to bid in the auction, applicants must submit an upfront payment accompanied by a FCC Remittance Advice Form (FCC Form 159). After completing the FCC Form 175, filers will have access to an electronic version of the FCC Form 159 that can be printed and faxed to Mellon Bank in Pittsburgh, PA. All upfront payments must be received at Mellon Bank by 6 p.m. e.t. on April 14, 2003.

Please note that:

- All payments must be made in U.S. dollars.
- All payments must be made by wire transfer.
- Upfront payments for Auction No. 48 go to a lockbox number different from the lockboxes used in previous FCC auctions, and different from the lockbox number to be used for post-auction payments.
- Failure to deliver the upfront payment by the April 14, 2003, deadline will result in dismissal of the application and disqualification from participation in the auction.

i. Making Auction Payments by Wire Transfer

66. Wire transfer payments must be received by 6 p.m. e.t. on April 14, 2003. To avoid untimely payments, applicants should discuss arrangements (including bank closing schedules) with their banker several days before they plan to make the wire transfer, and allow sufficient time for the transfer to be initiated and completed before the deadline. Applicants will need the following information:

ABA Routing Number: 043000261.

Receiving Bank: Mellon Pittsburgh.

Beneficiary: FCC/Account # 910–1182.

OBI Field: (Skip one space between each information item) ''Auctionpay''

FCC Registration Number (FRN): (same as FCC Form 159, block 11 and/or 21).

Payment Type Code (same as FCC Form 159, block 24A: A48U).

FCC Code 1 (same as FCC Form 159, block 28A: ''48'').

Payer Name (same as FCC Form 159, block 2).

Lockbox No. # 358415.

Note: The BNF and Lockbox number are specific to the upfront payments for this auction; do not use BNF or Lockbox numbers from previous auctions.

67. Applicants must fax a completed FCC Form 159 (Revised 2/00) to Mellon Bank at (412) 209–6045 at least one hour before placing the order for the wire transfer (but on the same business day). On the cover sheet of the fax, write ''Wire Transfer—Auction Payment for Auction Event No. 48.'' Bidders should confirm receipt of their upfront payment at Mellon Bank by contacting their sending financial institution.

ii. FCC Form 159

68. A completed FCC Remittance Advice Form (FCC Form 159, Revised 2/00) must be faxed to Mellon Bank in order to accompany each upfront payment. Proper completion of FCC Form 159 (Revised 2/00) is critical to ensuring correct credit of upfront payments. Detailed instructions for completion of FCC Form 159 are included in Attachment E of the *Auction No. 48 Procedures Public Notice.* An electronic version of the FCC Form 159 is available after filing the FCC Form 175. The FCC Form 159 can be completed electronically, but must be filed with Mellon Bank via facsimile.

iii. Amount of Upfront Payment

69. In the *Part 1 Order* the Commission delegated to the Bureau the authority and discretion to determine appropriate upfront payment(s) for each auction. In addition, in the *Part 1 Fifth Report and Order,* the Commission ordered that ''former defaulters,'' *i.e.*, applicants that have ever been in default on any Commission license or have ever been delinquent on any non-tax debt owed to any Federal agency, be required to pay upfront payments fifty percent greater than non-''former defaulters.'' For purposes of this calculation, the ''applicant'' includes the applicant itself, its affiliates, its controlling interests, and affiliates of its controlling interests, as defined by § 1.2110 of the Commission's rules (as amended in the *Part 1 Fifth Report and Order*).

70. In the *Auction No. 48 Comment Public Notice*, the Bureau proposed that the amount of the upfront payment would determine the number of bidding units on which a bidder may place bids. In order to bid on a license, otherwise qualified bidders that applied for that license on Form 175 must have an eligibility level that meets or exceeds the number of bidding units assigned to that license. At a minimum, therefore, an applicant's total upfront payment must be enough to establish eligibility to bid on at least one of the licenses applied for on Form 175, or else the applicant will not be eligible to participate in the auction. An applicant does not have to make an upfront payment to cover all licenses for which the applicant has applied on Form 175, but rather to cover the maximum number of bidding units that are associated with licenses on which the bidder wishes to place bids and hold high bids at any given time.

71. In the *Auction No. 48 Comment Public Notice,* the Bureau proposed setting upfront payments for each license equal to the license's minimum opening bid. The Bureau further proposed setting the bidding units for each license equal to the license's upfront payment on a bidding unit for dollar basis. The bidding unit level for each license will remain constant throughout the auction. The Bureau

received no comments on this issue. The Bureau adopts its proposed upfront payments. The specific upfront payments and bidding units for each license are set forth in the list of licenses available for Auction No. 48 (''Attachment A''), available with the *Auction No. 48 Procedures Public Notice* at *http://wireless.fcc.gov/auctions/48/*.

72. In calculating its upfront payment amount, an applicant should determine the *maximum* number of bidding units on which it may wish to be active (bidding units associated with licenses on which the bidder has the standing high bid from the previous round and licenses on which the bidder places a bid in the current round) in any single round, and submit an upfront payment covering that number of bidding units. In order to make this calculation, an applicant should add together the upfront payments for all licenses on which it seeks to bid in any given round. Bidders should check their calculations carefully, as there is no provision for increasing a bidder's maximum eligibility after the upfront payment deadline.

73. Former defaulters should calculate their upfront payment for all licenses by multiplying the number of bidding units they wish to purchase by 1.5. In order to calculate the number of bidding units to assign to former defaulters, the Commission will divide the upfront payment received by 1.5 and round the result up to the nearest bidding unit.

Note: An applicant may, on its FCC Form 175, apply for every applicable license being offered, but its actual bidding in any round will be limited by the bidding units reflected in its upfront payment.

iv. Applicant's Wire Transfer Information for Purposes of Refunds of Upfront Payments

74. The Commission will use wire transfers for all Auction No. 48 refunds. To ensure that refunds of upfront payments are processed in an expeditious manner, the Commission is requesting that all pertinent information as listed be supplied to the FCC. Applicants can provide the information electronically during the initial short-form filing window after the form has been submitted. Wire Transfer Instructions can also be manually faxed to the FCC, Financial Operations Center, Auctions Accounting Group, ATTN: Tim Dates or Gail Glasser, at (202) 418–2843 by April 14, 2003. All refunds will be returned to the payer of record as identified on the FCC Form 159 unless the payer submits written authorization instructing otherwise. For additional information, please call Gail Glasser at (202) 418–0578 or Tim Dates at (202) 418–0496.

Name of Bank; ABA Number; Contact and Phone Number; Account Number to Credit; Name of Account Holder; FCC Registration Number (FRN); Taxpayer Identification Number; Correspondent Bank (if applicable); ABA Number; Account Number.

(Applicants should also note that implementation of the Debt Collection Improvement Act of 1996 requires the FCC to obtain a Taxpayer Identification Number (TIN) before it can disburse refunds.) Eligibility for refunds is discussed in part V.F.

E. Auction Registration

75. Approximately ten days before the auction, the FCC will issue a public notice announcing all qualified bidders for the auction. Qualified bidders are those applicants whose FCC Form 175 applications have been accepted for filing and have timely submitted upfront payments sufficient to make them eligible to bid on at least one of the licenses for which they applied.

76. All qualified bidders are automatically registered for the auction. Registration materials will be distributed prior to the auction by two separate overnight mailings, one containing the confidential bidder identification number (BIN) required to place bids and the other containing the SecurID cards. These mailings will be sent only to the contact person at the contact address listed in the FCC Form 175.

77. Applicants that do not receive both registration mailings will not be able to submit bids. Therefore, any qualified applicant that has not received both mailings by noon on Tuesday, May 6, 2003, should contact the Auctions Hotline at (717) 338–2888. Receipt of both registration mailings is critical to participating in the auction and each applicant is responsible for ensuring it has received all of the registration material.

78. Qualified bidders should note that lost bidder identification numbers or SecurID cards can be replaced only by appearing in person at the FCC Auction Headquarters located at 445 12th St., SW., Washington, DC 20554. Only an authorized representative or certifying official, as designated on an applicant's FCC Form 175, may appear in person with two forms of identification (one of which must be a photo identification) in order to receive replacement codes. Qualified bidders requiring replacements must call technical support prior to arriving at the FCC.

F. Electronic Bidding

79. The Commission will conduct this auction over the Internet. Telephonic bidding will also be available. As a contingency, the FCC Wide Area Network will be available as well. Qualified bidders are permitted to bid electronically or telephonically, *i.e.*, over the Internet or the FCC's Wide Area Network. In either case, each authorized bidder must have its own Remote Security Access SecurID card, which the FCC will provide at no charge. Each applicant with less than three authorized bidders will be issued two SecurID cards, while applicants with three authorized bidders will be issued three cards. For security purposes, the SecurID cards and the FCC Automated Auction System user manual are only mailed to the contact person at the contact address listed on the FCC Form 175. Please note that each SecurID card is tailored to a specific auction, therefore, SecurID cards issued for other auctions or obtained from a source other than the FCC will not work for Auction No. 48. The telephonic bidding phone number will be supplied in the first overnight mailing, which also includes the confidential bidder identification number. Each applicant should indicate its bidding preference—electronic or telephonic—on the FCC Form 175.

80. Please note that the SecurID cards can be recycled, and the Bureau encourages bidders to return the cards to the FCC. The Bureau will provide pre-addressed envelopes that bidders may use to return the cards once the auction is over.

a. Mock Auction

81. All qualified bidders will be eligible to participate in a mock auction on Thursday, May 8, 2003. The mock auction will enable applicants to become familiar with the FCC Automated Auction System prior to the auction. Participation by all bidders is strongly recommended. Details will be announced by public notice.

IV. Auction Event

82. The first round of bidding for Auction No. 48 will begin on Tuesday, May 13, 2003. The initial bidding schedule will be announced in a public notice listing the qualified bidders, which is released approximately 10 days before the start of the auction.

A. Auction Structure

i. Simultaneous Multiple Round Auction

83. In the *Auction No. 48 Comment Public Notice,* we proposed to award all licenses in Auction No. 48 in a

simultaneous multiple round auction. The Bureau received no comments on this issue. The Bureau concludes that it is operationally feasible and appropriate to auction the paging licenses through a simultaneous multiple round auction. Unless otherwise announced, bids will be accepted on all licenses in each round of the auction. This approach, the Bureau believes, allows bidders to take advantage of any synergies that exist among licenses and is administratively efficient.

ii. Maximum Eligibility and Activity Rules

84. In the *Auction No. 48 Comment Public Notice,* the Bureau proposed that the amount of the upfront payment submitted by a bidder would determine the initial maximum eligibility (as measured in bidding units) for each bidder. The Bureau received no comments on this issue.

85. For Auction No. 48, the Bureau adopts this proposal. The amount of the upfront payment submitted by a bidder determines the number of bidding units on which a bidder may place bids. Note again that each license is assigned a specific number of bidding units equal to the upfront payment, listed in the license inventory available for Auction No. 48 (''Attachment A''), available with the *Auction No. 48 Procedures Public Notice* at *http://wireless.fcc.gov/auctions/48/,* on a bidding unit per dollar basis. The total upfront payment defines the maximum number of bidding units on which the applicant will be permitted to bid and hold high bids during any given round. As there is no provision for increasing a bidder's eligibility after the upfront payment deadline, prospective bidders are cautioned to calculate their upfront payments carefully. The total upfront payment does not affect the total dollar amount a bidder may bid on any given license.

86. In order to ensure that the auction closes within a reasonable period of time, an activity rule requires bidders to bid actively throughout the auction, rather than wait until the end before participating. Bidders are required to be active on a specific percentage of their current eligibility during each round of the auction.

87. A bidder's activity level in a round is the sum of the bidding units associated with licenses on which the bidder is active. A bidder is considered active on a license in the current round if it is either the high bidder at the end of the previous bidding round and does not withdraw the high bid in the current round, or if it submits a bid in the current round (*see* ''Bid Increments and Minimum Acceptable Bids'' in Part IV.B.(iii)). The minimum required activity is expressed as a percentage of the bidder's current bidding eligibility, and increases by stage as the auction progresses. Because these procedures have proven successful in maintaining the pace of previous auctions (as set forth under ''Auction Stages'' in part IV.A.iii and ''Stage Transitions'' in part IV.A.iv), we adopt them for Auction No. 48.

iii. Auction Stages

88. In the *Auction No. 48 Comment Public Notice,* the Bureau proposed to conduct the auction in three stages and employ an activity rule. The Bureau further proposed that, in each round of Stage One, a bidder desiring to maintain its current eligibility would be required to be active on licenses encompassing at least 80 percent of its current bidding eligibility. In each round of Stage Two, a bidder desiring to maintain its current eligibility would be required to be active on at least 90 percent of its current bidding eligibility. Finally, the Bureau proposed that a bidder in Stage Three, in order to maintain its current eligibility, would be required to be active on 98 percent of its current eligibility. The Bureau received no comments on this proposal.

89. The Bureau will adopt its proposals for the activity rules. Listed are the activity levels for each stage of the auction. The FCC reserves the discretion to further alter the activity percentages before and/or during the auction.

Stage One: During the first stage of the auction, a bidder desiring to maintain its current eligibility will be required to be active on licenses that represent at least 80 percent of its current bidding eligibility in each bidding round. Failure to maintain the required activity level will result in a reduction in the bidder's bidding eligibility in the next round of bidding (unless an activity rule waiver is used). During Stage One, reduced eligibility for the next round will be calculated by multiplying the bidder's current activity (the sum of bidding units of the bidder's standing high bids and bids during the current round) by five-fourths (5/4).

Stage Two: During the second stage of the auction, a bidder desiring to maintain its current eligibility is required to be active on 90 percent of its current bidding eligibility. Failure to maintain the required activity level will result in a reduction in the bidder's bidding eligibility in the next round of bidding (unless an activity rule waiver is used). During Stage Two, reduced eligibility for the next round will be calculated by multiplying the bidder's current activity (the sum of bidding units of the bidder's standing high bids and bids during the current round) by ten-ninths (10/9).

Stage Three: During the third stage of the auction, a bidder desiring to maintain its current eligibility is required to be active on 98 percent of its current bidding eligibility. Failure to maintain the required activity level will result in a reduction in the bidder's bidding eligibility in the next round of bidding (unless an activity rule waiver is used). In this stage, reduced eligibility for the next round will be calculated by multiplying the bidder's current activity (the sum of bidding units of the bidder's standing high bids and bids during the current round) by fifty-forty ninths (50/49).

Caution: Since activity requirements increase in each auction stage, bidders must carefully check their current activity during the bidding period of the first round following a stage transition. This is especially critical for bidders that have standing high bids and do not plan to submit new bids. In past auctions, some bidders have inadvertently lost bidding eligibility or used an activity rule waiver because they did not re-verify their activity level at stage transitions. Bidders may check their activity against the required activity level by using the bidding system's bidding module.

90. Because the foregoing procedures have proven successful in maintaining proper pace in previous auctions, the Bureau adopts them for Auction No. 48.

iv. Stage Transitions

91. In the *Auction No. 48 Comment Public Notice,* the Bureau proposed that the auction would generally advance to the next stage (*i.e.*, from Stage One to Stage Two, and from Stage Two to Stage Three) when the auction activity level, as measured by the percentage of bidding units receiving new high bids, is below 20 percent for three consecutive rounds of bidding in each Stage. The Bureau further proposed that it would retain the discretion to change stages unilaterally by announcement during the auction. This determination, the Bureau proposed, would be based on a variety of measures of bidder activity, including, but not limited to, the auction activity level, the percentages of licenses (as measured in bidding units) on which there are new bids, the number of new bids, and the percentage increase in revenue. The Bureau received no comments on this subject.

92. The Bureau adopts its proposal. Thus, the auction will start in Stage One

and will advance to the next stage (*i.e.*, from Stage One to Stage Two, and from Stage Two to Stage Three) when, in each of three consecutive rounds of bidding, the high bid has increased on 20 percent or less of the licenses being auctioned (as measured in bidding units). In addition, the Bureau will retain the discretion to regulate the pace of the auction by announcement. This determination will be based on a variety of measures of bidding activity, including, but not limited to, the auction activity level, the percentages of licenses (as measured in bidding units) on which there are new bids, the number of new bids, and the percentage increase in revenue. The Bureau believes that these stage transition rules, having proven successful in prior auctions, are appropriate for use in Auction No. 48.

v. Activity Rule Waivers and Reducing Eligibility

93. In the *Auction No. 48 Comment Public Notice,* the Bureau proposed that each bidder in the auction would be provided five activity rule waivers. Bidders may use an activity rule waiver in any round during the course of the auction. The Bureau received no comments on this subject.

94. Based upon our experience in previous auctions, the Bureau adopts its proposal that each bidder be provided five activity rule waivers that may be used in any round during the course of the auction. Use of an activity rule waiver preserves the bidder's current bidding eligibility despite the bidder's activity in the current round being below the required level. An activity rule waiver applies to an entire round of bidding and not to a particular license. The Bureau is satisfied that its practice of providing five waivers over the course of the auction provides a sufficient number of waivers and flexibility to the bidders, while safeguarding the integrity of the auction.

95. The Automated Auction System assumes that bidders with insufficient activity would prefer to use an activity rule waiver (if available) rather than lose bidding eligibility. Therefore, the system will automatically apply a waiver (known as an ''automatic waiver'') at the end of any round where a bidder's activity level is below the minimum required unless: (i) There are no activity rule waivers available; or (ii) the bidder overrides the automatic application of a waiver by reducing eligibility, thereby meeting the required activity level. If a bidder has no waivers remaining and does not satisfy the required activity level, the current eligibility will be permanently reduced, possibly eliminating the bidder from the auction.

96. A bidder with insufficient activity that wants to reduce its bidding eligibility rather than use an activity rule waiver must affirmatively override the automatic waiver mechanism during the round by using the ''reduce eligibility'' function in the bidding system. In this case, the bidder's eligibility is permanently reduced to bring the bidder into compliance with the activity rules as described in ''Auction Stages'' (*see* part IV.A.iii). Once eligibility has been reduced, a bidder will not be permitted to regain its lost bidding eligibility.

97. Finally, a bidder may proactively use an activity rule waiver as a means to keep the auction open without placing a bid. If a bidder submits a proactive waiver (using the proactive waiver function in the Automated Auction System) during a round in which no bids are submitted, the auction will remain open and the bidder's eligibility will be preserved. However, an automatic waiver triggered during a round in which there are no new bids or withdrawals will not keep the auction open.

Note: Once a proactive waiver is placed during a round, that waiver cannot be unsubmitted.

vi. Auction Stopping Rules

98. For Auction No. 48, the Bureau proposed to employ a simultaneous stopping rule approach. The Bureau also sought comment on a modified version of the stopping rule. The modified version of the stopping rule would close the auction for all licenses after the first round in which no bidder submits a proactive waiver, a withdrawal, or a new bid on any license on which it is not the standing high bidder. Thus, absent any other bidding activity, a bidder placing a new bid on a license for which it is the standing high bidder would not keep the auction open under this modified stopping rule.

99. The Bureau further proposed retaining the discretion to keep the auction open even if no new acceptable bids or proactive waivers are submitted and no previous high bids are withdrawn in a round. In this event, the effect will be the same as if a bidder had submitted a proactive waiver. Thus, the activity rule will apply as usual, and a bidder with insufficient activity will either use an activity rule waiver (if it has any left) or lose bidding eligibility.

100. In addition, the Bureau proposed that it reserve the right to declare that the auction will end after a designated number of additional rounds (''special stopping rule''). If the Bureau invokes this special stopping rule, it will accept bids in the final round(s) only for licenses on which the high bid increased in at least one of the preceding specified number of rounds. The Bureau proposed to exercise this option only in circumstances such as where the auction is proceeding very slowly, where there is minimal overall bidding activity or where it appears likely that the auction will not close within a reasonable period of time. Before exercising this option, the Bureau is likely to attempt to increase the pace of the auction by, for example, moving the auction into the next stage (where bidders will be required to maintain a higher level of bidding activity), increasing the number of rounds per day and/or adjusting the minimum acceptable bids and bid increments for the licenses.

101. The Bureau received no comments concerning the auction stopping rules; therefore, it adopts the proposals. Auction No. 48 will begin under the simultaneous stopping rule, and the Bureau will retain the discretion to invoke the other versions of the stopping rule. The Bureau believes that these stopping rules are most appropriate for Auction No. 48, because its experience in prior auctions demonstrates that the auction stopping rules balance the interests of administrative efficiency and maximum bidder participation.

vii. Auction Delay, Suspension, or Cancellation

102. In the *Auction No. 48 Comment Public Notice,* the Bureau proposed that, by public notice or by announcement during the auction, the Bureau may delay, suspend, or cancel the auction in the event of natural disaster, technical obstacle, evidence of an auction security breach, unlawful bidding activity, administrative or weather necessity, or for any other reason that affects the fair conduct of competitive bidding.

103. Because this approach has proven effective in resolving exigent circumstances in previous auctions, the Bureau adopts its proposed auction cancellation rules. By public notice or by announcement during the auction, the Bureau may delay, suspend, or cancel the auction in the event of natural disaster, technical obstacle, evidence of an auction security breach, unlawful bidding activity, administrative or weather necessity, or for any other reason that affects the fair and competitive conduct of competitive bidding. In such cases, the Bureau, in its sole discretion, may elect to resume the auction starting from the beginning of

the current round, resume the auction starting from some previous round, or cancel the auction in its entirety. Network interruption may cause the Bureau to delay or suspend the auction. The Bureau emphasizes that exercise of this authority is solely within the discretion of the Bureau, and its use is not intended to be a substitute for situations in which bidders may wish to apply their activity rule waivers.

B. Bidding Procedures

i. Round Structure

104. The initial bidding schedule will be announced in the public notice listing the qualified bidders, which is released approximately 10 days before the start of the auction. Each bidding round is followed by the release of the round results. Multiple bidding rounds may be conducted in a given day. Details regarding round results formats and locations will also be included in the qualified bidders public notice.

105. The FCC has discretion to change the bidding schedule in order to foster an auction pace that reasonably balances speed with the bidders' need to study round results and adjust their bidding strategies. The Bureau may increase or decrease the amount of time for the bidding rounds and review periods, or the number of rounds per day, depending upon the bidding activity level and other factors.

ii. Reserve Price or Minimum Opening Bid

106. *Background.* The Balanced Budget Act calls upon the Commission to prescribe methods by which a reasonable reserve price will be required or a minimum opening bid established when FCC licenses are subject to auction (*i.e.*, because they are mutually exclusive), unless the Commission determines that a reserve price or minimum opening bid is not in the public interest. Consistent with this mandate, the Commission directed the Bureau to seek comment on the use of a minimum opening bid and/or reserve price prior to the start of each auction. Among other factors, the Bureau should consider the amount of spectrum being auctioned, levels of incumbency, the availability of technology to provide service, the size of the geographic service areas, the extent of interference with other spectrum bands, and any other relevant factors that could have an impact on the spectrum being auctioned. The Commission concluded that the Bureau should have the discretion to employ either or both of these mechanisms for future auctions.

107. In the *Auction No. 48 Comment Public Notice,* the Bureau proposed to establish minimum opening bids for Auction No. 48 and to retain discretion to lower the minimum opening bids. Specifically, for Auction No. 48, the Bureau proposed the following formula for minimum opening bids:

- For a license being auctioned by MEA, the minimum opening bid will be 20% of the average gross high bid received in Auction No. 40 in the same MEA and the same band.
- For a license being auctioned by EA, the minimum opening bid will be 20% of the average gross high bid received in Auction No. 40 in the same EA and the same band.

108. The Bureau will set a ''floor'' for minimum opening bids at $500 for licenses in both the upper paging bands (929–931 MHz) and the lower paging bands (35 MHz, 43 MHz, 152 and 158 MHz, 454 MHz and 459 MHz, 929 MHz, 931 MHz).

109. In the alternative, the Bureau sought comment on whether, consistent with the Balanced Budget Act, the public interest would be served by having no minimum opening bid or reserve price. The Bureau received one comment regarding this issue, suggesting that there be no minimum bid on all licenses that remain unsold from a previous auction.

110. After reviewing the comment, the Bureau has concluded that it should adopt its original proposal and the minimum opening bids listed in the *Auction No. 48 Comment Paging Notice.* The Bureau believes that the use of minimum opening bids is in the public interest because parties unable or unwilling to make proposed minimum opening bids most likely will be unable or unwilling to use the licenses to provide service to the public. The Bureau has concluded that the proposed absolute minimum opening bid of $500 will not impede any party willing and able to use the license to provide paging service. Under the Commission's current rules, the filing fee for a new paging service license or to make major modifications to an existing paging service license is $325. This fee is waived for applicants that obtained licenses through the auction process. Finally, small businesses qualifying for a thirty-five percent (35%) bidding credit and winning a lower paging bands license for the minimum opening bid of $500 will have to pay $325 for the license. Thus, even absent an auction, service providers would have to meet costs comparable to the proposed absolute minimum opening bids in order to obtain a license.

111. The Bureau will adopt minimum opening bids for Auction No. 48, that are reducible at the discretion of the Bureau. The Bureau emphasizes, however, that such discretion will be exercised, if at all, sparingly and early in the auction, *i.e.*, before bidders lose all waivers and begin to lose substantial eligibility. During the course of the auction, the Bureau will not entertain requests to reduce the minimum opening bid on specific licenses.

112. The specific minimum opening bid for each license available in Auction No. 48 is set forth in the list of licenses provided in electronic format as the *Auction No. 48 Procedures Public Notice* at *http://wireless.fcc.gov/auctions/48/*.

iii. Minimum Acceptable Bids and Bid Increments

113. In the *Auction No. 48 Comment Public Notice,* the Bureau proposed to set the minimum acceptable bid as the minimum opening bid or the standing high bid plus the defined increment. Eligible bidders will be able to place bids on a given license in any of nine different amounts. Until a bid has been placed on a license, the minimum acceptable bid for that license will be equal to its minimum opening bid. In the rounds after a bid is placed on a license, the minimum acceptable bid for that license will be equal to the standing high bid plus the defined increment. With respect to calculating the defined increment, the Bureau proposed basing the defined increment on a percentage of the standing high bid or, if no standing high bid had been placed, on a percentage of the minimum opening bid. The Bureau proposed that at the outset of the auction, it would use twenty percent of the standing high bid or minimum opening bid to calculate the increment. The Bureau further proposed to retain the discretion to change the percentage used to calculate the defined increment if circumstances so dictate and to set a floor for the increment used to calculate the minimum acceptable bid at an absolute dollar amount. Finally, the Bureau proposed that it have discretion to use a smaller percentage to calculate the increment used in setting acceptable bids higher than the minimum acceptable bid. In all other respects, such as rounding, the smaller defined increment would be calculated in the same manner as the defined increment used to set the minimum acceptable bid.

114. For Auction No. 48, the Bureau proposed to use a fixed 20 percent bid increment. This means that the minimum acceptable bid for a license will be approximately 20 percent greater

than the previous standing high bid received on the license. The minimum acceptable bid amount will be calculated by multiplying the standing high bid times one plus the fixed percentage—*i.e.*, minimum acceptable bid amount = (standing high bid) * (1.20){rounded}. The Bureau will round the result using its standard rounding procedure for minimum acceptable bid calculations: Results above $10,000 are rounded to the nearest $1,000; results below $10,000 but above $1,000 are rounded to the nearest $100; and results below $1,000 are rounded to the nearest $10.

115. At the start of the auction and until a bid has been placed on a license, the minimum acceptable bid for that license will be equal to its minimum opening bid. Corresponding additional bid amounts will be calculated using bid increments defined as the difference between the minimum opening bid times one plus the percentage increment, rounded as described, and the minimum opening bid—*i.e.*, bid increment = (minimum opening bid)(1 + percentage increment){rounded}—(minimum opening bid). At the start of the auction and until a bid has been placed on a license, the nine acceptable bid amounts for each license consist of the minimum opening bid and additional amounts are calculated using multiple bid increments (*i.e.*, the second bid amount equals the minimum opening bid plus the bid increment, the third bid amount equals the minimum opening bid plus two times the bid increment, etc.).

Example bid amount calculation for licenses at the start of the auction and without standing high bids:

1st bid amount = minimum opening bid
2nd bid amount = minimum opening bid + (bid increment)
3rd bid amount = minimum opening bid + 2(bid increment) * * *
9th bid amount = minimum opening bid + 8(bid increment)

116. Once there is a standing high bid on the license, the Automated Auction System will calculate a minimum acceptable bid for that license for the following round, as described. The difference between the minimum acceptable bid and the standing high bid for each license will define the bid increment—*i.e.*, bid increment = (minimum acceptable bid) − (standing high bid). The nine acceptable bid amounts for each license consist of the minimum acceptable bid (the standing high bid plus one bid increment) and additional amounts calculated using multiple bid increments (*i.e.*, the second bid amount equals the standing high bid plus two times the bid increment, the third bid amount equals the standing high bid plus three times the bid increment, etc.).

Example bid amount calculation for a license with standing high bids:

1st bid amount (minimum acceptable bid) = standing high bid + bid increment
2nd bid amount = standing high bid +2(bid increment)
3rd bid amount = standing high bid +3(bid increment) * * *
9th bid amount = standing high bid +9(bid increment)

117. The Bureau retains the discretion to change the minimum acceptable bids and bid increments and the methodology for determining the minimum acceptable bids and bid increments if it determines circumstances so dictate. The Bureau will do so by announcement in the FCC Automated Auction System. The Bureau may also use its discretion to adjust the minimum bid increment without prior notice if circumstances warrant.

118. The Bureau will adopt its proposals contained in the *Auction No. 48 Comment Public Notice.* In doing so, the Bureau will retain the discretion to set the percentages being used. Advance notice of the Bureau's decision to exercise its discretion with regard to acceptable bids in any manner will be announced via the Automated Auction System.

iv. High Bids

119. At the end of each bidding round, the high bids will be determined based on the highest gross bid amount of the bids received for each license.

120. In the *Auction No. 48 Comment Public Notice,* the Bureau proposed to use a random number generator to select a high bid in the event of identical high bids on a license in a given round (*i.e.*, tied bids). A random number will be assigned to each bid. The tied bid having the highest random number will become the standing high bid. The remaining bidders, as well as the high bidder, will be able to submit a higher bid in a subsequent round. If no bidder submits a higher bid in a subsequent round, the high bid from the previous round will win the license. If any bids are received on the license in a subsequent round, the high bid will once again be determined on the highest gross bid amount received for the license. The Bureau received no comments on this issue. Therefore, the Bureau adopts its proposal.

v. Bidding

121. During a round, a bidder may submit bids for as many licenses as it wishes (subject to its eligibility), withdraw high bids from previous bidding rounds, remove bids placed in the same bidding round, or permanently reduce eligibility. Bidders also have the option of making multiple submissions and withdrawals in each round. If a bidder submits multiple bids for a single license in the same round, the system takes the last bid entered as that bidder's bid for the round. Bidders should note that the bidding units associated with licenses for which the bidder has removed or withdrawn its bid do not count towards the bidder's activity at the close of the round.

122. Please note that all bidding will take place remotely either through the Automated Auction System or by telephonic bidding. (Telephonic bid assistants are required to use a script when entering bids placed by telephone. Telephonic bidders are therefore reminded to allow sufficient time to bid by placing their calls well in advance of the close of a round. Normally, five to 10 minutes are necessary to complete a bid submission. Due to the large number of licenses in Auction No. 48, bidders may require more time to submit their bids than in past auctions.) There will be no on-site bidding during Auction No. 48.

123. A bidder's ability to bid on specific licenses in the first round of the auction is determined by two factors: (i) the licenses applied for on FCC Form 175 and (ii) the upfront payment amount deposited. The bid submission screens will allow bidders to submit bids on only those licenses for which the bidder applied on its FCC Form 175.

124. In order to access the bidding functions of the Automated Auction System, bidders must be logged in during the bidding round using the bidder identification number provided in the registration materials, and the generated SecurID code. Bidders are strongly encouraged to print bid confirmations for each round after they have completed all of their activity for that round.

125. In each round, eligible bidders will be able to place bids on a given license in any of nine different amounts. For each license, the Automated Auction System interface will list the nine acceptable bid amounts in a drop-down box. Bidders may use the drop-down box to select from among the nine acceptable bid amounts. The Automated Auction System also includes an import function that allows bidders to upload text files containing their bid information.

126. Until a bid has been placed on a license, the minimum acceptable bid for that license will be equal to its

minimum opening bid. In the rounds after an acceptable bid is placed on a license, the minimum acceptable bid for that license will be equal to the standing high bid plus the defined increment.

127. As detailed, for each license in Auction No. 48, the defined increment for the minimum acceptable bid is based on a percentage of the standing high bid on the license or, if no bid has been placed on the license, a percentage of the minimum opening bid for the license. Presuming, for example, that the percentage being used is 20 percent—the initial value at the start of the auction—and the standing high bid for a license is $10,000, the minimum acceptable bid will be $12,000.

128. In addition, the Bureau proposed discretion to use a smaller defined increment to calculate acceptable bids higher than the minimum acceptable bid. The smaller defined increment would be calculated using a smaller percentage than the percentage used to calculate the defined increment that sets the minimum acceptable bid. For example, 20 percent might be used to calculate the defined increment for the minimum acceptable bid and 10 percent might be used to calculate the smaller defined increment used to calculate higher acceptable bids. In all other respects, the smaller defined increment would be calculated in exactly the manner described for the initial defined increment, including rounding. In this case, for the example in which the standing high bid for a license is $10,000 and the minimum acceptable bid is $12,000, the values for the minimum acceptable bid and higher amounts will be calculated as follows:

Defined Increment
= (Standing High Bid * 1.2{rounded}) − Standing High Bid
= ($10,000 * 1.2{rounded}) − $10,000
= ($12,000{rounded}) − $10,000
= $12,000 − $10,000
= $2,000

Smaller Defined Increment
= (Standing High Bid * 1.1{rounded}) − Standing High Bid
= ($10,000 * 1.1{rounded}) − $10,000
= ($11,000{rounded}) − $10,000
= $11,000 − $10,000
= $1,000

Minimum Acceptable Bid
= Standing High Bid + Defined Increment
= $10,000 + $2,000
= $12,000

One Increment Higher Than Minimum Acceptable Bid
= Minimum Acceptable Bid + (Smaller Defined Increment * 1)
= $12,000 + ($1,000 * 1)
= $12,000 + $1,000
= $13,000

Two Increments Higher Than Minimum Acceptable Bid
= Minimum Acceptable Bid + (Smaller Defined Increment * 2)
= $12,000 + ($1,000 * 2)
= $12,000 + $2,000
= $14,000

129. This procedure would enable bidders unwilling to raise the standing high bid by twice the defined increment to place bids higher than the minimum acceptable bid. Thus, in the example, a bidder wanting to bid above the minimum acceptable bid but unwilling to raise the standing high bid of $10,000 by twice the defined increment of $2,000 ($4,000 or 40 percent) would have the flexibility to bid $13,000, raising the standing high bid by $3,000. In the case of a license for which the standing high bid has been withdrawn, the minimum acceptable bid will equal the second highest bid received for the license. The additional bid amounts are calculated using the defined increment, as stated. The Bureau will adopt these proposals for Auction No. 48.

130. Finally, bidders are cautioned in selecting their bid amounts because, as explained in the following section, bidders who withdraw a standing high bid from a previous round, even if mistakenly or erroneously made, are subject to bid withdrawal payments.

vi. Bid Removal and Bid Withdrawal

131. In the *Auction No. 48 Comment Public Notice,* the Bureau proposed bid removal and bid withdrawal procedures. With respect to bid withdrawals, the Bureau proposed limiting each bidder to withdrawals in no more than two rounds during the course of the auction. The two rounds in which withdrawals are utilized, the Bureau proposed, would be at the bidder's discretion. The Bureau received no comments on this issue.

132. Procedures. Before the close of a bidding round, a bidder has the option of removing any bids placed in that round. By using the ''remove bid'' function in the bidding system, a bidder may effectively ''unsubmit'' any bid placed within that round. A bidder removing a bid placed in the same round is not subject to withdrawal payments. Removing a bid will affect a bidder's activity for the round in which it is removed, *i.e.*, a bid that is subsequently removed does not count toward the bidder's activity requirement. This procedure, about which the Bureau received no comments, will enhance bidder flexibility during the auction. Therefore, the Bureau will adopt these procedures for Auction No. 48.

133. Once a round closes, a bidder may no longer remove a bid. However, in later rounds, a bidder may withdraw standing high bids from previous rounds using the withdraw bid function in the Automated Auction System (assuming that the bidder has not exhausted its withdrawal allowance). A high bidder that withdraws its standing high bid from a previous round during the auction is subject to the bid withdrawal payments specified in 47 CFR 1.2104(g).

Note: Once a withdrawal is placed during a round, that withdrawal cannot be unsubmitted.

134. In previous auctions, the Bureau has detected bidder conduct that, arguably, may have constituted strategic bidding through the use of bid withdrawals. While the Bureau continues to recognize the important role that bid withdrawals play in an auction, *i.e.*, reducing risk associated with efforts to secure various licenses in combination, it concludes that, for Auction No. 48, adoption of a limit on their use to two rounds per bidder is the most appropriate outcome. By doing so the Bureau believes it strikes a reasonable compromise that will allow bidders to use withdrawals. The Bureau's decision on this issue is based upon our experience in prior auctions, particularly the PCS D, E and F block auctions, and 800 MHz SMR auction, and is in no way a reflection of its view regarding the likelihood of any speculation or ''gaming'' in this auction.

135. The Bureau will therefore limit the number of rounds in which each bidder may place withdrawals to two rounds. These rounds will be at the bidder's discretion, and there will be no limit on the number of bids that may be withdrawn in either of these rounds. Withdrawals during the auction will still be subject to the bid withdrawal payments specified in 47 CFR 1.2104(g). Bidders should note that abuse of the Commission's bid withdrawal procedures could result in the denial of the ability to bid on a market.

136. If a high bid is withdrawn, the minimum acceptable bid will equal the second highest bid received for the license, which may be less than, or equal to, in the case of tied bids, the amount of the withdrawn bid. To set the additional bid amounts, the second highest bid also will be used in place of the standing high bid in the formula used to calculate bid increments. The Commission will serve as a ''place holder'' high bidder on the license until a new bid is submitted on that license.

137. Calculation. Generally, the Commission imposes payments on

bidders that withdraw high bids during the course of an auction. If a bidder withdraws its bid and there is no higher bid in the same or subsequent auction(s), the bidder that withdrew its bid is responsible for the difference between its withdrawn bid and the net high bid in the same or subsequent auction(s). In the case of multiple bid withdrawals on a single license, within the same or subsequent auctions(s), the payment for each bid withdrawal will be calculated based on the sequence of bid withdrawals and the amounts withdrawn. No withdrawal payment will be assessed for a withdrawn bid if either the subsequent winning bid or any of the intervening subsequent withdrawn bids, in either the same or subsequent auctions(s), equals or exceeds that withdrawn bid. Thus, a bidder that withdraws a bid will not be responsible for any withdrawal payments if there is a subsequent higher bid in the same or subsequent auction(s). This policy allows bidders most efficiently to allocate their resources as well as to evaluate their bidding strategies and business plans during an auction while, at the same time, maintaining the integrity of the auction process. The Bureau retains the discretion to scrutinize multiple bid withdrawals on a single license for evidence of anti-competitive strategic behavior and take appropriate action when deemed necessary.

138. In the *Part 1 Fifth Report and Order,* the Commission modified § 1.2104(g)(1) of the rules regarding assessments of interim bid withdrawal payments. As amended, § 1.2104(g)(1) provides that in instances in which bids have been withdrawn on a license that is not won in the same auction, the Commission will assess an interim withdrawal payment equal to 3 percent of the amount of the withdrawn bids. The 3 percent interim payment will be applied toward any final bid withdrawal payment that will be assessed after subsequent auction of the license. Assessing an interim bid withdrawal payment ensures that the Commission receives a minimal withdrawal payment pending assessment of any final withdrawal payment. *The Part 1 Fifth Report and Order* provides specific examples showing application of the bid withdrawal payment rule

vii. Round Results

139. In the *Auction No. 48 Comment Public Notice,* the Bureau proposed disclosing all information relating to the bids during Auction No. 48 after each round of bidding closes, including all bids and withdrawals placed in each round, the identity of the bidder placing each bid or withdrawal, and the net and gross amounts of each bid or withdrawal. Accordingly, the Bureau will adopt the proposal in the *Auction No. 48 Comment Public Notice.*

140. Bids placed during a round will not be published until the conclusion of that bidding period. After a round closes, the Bureau will compile reports of all bids placed, bids withdrawn, current high bids, new minimum acceptable bids, and bidder eligibility status (bidding eligibility and activity rule waivers), and post the reports for public access. Reports reflecting bidders' identities and bidder identification numbers for Auction No. 48 will be available before and during the auction. Thus, bidders will know in advance of this auction the identities of the bidders against which they are bidding.

viii. Auction Announcements

141. The FCC will use auction announcements to announce items such as schedule changes and stage transitions. All FCC auction announcements will be available by clicking a link on the Automated Auction System.

ix. Maintaining the Accuracy of FCC Form 175 Information

142. As noted in part II.H., after the short-form filing deadline, applicants may make only minor changes to their FCC Form 175 applications. For example, permissible minor changes include deletion and addition of authorized bidders (to a maximum of three) and certain revision of exhibits. Applicants must make these modifications to their FCC Form 175 electronically and submit a letter, briefly summarizing the changes, by electronic mail to the attention of Margaret Wiener, Chief, Auctions and Industry Analysis Division at the following address: *auction48@fcc.gov*. The electronic mail summarizing the changes should include a subject or caption referring to Auction No. 48. The Bureau requests that parties format any attachments to electronic mail as Adobe® Acrobat® (pdf) or Microsoft® Word documents.

143. A separate copy of the letter should be faxed to the attention of Kathryn Garland at (717) 338–2850. Questions about other changes should be directed to Rosemary Cabral of the Auctions and Industry Analysis Division at (202) 418–0660.

V. Post-Auction Procedures

A. Down Payments and Withdrawn Bid Payments

144. After bidding has ended, the Commission will issue a public notice declaring the auction closed, identifying winning bidders, down payments and any withdrawn bid payments due.

145. Within 10 business days after release of the auction closing notice, each winning bidder must submit sufficient funds (in addition to its upfront payment) to bring its total amount of money on deposit with the Government to 20 percent of its net winning bids (actual bids less any applicable small business bidding credits). *See* 47 CFR 1.2107(b). In addition, by the same deadline all bidders must pay any bid withdrawal payments due under 47 CFR 1.2104(g), as discussed in ''Bid Removal and Bid Withdrawal,'' Part IV.B.vi. (Upfront payments are applied first to satisfy any withdrawn bid liability, before being applied toward down payments.)

B. Auction Discount Voucher

146. On June 8, 2000, the Commission awarded Qualcomm, Inc. a transferable Auction Discount Voucher (''ADV'') in the amount of $125,273,878.00. This ADV may be used by Qualcomm or its transferee, in whole or in part, to adjust a winning bid in any spectrum auction prior to June 8, 2003, subject to terms and conditions set forth in the Commission's Order. Qualcomm transferred $10,848,000.00 of the ADV to a winning bidder in FCC Auction No. 35 and the transferee used its portion of the ADV to pay a portion of one of its winning bids in Auction No. 35. The remaining portion of Qualcomm's ADV could be used to adjust winning bids in another FCC auction, including Auction No. 48.

C. Long-Form Application

147. Within 10 business days after release of the auction closing notice, winning bidders must electronically submit a properly completed long-form application (FCC Form 601) and required exhibits for each license won through Auction No. 48. Winning bidders that are small businesses must include an exhibit demonstrating their eligibility for small business bidding credits. *See* 47 CFR 1.2112(b), 24.709(c)(2)(i). Further filing instructions will be provided to auction winners at the close of the auction.

D. Tribal Land Bidding Credit

148. A winning bidder that intends to use its license(s) to deploy facilities and provide services to federally-recognized

tribal lands that are unserved by any telecommunications carrier or that have a telephone service penetration rate equal to or below 70 percent is eligible to receive a tribal land bidding credit as set forth in 47 CFR 1.2107 and 1.2110(f). A tribal land bidding credit is in addition to, and separate from, any other bidding credit for which a winning bidder may qualify.

149. Unlike other bidding credits that are requested prior to the auction, a winning bidder applies for the tribal land bidding credit after winning the auction when it files its long-form application (FCC Form 601). When filing the long-form application, the winning bidder will be required to advise the Commission whether it intends to seek a tribal land bidding credit, for each market won in the auction, by checking the designated box(es). After stating its intent to seek a tribal land bidding credit, the applicant will have 90 days from the close of the long-form filing window to amend its application to select the specific tribal lands to be served and provide the required tribal government certifications. Licensees receiving a tribal land bidding credit are subject to performance criteria as set forth in 47 CFR 1.2110(f).

150. For additional information on the tribal land bidding credit, including how the amount of the credit is calculated, applicants should review the Commission's rule making proceeding regarding tribal land bidding credits and related public notices. Relevant documents can be viewed on the Commission's web site by going to *http://wireless.fcc.gov/auctions* and clicking on the *Tribal Land Credits* link.

E. Default and Disqualification

151. Any winning bidder that defaults or is disqualified after the close of the auction (*i.e.*, fails to remit the required down payment within the prescribed period of time, fails to submit a timely long-form application; fails to make full payment, or is otherwise disqualified) will be subject to the payments described in 47 CFR 1.2104(g)(2). In such event the Commission may re-auction the license or offer it to the next highest bidder (in descending order) at its final bid. In addition, if a default or disqualification involves gross misconduct, misrepresentation, or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant.

F. Refund of Remaining Upfront Payment Balance

152. All applicants that submitted upfront payments but were not winning bidders for a license in Auction No. 48 may be entitled to a refund of their remaining upfront payment balance after the conclusion of the auction. No refund will be made unless there are excess funds on deposit from that applicant after any applicable bid withdrawal payments have been paid. All refunds will be returned to the payer of record, as identified on the FCC 159, unless the payer submits written authorization instructing otherwise.

153. Bidders that drop out of the auction completely may be eligible for a refund of their upfront payments before the close of the auction. Qualified bidders that have exhausted all of their activity rule waivers, have no remaining bidding eligibility, and have not withdrawn a high bid during the auction must submit a written refund request. If you have completed the refund instructions electronically, then only a written request for the refund is necessary. If not, the request must also include wire transfer instructions, Taxpayer Identification Number (TIN) and FCC Registration Number (FRN). Send refund request to: Federal Communications Commission, Financial Operations Center, Auctions Accounting Group, Gail Glasser or Tim Dates, 445 12th Street, SW, Room 1–C863, Washington, DC 20554.

154. Bidders are encouraged to file their refund information electronically using the refund information portion of the FCC Form 175, but bidders can also fax their information to the Auctions Accounting Group at (202) 418–2843. Once the information has been approved, a refund will be sent to the party identified in the refund information.

Note: Refund processing generally takes up to two weeks to complete. Bidders with questions about refunds should contact Tim Dates at (202) 418–0496 or Gail Glasser at (202) 418–0578.

Federal Communications Commission.

Margaret Wiener,

Chief, Auctions and Industry Analysis Division, WTB.

[FR Doc. 03–2839 Filed 2–5–03; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

[Report No. AUC–03–53–A (Auction No. 53); DA 03–286]

Auction of Multichannel Video Distribution and Data Service Licenses Rescheduled for June 25, 2003; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document announces that the auction of licenses in the Multichannel Video Distribution and Data Service (''MVDDS'') is rescheduled for June 25, 2003 and seeks comment on specific terms and conditions of this auction.

DATES: Comments are due on or before February 13, 2003, and reply comments are due on or before February 20, 2003.

ADDRESSES: Comments and reply comments must be sent by electronic mail to the following address: *auction53@fcc.gov. See* **SUPPLEMENTARY INFORMATION** for filing instructions.

FOR FURTHER INFORMATION CONTACT: *For legal questions:* Brian Carter (202) 418–0660. *For general auction questions:* Roy Knowles (717) 338–2888 or Barbara Sibert (717) 338–2888. *For service rule questions:* Jennifer Burton (legal), Michael Pollak (technical) at (202) 418–0680.

SUPPLEMENTARY INFORMATION: This is a summary of the *Auction No. 49 Comment Public Notice* released on January 30, 2003. The complete text of the *Auction No. 49 Comment Public Notice* is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The *Auction No. 49 Comment Public Notice* may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

1. By the *Auction No. 49 Comment Public Notice,* the Wireless Telecommunications Bureau (''Bureau'') announces that the auction of licenses in the MVDDS previously scheduled to commence on August 6, 2003 (''Auction No. 53'') has been rescheduled for June 25, 2003. The *Auction No. 49 Comment Public Notice* seeks comment on specific terms and conditions of this auction. The key dates are listed:

Auction Seminar: May 1, 2003.

Short Form Deadline: May 12, 2003. (FCC Form 175 Application)

Upfront Payment Deadline: May 30, 2003.

Mock Auction: June 20, 2003.

Auction Begins: June 25, 2003.

2. Auction No. 53 will offer one block of unpaired spectrum in the 12.2–12.7 GHz band. MVDDS licensees may use this spectrum for any digital fixed one-way non-broadcast service including direct-to-home/office wireless service.[1] Mobile and aeronautical services are not authorized. Two-way services may be provided by using other spectrum or media for the return or upstream path.[2]

I. Background

3. In the *MVDDS Second Report and Order,* 67 FR 43031 (June 26, 2002), the Commission adopted Component Economic Areas (''CEAs'') as the geographic licensing areas for this service. CEAs are based on Economic Areas delineated by the United States Department of Commerce. There are a total of 354 CEAs and FCC-defined CEA-like service areas that encompass the United States, American Samoa, Guam, the Northern Mariana Islands, San Juan (Puerto Rico), Mayagüez/Aguadilla-Ponce (Puerto Rico), and the United States Virgin Islands. The 354 CEA service areas are based on the 348 Component Economic Areas delineated by the Regional Economic Analysis Division, Bureau of Economic Analysis, U.S. Department of Commerce, February 1995, with the following six FCC-defined service area additions: American Samoa, Guam, the Northern Mariana Islands, San Juan (Puerto Rico), Mayagüez/Aguadilla-Ponce (Puerto Rico), and the United States Virgin Islands. County definitions for the 348 U.S. Department of Commerce Component Economic Areas can be obtained from a file posted on the internet at *http://www.fcc.gov/oet/info/maps/areas/* via the link labeled ''CEA DATA.'' (This link is to a compressed file (ceadata.zip) that includes the text file Eacodes.fin. The Eacodes.fin file includes county, metro area, Component Economic Area, and Economic Area codes for each county, and alphabetic names for all counties, Component Economic Areas, and Economic Areas.)

4. The Commission has before it petitions for reconsideration of the *MVDDS Second Report and Order,* and a pleading filed in response to these petitions that urges the Commission, *inter alia,* to reconsider its decision to use CEAs and instead use Designated Market Areas (''DMAs'') as the geographic licensing areas. DMAs have been developed by Nielsen Media Research (''Nielsen'') utilizing audience survey information from cable and non-cable households to determine the assignment of counties to local television markets.[3] There are a total of 214 DMAs and FCC-defined DMA-like service areas that encompass the United States, Guam and the Northern Mariana Islands, Puerto Rico and the United States Virgin Islands, and American Samoa.

5. The 214 service areas are based on the 210 DMAs delineated by Nielsen in its publication entitled ''U.S. Television Household Estimates'' dated September 2002 plus the following four FCC-defined service area additions: Alaska—Balance of State (all geographic areas of Alaska not included in Nielsen's three DMAs for the state: Anchorage, Fairbanks, and Juneau), Guam and the Northern Mariana Islands, Puerto Rico and the United States Virgin Islands, and American Samoa. While most DMAs consist of one contiguous geographic area, a few are composed of multiple noncontiguous areas.

6. To minimize any delay in the auction process that might result from a decision by the Commission to change the MVDDS geographic license areas, the Bureau seeks comment on reserve prices, minimum opening bids, and other auction procedures as they would apply to an auction of either CEA licenses or DMA licenses. With respect to licenses for the 210 DMAs developed by Nielsen, the Bureau seeks comment on reserve prices, minimum opening bids, and other auction procedures as they would apply to DMAs as defined in Nielsen's publication entitled ''U.S. Television Household Estimates'' dated September 2002.[4]

7. As discussed, the Bureau proposes to use the same auction rules and procedures for an auction of MVDDS licenses whether the licenses are based on CEAs or DMAs, but it proposes different upfront payments and minimum opening bids for each of these geographic licensing areas.

8. A complete list of the CEA licenses that are available for Auction No. 53 is included in Attachment A of the *Auction No. 49 Comment Public Notice.* Attachment B of the *Auction No. 49 Comment Public Notice* provides a complete list of the licenses that would be available in Auction No. 53 if licenses were based on DMAs.

9. The following table describes the licenses that will be auctioned, depending on whether the Bureau uses a CEA or DMA geographic license area:

Frequencies	Bandwidth	Geographic area type	No. of licenses
12.2–12.7 GHz	500 MHz	CEA	354
12.2–12.7 GHz	500 MHz	DMA	214

10. The Balanced Budget Act of 1997 requires the Commission to ''ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed * * * before issuance of bidding rules, to permit notice and comment on proposed auction procedures * * *.'' Consistent with the provisions of the Balanced Budget Act and to ensure that potential bidders have adequate time to familiarize themselves with the specific rules that will govern the day-to-day conduct of an auction, the Commission directed the Bureau, under its existing delegated authority, to seek comment on a variety of auction-specific procedures prior to the start of each auction. The Bureau therefore seeks comment on the issues set forth relating to Auction No. 53. Parties submitting comments in response to the *Auction No. 49 Comment Public Notice* should file an additional copy of such comments in ET Docket No. 98–206. Instructions for filing comments are provided.

[1] 47 CFR 101.1407. Broadcast services are intended for reception of the general public and not on a subscribership basis.

[2] The following eligibility restriction applies to MVDDS licenses: no cable operator, nor any entity owning an attributable interest in a cable operator, may hold an attributable interest in an MVDDS license if such cable operator's service area significantly overlaps the MVDDS license area. *See* 47 CFR 101.1412.

[3] *See http://www.nielsenmedia.com/DMAs.html.* Nielsen determines what constitutes a separate market by applying a complex statistical formula based upon viewership and other factors. Nielsen owns the copyright to the DMA listing.

[4] This publication lists estimates of television households ''as of January 2003'' and can be found at Nielsen's Web site. *See http://www.nielsenmedia.com.* Interested parties are advised to consult this website and contact Nielsen directly for relevant market data.

II. Auction Structure

A. Simultaneous Multiple Round (SMR) Auction Design

11. The Bureau proposes to award all licenses included in Auction No. 53 in a simultaneous multiple-round auction. As described further, this methodology offers every license for bid at the same time with successive bidding rounds in which bidders may place bids. The Bureau seeks comment on this proposal.

B. Upfront Payments and Initial Maximum Eligibility

12. The Bureau has been delegated authority and discretion to determine an appropriate upfront payment for each license being auctioned, taking into account such factors as the population in each geographic license area, and the value of similar spectrum. As described further, the upfront payment is a refundable deposit made by each bidder to establish eligibility to bid on licenses. Upfront payments related to the specific spectrum subject to auction protect against frivolous or insincere bidding and provide the Commission with a source of funds from which to collect payments owed at the close of the auction. With these guidelines in mind for Auction No. 53, the Bureau proposes to calculate upfront payments on a license-by-license basis.

13. The Bureau proposes to calculate upfront payments on a license-by-license basis for CEAs using the following formula: $0.025 * License Area Population with a minimum of $1,000 per license.

14. Accordingly, the Bureau lists all CEA licenses, including the related license area population and proposed upfront payment for each license, in Attachment A of the *Auction No. 49 Comment Public Notice.* The Bureau seeks comment on this proposal.

15. The Bureau proposes to calculate upfront payments on a license-by-license basis for DMAs as follows: From the total upfront payment amount for all CEA licenses ($7,139,300), subtract the upfront payments for CEA349–CEA354 ($104,700), for a remainder of $7,034,600. For each DMA (DMA001–DMA210), the upfront payment is calculated by multiplying $7,034,600 by a percentage that is the ratio of television households in that DMA to the total television households in DMA001–DMA210, with a minimum of $1,000 per license. The upfront payment for DMA211 is set at the minimum upfront payment amount of $1,000. Upfront payments for DMA212–DMA214 are calculated as the sum of the upfront payments for the corresponding CEA licenses.[5] Accordingly, the Bureau lists all DMA licenses, including the related percentage of total television households and proposed upfront payment for each license, in Attachment B of the *Auction No. 49 Comment Public Notice.* The Bureau seeks comment on this proposal.

16. The Bureau further proposes that the amount of the upfront payment submitted by a bidder will determine the number of bidding units on which a bidder may place bids. This limit is a bidder's ''maximum initial eligibility.'' Each license is assigned a specific number of bidding units equal to the upfront payment listed in Attachment A of the *Auction No. 49 Comment Public Notice* (CEAs) or Attachment B of the *Auction No. 49 Comment Public Notice* (DMAs), on a bidding unit per dollar basis. This number does not change as prices rise during the auction. A bidder's upfront payment is not attributed to specific licenses. Rather, a bidder may place bids on any combination of licenses as long as the total number of bidding units associated with those licenses does not exceed the bidder's eligibility. Eligibility cannot be increased during the auction. Thus, in calculating its upfront payment amount, an applicant should determine the maximum number of bidding units it may wish to bid on (or hold high bids on) in any single round and submit an upfront payment covering that number of bidding units. The Bureau seeks comment on this proposal.

C. Activity Rules

17. In order to ensure that the auction closes within a reasonable period of time, an activity rule requires bidders to bid actively on a percentage of their current bidding eligibility during each round of the auction rather than waiting until the end to participate. A bidder that does not satisfy the activity rule will either use an activity rule waiver (if any remain) or lose bidding eligibility for the next round.

18. The Bureau proposes to divide the auction into three stages, each characterized by an increased activity requirement. The auction will start in Stage One. The Bureau proposes that the auction generally will advance to the next stage (*i.e.*, from Stage One to Stage Two, and from Stage Two to Stage Three) when the auction activity level, as measured by the percentage of bidding units receiving new high bids, is approximately twenty percent or below for three consecutive rounds of bidding. However, the Bureau further proposes that it retain the discretion to change stages unilaterally by announcement during the auction. In exercising this discretion, the Bureau will consider a variety of measures of bidder activity, including, but not limited to, the auction activity level, the percentage of licenses (as measured in bidding units) on which there are new bids, the number of new bids, and the percentage increase in revenue. The Bureau seeks comment on these proposals.

19. For Auction No. 53, the Bureau proposes the following activity requirements:

Stage One: In each round of the first stage of the auction, a bidder desiring to maintain its current eligibility is required to be active on licenses representing at least 80 percent of its current bidding eligibility. Failure to maintain the requisite activity level will result in a reduction in the bidder's bidding eligibility in the next round of bidding (unless an activity rule waiver is used). During Stage One, reduced eligibility for the next round will be calculated by multiplying the current round activity by five-fourths (5/4).

Stage Two: In each round of the second stage, a bidder desiring to maintain its current eligibility is required to be active on 90 percent of its current bidding eligibility. During Stage Two, reduced eligibility for the next round will be calculated by multiplying the current round activity by ten-ninths (10/9).

Stage Three: In each round of the third stage, a bidder desiring to maintain its current eligibility is required to be active on 98 percent of its current bidding eligibility. In this final stage, reduced eligibility for the next round will be calculated by multiplying the current round activity by fifty/forty-ninths (50/49).

20. The Bureau seeks comment on these proposals. Commenters that believe these activity rules should be modified should explain their reasoning and comment on the desirability of an alternative approach. Commenters are advised to support their claims with analyses and suggested alternative activity rules.

D. Activity Rule Waivers and Reducing Eligibility

21. Use of an activity rule waiver preserves the bidder's current bidding eligibility despite the bidder's activity in the current round being below the required minimum level. An activity rule waiver applies to an entire round

[5] That is, the upfront payment for DMA212 equals the sum of the upfront payments for CEA352–CEA354; for DMA213, the sum of the upfront payments for CEA350 and CEA351; and for DMA214, the upfront payment for CEA349.

of bidding and not to a particular license. Activity rule waivers can be either proactive or automatic and are principally a mechanism for auction participants to avoid the loss of auction eligibility in the event that exigent circumstances prevent them from placing a bid in a particular round.

Note: Once a proactive waiver is submitted during a round, that waiver cannot be unsubmitted.

22. The FCC Automated Auction System assumes that bidders with insufficient activity would prefer to use an activity rule waiver (if available) rather than lose bidding eligibility. Therefore, the system will automatically apply a waiver (known as an ''automatic waiver'') at the end of any bidding round in which a bidder's activity level is below the minimum required unless: (i) the bidder has no activity rule waivers remaining; or (ii) the bidder overrides the automatic application of a waiver by reducing eligibility, thereby meeting the minimum requirements.

Note: If a bidder has no waivers remaining and does not satisfy the required activity level, its current eligibility will be permanently reduced, possibly eliminating the bidder from the auction.

23. A bidder with insufficient activity may wish to reduce its bidding eligibility rather than use an activity rule waiver. If so, the bidder must affirmatively override the automatic waiver mechanism during the bidding period by using the ''reduce eligibility'' function in the bidding system. In this case, the bidder's eligibility is permanently reduced to bring the bidder into compliance with the activity rules as described. Once eligibility has been reduced, a bidder will not be permitted to regain its lost bidding eligibility.

24. A bidder may proactively use an activity rule waiver as a means to keep the auction open without placing a bid. If a bidder submits a proactive waiver (using the ''proactive waiver'' function in the bidding system) during a bidding period in which no bids or withdrawals are submitted, the auction will remain open and the bidder's eligibility will be preserved. An automatic waiver invoked in a round in which there are no new valid bids or withdrawals will not keep the auction open.

25. The Bureau proposes that each bidder in Auction No. 53 be provided with five activity rule waivers that may be used at the bidder's discretion during the course of the auction as set forth. The Bureau seeks comment on this proposal.

E. Information Relating to Auction Delay, Suspension, or Cancellation

26. For Auction No. 53, the Bureau proposes that, by public notice or by announcement during the auction, it may delay, suspend, or cancel the auction in the event of natural disaster, technical obstacle, evidence of an auction security breach, unlawful bidding activity, administrative or weather necessity, or for any other reason that affects the fair and efficient conduct of competitive bidding. In such cases, the Bureau, in its sole discretion, may elect to resume the auction starting from the beginning of the current round, resume the auction starting from some previous round, or cancel the auction in its entirety. Network interruption may cause the Bureau to delay or suspend the auction. The Bureau emphasizes that exercise of this authority is solely within its discretion, and its use is not intended to be a substitute for situations in which bidders may wish to apply their activity rule waivers. The Bureau seeks comment on this proposal.

III. Bidding Procedures

A. Round Structure

27. The Commission will conduct Auction No. 53 over the Internet. Telephonic Bidding will also be available. As a contingency, the FCC Wide Area Network will be available as well. The telephone number through which the backup FCC Wide Area Network may be accessed will be announced in a later public notice. Full information regarding how to establish such a connection, and related charges, will be provided in the public notice announcing details of auction procedures.

28. The initial bidding schedule will be announced in a public notice to be released at least one week before the start of the auction, and will be included in the registration mailings. The simultaneous multiple round format will consist of sequential bidding rounds, each followed by the release of round results. Details regarding the location and format of round results will be included in the same public notice.

29. The Bureau has discretion to change the bidding schedule in order to foster an auction pace that reasonably balances speed with the bidders' need to study round results and adjust their bidding strategies. The Bureau may increase or decrease the amount of time for the bidding rounds and review periods, or the number of rounds per day, depending upon the bidding activity level and other factors. The Bureau seeks comment on this proposal.

B. Reserve Price or Minimum Opening Bid

30. The Balanced Budget Act calls upon the Commission to prescribe methods for establishing a reasonable reserve price or a minimum opening bid when FCC licenses are subject to auction, unless the Commission determines that a reserve price or minimum opening bid is not in the public interest. Consistent with this mandate, the Commission has directed the Bureau to seek comment on the use of a minimum opening bid and/or reserve price prior to the start of each auction.

31. Normally, a reserve price is an absolute minimum price below which an item will not be sold in a given auction. Reserve prices can be either published or unpublished. A minimum opening bid, on the other hand, is the minimum bid price set at the beginning of the auction below which no bids are accepted. It is generally used to accelerate the competitive bidding process. Also, the auctioneer often has the discretion to lower the minimum opening bid amount later in the auction. It is also possible for the minimum opening bid and the reserve price to be the same amount.

32. In light of the Balanced Budget Act's requirements, the Bureau proposes to establish minimum opening bids for Auction No. 53. The Bureau believes a minimum opening bid, which has been utilized in other auctions, is an effective bidding tool.

33. For Auction No. 53, the Bureau proposes the following license-by-license formula for calculating minimum opening bids for CEAs: $0.05 * License Area Population with a minimum of $1,000 per license.

34. The specific minimum opening bid for each CEA license available in Auction No. 53 is set forth in Attachment A of the *Auction No. 49 Comment Public Notice.* Comment is sought on this proposal.

35. The Bureau proposes to calculate minimum opening bids on a license-by-license basis for DMAs as follows: From the total minimum opening bid amount for all CEA licenses ($14,283,500), subtract the minimum opening bids for CEA349–CEA354 ($210,500), for a remainder of $14,073,000. For each DMA (DMA001–DMA210), the minimum opening bid is calculated by multiplying $14,073,000 by a percentage that is the ratio of television households in that DMA to the total television households in DMA001–DMA210, with a minimum of $1,000 per license. The minimum opening bid for DMA211 is set at the minimum amount of $1,000.

Minimum opening bids for DMA212–DMA214 are calculated as the sum of the minimum opening bids for the corresponding CEA licenses.[6] Accordingly, the Bureau lists all DMA licenses, including the related percentage of total television households and proposed minimum opening bid for each license, in Attachment B of the *Auction No. 49 Comment Public Notice.* The Bureau seeks comment on this proposal.

36. If commenters believe that these minimum opening bids will result in substantial numbers of unsold licenses, or are not reasonable amounts, or should instead operate as reserve prices, they should explain why this is so, and comment on the desirability of an alternative approach. Commenters are advised to support their claims with valuation analyses and suggested reserve prices or minimum opening bid levels or formulas. In establishing the minimum opening bids, the Bureau particularly seeks comment on such factors as the amount of spectrum being auctioned, levels of incumbency, the availability of technology to provide service, the size of the geographic service areas, issues of interference with other spectrum bands and any other relevant factors that could reasonably have an impact on valuation of the MVDDS spectrum. Alternatively, comment is sought on whether, consistent with the Balanced Budget Act, the public interest would be served by having no minimum opening bid or reserve price.

C. Minimum Acceptable Bids and Bid Increments

37. In each round, eligible bidders will be able to place bids on a given license in any of nine different amounts. The FCC Automated Auction System interface will list the nine acceptable bid amounts for each license. Until a bid has been placed on a license, the minimum acceptable bid for that license will be equal to its minimum opening bid. In the rounds after an acceptable bid is placed on a license, the minimum acceptable bid for that license will be equal to the standing high bid plus the defined increment.

38. Once there is a standing high bid on a license, the FCC Automated Auction System will calculate a minimum acceptable bid for that license for the following round, as described. The difference between the minimum acceptable bid and the standing high bid for each license will define the bid increment. The nine acceptable bid amounts for each license consist of the minimum acceptable bid (the standing high bid plus one bid increment) and additional amounts calculated using multiple bid increments (*i.e.*, the second bid amount equals the standing high bid plus two times the bid increment, the third bid amount equals the standing high bid plus three times the bid increment, etc.).

39. Until a bid has been placed on a license, the minimum acceptable bid for that license will be equal to its minimum opening bid. The additional bid amounts for licenses that have not yet received a bid will be calculated differently, as explained.

40. For Auction No. 53, the Bureau proposes to calculate minimum acceptable bids by using a smoothing methodology, as it has done in several other auctions. The smoothing formula calculates minimum acceptable bids by first calculating a percentage increment, not to be confused with the bid increment. The percentage increment for each license is based on bidding activity on that license in all prior rounds; therefore, a license which has received many bids throughout the auction will have a higher percentage increment than a license which has received few bids.

41. The calculation of the percentage increment used to determine the minimum acceptable bids for each license for the next round is made at the end of each round. The computation is based on an activity index, which is a weighted average of the number of bids in that round and the activity index from the prior round. The current activity index is equal to a weighting factor times the number of new bids received on the license in the most recent bidding round plus one minus the weighting factor times the activity index from the prior round. The activity index is then used to calculate a percentage increment by multiplying a minimum percentage increment by one plus the activity index with that result being subject to a maximum percentage increment. The Commission will initially set the weighting factor at 0.5, the minimum percentage increment at 0.1 (10%), and the maximum percentage increment at 0.2 (20%). Hence, at these initial settings, the percentage increment will fluctuate between 10% and 20% depending upon the number of bids for the license.

Equations

$A_i = (C * B_i) + ((1–C) * A_{i–1})$

I_{i+1} = smaller of $((1 + A_i) * N)$ and M

$X_{i+1} = I_{i+1} * Y_i$

Where:

A_i = activity index for the current round (round i)

C = activity weight factor

B_i = number of bids in the current round (round i)

$A_{i–1}$ = activity index from previous round (round i–1), A_0 is 0

I_{i+1} = percentage increment for the next round (round i+1)

N = minimum percentage increment or percentage increment floor

M = maximum percentage increment or percentage increment ceiling

X_{i+1} = dollar amount associated with the percentage increment

Y_i = high bid from the current round

42. Under the smoothing methodology, once a bid has been received on a license, the minimum acceptable bid for that license in the following round will be the high bid from the current round plus the dollar amount associated with the percentage increment, with the result rounded to the nearest thousand if it is over ten thousand or to the nearest hundred if it is under ten thousand.

Examples

License 1

C = 0.5, N = 0.1, M = 0.2

Round 1 (2 new bids, high bid = $1,000,000)

i. Calculation of percentage increment for round 2 using the smoothing formula:

$A_1 = (0.5 * 2) + (0.5 * 0) = 1$

I_2 = The smaller of ((1 + 1) * 0.1) = 0.2 or 0.2 (the maximum percentage increment)

ii. Calculation of dollar amount associated with the percentage increment for round 2 (using I_2):

$X_2 = 0.2 * \$1{,}000{,}000 = \$200{,}000$

iii. Minimum acceptable bid for round 2 = $1,200,000

Round 2 (3 new bids, high bid = $2,000,000)

i. Calculation of percentage increment for round 3 using the smoothing formula:

$A_2 = (0.5 * 3) + (0.5 * 1) = 2$

I_3 = The smaller of ((1 + 2) * 0.1) = 0.3 or 0.2 (the maximum percentage increment)

ii. Calculation of dollar amount associated with the percentage increment for round 3 (using I_3):

$X_3 = 0.2 * \$2{,}000{,}000 = \$400{,}000$

iii. Minimum acceptable bid for round 3 = $2,400,000

[6] That is, the minimum opening bid for DMA212 equals the sum of the minimum opening bids for CEA352–CEA354; for DMA213, the sum of the minimum opening bids for CEA350 and CEA351; and for DMA214, the minimum opening bid for CEA349.

Round 3 (1 new bid, high bid = $2,400,000)

i. Calculation of percentage increment for round 4 using the smoothing formula:

$A_3 = (0.5 * 1) + (0.5 * 2) = 1.5$

I_4 = The smaller of ((1 + 1.5) * 0.1) = 0.25 or 0.2 (the maximum percentage increment)

ii. Calculation of dollar amount associated with the percentage increment for round 4 (using I_4):

$X_4 = 0.2 * \$2,400,000 = \$480,000$

iii. Minimum acceptable bid for round 4 = $2,880,000

43. As stated, until a bid has been placed on a license, the minimum acceptable bid for that license will be equal to its minimum opening bid. The additional bid amounts are calculated using the difference between the minimum opening bid times one plus the minimum percentage increment, rounded as described, and the minimum opening bid. That is, I = (minimum opening bid)(1 + N){rounded}-(minimum opening bid). Therefore, when N equals 0.1, the first additional bid amount will be approximately ten percent higher than the minimum opening bid; the second, twenty percent; the third, thirty percent; etc.

44. In the case of a license for which the standing high bid has been withdrawn, the minimum acceptable bid will equal the second highest bid received for the license. The additional bid amounts are calculated using the difference between the second highest bid times one plus the minimum percentage increment, rounded, and the second highest bid.

45. The Bureau retains the discretion to change the minimum acceptable bids and bid increments if it determines that circumstances so dictate. The Bureau will do so by announcement in the FCC Automated Auction System. The Bureau seeks comment on these proposals.

D. High Bids

46. At the end of a bidding round, the high bids will be determined based on the highest gross bid amount received for each license. A high bid from a previous round is sometimes referred to as a ''standing high bid.'' A ''standing high bid'' will remain the high bid until there is a higher bid on the same license at the close of a subsequent round. Bidders are reminded that standing high bids confer bidding activity.

47. In the event of identical high bids on a license in a given round (*i.e.*, tied bids), the Bureau proposes to use a random number generator to select a high bid from among the tied bids. The remaining bidders, as well as the high bidder, will be able to submit a higher bid in a subsequent round. If no bidder submits a higher bid in a subsequent round, the high bid from the previous round will win the license. If any bids are received on the license in a subsequent round, the high bid again will be determined by the highest gross bid amount received for the license.

E. Information Regarding Bid Withdrawal and Bid Removal

48. For Auction No. 53, the Bureau proposes the following bid removal and bid withdrawal procedures. Before the close of a bidding period, a bidder has the option of removing any bid placed in that round. By removing selected bids in the bidding system, a bidder may effectively ''unsubmit'' any bid placed within that round. A bidder removing a bid placed in the same round is not subject to a withdrawal payment. Once a round closes, a bidder may no longer remove a bid.

49. A high bidder may withdraw its standing high bids from previous rounds using the withdraw function in the bidding system. A high bidder that withdraws its standing high bid from a previous round is subject to the bid withdrawal payment provisions of the Commission rules. The Bureau seeks comment on these bid removal and bid withdrawal procedures.

50. In the *Part 1 Third Report and Order*, 63 FR 770 (January 7, 1998), the Commission explained that allowing bid withdrawals facilitates efficient aggregation of licenses and the pursuit of efficient backup strategies as information becomes available during the course of an auction. The Commission noted, however, that, in some instances, bidders may seek to withdraw bids for improper reasons. The Bureau, therefore, has discretion, in managing the auction, to limit the number of withdrawals to prevent any bidding abuses. The Commission stated that the Bureau should assertively exercise its discretion, consider limiting the number of rounds in which bidders may withdraw bids, and prevent bidders from bidding on a particular market if it finds that a bidder is abusing the Commission's bid withdrawal procedures.

51. Applying this reasoning, the Bureau proposes to limit each bidder in Auction No. 53 to withdrawing standing high bids in no more than two rounds during the course of the auction. To permit a bidder to withdraw bids in more than two rounds would likely encourage insincere bidding or the use of withdrawals for anti-competitive purposes. The two rounds in which withdrawals are utilized will be at the bidder's discretion; withdrawals otherwise must be in accordance with the Commission's rules. There is no limit on the number of standing high bids that may be withdrawn in either of the rounds in which withdrawals are utilized. Withdrawals will remain subject to the bid withdrawal payment provisions specified in the Commission's rules. The Bureau seeks comment on this proposal.

F. Stopping Rule

52. The Bureau has discretion ''to establish stopping rules before or during multiple round auctions in order to terminate the auction within a reasonable time.'' For Auction No. 53, the Bureau proposes to employ a simultaneous stopping rule approach. A simultaneous stopping rule means that all licenses remain open until bidding closes simultaneously on all licenses.

53. Bidding will close simultaneously on all licenses after the first round in which no new acceptable bids, proactive waivers, or withdrawals are received. Thus, unless circumstances dictate otherwise, bidding will remain open on all licenses until bidding stops on every license.

54. However, the Bureau proposes to retain the discretion to exercise any of the following options during Auction No. 53:

i. Utilize a modified version of the simultaneous stopping rule. The modified stopping rule would close the auction for all licenses after the first round in which no bidder submits a proactive waiver, withdrawal, or a new bid on any license on which it is not the standing high bidder. Thus, absent any other bidding activity, a bidder placing a new bid on a license for which it is the standing high bidder would not keep the auction open under this modified stopping rule. The Bureau further seeks comment on whether this modified stopping rule should be used at any time or only in stage three of the auction.

ii. Keep the auction open even if no new acceptable bids or proactive waivers are submitted and no previous high bids are withdrawn. In this event, the effect will be the same as if a bidder had submitted a proactive waiver. The activity rule, therefore, will apply as usual, and a bidder with insufficient activity will either lose bidding eligibility or use a remaining activity rule waiver.

iii. Declare that the auction will end after a specified number of additional rounds (''special stopping rule''). If the Bureau invokes this special stopping rule, it will accept bids in the specified

final round(s) only for licenses on which the high bid increased in at least one of a specified preceding number of rounds.

55. The Bureau proposes to exercise these options only in certain circumstances, such as, for example, where the auction is proceeding very slowly, there is minimal overall bidding activity, or it appears likely that the auction will not close within a reasonable period of time. Before exercising these options, the Bureau is likely to attempt to increase the pace of the auction by, for example, increasing the number of bidding rounds per day, and/or increasing the amount of the minimum bid increments for the limited number of licenses where there is still a high level of bidding activity. The Bureau seeks comment on these proposals.

IV. Conclusion

56. Comments are due on or before February 13, 2003, and reply comments are due on or before February 20, 2003. Because of the disruption of regular mail and other deliveries in Washington, DC, the Bureau requires that all comments and reply comments be filed electronically. Comments and reply comments must be sent by electronic mail to the following address: *auction53@fcc.gov.* The electronic mail containing the comments or reply comments must include a subject or caption referring to Auction No. 53 Comments. The Bureau requests that parties format any attachments to electronic mail as Adobe® Acrobat® (pdf) or Microsoft® Word documents. In addition, the Bureau requests that commenters fax a courtesy copy of their comments and reply comments to the attention of Kathryn Garland at (717) 338–2850.

57. Parties submitting comments in response to the *Auction No. 49 Comment Public Notice* should file an additional copy of such comments in ET Docket No. 98–206. Comments may be filed in ET Docket No. 98–206 using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (May 1, 1998). Commenters that wish confidential treatment of their submissions should request that their submission, or specific part thereof, be withheld from public inspection. *See* 47 CFR 0.459.

58. Comments filed through the ECFS can be sent as an electronic file via the Internet to <*http://www.fcc.gov/e-file/ecfs.htm*>. Generally, only one copy of an electronic submission must be filed. Because multiple docket or rulemaking numbers appear in the caption of the MVDDS rulemaking proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. Because more than one docket or rulemaking number appears in the caption of the MVDDS rulemaking proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Commenters also should send four (4) paper copies of their filings to Jennifer Burton, Federal Communications Commission, Room 4–C425, 445 12th Street, SW., Washington, DC 20554. Copies of comments and reply comments will be available for public inspection during regular business hours in the FCC Public Reference Room, Room CY–A257, 445 12th Street, SW., Washington, DC 20554.

59. This proceeding and the MVDDS rulemaking proceeding have been designated as ''permit-but-disclose'' proceedings in accordance with the Commission's *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in § 1.1206(b) of the Commission's rules.

Federal Communications Commission.

Louis J. Sigalos,

Deputy Chief, Auctions and Industry Analysis Division, WTB.

[FR Doc. 03–3039 Filed 2–5–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that at 2:15 p.m. on Friday, January 31, 2003, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters relating to the Corporation's corporate activities.

In calling the meeting, the Board determined, on motion of Director James E. Gilleran (Director, Office of Thrift Supervision), seconded by Vice Chairman John M. Reich, concurred in by John M. Hawke, Jr. (Comptroller of the Currency), and Chairman Donald E. Powell, that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(8), and (c)(9)(A)(ii) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b(c)(2), (c)(8), and (c)(9)(A)(ii)).

The meeting was held in the Board Room of the FDIC Building located at 550—17th Street, NW., Washington, DC.

Federal Deposit Insurance Corporation.

Dated: February 3, 2003.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 03–3038 Filed 2–4–03; 10:23 am]

BILLING CODE 6714–01–M

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

AGENCY: Federal Election Commission.

PREVIOUSLY ANNOUNCED DATE & TIME: Thursday, February 6, 2003, meeting open to the public. This meeting was cancelled.

DATE & TIME: Tuesday, February 11, 2003 at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. 437g.

Audits conducted pursuant to 2 U.S.C. 437g, 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

DATE & TIME: Thursday, February 13, 2003 at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes.

Draft Advisory Opinion 2002–15: Association of Clinical Urologists and American Urological Association, Inc. by counsel, Randolph B. Fenninger.

Administrative Matters.

PERSON TO CONTACT FOR INFORMATION: Mr. Ron Harris, Press Officer, Telephone: (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. 03–3041 Filed 2–4–03; 8:45 am]

BILLING CODE 6715–01–M

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Reissuances

Notice is hereby given that the following Ocean Transportation Intermediary licenses have been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515.

License No.	Name/address	Date reissued
17096NF	Aero Costa International, Inc., 460 E. Carson Plaza Drive, #220, Carson, CA 90746	December 25, 2002.
11289N	Cargo Marketing Services Limited dba Procon Express Line, The Old Bakery, One Shaw Lane, Lichfield, Staffordshire, WS13 7AG, United Kingdom.	December 8, 2002.
17466N	Compass Shipping, Inc., 825 Empire Boulevard, Brooklyn, NY 11225	November 1, 2002.
3508F	E & B International, Inc., 5353 E. Princess Anne Road, Suite A, Norfolk, VA 23502	December 19, 2002.
16971N	Wil Can (USA) Group Inc., 167–10 South Conduit Avenue, Suite 210, Jamaica, NY 11434.	November 30, 2002.

Sandra L. Kusumoto,

Director, Bureau of Consumer Complaints and Licensing.

[FR Doc. 03–2810 Filed 2–5–03; 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

JUC Ocean Express Inc., 3380 Flair Dr., Suite 234, El Monte, CA 91731. *Officers:* Nai Hui Wang, Director (Qualifying Individual), Tai-Chuan, Wu, Secretary.

Hermes International Movers Corp., 23–83 31st Street, Astoria, NY 11105. *Officers:* Antonia Ladis, Secretary (Qualifying Individual), Ioannis Ladis, President.

Bravo International Group Corp., 17595 Almahurst Street, #206, City of Industry, CA 91748. *Officers:* Patricia Wu, Secretary (Qualifying Individual), Chi Hao Hung, President

Embarque Puerto Plata, Corp., 1426 Cromwell Avenue, Bronx, NY 10452. *Officer:* Hayda Garcia, President (Qualifying Individual).

Excel Freight Logistics, Inc., 9133 S. La Cienega Blvd., Suite #260, Inglewood, CA 90301. *Officers:* Edmund Tsang, Secretary (Qualifying Individual), Nick Tsu-Wei Lin, President.

WT Cargo LLC, 2100 Northwest 102nd Place, Miami, FL 33172. *Officer:* Francisco Celedon, President (Qualifying Individual).

Frederic Int'l Co. LLC, 16961 Colchester Way, Hacienda Heights, CA 91745, (Chih-Hui, Cheng, Vice President (Qualifying Individual), Samantha Pao, Secretary.

Railway Express Inc., 123 Pennsylvania Avenue, Kearney, NJ 07032. *Officer:* Mark Carrera, President (Qualifying Individual).

Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicant

HMM Logistics USA, Inc., 12917 Wolverton Lane, Cerritos, CA 90703. *Officer:* Kee Soo Pahk, President (Qualifying Individual).

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants

TISCO Logistic, Inc., 19 Schuyler Street, Pasippany, NJ 07054. *Officers:* Gang Qian, Vice President (Qualifying Individual), Jimmy Hsu, President.

Pacific Ocean Ship Management Co.. dba Pacocean Forwarding, 388 Market Street, Suite 1500, San Francisco, CA 94111, *Officers:* Alexander J. Bennett, President (Qualifying Individual), Joel S. Zaves, Director.

Dated: January 31, 2003.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 03–2812 Filed 2–5–03; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocations

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, effective on the corresponding date shown below:

License Number: 3987N.
Name: Abdulrazak Morgan Farah dba Overseas Express Services.
Address: 17206 S. Figueroa Street, Gardena, CA 90248.
Date Revoked: January 1, 2003.
Reason: Failed to maintain a valid bond.

License Number: 16183F.
Name: AJ International Shipping/ Logistics, Inc.
Address: 4548 Mundy Road, Jacksonville, FL 32207.
Date Revoked: September 25, 2002.
Reason: Surrendered license voluntarily.

License Number: 3883N.
Name: Brye International, Inc.
Address: 108 So. Franklin Avenue, Suite 15, Valley Stream, NY 11580.
Date Revoked: December 3, 2002.
Reason: Surrendered license voluntarily.

License Number: 17662N.
Name: Cargozone Trans Corporation.
Address: 19550 Dominguez Hills Drive, Rancho Dominguez, CA 90220.
Date Revoked: January 11, 2003.
Reason: Failed to maintain a valid bond.

License Number: 17037N.
Name: Global Network Financial Services, Inc. dba Global Network.
Address: 1237 NW 93 Court, Miami, FL 33178.
Date Revoked: January 2, 2003.
Reason: Failed to maintain a valid bond.

License Number: 5892N and 5892F.
Name: Greenbriar Forwarding Co., Inc.
Address: 108 Liberty Street, Metuchen, NJ 08840.
Date Revoked: November 22, 2002 and December 22, 2002.
Reason: Failed to maintain valid bonds.

License Number: 11972N and 11972F.
Name: Magna Transportation Inc.
Address: 515 N. Sam Houston Pkwy. East, Suite 340, Houston, TX 77060.
Date Revoked: December 25, 2002 And December 6, 2002.
Reason: Failed to maintain valid bonds.

License Number: 4648F.
Name: Mega Express, Inc.
Address: 6481 Orangethorpe Avenue, #21, Buena Park, CA 90620.
Date Revoked: November 18, 2002.
Reason: Surrendered license voluntarily.

License Number: 12367N.
Name: Maritime Express, Inc.
Address: 9009 Pinehill Line, #226, Houston, TX 77041.
Date Revoked: November 30, 2002.
Reason: Failed to maintain a valid bond.

License Number: 13709N.
Name: Pac West Trading and Transport Inc. dba Pacwest Transport.
Address: 2531 W. 237th Street, Suite 122, Torrance, CA 90505.
Date Revoked: January 8, 2003.
Reason: Failed to maintain a valid bond.

License Number: 1636N.
Name: Packers Enterprises Inc. dba American Export International.
Address: 100 Broad Avenue, Wilmington, CA 90744.
Date Revoked: November 23, 2002.
Reason: Failed to maintain a valid bond.

License Number: 4175N.
Name: Silken Fortress Corporation dba Transcargo International.
Address: 4564 W. 130th Street, Hawthorne, CA 90250.
Date Revoked: December 8, 2002.
Reason: Failed to maintain a valid bond.

License Number: 17742N.
Name: Vankor Logistics Int'l (U.S.A.), Inc.
Address: 1031 W. Manchester Blvd., Unit D, Inglewood, CA 90301.
Date Revoked: October 16, 2002.
Reason: Surrendered license voluntarily.

License Number: 16556N.
Name: YKL America Inc.
Address: 500 Carson Plaza Drive, Suite 213, Carson, CA 90746.
Date Revoked: January 11, 2003.
Reason: Failed to maintain a valid bond.

Sandra L. Kusumoto,
Director, Bureau of Consumer Complaints and Licensing.

[FR Doc. 03–2811 Filed 2–5–03; 8:45 am]
BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center Web site at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than March 3, 2003.

A. Federal Reserve Bank of Boston (Richard Walker, Community Affairs Officer) 600 Atlantic Avenue, Boston, Massachusetts 02106-2204:

1. South Shore Mutual Holding Company, Weymouth, Massachusetts; to become a bank holding company by acquiring 100 percent of the voting shares of South Shore Co-operative Bank, Weymouth, Massachusetts.

Board of Governors of the Federal Reserve System, January 31, 2003.

Jennifer J. Johnson,
Secretary of the Board.

[FR Doc. 03–2813 Filed 2–5–03; 8:45 am]
BILLING CODE 6210–01–S

GENERAL SERVICES ADMINISTRATION

Office of Management Services; Cancellation of an Optional Form by the Department of Defense

AGENCY: General Services Administration.

ACTION: Notice.

SUMMARY: The Department of Defense cancelled the following Optional Form because of low usage: OF 81, 999 Label (4 x 4″)

FOR FURTHER INFORMATION CONTACT: Ms. Barbara Williams, General Services Administration, (202) 501–0581.

DATES: Effective February 6, 2003.

Dated: January 30, 2003.

Barbara M. Williams,

Deputy Standard and Optional Forms Management Officer, General Services Administration.

[FR Doc. 03–2958 Filed 2–5–03; 8:45 am]

BILLING CODE 6820–34–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 00E–1238]

Determination of Regulatory Review Period for Purposes of Patent Extension; TEMODAR

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for TEMODAR and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Commissioner of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that human drug product.

ADDRESSES: Submit written comments and petitions to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to http://www.fda.gov.dockets/ecomments.

FOR FURTHER INFORMATION CONTACT: Claudia V. Grillo, Office of Regulatory Policy (HFD–013), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3460.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Public Law 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Commissioner of Patents and Trademarks may award (for example, half the testing phase must be subtracted, as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human drug product TEMODAR (temozolomide). TEMODAR is indicated for the treatment of adult patients with refractory anaplastic astrocytoma, i.e., patients at first relapse who have experienced disease progression on a drug regimen containing a nitrosourea and procarbazine. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for TEMODAR (U.S. Patent No. 5,260,291) from Schering Corp., and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated April 13, 2000, FDA advised the Patent and Trademark Office that this human drug product had undergone a regulatory review period and that the approval of TEMODAR represented the first permitted commercial marketing or use of the product. Shortly thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for TEMODAR is 2,032 days. Of this time, 1,668 days occurred during the testing phase of the regulatory review period, while 364 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355(i)) became effective*: January 19, 1994. The applicant claims January 20, 1994, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was January 19, 1994, which was 30 days after FDA receipt of the IND.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the act*: August 13, 1998. The applicant claims August 12, 1998, as the date the new drug application (NDA) for TEMODAR (NDA 21–029) was initially submitted. However, FDA records indicate that NDA 21–029 was submitted on August 13, 1998.

3. *The date the application was approved*: August 11, 1999. FDA has verified the applicant's claim that NDA 21–029 was approved on August 11, 1999.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,136 days of patent term extension.

Anyone with knowledge that any of the dates as published are incorrect may submit to the Dockets Management Branch (see **ADDRESSES**) written or electronic comments and ask for a redetermination by April 7, 2003. Furthermore, any interested person may petition FDA by for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period August 5, 2003. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Dockets Management Branch (see **ADDRESSES**). Three copies of any information are to be submitted, except that individuals may submit single copies. Comments are to be identified with the docket number found in brackets in the heading of this document. Comments and petitions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: January 13, 2003.

Jane A. Axelrad,

Associate Director for Policy, Center for Drug Evaluation and Research.

[FR Doc. 03–2970 Filed 2–5–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Telehealth Network Competitive Grant Announcement HRSA–03–049

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice of availability of funds.

SUMMARY: This announcement replaces the announcement published on page 60 of the Fall 2002 HRSA Preview and the **Federal Register** dated August 9, 2002, Vol. 67, No.154.

The Health Resources and Services Administration's (HRSA), Office for the Advancement of Telehealth (OAT), announces the availability of funds for fiscal year (FY) 2003 awards for approximately 20 Telehealth Network Grants. HRSA will award grants to demonstrate how telehealth network projects in rural areas, in medically underserved areas, in frontier communities, and for medically underserved populations, can be used to: (a) Expand access to, coordinate, and improve the quality of health care services; (b) improve and expand the training of health care providers; and (c) expand and improve the quality of health information available to health care providers, patients, and their families. The primary objective of the Telehealth Network Grant Program (TNGP) is to help communities build the human, technical, and financial capacity to develop sustainable telehealth programs and networks.

Available Funding: At the time this **Federal Register** Notice is issued, HRSA is operating under a Continuing Resolution. Assuming that this level of funding continues, there will be available approximately $5 million to support up to 20 Telehealth Network Grant awards in FY 2003. It is expected that the average TNGP award will be approximately $250,000. These estimates are subject to change if an appropriations act providing otherwise is enacted. After the first year, continuation funding will depend on reasonable progress and on the availability of funds. There are no matching requirements for this program.

Eligible Applicants: The applicant shall be a nonprofit entity that will provide services through a telehealth network. Although the grant recipient may not be a profit making entity, each entity participating in the telehealth network may be either a nonprofit or for-profit entity. Faith-based and community-based organizations are encouraged to apply.

The telehealth network shall include at least two (2) of the following entities (at least one (1) of which shall be a community-based health care provider):

(a) Community or migrant health centers or other federally qualified health centers;

(b) Health care providers, including pharmacists, in private practice;

(c) Entities operating clinics, including rural health clinics;

(d) Local health departments;

(e) Nonprofit hospitals, including community (critical) access hospitals;

(f) Other publicly funded health or social service agencies;

(g) Long-term care providers;

(h) Providers of health care services in the home;

(i) Providers of outpatient mental health services and entities operating outpatient mental health facilities;

(j) Local or regional emergency health care providers;

(k) Institutions of higher education, and/or

(l) Entities operating dental clinics.

Authorizing Legislation: The Telehealth Network Grant Program is authorized by Section 330I of the Public Health Service Act. The Health Care Safety Net Amendments of 2002, Public Law 107–251, amended the Public Service Act by adding Section 330I.

Where to Request and Send Applications: To obtain an application kit, contact the HRSA Grants Application Center at their toll-free telephone number (1–877–477–2123) and request the OMB Catalogue of Federal Domestic Assistance number (CFDA) 93.211, citing ''Telehealth Network Grant Program.'' To submit the completed kit: Send the original and two copies of your grant application to: HRSA Grants Application Center, Attention: HAB Grants Management Officer, CFDA # 93.211, HRSA–03–049, 901 Russell Avenue, Suite 450, Gaithersburg, MD 20879. Applications sent to any other address are subject to being returned.

Application Dates: A letter of intent to submit an application is requested by February 20, 2003. Applications for this announced grant must be received in the HRSA Grants Application Center by close of business April 7, 2003. Applications shall be considered as meeting the deadline if they are (1) received on or before the deadline date or (2) postmarked on or before the deadline date and received in time for orderly processing and submission to the review committee. Applicants should request a legibly dated receipt from a commercial carrier or U.S. Postal Service postmark. Private metered postmarks will not be accepted as proof of timely mailing. Applications postmarked after the due date will be returned to the applicant.

ADDRESSES: Using the form in the application, letters of intent are requested for OAT to determine how many will apply. Letters of intent to apply for funding should be faxed to (301) 443–1330 or e-mailed to Monica Cowan at *mcowan@hrsa.gov.*

FOR FURTHER INFORMATION CONTACT: Inquiries regarding programmatic and technical information may be made to (301) 443–0447 or to the following e-mail address: *THGP@hrsa.gov.* Telephone responses, where appropriate, will be made within 48 hours by an OAT staff member.

SUPPLEMENTARY INFORMATION: Applications will be reviewed by an objective review committee. The review criteria will include:

(1) Needs assessment and development of goals and objectives (*e.g.*, Does the applicant demonstrate knowledge of the region's health status, referral and usage patterns, issues of practitioner recruitment/retention, other telehealth activities in the region, etc? Are the expected outcomes for each objective described using qualitative and quantitative measures?);

(2) Program priorities—Does the applicant address any or all of the following: (a) Clinical telemedicine networks that address chronic conditions (*e.g.*, asthma, diabetes) in a variety of settings, such as patient homes, schools, and other community settings; (b) projects that are designed to demonstrate improved health care outcomes (*e.g.*, improved access, productivity, dollars saved) as well as improved quality of services (*e.g.* reduction of medical errors); (c) clinical telemedicine networks that include distance-learning education for health professionals, and patients and their families, if such activities are in conjunction with the delivery of health services; and (d) clinical telemedicine networks that integrate their telemedicine information system into overall electronic clinical information systems (*e.g.* electronic medical record) used by network members.

(3) Implementation and monitoring of the work plan (*e.g.*, Is the proposed work plan feasible? Are the qualifications and responsibilities of key individuals in the telehealth network clearly identified?);

(4) Community involvement, cost participation, and sustainability (*e.g.*, How will network members and members of the community have an active role in planning the telehealth network project? Does the applicant

demonstrate a long-term commitment to the project, beyond the 3-year funding cycle?);

(5) Evaluation and dissemination (*e.g.* Do the data collection tools and strategies directly address the objectives outlined for the program? Is there a plan for disseminating information about the project, including ''lessons learned?''); and

(6) Budget (*e.g.* Are program needs for equipment, supplies, contractual services, etc., adequately justified in terms of the goal(s), objectives, and proposed activities?).

The Secretary will give preference to an eligible entity that meets at least one (1) of the following requirements:

(a) Organization—The eligible entity is a rural community-based organization, other community-based organization, or a faith-based organization.

(b) Service—The eligible entity proposes to use Federal funds made available through such a grant to develop plans for, or to establish, telehealth networks that provide mental health, public health, long-term care, home care, preventive health, or case management services.

(c) Coordination—The eligible entity demonstrates how the project to be carried out under the grant will be coordinated with other relevant federally funded projects in the areas, communities, and populations to be served through the grant.

(d) Network—The eligible entity demonstrates that the project involves a telehealth network that includes an entity that—

(i) Provides clinical health care services, or educational services for health care providers and for patients or their families; and

(ii) Is—

(I) A public school;

(II) A public library;

(III) An institution of higher education; or

(IV) A local government entity.

(e) Connectivity—The eligible entity proposes a project that promotes local connectivity within areas, communities, or populations to be served through the project.

(f) Integration—The eligible entity demonstrates that health care information has been integrated into the project.

Priority will be given to applications that address the following program priorities:

(g) Clinical telemedicine networks that address chronic conditions (*e.g.*, asthma, diabetes) in a variety of settings, such as patient homes, schools, and other community settings;

(h) Projects designed to improve health care outcomes (*e.g.*, improved access, productivity, dollars saved) as well as improved quality of services (*e.g.*, reduction of medical errors);

(i) Clinical telemedicine networks that include distance-learning education for health professionals, and patients and their families, if such activities are in conjunction with the delivery of health services; and

(j) Clinical telemedicine networks that integrate their telemedicine information system into overall electronic clinical information systems (*e.g.*, electronic medical record) used by network members.

Note: In accordance with Public Law 107–251, (a) the total amount of funds awarded for rural projects for FY 2003 shall not be less than the total amount of funds awarded for FY 2001 under section 330A, and (b) the funds will be distributed so that not less than 50 percent of the total funds awarded under this program announcement shall be awarded for projects in rural areas.

Paperwork Reduction Act: Should any of the data collection activities associated with this grant program fall under the purview of the Paper Reduction Act of 1995, OMB approval will be sought.

Dated: January 22, 2003.

Elizabeth M. Duke,

Administrator.

[FR Doc. 03–2823 Filed 2–5–03; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4815–N–02]

Notice of Submission of Proposed Information Collection to OMB: Data Collection Techniques for Identifying the Housing Subsidy Status of Survey Respondents

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments Due Date: March 10, 2003.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval number and should be sent to: Lauren Wittenberg, OMB Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Fax number (202) 395–6974; E-mail *Lauren_Wittenberg@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, AYO, Department of Housing and Urban Development, 451 Seventh Street, Southwest, Washington, DC 20410; e-mail *Wayne_Eddins@HUD.gov*; telephone (202) 708–2374. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Eddins.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35). The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the OMB approval number, if applicable; (4) the description of the need for the information and its proposed use; (5) the agency form number, if applicable; (6) what members of the public will be affected by the proposal; (7) how frequently information submissions will be required; (8) an estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (9) whether the proposal is new, an extension, reinstatement, or revision of an information collection requirement; and (10) the name and telephone number of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

This Notice also lists the following information:

Title of Proposal: Data Collection Techniques for Identifying the Housing Subsidy Status of Survey Respondents.

OMB Approval Number: 2528–XXXX.

Form Numbers: None.

Description of the Need for the Information and its Proposed Use:

This collection will test new questions developed to better identify respondents housing subsidy status in the American Housing Survey.

Respondents: Individuals or households.

Frequency of Submission: Once.

	Number of respondents	Annual responses	×	Hours per response	=	Burden Hours
Reporting burden	815	1		0.1		82

Total Estimated Burden Hours: 82.
Status: New Collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: January 31, 2003.

Wayne Eddins,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 03–2826 Filed 2–5–03; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Availability of *Birds of Conservation Concern 2002*

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We are announcing the availability of a document entitled *Birds of Conservation Concern 2002.* The purpose of this document is to identify species, subspecies, and populations of migratory and non-migratory birds in need of additional conservation actions. The document is published under authority of the Fish and Wildlife Conservation Act of 1980, the Endangered Species Act of 1973, the Fish and Wildlife Act of 1956, and 16 U.S.C. 701.

DATES: Individuals wishing to comment on the process used in developing *Birds of Conservation Concern 2002,* especially to provide recommendations for improving future versions of the document, may direct their written comments to the Chief, Division of Migratory Bird Management (listed below under **ADDRESSES**). All comments received will be filed for use in developing the next version of the list. Comments will be accepted up until the time that work begins on the next edition of this report (approximately 5 years).

ADDRESSES: Printed copies of *Birds of Conservation 2002* may be obtained by writing to the Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Mail Stop 4107, Arlington, VA 22203–1610, ATTN: BCC 2002. This document is also available for downloading on the Division of Migratory Bird Management's World Wide Web page at *http://migratorybirds/fws.gov.*

FOR FURTHER INFORMATION CONTACT: Brian Millsap, Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Mail Stop 4107, Arlington, VA 22203–1610; phone: (703) 358–1714; fax: (703) 358–2272.

SUPPLEMENTARY INFORMATION: The 1988 amendment to the Fish and Wildlife Conservation Act (FWCA) of 1980 (Pub. L. 100–653, Title VIII) requires the Secretary of the Interior, through the U.S. Fish and Wildlife Service, to ''identify species, subspecies, and populations of all migratory nongame birds that, without additional conservation actions, are likely to become candidates for listing under the Endangered Species Act [ESA] of 1973.'' *Birds of Conservation Concern 2002* fulfills that mandate, and supersedes *Migratory Nongame Birds of Management Concern in the United States: The 1995 List.* The current document differs from the 1995 version in that it identifies birds of conservation concern at three different scales: Bird Conservation Regions, U.S. Fish and Wildlife Service Regions, and National. This will maximize flexibility and increase the utility of the document for a variety of users and purposes. The species that appear in *Birds of Conservation Concern 2002* are deemed to be the highest priority for conservation actions. We anticipate that the document will be consulted by Federal agencies and their partners prior to undertaking cooperative research, monitoring, and management actions that might directly or indirectly affect migratory birds. Our goal in publishing this document is to stimulate coordinated and collaborative proactive conservation actions among Federal, State, and private partners.

To serve as a broad early warning system in the context of the FWCA, this document includes all of the species for which we have some basis, no matter how remote, to consider them to be of conservation concern. Our objective in publishing this list is to focus conservation attention on bird species of concern well in advance of a possible or plausible need to consider them for listing under the ESA. Inclusion on this list does not constitute a finding that listing under the ESA is warranted, or that substantial information exists to indicate that listing under the ESA may be warranted. Many of the species on this list will probably never have to be considered for ESA listing, even if no additional conservation actions are taken.

Dated: January 30, 2003.

Steven A. Williams,

Director, Fish and Wildlife Service.

[FR Doc. 03–2908 Filed 2–5–03; 8:45 am]

BILLING CODE 4310–55–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–03–004]

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: International Trade Commission.

DATE AND TIME: February 13, 2003 at 11 a.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meetings: none
2. Minutes
3. Ratification List
4. Inv. No. 731–TA–1023 (Preliminary)(Certain Ceramic Station Post Insulators from Japan)—briefing and vote. (The Commission is currently scheduled to transmit its determination to the Secretary of Commerce on or before February 14, 2003; Commissioners' opinions are currently scheduled to be transmitted to the Secretary of Commerce on or before February 24, 2003.)
5. Outstanding action jackets: none

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: January 31, 2003.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 03–3006 Filed 2–3–03; 4:49 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Office of Community Policing Services; Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-day notice of information collection under review: New Universal Hiring Program Extension Request Worksheet.

The Department of Justice (DOJ), Office of Community Oriented Policing Services (COPS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval 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 191, page 61923 on October 2, 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 March 10, 2003. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in 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. Additionally, comments may be submitted to OMB via facsimile to (202) 395–7285.

Request 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 agencies 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:* New collection.

(2) *Title of the Form/Collection:* Universal Hiring Program Extension Request Worksheet.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* None. U.S. Department of Justice Office of Community Oriented Policing Services (COPS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Law Enforcement Agencies. *Other:* none. *Abstract:* The information collected will be used by the COPS Office to assess grantees' requests for no-cost extensions to their Universal Hiring Program grants.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 4,000 respondents, who will complete the worksheet within approximately 30 minutes.

(6) *An estimate of the total burden (in hours) associated with the collection:* There are an estimated 2,000 total burden hours associated with this collection.

If additional information is required contact: Mrs. Brenda E. Dyer, Deputy Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 1600, Patrick Henry Building, 601 D Street NW., Washington, DC 20530.

Dated: January 31, 2003.

Brenda E. Dyer,

Department Deputy Clearance Officer, Department of Justice.

[FR Doc. 03–2829 Filed 2–5–03; 8:45 am]

BILLING CODE 4410–AT–M

DEPARTMENT OF JUSTICE

Notice of Lodging Proposed Consent Decree

In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given a proposed consent decree in *United States* v. *Frenchtown Harbor, Inc.,* United States District Court, Eastern District of Michigan 03–70364, was lodged with the United States District Court for the Eastern District of Michigan on January 28, 2003. This proposed Consent Decree concerns a compliant filed by the United States of America against Frenchtown Harbor, Inc., pursuant to section 309 of the Clean Water Act, 33 U.S.C. 1319, to obtain injunctive relief from and impose civil penalties against the Defendant for the discharge of pollutants into waters of the United States without authorization by the United States Department of the Army in violation of section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a).

The proposed Consent Decree prohibits the Defendant from discharging any pollutant into waters of the United States except in compliance with the Clean Water act, requires the restoration of the violation site and the payment of $15,000 in civil penalties.

The Department of Justice will accept written comments relating to this proposed Consent Decree for thirty (30) days from the date of publication of this notice. Please address comments to Karen R. Hiyama, Assistant U.S. Attorney, 211 W. Fort Street, Suite 2001, Detroit, MI 48226, and refer to *U.S.* v. *Frenchtown Harbor, Inc.,* USAO No. 2002V00808, DJ#90–5–1–1–16858.

The proposed Consent Decree may be examined at the Clerk's Office, United States District Court for the Eastern District of Michigan. In addition, the proposed Consent Decree may be viewed on the World Web at *http://www.usdoj.gov/enrd/enrd-home.html.*

Karen R. Hiyama,

Assistant U.S. Attorney, United States Attorney's Office, Eastern District of Michigan.

[FR Doc. 03–2832 Filed 2–5–03; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Settlement Agreement Under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA)

Notice is hereby given that on January 21, 2003, a proposed Settlement Agreement in *In re: Laclede Steel Company,* Case No. 01–48321–399 was lodged with the United States Bankruptcy Court for the Eastern District of Missouri.

In this action the United States sought future response costs associated with the release or threatened release of hazardous substances at Laclede's Alton, Illinois mill and injunctive relief in the form of compliance with all Resource Conservation and Recovery Act (''RCRA'') corrective action and closure and post-closure care

requirements applicable to the facility. The Settlement Agreement provides that Laclede will sell the Facility to Alton Steel Company for $1,000,000. These funds will be placed in a trust to be used by Alton Steel to perform clean-up activities at the site according to an agreed order of priorities and under the supervision of the U.S. Environmental Protection Agency and Illinois Environmental Protection Agency. Laclede will also pay the United States $100,000 to be placed in a Superfund special account.

Under the Settlement Agreement, Laclede will transfer its RCRA part B permit (''RCRA Permit'') to Alton Steel, and Alton Steel will perform closure and corrective action work and take other steps required in the Agreement to bring the Alton mill back into compliance with the RCRA Permit. Alton Steel will receive a covenant not to sue under CERCLA Sections 106 and 107 and RCRA Section 7003 for ''existing contamination'' at the Site. Alton Steel will also receive a covenant not to sue under RCRA Section 3008(h) so long as it remains in compliance with the compliance plan. Finally, Laclede will assign its rights under any applicable insurance policies to Alton Steel, and Alton Steel will seek to recover under such policies, with the proceeds to be used in remediating the Facility.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Settlement Agreement. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *In re: Laclede Steel Company,* D.J. Ref. 90–7–1–07324/1. Commenters may request an opportunity for a public meeting in the affected area, in accordance with Section 7003(d) of RCRA, 42 U.S.C. 6973(d).

The Settlement Agreement may be examined at the Office of the United States Attorney, 111 South 10th Street, 20th Floor, St. Louis, Missouri, and at U.S. EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604. A copy of the Settlement Agreement may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $15.00 (25 cents per page reproduction cost) payable to the U.S. Treasury.

William D. Brighton,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 03–2833 Filed 2–5–03; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response Compensation and Liability Act (''CERCLA'')

Pursuant to section 122(d) of CERCLA, 42 U.S.C. 9622(d), and 28 CFR 50.7 notice is hereby given that on January 13, 2003, a proposed Consent Decree in *United States* v. *Regional Refuse District No. 1, et al.,* Civ. No. 3:03CV84 (PCD), was lodged with the United States District Court for the District of Connecticut.

In this action the United States sought recovery of costs incurred, and injunctive relief requiring performance of response actions at the Barkhamsted-New Hartford Landfill Superfund Site located adjacent to and southwest of Route 44, in the Towns of Barkhamsted and New Hartford, Connecticut. The Consent Decree requires that the settling parties pay $483,304.55 in reimbursement of past response costs; implement EPA's September 28, 2001 Record of Decision (''ROD''); pay the governments' future oversight costs; and implement certain institutional controls, including recordation of land/water use restrictions.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Regional Refuse District No. 1, et al.,* Civ. No. 3:03CV84 (PCD), D.J. Ref. No. 90–11–2–830/1.

The Consent Decree may be examined at the Office of the United States Attorney, 157 Church Street, 23rd Floor, New Haven, CT, and at U.S. EPA Region I, 1 Congress Street, Suite 1100, Boston, MA. A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing a request to Tonia Fleetwood, fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy, please enclose a check in the amount of $58.50 (25 cents per page reproduction cost) payable to the U.S. Treasury. In requesting a copy exclusive of exhibits, defendants' signatures, and appendices, please enclose a check in the amount of $11.25 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Ronald Gluck,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 03–2831 Filed 2–5–03; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of title 21 of the Code of Federal Regulations (CFR), this is notice that on October 23, 2002, AccuStandard, Inc., 125 Market Street, New Haven, Connecticut 06513, made application by letter to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Cathinone (1235)	I
Methcathinone (1237)	I
Aminorex (1585)	I
Gamma hydroxybutyric acid (2010).	I
Metaqualone (2565)	I
Ibogaine (7260)	I
Lysergic acid diethylamide (7315)	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
N-Hydroxy-3,4-methylenedioxyamphetamine (7402).	I
3,4-Methylenedioxy-N-ethylamphetamine (7404).	I
3,4-Methylenedioxymethamphetamine (7405).	I
4-Methoxyamphetamine (7411)	I
Bufotenine (7433)	I
1-[1-(2-Thienyl)cyclohexyl]piperidine (7470).	I
Codeine-N-oxide (9053)	I
Dihydromorphine (9145)	I

Drug	Schedule
Heroin (9200)	I
Morphine-N-oxide (9307)	I
Normorphine (9313)	I
Etonitazene (9624)	I
Amphetamine (1100)	II
Methamphetamine (1105)	II
Phenmetrazine (1631)	II
Methylphenidate (1724)	II
Amobarbital (2125)	II
Pentobarbital (2270)	II
Secobarbital (2315)	II
Glutethimide (2550)	II
Phencyclidine (7471)	II
Alphaprodine (9010)	II
Anileridine (9020)	II
Cocaine (9041)	II
Codeine (9050)	II
Diprenorphine (9058)	II
Dihydrocodeine (9120)	II
Hydromorphone (9150)	II
Diphenoxylate (9170)	II
Benzoylecgonine (9180)	II
Ecgonine (9180)	II
Hydrocodone (9193)	II
Levorphanol (9220)	II
Methadone (9250)	II
Morphine (9300)	II
Thebaine (9333)	II
Opium, raw (9600)	II
Opium tincture (9630)	II
Opium powdered (9639)	II
Levo-alphacetylmethadol (9648)	II
Oxymorphone (9652)	II
Alfentanil (9737)	II
Sufentanil (9740)	II
Fentanyl (9801)	II

The firm plans to manufacture small quantities of the listed controlled substances to make reference standards.

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA **Federal Register,** Representative (CCR), and must be filed no later then April 7, 2003.

Dated: January 27, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–2919 Filed 2–5–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of title 21 of the Code of Federal Regulations (CFR), this is notice that on July 3, 2002, American Radiolabeled Chemicals, Inc., 11624 Bowling Green Drive, St. Louis, Missouri 63146, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Gamma hydroxybutyric acid (2010).	I
Lysergic acid diethylamide (7315)	I
Dimethyltryptamine (7435)	I
Dihydromorphine (9145)	I
Phencyclidine (7471)	II
Cocaine (9041)	II
Codeine (9050)	II
Hydromorphone (9150)	II
Oxycodone (9143)	II
Thebaine (9333)	II
Benzoylecgonine (9180)	II
Meperidine (9230)	II
Metazocine (9240)	II
Morphine (9300)	II
Oxymorphone (9652)	II

The firm plans to bulk manufacture small quantities of the listed controlled substances as radiolabeled compounds.

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA **Federal Register** Representative (CCR), and must be filed no later than April 7, 2003.

Dated: January 27, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–2916 Filed 2–5–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of title 21 of the Code of Federal Regulations (CFR), this is notice that on July 31, 2002, Cerrilliant Corporation, 811 Paloma Drive, Suite A, Round Rock, Texas 78664, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Cathinone (1235)	I
Methcathinone (1237)	I
N-Ethylamphetamine (1475)	I
N,N–Dimethylamphetamine (1480).	I
Aminorex (1585)	I
4-Methylaminorex (cis isomer) (1590).	I
Gamma hydroxybutyric acid (2010).	I
Methaqualone (2565)	I
Alpha-Ethyltryptamine (7249)	I
Lysergic acid diethylamide (7315)	I
Tetrahydrocannabinols (7370)	I
Mescaline (7381)	I
3,4,5-Trimethoxyamphetamine (7390).	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
2,5-Dimethoxy-4-ethylamphetamine (7399).	I
3,4-Methylenedioxyamphetamine (7400).	I
5-Methoxy-3,4-methylenedioxyamphetamine (7401).	I
N-Hydroxy-3,4-methylenedioxyamphetamine (7402).	I
3,4-Methylenedioxy-N-ethylamphetamine (7404).	I
3,4-Methylenedioxymethamphetamine (7405).	I
4-Methoxyamphetamine (7411)	I
Bufotenine (7433)	I
Diethyltryptamine (7434)	I
Dimethyltryptamine (7435)	I
Psilocybin (7437)	I
Psilocyn (7438)	I
Acetyldihydrocodeine (9051)	I
Benzylmorphine (9052)	I
Codeine-N-oxide (9053)	I
Dihydromorphine (9145)	I
Heroin (9200)	I
Hydromorphinol (9301)	I
Methyldihydromorphine (9304)	I
Morphine-N-oxide (9307)	I

Drug	Schedule
Normorphine (9313)	I
Pholcodine (9314)	I
Acetylmethadol (9601)	I
Allyprodine (9602)	I
Alphacetylmethadol except Levo-Alphacetylmethadol (9603).	I
Alphameprodine (9604)	I
Alphamethadol (9605)	I
Betacetylmethadol (9607)	I
Betameprodine (9608)	I
Betamethadol (9609)	I
Betaprodine (9611)	I
Hydromorphinol (9627)	I
Noracymethadol (9633)	I
Norlevorphanol (9634)	I
Normethadone (9635)	I
Trimeperidine (9646)	I
Phenomorphan (9647)	I
Para-Fluorofentanyl (9812)	I
3-Methylfentanyl (9813)	I
Alpha-methylfentanyl (9814)	I
Acetyl-alpha-methylfentanyl (9815).	I
Beta-hydroxyfentanyl (9830)	I
Beta-hydroxy-3-methylfentanyl (9831).	I
Alpha-Methylthiofentanyl (9832)	I
3-Methylthiofentanyl (9833)	I
Thiofentanyl (9835)	I
Amphetamine (1100)	II
Methamphetamine (1105)	II
Phenmetrazine (1631)	II
Methylphenidate (1724)	II
Amobarbital (2125)	II
Pentabarbital (2270)	II
Secobarbital (2315)	II
Glutethimide (2550)	II
Nabilone (7379)	II
1-Phenylcyclohexylamine (7460)	II
Phencyclidine (7471)	II
1-Piperidinocyclohexanecarbonitrile (8603).	II
Alphaprodine (9010)	II
Cocaine (9041)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Diphenoxylate (9170)	II
Benzoylecgonine (9180)	II
Ethylmorphine (9190)	II
Hydrocodone (9193)	II
Levomethorphan (9210)	II
Levorphanol (9220)	II
Isomethadone (9226)	II
Meperidine (9230)	II
Methadone (9250)	II
Methadone-intermediate (9254)	II
Dextropropoxyphene, bulk (non-dosage forms) (9273).	II
Morphine (9300)	II
Thebaine (9333)	II
Levo-alphacetylmethadol (9648)	II
Oxymorphone (9652)	II
Noroxymorphone (9668)	II
Racemethorphan (9732)	II
Alfentanil (9737)	II
Sufentanil (9740)	II
Fentanyl (9801)	II

The firm plans to manufacture small quantities of the listed controlled substances to make deuterated and non-deuterated drug reference standards which will be distributed to analytical and forensic laboratories for drug testing programs.

Any other such applicant and nay person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than April 7, 2003.

Dated: January 27, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–2914 Filed 2–5–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of title 21 of the Code of Federal Regulations (CFR), this is notice that on October 10, 2002, Houba Inc., 16235 State Road 17, Culver, Indiana 46511, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Oxycodone (9143)	II
Hydrocodone (9193)	II

The firm plans to bulk manufacture the controlled substances for the production of finished dosage form products.

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA **Federal Register** Representative (CCR), and must be filed no later than April 7, 2003.

Dated: January 27, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–2912 Filed 2–5–03; 8:45 am]

BILLING CODE 4410–09–M

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 § 1301.34 of title 21, Code of Federal Regulations (CFR), notice is hereby given that on November 4, 2002, Lipomed, Inc., One Broadway, Cambridge, Massachusetts 02142, 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
Methaqualone (2565)	I
Lysergic acid diethylamide (7315)	I
Marihuana (7360)	I
Tetrahydrocannabinols (7370)	I
Mescaline (7381)	I
3,4,5-Trimethoxyamphetamine (7390).	I
4-Bromo-2,5-dimethoxyamphetamine (7391).	I
4-Methyl-2,5-dimethoxyamphetamine (7395).	I
2,5-Dimethoxyamphetamine (7396).	I
2,5-Dimethoxy-4-ethylamphetamine (7399).	I
3,4-Methylenedioxyamphetamine (7400).	I
3,4-Methylenedioxy-N-ethylamphetamine (7404).	I
3,4-Methylenedioxymethamphetamine (7405).	I
Psilocybin (7437)	I
Psilocyn (7438)	I
Acetyldihydrocodeine (9051)	I
Dihydromorphine (9145)	I
Heroin (9200)	I
Tilidine (9750)	I
Amphetamine (1100)	II

Drug	Schedule
Methamphetamine (1105)	II
Amobarbital (2125)	II
Secobarbital (2315)	II
Phencyclidine (7471)	II
Cocaine (9041)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Benzoylecgonine (9180)	II
Hydrocodone (9193)	II
Levorphanol (9220)	II
Methadone (9250)	II
Dextropropoxyphene, bulk (non-dosage forms) (9273).	II
Morphine (9300)	II
Thebaine (9333)	II
Oxymorphone (9652)	II
Alfentanil (9737)	II
Fentanyl (9801)	II

The firm plans to import small reference standard quantities of finished commercial product from its sister company in Switzerland for sale to its customers for drug testing and pharmaceutical research and development.

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 March 10, 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 27, 2003.

Laura M.Nagel,

deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–2913 Filed 2–5–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of title 21 of the Code of Federal Regulations (CFR), this is notice that on July 24, 2002, National Center for Natural Products Research-NIDA MProject University of Mississippi, 135 Coy Waller Complex, University, Mississippi 38677, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Marihuana (7360)	I
Tetrahydrocannabinols (7370)	I

The firm will cultivate marijuana for the National Institute of Drug Abuse for research approved by the Department of Health and Human Services.

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than April 7, 2003.

Dated: January 27, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–2918 Filed 2–5–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of title 21 of the Code of Federal Regulations (CFR), this is notice that on July 10, 2002, Norac Company, Inc., 405 S. Motor Avenue, Azusa, California 91702, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of tetrahydrocannabinols (7370), a basic class of controlled substance listed in Schedule I.

The firm plans to manufacture bulk tetrahydrocannabinols for formulation into pharmaceutical products.

Any other such applicant and any person who is presently registered with DEA to manufacture such substance may file comments or objections to the issuance of the proposed registration.

Any such comment or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than April 7, 2003.

Dated: January 27, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–2915 Filed 2–5–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of title 21 of the Code of Federal Regulations (CFR), this is notice that on October 1, 2002, Noramco, Inc., 1440 Olympic Drive, Athens, Georgia 30601, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Amphetamine (1100)	II
Oxycodone (9143)	II
Hydrocodone (9193)	II
Morphine (9300)	II
Thebaine (9333)	II
Sufentanil (9740)	II
Fentanyl (9801)	II

The firm plans to support its other manufacturing facility with manufacturing and analytical testing.

Any other such applicant and any person who is presently registered with DEA to manufacture such substances

may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than April 7, 2003.

Dated: January 27, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–2920 Filed 2–5–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of title 21 of the Code of Federal Regulations (CFR), this is notice that on September 24, 2002, OraSure Technologies, Inc., 1745 Eaton Avenue, Bethlehem, Pennsylvania 18018, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Alphamethadol (9605)	I
Benzoylecgonine (9180)	II
Morphine (9300)	II

The firm plans to bulk manufacture the listed controlled substances to be used in-house to manufacture other controlled substances.

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than April 7, 2003.

Dated: January 27, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–2917 Filed 2–5–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP(OJP)–1372]

Meeting of the Public Safety Officer Medal of Valor Review Board

AGENCY: Office of Justice Programs (OJP), Justice.

ACTION: Notice of meeting.

SUMMARY: This is an announcement of a meeting of the Public Safety Officer Medal of Valor Review Board to review and discuss the timetable for carrying out the Board's responsibilities for 2003.

DATES: The meeting will take place on Thursday, February 13, 2003, from 2 p.m. to 5 p.m. E.S.T.

ADDRESSES: The meeting will take place at the Office of Justice Programs, 810 7th St., NW., Washington, DC 20531; Phone: 202–307–5933.

FOR FURTHER INFORMATION CONTACT: Tracy A. Henke, Principal Deputy Assistant Attorney General, Office of Justice Programs, 810 7th Street NW., Sixth Floor, Washington, DC 20531; Phone: (202) 307–5933 (note: this not a toll free number).

SUPPLEMENTARY INFORMATION: This meeting will be open to the public and registrations will be accepted on a space available basis. Members of the public who wish to attend the meeting must register at least seven (7) days in advance of the meeting by contacting Ms. Henke at the above address. Access to the meeting will not be allowed without registration. All attendees will be required to sign in at the meeting registration desk. Please bring photo identification and allow extra time prior to the meeting.

Anyone requiring special accommodations should contact Ms. Henke at least seven (7) days in advance of the meeting.

Authority

The Public Safety Officer Medal of Valor Review Board is authorized to carry out its advisory function under 42 U.S.C. 15202. 42 U.S.C. 15201 authorizes the President to award the Public Safety Officer Medal of Valor, the highest national award for valor by a public safety officer.

Tracy A. Henke,

Principal Deputy Assistant Attorney General, Office of Justice Programs.

[FR Doc. 03–2814 Filed 2–5–03; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Office of the Secretary

Privacy Act of 1974; Publication of A New System of Records

AGENCY: Office of the Secretary, Labor.

ACTION: Notice of a new system of records.

SUMMARY: The Privacy Act of 1974 requires that each agency publish notice of all of the systems of records that it maintains. This document adds a new system of records to the Department's current systems of records. With the addition of the new system of records, the Department will be maintaining 148 systems of records.

DATES: Persons wishing to comment on this new system of records may do so by March 18, 2003.

EFFECTIVE DATE: Unless there is a further notice in the **Federal Register**, this new system of records will become effective on April 2, 2003.

ADDRESSES: Written comments may be mailed or delivered to Robert A. Shapiro, Associate Solicitor, Division of Legislation and Legal Counsel, 200 Constitution Avenue, NW., Room N–2428, Washington, DC 20210 or by e-mail to *miller-miriam@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Miriam McD. Miller, Co-Counsel for Administrative Law, Office of the Solicitor, Department of Labor, 200 Constitution Avenue, NW., Room N–2428, Washington, DC 20210, telephone (202) 693–5500.

SUPPLEMENTARY INFORMATION: Pursuant to section three of the Privacy Act of 1974 (5 U.S.C. 552a(e)(4)), hereinafter referred to as the Act, the Department hereby publishes notice of a new system of records currently maintained pursuant to the Act. On April 8, 2002, in volume 67 at page 16816 of the **Federal Register**, the Department published a notice of 147 systems of records which are maintained under the Act. The new system of records presented herein, established by the Office of the 21st Century Workforce, is entitled DOL/21st CENTURY–1, *Correspondents With the Office of the 21st Century Workforce.* This system contains information necessary to

satisfy requests by individuals for information, brochures, or requests to register for events, activities and/or programs. Depending on the nature of the request, the file may include (but is not limited to) the following information on the individuals who have contacted DOL: name, title, mailing address, telephone and fax numbers, E-Mail addresses.

General Prefatory Statement

1. In its April 8, 2002, publication, the Department gave notice of 12 paragraphs containing routine uses which apply to all of its systems of records, except for DOL/OASAM–5 and DOL/OASAM–7. These 12 paragraphs were presented in the General Prefatory Statement for that document, and it appeared at pages 16825 of volume 67 of the **Federal Register**. At this time we are republishing the April 8, 2002, version of the General Prefatory Statement as a convenience to the reader of this document.

2. This republication shall include the statement that pursuant to the Flexiplace Program, the system location for all systems of records may be temporarily located at alternate worksites, including the employees' homes or at geographically convenient satellite offices for part of the workweek.

The public, the Office of Management and Budget (OMB), and the Congress are invited to submit written comments on this new system. A report on this system has been provided to OMB and to the Congress as required by OMB Circular A–130, Revised, and 5 U.S.C. 552a.

General Prefatory Statement

A. Universal Routine Uses of the Records

The following routine uses of the records apply to and are incorporated by reference into each system of records published below unless the text of a particular notice of a system of records indicates otherwise. These routine uses do not apply to DOL/OASAM—5, Rehabilitation and Counseling File, nor to DOL/OASAM—7, Employee Medical Records.

1. To disclose the records to the Department of Justice when: (a)The agency or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) the United States Government, is a party to litigation or has an interest in such litigation, and by careful review, the agency determines that the records are both relevant and necessary to the litigation, and the use of such records by the Department of Justice is for a purpose that is compatible with the purpose for which the agency collected the records.

2. To disclose the records in a proceeding before a court or adjudicative body, when: (a) The agency or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity; or (d) the United States government, is a party to litigation or has an interest in such litigation, and by careful review, the agency determines that the records are both relevant and necessary to the litigation, and that the use of such records is a purpose that is compatible with the purpose for which the agency collected the records.

3. When a record on its face, or in conjunction with other information, indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order issued pursuant thereto, disclosure may be made to the appropriate agency, whether Federal, foreign, State, local, or tribal, or other public authority responsible for enforcing, investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation, or order issued pursuant thereto, if the agency determines by careful review that the records or information are both relevant and necessary to any enforcement, regulatory, investigative or prosecutive responsibility of the receiving entity, and that the use of such records or information is for a purpose that is compatible with the purposes for which the agency collected the records.

4. To a Member of Congress or to a Congressional staff member in response to an inquiry of the Congressional office made at the written request of the constituent about whom the record is maintained.

5. To the National Archives and Records Administration or to the General Services Administration for records management inspections conducted under 44 U.S.C. 2904 and 2906.

6. To disclose to contractors, employees of contractors, consultants, grantees, and volunteers who have been engaged to assist the agency in the performance of or working on a contract, service, grant, cooperative agreement or other activity or service for the Federal Government.

Note 1. Recipients shall be required to comply with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a; *see also* 5 U.S.C. 552a(m).

7. To the parent locator service of the Department of Health and Human Services or to other authorized persons defined by Pub. L. 93–647 the name and current address of an individual for the purpose of locating a parent who is not paying required child support.

8. To any source from which information is requested in the course of a law enforcement or grievance investigation, or in the course of an investigation concerning retention of an employee or other personnel action, the retention of a security clearance, the letting of a contract, the retention of a grant, or the retention of any other benefit, to the extent necessary to identify the individual, inform the source of the purpose(s) of the request, and identify the type of information requested.

9. To a Federal, State, local, foreign, or tribal or other public authority of the fact that this system of records contains information relevant to the hiring or retention of an employee, the granting or retention of a security clearance, the letting of a contract, a suspension or debarment determination or the issuance or retention of a license, grant, or other benefit.

10. To the Office of Management and Budget during the coordination and clearance process in connection with legislative matters.

11. To the Department of the Treasury, and a debt collection agency with which the United States has contracted for collection services to recover debts owed to the United States.

12. To the news media and the public when (1) the matter under investigation has become public knowledge, (2) the Solicitor of Labor determines that disclosure is necessary to preserve confidence in the integrity of the Department or is necessary to demonstrate the accountability of Department's officers, employees, or individuals covered by this system, or (3) the Solicitor of Labor determines that there exists a legitimate public interest in the disclosure of the information, except to the extent that the Solicitor of Labor determines in any of these situations that disclosure of specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

B. System Location—Flexiplace Programs

The following paragraph applies to and is incorporated by reference into all of the Department's systems of records under the Privacy Act, within the category entitled, System Location: ''Pursuant to the Department of Labor's

Flexiplace Programs, copies of records may be temporarily located at alternative worksites, including employees' homes or at geographically convenient satellite offices for part of the workweek. All appropriate safeguards will be taken at these sites.''

Publication of a New System of Records

Office of the 21st Century Workforce (21st CENTURY)

DOL/21st Century-1

SYSTEM NAME:

Correspondents with the Office of the 21st Century Workforce.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Office of the 21st Century Workforce, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individual correspondents with the Office of the 21st Century Workforce who contact, by telephone, U.S. Mail or E-Mail, the Office of the 21st Century Workforce for various reasons such as, but not limited to, requests for information, brochures, registration for events, activities, and programs and requests for related reasons.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information necessary to satisfy requests for information, brochures, or requests to register for events, activities and /or programs. Depending on the nature of the request, the file may include (but is not limited to) the following information on the individuals who have contacted DOL: name, title, mailing address, telephone and fax numbers, E-Mail addresses.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Executive Order 13218 of June 20, 2001, 66 FR 33627, 3 CFR, 2001 Compilation, p.776.

PURPOSE(S):

To enhance information exchange by improving the availability of the Office of the 21st Century Workforce and DOL component information on automated systems; to facilitate sending information about events, activities and programs to correspondents with the Office of the 21st Century Workforce with the public access Internet site, and to provide a frame from which to select an unbiased sample of individuals for surveys. Maintaining the names, addresses, *etc.* of individuals requesting data/publications will streamline the process for handling subsequent inquiries and requests by eliminating duplicative gathering of mailing information, data and material to individuals with corresponding interests; to provide usage statistics associated with the DOL public access Internet site, and to provide a frame from which to select an unbiased sample of users for users service surveys.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

A record from this system of records may be disclosed to the United States Small Business Administration. The Routine Uses listed at paragraphs 3, 4, 5, 7, 8, 9, 10, 11, and 12 in the General Prefatory Statement to this document are not applicable to this system of records. The Routine Uses listed at paragraphs 1, 2, and 6 are applicable to this system of records, and the records also may be disclosed where required by law.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Files are stored electronically and/or on paper.

RETRIEVABILITY:

By name, telephone or fax number (including the telephone number from which the individual dials), E-Mail address or other identifying information in the System.

SAFEGUARDS:

Access by authorized personnel only. Computer security safeguards are used for electronically stored data and locked locations for paper files.

RETENTION AND DISPOSAL:

Current correspondent information files are updated as necessary and are destroyed when no longer needed.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Office of the 21st Century Workforce, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

NOTIFICATION PROCEDURE:

Mail, or present in writing, all inquiries to the System Manager at the above address.

RECORD ACCESS PROCEDURES:

As in notification procedure.

CONTESTING RECORD PROCEDURES:

As in notification procedure.

RECORD SOURCE CATEGORIES:

Correspondents with the Office of the 21st Century Workforce.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

Signed in Washington, DC this 27th day of January, 2003.

Elaine L. Chao,

Secretary of Labor.

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–10988]

Proposed Exemption; Deutsche Bank Securities Inc. and Its Affiliates

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemption.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed exemption from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemption, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Attention: Application No. _____, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: *moffittb@pwba.dol.gov,* or by FAX to (202) 219–0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemption will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemption was requested in an application filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The application contains representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the application on file with the Department for a complete statement of the facts and representations.

Deutsche Bank Securities Inc. and Its Affiliates Located in New York, NY

[Application No. D–10988]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32847, August 10, 1990).

Section I—Transactions

If the exemption is granted, the restrictions of sections 406(a)(1)(A) through (D) of the Act and the sanctions resulting from application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to any purchase or sale of securities, in the context of a portfolio liquidation or restructuring, between (i) Deutsche Bank Securities Inc. (DBSI) and its current and future affiliates, including certain foreign broker-dealers or banks (the Foreign Affiliates, as defined in Section III below), (collectively, the Applicant) and (ii) employee benefit plans (the Plans) with respect to which the Applicant is a party in interest, provided that the conditions set forth in Section II are satisfied.

Section II—Conditions

A. The Applicant customarily purchases and sells securities for its own account in the ordinary course of its business as a broker-dealer or bank;

B. Neither the Applicant nor an affiliate thereof has discretionary authority or control with respect to the investment of the Plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets.

Notwithstanding the foregoing, the Applicant may be a directed trustee (as defined in Section III below) with respect to the Plan assets involved in the transaction.

In addition, this condition will be deemed satisfied if the Applicant is being terminated as a manager of the plan assets involved in the transaction, the termination is effective prior to the commencement of the portfolio liquidation or restructuring, and the Applicant has not used its discretion to appoint the transition broker-dealer.

Lastly, a transaction will not fail to meet the requirements of this section solely because the Applicant is being retained as an investment manager with respect to the Plan assets involved in the transaction, provided that: (i) The Applicant has not used its discretion to appoint the transition broker-dealer; (ii) the plan assets are to be managed as an Index or Model-Driven Fund; or (iii) the investment manager of such assets supplies a list of securities to be purchased, which list is prepared without regard to the identity of the broker-dealer and without reference to the portfolio being liquidated or restructured (*i.e.*, the list is substantially the same as would be provided to other similarly situated investors with similar objectives or consists of substantially the same securities as those in other existing investment portfolios managed in the same style);

C. The transaction is a purchase or sale, for no consideration other than cash;

D. The terms of any transaction are at least as favorable to the Plan as those obtainable in a comparable arm's length transaction with an unrelated party;

E. An Independent Fiduciary has given prior approval for the transaction, specifying (solely in the case where the price for any principal transaction is not based on an objective measure) whether the transaction is to be agency or principal, either on a security-by-security basis, or based on the whole portfolio or an identifiable part of the portfolio (such as all debt securities, all equity securities, all domestic securities, or the like);

F. All purchases and sales are effected within two days following the Independent Fiduciary's direction to purchase or sell a given security—except that, with the approval of the Independent Fiduciary, the Applicant may extend such initial period for a time not exceeding two additional days;

G. Prior to any transaction, the Independent Fiduciary agrees that the purchase or sale of a security, which must be one that is publicly traded, may be effectuated through a principal transaction at a price that—

(1) In the case of an equity security, is specified in advance by the Independent Fiduciary and is a stated dollar amount, or is based on an objective measure (as of a specified date or dates), including, but not limited to, the closing price, the opening price, or the volume-weighted average price; or

(2) In the case of a fixed income security, is a stated dollar amount, or is within the bid and asked spread, as of the close of the relevant market (on a specified date or dates), as reported by an independent third party reporting service or a publicly available electronic exchange;

H. The Independent Fiduciary is furnished with confirmations including the relevant information required under Rule 10b-10 of the Securities Exchange Act of 1934 (the 1934 Act), as well as a report, within five business days of the transaction, containing the following information with respect to each security:

(1) The identity of the security;

(2) The date on which the transaction occurred;

(3) The quantity and price of the securities involved; and

(4) Whether the transaction was executed with the Applicant as principal or agent;

I. Each Plan shall have total net assets with a value of at least $100 million. For purposes of the net assets test, where a group of Plans is maintained by a single employer or controlled group of employers, as defined in section 407(d)(7) of the Act, the $100 million net assets requirement may be met by aggregating the assets of such Plans, if the assets are pooled for investment purposes in a single master trust;

J. The Applicant complies with all applicable securities or banking laws relating to the transaction;

K. Any Foreign Affiliate is a registered broker-dealer or bank subject to regulation by a governmental agency, as described in Section III, B, and is in compliance with all applicable rules and regulations thereof in connection with any transaction covered by the proposed exemption;

L. Any Foreign Affiliate, in connection with any transaction covered by the proposed exemption, is in compliance with the requirements of Rule 15a–6 (17 CFR 240.15a–6) of the 1934 Act, and Securities and Exchange Commission (SEC) interpretations thereof, providing for foreign affiliates a limited exemption from U.S. broker-dealer registration requirements;

M. Prior to any transaction, the Foreign Affiliate enters into a written agreement with the Plan in which the Foreign Affiliate consents to the jurisdiction of the courts of the United States for any civil action or proceeding brought in respect of the subject transactions. In this regard, the Foreign Affiliate must (i) agree to submit to the jurisdiction of the United States; (ii) agree to appoint an agent for service of process in the United States, which may be an affiliate (the Process Agent); and (iii) consent to service of process on the Process Agent;

N. The Applicant maintains, or causes to be maintained, within the United States for a period of six years from the date of any transaction, such records as are necessary to enable the persons described in Paragraph O, below, to determine whether the conditions of the exemption have been met, except that—

(1) A party in interest with respect to a Plan, other than the Applicant, shall not be subject to a civil penalty under section 502(i) of the Act, or the taxes imposed by section 4975 (a) and (b) of the Code, if such records are not maintained, or not available for examination, as required by Paragraph O; and

(2) This record-keeping condition shall not be violated if, due to circumstances beyond the Applicant's control, such records are lost or destroyed prior to the end of the six year period; and

O. Notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the Applicant makes the records referred to in Paragraph N, above, unconditionally available within the United States during normal business hours at their customary location to the following persons or a duly authorized representative thereof: (1) The Department, the Internal Revenue Service, or the SEC; (2) any fiduciary of a Plan; (3) any contributing employer to a Plan; (4) any employee organization any of whose members are covered by a Plan; and (5) any participant or beneficiary of a Plan. However, none of the persons described in Items (2) through (5) of this subsection is authorized to examine the trade secrets of the Applicant, or commercial or financial information which is privileged or confidential.

Section III—Definitions

A. The term ''DBSI'' means Deutsche Bank Securities Inc. DBSI and its domestic affiliates must be one of the following:

(i) A broker-dealer registered under the 1934 Act; (ii) a reporting dealer who makes primary markets in securities of the United States Government or of any agency of the United States Government (''Government securities'') and reports daily to the Federal Reserve Bank of New York its positions with respect to Government securities and borrowings thereon; or (iii) a bank supervised by the United States or a State. DBSI and its current and future affiliates, including the Foreign Affiliates (as defined in Paragraph C, below), are collectively referred to herein as ''the Applicant.''

B. The term ''affiliate'' shall include: (1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; (2) any officer, director, or partner, employee or relative (as defined in section 3(15) of the Act) of such person; and (3) any corporation or partnership of which such person is an officer, director or partner. For purposes of this definition, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

C. The term ''Foreign Affiliate'' means an affiliate of DBSI that is subject to regulation as a broker-dealer or bank by: (1) The Securities and Futures Authority or the Financial Services Authority in the United Kingdom; (2) the Federal Authority for Financial Services Supervision, *i.e.*, der Bundesanstalt fuer Finanzdienstleistungsaufsicht (the BAFin) in Germany; (3) the Ministry of Finance and/or the Tokyo Stock Exchange in Japan; (4) the Ontario Securities Commission and/or the Investment Dealers Association, or the Office of the Superintendent of Financial Institutions, in Canada; (5) the Swiss Federal Banking Commission in Switzerland; or (6) the Australian Prudential Regulation Authority or the Australian Securities & Investments Commission, and/or the Australian Stock Exchange Limited, in Australia.

D. The term ''security'' shall include equities, fixed income securities, options on equity or fixed income securities, government obligations, and any other instrument that constitutes a security under U.S. securities laws. The term ''security'' does not include swap agreements or other notional principal contracts.

E. The term ''index'' means a securities index that represents the investment performance of a specific segment of the public market for equity or debt securities in the United States and/or foreign countries, but only if—

(1) The organization creating and maintaining the index is—

(i) Engaged in the business of providing financial information, evaluation, advice, or securities brokerage services to institutional clients,

(ii) A publisher of financial news or information, or

(iii) A public securities exchange or association of securities dealers;

(2) The index is created and maintained by an organization independent of the Applicant; and

(3) The index is a generally accepted standardized index of securities that is not specifically tailored for the use of the Applicant.

F. The term ''Index Fund'' means any investment fund, account, or portfolio trusteed or managed by the Applicant, in which one or more investors invest, and—

(1) Which is designed to track the rate of return, risk profile, and other characteristics of an independently maintained securities index (as ''index'' is defined in Paragraph E, above) by either (i) replicating the same combination of securities that compose such index, or (ii) sampling the securities that compose such index based on objective criteria and data;

(2) For which the Applicant does not use its discretion, or data within its control, to affect the identity or amount of securities to be purchased or sold;

(3) That contains ''plan assets'' subject to the Act, pursuant to the Department's regulations (*see* 29 CFR 2510.3–101, Definition of ''plan assets''—plan investments); and

(4) That involves no agreement, arrangement, or understanding regarding the design or operation of the Fund that is intended to benefit the Applicant or any party in which the Applicant may have an interest.

G. The term ''Model-Driven Fund'' means any investment fund, account, or portfolio trusteed or managed by the Applicant, in which one or more investors invest, and—

(1) Which is composed of securities, the identity of which and the amount of which, are selected by a computer model that is based on prescribed objective criteria using independent third party data, not within the control of the Manager, to transform an Index (as defined in Paragraph E, above);

(2) Which contains ''plan assets'' subject to the Act, pursuant to the Department's regulations (*see* 29 CFR 2510.3–101, Definition of ''plan assets''—plan investments); and

(3) That involves no agreement, arrangement, or understanding regarding the design or operation of the Fund, or the utilization of any specific objective criteria, that is intended to benefit the Applicant or any party in which the Applicant may have an interest.

H. The term ''Plan'' means an employee benefit plan that is subject to the fiduciary responsibility provisions of the Act.

I. The term ''Independent Fiduciary'' means a fiduciary of a Plan who is unrelated to, and independent of, the Applicant. For purposes of the proposed exemption, a Plan fiduciary will be deemed to be unrelated to, and independent of, the Applicant if such fiduciary represents that neither such fiduciary, nor any individual responsible for the decision to authorize or terminate authorization for transactions described in Section I, is an officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Applicant and represents that such fiduciary shall advise the Applicant if those facts change.

(1) Notwithstanding anything to the contrary in this Section III, I, a fiduciary is not independent if:

(i) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with the Applicant;

(ii) Such fiduciary directly or indirectly receives any compensation or other consideration from the Applicant for his or her own personal account in connection with any transaction described in the proposed exemption;

(iii) Any officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Applicant, responsible for the transactions described in Section I, is an officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Plan sponsor or the fiduciary responsible for the decision to authorize or terminate authorization for transactions described in Section I. However, if such individual is a director of the Plan sponsor or the responsible fiduciary, and if he or she abstains from participation in (A) the choice of the Plan's broker-dealer or bank executing the transactions covered herein, and (B) the decision to authorize or terminate authorization for transactions described in Section I, then Section III, I(1)(iii) shall not apply.

(2) The term ''officer'' means a president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), or any other officer who performs a policy-making function for the entity.

J. The term ''directed trustee'' means a Plan trustee whose powers and duties with respect to any assets of the Plan involved in the portfolio liquidation or restructuring are limited to (i) the provision of nondiscretionary trust services to the Plan, and (ii) duties imposed on the trustee by any provision or provisions of the Act or the Code. The term ''nondiscretionary trust services'' means custodial services and services ancillary to custodial services, none of which services is discretionary. For purposes of the proposed exemption, a person who is otherwise a directed trustee will not fail to be a directed trustee solely by reason of having been delegated, by the sponsor of a master or prototype Plan, the power to amend such Plan.

Summary of Facts and Representations

1. Deutsche Bank Securities Inc. (*i.e.*, DBSI) is an indirect wholly-owned subsidiary of Deutsche Bank AG, a German banking corporation regulated by the BAFin. DBSI, a Delaware corporation, is a full-service broker-dealer, providing research, sales and trading, investment banking, retail, investment advisory services, and prime brokerage services. DBSI is registered as a U.S. broker-dealer under Section 15 of the 1934 Act, as amended, and is a member of the New York Stock Exchange, American Stock Exchange, Chicago Board of Options Exchange, and the Chicago Stock Exchange, among others, and DBSI is a member of the National Association of Securities Dealers.

DBSI's affiliate, Deutsche Bank Trust Company Americas (DBT), is a wholly-owned subsidiary of Deutsche Bank Trust Corporation, which, in turn, is an indirectly wholly-owned subsidiary of Deutsche Bank AG. DBT, a New York State banking corporation, is supervised by the Federal Reserve Bank of New York.

2. DBSI also has several foreign affiliates which are broker-dealers or banks. Those covered by the proposed exemption (*i.e.*, the Foreign Affiliates) include but are not limited to:

(a) United Kingdom—Morgan Grenfell & Co., Ltd., Bankers Trust International PLC, and the London Branch of Deutsche Bank;

(b) Germany—Deutsche Bank AG;

(c) Japan—Japan Bankers Trust Ltd., Deutsche Bank Securities Limited, Tokyo Branch, and Deutsche Trust Bank Limited;

(d) Canada—Deutsche Bank Canada and Deutsche Bank Securities Limited;

(e) Switzerland—Deutsche Bank (Suisse) S.A.; and

(f) Australia—Deutsche Bank Securities Australia, Limited and the Sydney Branch of Deutsche Bank.

The Applicant requests an individual exemption for DBSI and its current and future affiliates, including the Foreign Affiliates identified above, which would permit principal transactions with employee benefit plans (*i.e.*, the Plans), as described herein.

The Applicant represents that the Foreign Affiliates are subject to regulation by a governmental agency in the foreign country in which they are located. The Applicant states that registration of a foreign broker-dealer or bank with the governmental agency in these cases addresses regulatory concerns similar to those addressed by registration of a broker-dealer with the SEC under the 1934 Act. The rules and regulations set forth by the above-referenced agencies and the SEC share a common objective: The protection of the investor by the regulation of securities markets. The foreign regulatory regimes have been described in detail in numerous other exemptions previously granted by the Department [*see, e.g.*, PTE 99–50 (65 FR 534, January 5, 2000), granted to Bankers Trust Company, now known as Deutsche Bank Trust Company Americas].

Further, the Applicant represents that, in connection with the transactions covered by the proposed exemption, the Foreign Affiliates' compliance with any applicable requirements of Rule 15a–6

(17 CFR 240.15a–6) of the 1934 Act (as discussed further in Item 9, below), and SEC interpretations thereof, providing for foreign affiliates a limited exemption from U.S. registration requirements, will offer additional protections to the Plans.

3. The Applicant represents that it customarily purchases and sells securities for its own account in the ordinary course of its business as a broker-dealer or bank. Such trades are referred to as principal transactions. In the subject principal transactions with Plans, occurring in the context of a portfolio liquidation or restructuring, the Applicant may be a party in interest with respect to such Plans.

The Applicant believes that the principal transactions at issue may fall outside the scope of relief provided by Prohibited Transaction Exemption (PTE) 75–1 (40 FR 50845, October 31, 1975), Part II,[1] because that class exemption is unavailable where the broker-dealer's affiliate is the trustee of a Plan, even if only a directed trustee. In addition, because PTE 75–1 provides an exemption only for U.S. registered broker-dealers and U.S. banks, it is unavailable for the Applicant's Foreign Affiliates.[2] Thus, the Applicant seeks an individual exemption permitting it to execute principal transactions with Plans in the situations described above.

As a condition of the proposed exemption, neither the Applicant nor an affiliate thereof may have discretionary authority or control with respect to the investment of the Plan assets involved in the principal transaction, or render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets. However, one or more of the entities affiliated with the Applicant may be a directed trustee of the Plan (as discussed further in Item 5, below).

In addition, this condition will be deemed met if the Applicant or an affiliate is the ''legacy manager'' whose appointment as a manager of plan assets has been terminated prior to the commencement of the portfolio liquidation or restructuring, since the legacy manager would not have been involved in the selection of the ''transition broker-dealer'' and would no longer be acting as a fiduciary with respect to the assets involved in the liquidation or restructuring.

This condition will also be met if the Applicant or an affiliate is the ''destination manager,'' who was not involved in the selection of the transition broker-dealer but provides such broker-dealer with a list of securities to be purchased for the Plan with the proceeds of the securities being liquidated, so long as the list represents those securities in an Index or Model-Driven Fund.

Similarly, this condition will be met if the destination manager prepares for the Plan sponsor (*i.e.*, the Independent Fiduciary) a list of securities to be purchased for the Plan with the proceeds of the securities being liquidated, so long as that list is prepared without regard to the identity of the transition broker-dealer and without reference to the portfolio being liquidated or restructured (*i.e.*, the list is substantially the same as would be provided to other similarly situated investors with similar objectives or consists of substantially the same securities as those in other existing investment portfolios managed in the same style).

Thus, the Applicant or an affiliate may be retained as an investment manager for the Plan with respect to some or all of the portfolio resulting from the liquidation or restructuring (as discussed further in Item 6, below), provided that an Independent Fiduciary has given prior approval for the principal transactions, as part of the liquidation or restructuring, and the other conditions set forth herein are met.[3]

4. The Applicant represents that when sponsors of Plans terminate an investment manager, it is customary to hire a broker-dealer to liquidate the portfolio of the terminated manager and/or create the portfolio of the newly hired manager. An Independent Fiduciary, generally the Plan sponsor, hires a broker-dealer to perform these so-called ''transition services.'' The Independent Fiduciary instructs the broker-dealer to purchase or sell a list of securities within a specified period. The list of securities to be sold is from the portfolio held by the Plan at the time the manager is terminated. The list of securities to be purchased is from a list prepared by the new manager (who may or may not be affiliated with the Applicant). Generally, the transition broker-dealer takes both the legacy portfolios and the destination portfolios, matches any securities that appear in both, and allocates such securities to the appropriate destination managers ratably. Then the remaining legacy securities are sold, the cash proceeds placed in the appropriate custody account, and the destination securities are purchased.

The Applicant represents that, while the Independent Fiduciary may specify that the transactions are to be executed by the broker-dealer as agent in markets where such transactions are typical,[4] it is often the case that the markets involved require principal transactions, such as is the case for NASDAQ National Market securities or fixed income securities.

The Applicant represents that often the Independent Fiduciary and the transition broker-dealer will agree that certain principal transactions will be effected at a price determined by an objective reference outside the control of the transition broker-dealer, including, but not limited to, the opening or closing price of the security for the day on the principal exchange on which the security is traded, the volume-weighted average price[5] for the day, or the price as reported by an independent reporting service for that particular day. In such case, the Applicant represents that the price at which the principal transaction will

[1] PTE 75–1, Part II, provides a class exemption, subject to certain conditions, from section 406(a) of the Act and section 4975(c)(1)(A) through (D) of the Code, for principal transactions between employee benefit plans and U.S. registered broker-dealers or U.S. banks that are parties in interest with respect to such plans. PTE 75–1, Part II(d) states, among other things, that ''such broker-dealer, reporting dealer or bank is not a fiduciary with respect to the plan, and such broker-dealer, reporting dealer or bank is a party in interest or disqualified person with respect to the plan solely by reason of section 3(14)(B) of the Act or section 4975(e)(2)(B) of the Code, or by reason of a relationship to a person described in such sections.''

[2] Deutsche Bank AG, and certain foreign affiliates thereof, filed Submission No. E–00194 and obtained authorization from the Department to engage in principal transactions, among other things, with employee benefit plans, pursuant to an authorization made under PTE 96–62 (61 FR 39988, July 31, 1996), and which was designated Final Authorization No. (FAN) 2000–28E, effective November 25, 2000. In this regard, the Department notes that the relief provided by FAN 2000–28E may not cover the principal transactions described in this proposed exemption.

[3] The Department notes that the proposed exemption is unavailable for any principal transaction occurring upon or after the Applicant's assumption of responsibility as an investment manager for the Plan assets that would be involved in such transaction (notwithstanding the transactions described herein). Once the transition has been completed and the purchases and sales have been consummated, the destination manager will then assume fiduciary responsibility for the portfolio, and the proposed exemption will not apply to any subsequent principal transactions with an affiliate, as described herein, unless the manager is terminated (*i.e.*, a ''legacy'' investment manager).

[4] The Applicant represents that where securities are to be purchased or sold on an agency basis, the Applicant will comply with the safe harbor provided by 29 CFR 2510.3–21(d) for the execution of a securities transaction.

Further, the Department notes that PTE 86–128 (51 FR 41686, November 18, 1986) provides a class exemption permitting, among other things, persons who serve as fiduciaries for employee benefit plans to effect or execute securities transactions as an agent for the plan, provided the conditions set forth therein are met.

[5] For purposes of the proposed exemption, the term volume-weighted average price means the weighted average of the price of each trade that was reported for the security on a given day.

occur will be determined by market forces and not by the broker-dealer.

Prior to any transaction that is not based on an objective reference for pricing, the Independent Fiduciary shall specify whether the transaction is to be agency or principal, either on a security-by-security basis, or based on the whole portfolio or an identifiable part of the portfolio (such as all debt securities, all equity securities, all domestic securities, or the like). Any principal transaction will be for cash, and the terms at least as favorable to the Plan as those obtainable in a comparable arm's length transaction with an unrelated party.

5. The Applicant represents that purchases and sales of securities effected as part of transition services will take place as follows. The Independent Fiduciary of a Plan, after such due diligence as it deems appropriate under the circumstances, selects a broker-dealer to purchase or sell a specified portfolio of securities. Where the broker-dealer selected is the Applicant and an affiliate of the Applicant is the directed trustee of the Plan, such affiliate must be a fiduciary that has no discretionary authority or control with respect to the investment of the Plan assets involved in the transaction (including determining the broker-dealer to be hired to provide transition services for the Plan), nor renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets.

The Applicant asserts that permitting it to engage in principal transactions where one of its affiliates is a directed trustee of a Plan will provide Plans with additional expert broker-dealers experienced at transition services from which Plans may choose to implement changes in investment managers or investment strategies.

In such situations, the Applicant believes it may not be able to rely on the Department's class exemptions providing relief for principal transactions. For example, the Applicant believes that the Independent Fiduciary for the subject transactions is unlikely to be a ''qualified professional asset manager'' (QPAM), as defined in PTE 84–14, (49 FR 9494, 9506, March 13, 1984),[6] or an ''in-house asset manager'' (INHAM), as defined in PTE 96–23 (61 FR 15975, April 10, 1996).[7]

6. Although the Applicant may not have discretionary authority or control over the Plan assets involved at the time of the transaction, this condition is not violated and the proposed exemption provides relief for purchases and sales of securities where the Applicant's affiliate will serve as the new investment manager for such assets, where such manager has provided a list of securities to be purchased for the Plan to the transition broker-dealer, as described below.

Where the destination manager will be managing the assets in an Index Fund (as defined in Section III, F) or a Model-Driven Fund (as defined in Section III, G), the list of securities to be purchased is the optimum portfolio that has been identified by the manager's computer model, or is a slice of the underlying index, or a slice of the Fund (taking into account round lots and other conventions).

Where the destination manager of an actively managed portfolio supplies a list of securities that it would purchase if it were to receive cash, the transition broker-dealer uses that list to assemble the desired portfolio prior to the date that the destination manager assumes responsibility for the portfolio. That list is prepared without reference to the identity of the transition broker-dealer, without reference to the portfolio being liquidated, and without reference to the securities held in inventory by the transition broker-dealer. The Applicant asserts that compliance with condition II.B(iii) can be demonstrated by comparison with a list that was provided on the same day to other similarly situated investors with similar objectives or by comparison with the holdings in other existing investment portfolios managed in the same style.

According to the Applicant, the choice of a destination manager of an actively managed portfolio generally precedes and is separate from any decision regarding the transition broker-dealer. The Independent Fiduciary has selected the destination manager on the basis of its investment style and performance, and the Plan's asset allocation requirements. The destination manager may introduce the transition broker-dealer to the Independent Fiduciary but is not responsible for choosing the transition broker-dealer, nor for giving advice on which the Independent Fiduciary intends to rely as a primary basis for such choice. When the transition broker-dealer is selected, the Independent Fiduciary requests that the destination manager provide the list of securities to be purchased, which is the same list that the destination manager would provide to any new client with the same investment style choices, as described above. The Applicant further represents that the situation should not present an opportunity for self-dealing on the part of the transition broker-dealer or destination manager, since the destination manager would not be acting as a fiduciary with respect to the buy portfolio until after the portfolio is purchased.[8]

7. Generally, the time period for the transition program is specified in advance by the Independent Fiduciary as of a date certain, to be completed by a date certain. The Applicant represents that this time period may vary, based on the size of the portfolio, but, generally, does not exceed four business days. As a condition of the proposed exemption, all purchases and sales must be effected within two days following an Independent Fiduciary's direction to purchase or sell a given security—except that, with the approval of the Independent Fiduciary, the Applicant may extend such initial period for an additional two days.

8. The Applicant represents that the Independent Fiduciary often specifies an objective method or reference for pricing, such as the closing price, opening price, or the volume-weighted average price for the security on a particular day. In the fixed income markets, it is generally customary for an Independent Fiduciary to specify that the price be within the bid-asked spread, as of the close of the relevant market. Such benchmarks provide an Independent Fiduciary with a basis for measuring the performance of the broker-dealer and satisfying itself that the Plan obtained best execution.

The Applicant represents that it will provide the Independent Fiduciary with confirmations that include the relevant information required under Rule 10b–10 of the 1934 Act, as well as a report, within five business days after any principal transaction, which specifies the security, the date of the transaction,

[6] PTE 84–14 provides a class exemption, subject to certain conditions, for transactions between a party in interest with respect to an employee benefit plan and an investment fund (including a single customer or pooled separate account) in which the plan has an interest and which is managed by a QPAM.

[7] PTE 96–23 provides a class exemption, subject to certain conditions, for transactions between a party in interest with respect to an employee benefit plan and an investment fund (including a single customer or pooled separate account) in which the plan has an interest and which is managed by an INHAM.

[8] The Department notes, and the Applicant concurs, that no relief would be provided under the proposed exemption for any violation of section 406(b) of the Act by the destination manager or transition broker-dealer. In this regard, section 406(b) of the Act prohibits, among other things, a fiduciary for a plan from dealing with the assets of the plan in his own interest or for his own account or acting, in his individual or in any other capacity, in a transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or the interest of its participants or beneficiaries.

the quantity and price paid or received by the Plan, and the manner of execution (agency or principal). The Applicant states that such disclosure is meaningful because it can be verified against objective prices obtainable through independent pricing services available to the public.

Only Plans with total assets in excess of $100 million are covered by the proposed exemption. However, for purposes of the net assets test, where a group of Plans is maintained by a single employer or controlled group of employers, as defined in section 407(d)(7) of the Act, the $100 million net assets requirement may be met by aggregating the assets of such Plans, if the assets are pooled for investment purposes in a single master trust.

9. Finally, the Applicant notes that many Plans have expanded their investment portfolios in recent years to include foreign securities. With respect to the Foreign Affiliates covered by the proposed exemption, the Applicant represents that Rule 15a–6 of the 1934 Act provides an exemption from U.S. registration requirements for a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security (including over-the-counter equity and debt options) by a ''U.S. institutional investor'' or a ''major U.S. institutional investor,'' provided that the foreign broker-dealer, among other things, enters into these principal transactions through a U.S. registered broker or dealer intermediary.

The term ''U.S. institutional investor,'' as defined in Rule 15a–6(b)(7), includes an employee benefit plan within the meaning of the Act if:

(a) The investment decision is made by a plan fiduciary, as defined in section 3(21) of the Act, which is either a bank, savings and loan association, insurance company or registered investment adviser, or

(b) The employee benefit plan has total assets in excess of $5 million, or

(c) The employee benefit plan is a self-directed plan with investment decisions made solely by persons that are ''accredited investors,'' as defined in Rule 501(a)(1) of Regulation D of the Securities Act of 1933, as amended.

The term ''major U.S. institutional investor,'' as defined in Rule 15a–6(b)(4), includes a U.S. institutional investor that has total assets in excess of $100 million.[9] The Applicant represents that the intermediation of the U.S. registered broker or dealer imposes upon the foreign broker-dealer the requirement that the securities transaction be effected in accordance with a number of U.S. securities laws and regulations applicable to U.S. registered broker-dealers.

The Applicant represents that under Rule 15a–6, a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security by a U.S. institutional or major U.S. institutional investor in accordance with Rule 15a–6 must, among other things:

(a) Provide written consent to service of process for any civil action brought by or proceeding before the SEC or a self-regulatory organization;

(b) Provide the SEC with any information or documents within its possession, custody or control, any testimony of foreign associated persons, and any assistance in taking the evidence of other persons, wherever located, that the SEC requests and that relates to transactions effected pursuant to the Rule;

(c) Rely on the U.S. registered broker or dealer through which the principal transactions with the U.S. institutional and major U.S. institutional investors are effected, among other things, for:

(1) Effecting the transactions, other than negotiating their terms;

(2) Issuing all required confirmations and statements;

(3) As between the foreign broker-dealer and the U.S. registered broker or dealer, extending or arranging for the extension of any credit in connection with the transactions;

(4) Maintaining required books and records relating to the transactions, including those required by Rules 17a–3 (Records to be Made by Certain Exchange Members) and 17a–4 (Records to be Preserved by Certain Exchange Members, Brokers and Dealers) of the 1934 Act; [10]

(5) Receiving, delivering, and safeguarding funds and securities in connection with the transactions on behalf of the U.S. institutional investor or major U.S. institutional investor in compliance with Rule 15c3–3 (Customer Protection—Reserves and Custody of Securities) of the 1934 Act; [11] and

(6) Participating in all oral communications (*e.g.*, telephone calls) between the foreign associated person and the U.S. institutional investor, other than a major U.S. institutional investor. Under certain circumstances, the foreign associated person may have direct communications and contact with the U.S. institutional investor. (*See* April 9, 1997 No-Action Letter.)

10. Prior to any transaction, the Foreign Affiliate will enter into a written agreement with the Plan in which the Foreign Affiliate consents to the jurisdiction of the courts of the United States for any civil action or proceeding brought in respect of the subject transactions. In this regard, the Foreign Affiliate must (i) Agree to submit to the jurisdiction of the United States; (ii) agree to appoint a Process Agent for service of process in the United States; and (iii) consent to service of process on the Process Agent.

11. In summary, the Applicant represents that the proposed transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act for the following reasons:

(a) Permitting the Applicant to engage in principal transactions where its affiliate is the directed trustee of a Plan will provide Plans with additional expert broker-dealers experienced at transition services from which Plans may choose as service providers;

(b) Permitting the Applicant to engage in principal transactions, as described herein, will provide Plans with more predictable and verifiable pricing and enable transitions to occur in dealer markets in a timely and efficient manner, by transferring to the broker-dealer the risk of adverse execution;

(c) An Independent Fiduciary will give prior approval for the principal transactions and will monitor the prices received by the Plan through independent, verifiable means; and

(d) An Independent Fiduciary will ensure that securities assembled for either an Index or Model-Driven Fund or actively managed portfolio by a transition broker-dealer affiliated with the destination manager are consistent with the Plan's investment guidelines and objectives.

For Further Information Contact: Ms. Karin Weng of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

[9] The Department notes that the categories of entities that qualify as ''major U.S. institutional investors'' has been expanded by an SEC No-Action letter. *See* No-Action Letter issued to Cleary, Gottlieb, Steen & Hamilton on April 9, 1997 (the April 9, 1997 No-Action Letter).

[10] The Applicant represents that all such requirements relating to record-keeping of principal transactions would be applicable for any Foreign Affiliate in a transaction that would be covered by the proposed exemption.

[11] Under certain circumstances described in the April 9, 1997 No-Action Letter (*e.g.*, clearance and settlement transactions), there may be direct transfers of funds and securities between a Plan and a Foreign Affiliate. Please note that in such situations (as in the other situations covered by Rule 15a–6), the U.S. broker-dealer will not be acting as a principal with respect to any duties it is required to undertake pursuant to Rule 15a–6.

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed in Washington, DC, this 3rd day of February, 2003.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 03–2964 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Prohibited Transaction Exemption 2003–01; Exemption Application No. D–10995 et al.,]

Grant of Individual Exemptions; The Northern Trust Company and Affiliates

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

The Northern Trust Company and Affiliates Located in Chicago, Illinois

[Prohibited Transaction Exemption 2003–01; Application No. D–10995]

Exemption

Section I—Exemption for In-Kind Redemption of Assets

The restrictions of section 406(a) and 406(b) of ERISA and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (F) of the Code shall not apply [1] to the in-kind redemption (the Redemption) by the Northern Trust Company Thrift-Incentive Plan (the Plan) (the Applicant) of shares (the Shares) of proprietary mutual funds currently offered by, or offered in the future by, investment companies for which the Northern Trust Company (Northern) or an affiliate thereof provides investment advisory and other services (the Mutual Funds), provided that the following conditions are satisfied:

(A) The Plan pays no sales commissions, redemption fees, or other similar fees in connection with the Redemption (other than customary transfer charges paid to parties other than Northern and any affiliates of Northern (Northern Affiliates);

(B) The assets transferred to the Plan pursuant to the Redemptions consist entirely of cash and Transferable Securities. Notwithstanding the foregoing, Transferable Securities which are odd lot securities, fractional shares and accruals on such securities may be distributed in cash;

(C) With certain exceptions defined below, the Plan receives a pro rata portion of the securities of the Mutual Fund upon a Redemption that is equal in value to the number of Shares redeemed for such securities, as determined in a single valuation performed in the same manner and as of 3 p.m. Chicago time (local time for the closing of the exchanges) on the same day in accordance with Rule 2a–4 under the Investment Company Act of 1940, as amended (the 1940 Act), and the then-

[1] Section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996) generally transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975(c)(2) of the Code to the Secretary of Labor. For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

existing procedures established by the Board of Trustees of the Mutual Fund (using sources independent of Northern and Northern Affiliates);

(D) Northern, or any affiliate thereof, does not receive any fees, including any fees payable pursuant to Rule 12b–1 under the 1940 Act in connection with any redemption of the Shares;

(E) Prior to a Redemption, Northern provides in writing to an independent fiduciary, as such term is defined in Section II (an Independent Fiduciary), a full and detailed written disclosure of information regarding the Redemption;

(F) Prior to a Redemption, the Independent Fiduciary provides written authorization for such Redemption to Northern, such authorization being terminable at any time prior to the date of Redemption without penalty to the Plan, and such termination being effectuated by 3 p.m. Chicago time following the date of receipt by Northern of written or electronic notice regarding such termination (unless circumstances beyond the control of Northern delay termination for no more than one additional business day);

(G) Before authorizing a Redemption, based on the disclosures provided by the Mutual Fund to the Independent Fiduciary, the Independent Fiduciary determines that the terms of the Redemption are fair to the participants of the Plan, and comparable to and no less favorable than terms obtainable at arms-length between unaffiliated parties, and that the Redemption is in the best interest of the Plan and its participants and beneficiaries;

(H) Not later than thirty (30) business days after the completion of a Redemption, the relevant Fund will provide to the Independent Fiduciary a written confirmation regarding such Redemption containing:

(i) The number of Shares held by the Plan immediately before the Redemption (and the related per Share net asset value and the total dollar value of the Shares held);

(ii) the identity (and related aggregate dollar value) of each security provided to the Plan pursuant to the Redemption, including each security valued in accordance with Rule 2a–4 under the 1940 Act and the then-existing procedures established by the Board of Trustees of the Mutual Fund (using sources independent of Northern and Northern Affiliates);

(iii) The current market price of each security received by the Plan pursuant to the Redemption; and

(iv) The identity of each pricing service or market-maker consulted in determining the value of such securities;

(I) The value of the securities received by the Plan for each redeemed Share equals the net asset value of such Share at the time of the transaction, and such value equals the value that would have been received by any other investor for shares of the same class of the Mutual Fund at that time;

(J) Subsequent to a Redemption, the Independent Fiduciary performs a post-transaction review which will include, among other things, testing a sampling of material aspects of the Redemption deemed in its judgment to be representative, including pricing;

(K) Each of the Plan's dealings with: the Mutual Funds, the investment advisors to the Mutual Funds (the Investment Advisers), the principal underwriter for the Mutual Funds, or any affiliated person thereof, are on a basis no less favorable to the Plan than dealings between the Mutual Funds and other shareholders holding shares of the same class as the Shares;

(L) Northern will maintain, or cause to be maintained, for a period of six years from the date of any covered transaction such records as are necessary to enable the persons described in paragraph (M) below to determine whether the conditions of this exemption have been met, except that (i) this record-keeping condition shall not be violated if, due to circumstances beyond the control of Northern, the records are lost or destroyed prior to the end of the six year period, (ii) no party in interest with respect to the Plan other than Northern shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if such records are not maintained or are not available for examination as required by paragraph (M) below;

(M)(1) Except as provided in subparagraph (2) of this paragraph (M), and notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (L) above are unconditionally available at their customary locations for examination during normal business hours by (i) any duly authorized employee or representative of the Department of Labor, the Internal Revenue Service, or the Securities and Exchange Commission, (ii) any fiduciary of the Plan or any duly authorized representative of such fiduciary, (iii) any participant, beneficiary, or union employee covered by the Plan or duly authorized representative of such participant, beneficiary, or union employee, (iv) any employer whose employees are covered by Plan and any employee organization whose members are covered by such Plan.

(2) None of the persons described in paragraphs (M)(1)(ii), (iii) and (iv) shall be authorized to examine trade secrets of Northern or the Mutual Funds, or commercial or financial information which is privileged or confidential; and

(3) Should Northern or the Mutual Funds refuse to disclose information on the basis that such information is exempt from disclosure pursuant to paragraph (2) above, Northern shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

Section II—Definitions

For purposes of this exemption—

(A) The term ''affiliate'' means:

(1) Any person (including corporation or partnership) directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(B) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(C) The term ''net asset value'' means the amount for purposes of pricing all purchases and sales calculated by dividing the value of all securities, determined by a method as set forth in the Mutual Fund's prospectus and statement of additional information, and other assets belonging to the Mutual Fund, less the liabilities charged to each such Mutual Fund, by the number of outstanding shares.

(D) The term ''Independent Fiduciary'' means a fiduciary who is: (i) independent of and unrelated to Northern and its affiliates, and (ii) appointed to act on behalf of the Plan with respect to the in-kind transfer of assets from one or more Mutual Funds to or for the benefit of the Plan. For purposes of this exemption, a fiduciary will not be deemed to be independent of and unrelated to Northern if: (i) Such fiduciary directly or indirectly controls, is controlled by or is under common control with Northern, (ii) such fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this exemption; except that an independent fiduciary

may receive compensation from Northern in connection with the transactions contemplated herein if the amount or payment of such compensation is not contingent upon or in any way affected by the independent fiduciary's ultimate decision, and (iii) more than 2 percent (2%) of such fiduciary's gross income, for federal income tax purposes, in its prior tax year, will be paid by Northern and its affiliates in the fiduciary's current tax year.

(E) The term ''Transferable Securities'' shall mean securities (1) for which market quotations are readily available (as determined under Rule 2a–4 of the 1940 Act) and (2) which are not: (i) Securities which, if distributed, would require registration under the 1933 Act; (ii) securities issued by entities in countries which (a) restrict or prohibit the holding of securities by non-nationals other than through qualified investment vehicles, such as the Mutual Funds, or (b) permit transfers of ownership of securities to be effected only by transactions conducted on a local stock exchange; (iii) certain portfolio positions (such as forward foreign currency contracts, futures and options contracts, swap transactions, certificates of deposit and repurchase agreements) that, although they may be liquid and marketable, involve the assumption of contractual obligations, require special trading facilities or can only be traded with the counter-party to the transaction to effect a change in beneficial ownership; (iv) cash equivalents (such as certificates of deposit, commercial paper and repurchase agreements) which are not readily distributable; (v) other assets which are not readily distributable (including receivables and prepaid expenses), net of all liabilities (including accounts payable); and (vi) securities subject to ''stop transfer'' instructions or similar contractual restrictions on transfer.

(F) The term ''relative'' means a ''relative'' as that term is defined in section 3(15) of ERISA (or a ''member of the family'' as that term is defined in section 4975(e)(6) of the Code), or a brother, sister, or a spouse of a brother or a sister.

Effective Date: The exemption is effective as of the date this notice of final exemption is published in the **Federal Register**.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on November 18, 2002, at 67 FR 69560.

For Further Information Contact: Ms. Andrea W. Selvaggio of the Department, telephone (202) 694–8540. (This is not a toll-free number).

Brightpoint, Inc. (Brightpoint) Located in Indianapolis, Indiana

[Prohibited Transaction Exemption 2003–02; Exemption Application No. D–10999]

Exemption

The restrictions of sections 406(a) and 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply, effective June 5, 2001, to: (1) The payment (the Payment) by Brightpoint of $108,738.85 (the Assessment Amount) to the Millennium Trust Company LLC (Millennium) on behalf of the Brightpoint, Inc. 401(k) Plan (the Plan) for the purpose of satisfying a court-ordered assessment against the assets of the Plan (the Assessment) that arose in connection with the $68,100,000.00 deficiency (the Deficiency) incurred by the Independent Trust Corporation (Intrust); and (2) the transfer by the Plan to Brightpoint (the Repayment) of certain assets recovered by PricewaterhouseCoopers LLP (the Receiver) in connection with the Deficiency, if the following conditions are met:

(A) In the event the Plan receives an amount of assets from the Receiver (a Recovery Amount) that is greater than the Assessment Amount, the Plan will not be required to pay Brightpoint that portion of the Recovery Amount that is in excess of the Assessment Amount;

(B) In the event the Plan receives a Recovery Amount that is less than the Assessment Amount, the Plan will not be required to pay Brightpoint the difference between the Assessment Amount and the Recovery Amount;

(C) The Plan will not pay any of the costs and/or fees associated with the Payment and the Repayment;

(D) The Deficiency did not arise in connection with any improper act undertaken by a Plan fiduciary (other than Intrust or its principals); and

(E) Upon notification of the Intrust losses, the Brightpoint Plan fiduciaries undertook, and will continue to undertake, any actions necessary to ensure that the assets of the Plan were, and are, adequately protected.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published in the **Federal Register** on October 8, 2002 (67 FR 62822).

For Further Information Contact: Christopher Motta of the Department, telephone (202) 693–8544. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed in Washington, DC this 3rd day of February, 2003.

Ivan Strasfeld,

Director of Exemption Determination, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 03–2963 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11122]

Notice of Proposed Individual Exemption To Replace Prohibited Transaction Exemption 97–63 (PTE 97–63) Involving State Street Bank and Trust Company (State Street) Located in Boston, MA

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Notice of proposed individual exemption to replace PTE 97–63.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed individual exemption which, if granted, would replace PTE 97–63 (62 FR 66689, December 19, 1997). The exemption, as proposed, would permit securities lending transactions between State Street, its United States (U.S.) domiciled affiliates, and certain employee benefit plans (the Client Plan(s)), including commingled investment funds holding plan assets, for which State Street, through any division or U.S. affiliate of State Street or of its parent acts as securities lending agent (or sub-agent). The exemption, as proposed, would also permit receipt of compensation by an U.S. registered introducing broker affiliated with State Street (the Introducing Broker) in connection with an arrangement whereby securities are lent to an unrelated U.S. registered broker-dealer (the Clearing Broker) who in turn lends such securities to clients of the Introducing Broker; provided that certain conditions are satisfied.

In addition, State Street has requested that this exemption incorporate various modifications to specific terms and conditions of PTE 97–63. The replacement of PTE 97–63 will affect the participants and beneficiaries of the Client Plans participating in securities lending transactions and the fiduciaries with respect to such Client Plans.

EFFECTIVE DATE: If granted, the exemption will be effective as of the date this notice of proposed exemption (the notice) is published in the **Federal Register**.

DATES: Written comments and requests for a public hearing should be received by the Department on or before 45 days from the date of the publication in the **Federal Register** of this notice.

ADDRESSES: All written comments and requests for a public hearing (preferably, three copies) should be sent to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Application No. D–11122. The application pertaining to this notice and the comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Welfare Benefits Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena C. Le Blanc, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, telephone number (202) 693–8540. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Notice is hereby given of the pendency before the Department of a proposed exemption that would replace PTE 97–63. The proposed exemption has been requested in an application filed on behalf of State Street and its U.S. affiliates (the Applicants), pursuant to section 408(a) of the Employee Retirement Income Security Act of 1974 (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1, 1995) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Accordingly, this proposed exemption is issued solely by the Department.

PTE 97–63 provides an exemption from certain prohibited transaction restrictions of section 406 of the Act and from the sanctions resulting from the application of section 4975 of the Code, as amended, by reason of section 4975(c)(1) of the Code. Specifically, PTE 97–63 provides relief from the restrictions of sections 406(a)(1)(A) through (D), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, for:

(1) The lending of securities to State Street, acting through its Financial Markets Group (FMG) (formerly the Money Market Division of the Capital Markets Area) or acting through any other division or U.S. affiliate of State Street that is a successor to the activities of FMG; and for the lending of securities to any U.S. registered broker-dealer affiliated with State Street (the Affiliated Broker Dealer(s)) [1] by certain Client Plans (the Client Plans or the Client Plan), including commingled investment funds holding plan assets, for which State Street, through its Master Trust Services Division, acts as directed trustee or custodian, and for which State Street, through its Global Securities Lending Division or any other similar division of State Street or U.S. affiliate of State Street or of its parent (collectively, GSL) acts as securities lending agent (or sub-agent), and (2) the receipt of compensation by GSL in connection with such securities lending transactions; provided that certain conditions are satisfied.

The Applicants have confirmed that the representations, as set forth in paragraphs 18, 19, 20, 21, 22, and 23 of the summary of facts and representations of the notice of proposed exemption relating to PTE 97–63 (62 FR 51684, at 51686, October 2, 1997) continue to accurately describe the material terms of the transactions to be consummated, pursuant to this proposed exemption, except that (i) the factual statements contained in the second and third sentences of paragraph 21 related to market conditions at the time, may not be accurate currently and should be deleted, and (ii) the provisions of paragraph 22 that contemplate that an affirmative approval or consent will be given by the Client Plan will be overridden by the negative consent procedure contained in conditions (p) and (q) of this proposed exemption to the extent that the requirements thereof have been satisfied. Accordingly, the Department, hereby, incorporates by reference such representations (as adjusted by the preceding sentence) into the preamble of this proposed exemption.

The proposed exemption would replace PTE 97–63 and expand the relief beyond that already provided, pursuant to PTE 97–63. In this regard, it is represented that one of State Street's Affiliated Broker Dealers proposes to act as a ''prime broker'' with respect to certain of its clients, including hedge fund clients (the Prime Brokerage Client(s)). As a prime broker, the Affiliated Broker Dealer will provide a wide range of services to its Prime Brokerage Clients, including daily trade reporting, trade break resolution, consolidated position and profit and loss reporting, custodial services, risk analytics, and performance reporting.

Because these Prime Brokerage Clients frequently engage in short sales of securities (*i.e.*, the sale of securities that are not owned by the seller), such

[1] FMG, any division or U.S. affiliate of State Street that becomes a successor to the activities of FMG, and U.S. registered broker-dealers affiliated with State Street (the Affiliated Broker Dealer(s)) are collectively referred to, herein, as the ''SSB Group.''

clients are often required to borrow the securities needed to engage in such short selling activity. Accordingly, one of the services that the Prime Brokerage Clients seek is the ability to borrow the required securities from their prime broker. This, in turn, frequently causes the prime broker to borrow the required securities on the institutional securities lending market from lenders such as the Client Plans. It is represented that a significant component of the institutional securities lending market consists of the lending of securities to broker-dealers who require such securities in order to meet the short selling needs of their prime brokerage clients.

As noted above, one of State Street's Affiliated Broker Dealers proposes to provide prime brokerage services to its Prime Brokerage Clients. Eventually, this Affiliated Broker Dealer intends to self-clear all of the securities transactions (including the securities borrowing and lending transactions) required of a prime broker. It is represented that, at that time, the Affiliated Broker Dealer anticipates that it will borrow the required securities on the institutional lending market, including borrowing such securities from the Client Plans, pursuant to PTE 97–63.[2]

It is represented that the Affiliated Broker Dealer will not initially have all of the administrative and back-office capability required to perform such self-clearing functions. As a result, until these functions and capabilities are developed, the Affiliated Broker Dealer will limit its role to acting as Introducing Broker for its Prime Brokerage Clients and will utilize a Clearing Broker to actually borrow securities to meet the Prime Brokerage Clients' short selling needs. It is represented that the Clearing Broker will be well-known within the industry as providing complete clearing services for introducing broker-dealers. It is further represented that the provision of such clearing services will be a core focus of such Clearing Broker's business.

It is represented that the Introducing Broker will select the Clearing Broker based on all of the relevant facts and circumstances, including such factors as the Clearing Broker's: (1) Financial stability; (2) ability to execute effectively the trading activities of the Prime Brokerage Clients; (3) ability to meet such clients' needs for financing of margin transactions; (4) ability to meet such clients' needs to borrow securities to implement short selling strategies; (5) internal systems and controls; (6) reporting capabilities; and (7) credibility within the industry. It is represented that the Clearing Broker will be registered as a broker-dealer under the Security Exchange Act of 1934 and will satisfy all of the Securities Exchange Commission and NASD requirements for clearing brokers. In addition, the Clearing Broker will be required to have net capital at least equal to $10 million.

As indicated above, it is anticipated that the Clearing Broker will frequently borrow securities to meet the Prime Brokerage Clients' short selling needs. To the extent that it is necessary for the Clearing Broker to borrow securities for this purpose, the Clearing Broker will act as a principal in borrowing the requisite securities from institutional lenders, such as the Client Plans. In this regard, the Applicants have requested relief that encompasses securities lending transactions, as described in PTE 97–63, and also encompasses securities lending transactions between the Client Plans and the Clearing Broker, in situations where an Affiliated Broker Dealer is acting as the Introducing Broker for the Clearing Broker, provided that certain conditions are satisfied.[3]

The Applicants have also requested relief for receipt of compensation by the Introducing Broker in connection with an arrangement with the Clearing Broker. In this regard, it is anticipated that the Introducing Broker will receive consideration from the Clearing Broker based upon the revenue generated by the Clearing Broker through its use of the securities borrowed from the Client Plans. The Applicants have provided the following example of how the cash flow would operate in the context of the interim transition period when both the Clearing Broker and the Introducing Broker are involved in a securities lending transaction covered by this exemption.

Example: Assume one of the Introducing Broker's Prime Brokerage Clients desires to borrow a particular security in order to consummate a short sale. The Prime Brokerage Client contacts the Introducing Broker who, as agent for the Prime Brokerage Client, contacts the Clearing Broker. The Clearing Broker can satisfy the request (*i.e.*, lend the required securities) using: (A) Securities that the Clearing Broker already holds in its own inventory, (B) securities that the Clearing Broker borrows from GSL (*i.e.*, from the Client Plans) pursuant to its securities loan agreement with GSL, or (C) securities that the Clearing Broker borrows from some other securities lender.

Further, assume that the Clearing Broker elects to borrow the securities from GSL, pursuant to this proposed exemption, and that the loan is collateralized with cash. Under the applicable securities loan agreement, GSL will invest the cash collateral and will agree to pay the Clearing Broker a specified rate (the rebate rate) throughout the term of the loan. In turn, the Clearing Broker will loan the securities that it has just borrowed from GSL to the Introducing Broker's Prime Brokerage Client, will receive cash collateral from the Prime Brokerage Client, and will agree to pay the Introducing Broker, as agent for its Prime Brokerage Client, a rebate rate (typically lower than the rebate rate that the Clearing Broker will receive from GSL) with respect to the cash collateral throughout the term of the loan. The Introducing Broker will pay a portion of this rebate rate to its Prime Brokerage Client, retaining the difference as its compensation for serving as the Introducing Broker.

Utilizing hypothetical numbers for illustrative purposes, GSL might agree to pay the Clearing Broker a rebate rate of 200 basis points while the Clearing Broker in turn might pay the Introducing Broker, as agent for its Prime Brokerage Client, a rebate rate of 185 basis points of which the Introducing Broker might retain 5 basis points. Accordingly, if one assumes that GSL earns 250 basis points by investing the cash collateral during the term of the loan, GSL will pay 200 basis points to the Clearing Broker (leaving 50 basis points as the securities lending income to be split between the Client Plan and GSL). The Clearing Broker will, in turn, pay 185 basis points to the Introducing Broker, as agent for its Prime Brokerage Client, with 15 basis points remaining with the Clearing Broker as its compensation. Finally, the Introducing Broker will pay 180 basis points to its Prime Brokerage Client, with 5 basis points remaining with the Introducing Broker as its compensation.

The Applicants believe that the receipt of consideration by the

[2] The Department notes that the proposed exemption, if granted, will replace PTE 97–63. Accordingly, the Applicants must comply with the terms and conditions of this exemption, if granted, in order to obtain relief for securities lending transactions between Client Plans and an Affiliated Broker Dealer, acting as a prime broker for the Prime Brokerage Clients.

[3] The Department, herein, is not providing relief for securities lending transactions engaged in by the Clearing Broker, beyond that available, pursuant to Prohibited Transaction Exemption 81–6 (PTE 81–6) (46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987) and Prohibited Transaction Exemption 82–63 (PTE 82–63) (47 FR 14804, April 6, 1982); provided the condition of these class exemptions are satisfied.

Introducing Broker from the Clearing Broker could be deemed a prohibited transaction. In this regard, the decision by GSL, acting as a fiduciary of a Client Plan, to lend such securities to the Clearing Broker could be deemed to violate section 406(b) of the Act. Accordingly, the Applicants have requested relief from section 406(a), 406(b)(1), 406(b)(2), and 406(b)(3) of the Act and section 4975(c)(1)(A) through (F) of the Code for the receipt of such compensation paid to the Introducing Broker by the Clearing Broker; provided that certain conditions are satisfied.

The Applicants have also requested that the underlined phrase, below, from the opening paragraph of PTE 97–63, be deleted from the proposed exemption:

The restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the lending of securities to State Street Bank and Trust Company (State Street), acting through its Financial Markets Group (FMG) (formerly the Money Market Division of the Capital Markets Area) or acting through any other division or U.S. affiliate of State Street that is a successor to the activities of FMG; and shall not apply to the lending of securities to any U.S. registered broker-dealers affiliated with State Street (the Affiliated Broker Dealers) by employee benefit plans (the Client Plans or the Client Plan), including commingled investment funds holding plan assets *for which State Street, through its Master Trust Services Division (the Trust Division) acts as directed trustee or custodian, and* for which State Street, through its Global Securities Lending Division or any other similar division of State Street or U.S. affiliate of State Street or of its parent (collectively, GSL) acts as securities lending agent (or sub-agent); and shall not apply to the receipt of compensation by GSL in connection with the transactions, provided that the following conditions are met.

In this regard, the Applicants have informed the Department that State Street, in most cases, will be either the trustee or the custodian of the Client Plans. However, on occasion GSL may be retained as a securities lending agent by a Client Plan as to which State Street is neither the trustee nor the custodian. The Applicants do not believe that there is any reason to deprive such Client Plans of the opportunity to participate in securities lending transactions for which GSL acts as agent (or sub-agent). Further, the Applicants do not believe that there is any reason to impose the incremental administrative burdens on GSL that would be entailed, if such Client Plans were treated differently from all other securities lending clients in this regard. Accordingly, the Applicants request that the specified phrase in PTE 97–63 not be included in the language of the proposed exemption in order to provide the flexibility needed to enable a non-trustee, non-custodial Client Plan to lend securities.

In connection with the expansion of PTE 97–63, the Applicants have requested relief which would permit securities lending by certain index funds (the Index Fund(s)) or model-driven funds (the Model-Driven Fund(s)) managed by State Street or one of its divisions or U.S. affiliates. Specifically, the Applicants request that the Department modify Condition (a) of PTE 97–63. In this regard, Condition (a) of PTE 97–63 precludes the lending of securities to the SSB Group, if State Street or any of its divisions or affiliates has or exercises discretionary authority or renders investment advice with respect to the assets being lent. The Applicants have acknowledged that section II(a) in this proposed exemption precludes the lending of securities to either the SSB Group or the Clearing Broker, if State Street, the Clearing Broker, or any affiliate of State Street or the Clearing Broker has discretionary authority or renders investment advice with respect to such securities.

However, the Applicants note that the management of Index Funds and Model-Driven Funds entails a very limited degree of discretionary authority. As a result, the Applicants maintain that the potential for the abuse which Condition (a), as set forth in PTE 97–63, was designed to protect against (*i.e.*, that the investment decisions relating to a portfolio will be influenced by the possibility that the securities in such portfolio will be available for loan to an affiliated borrower) is not present in the context of Index Funds and Model-Driven Funds. Accordingly, the Applicants have requested that the language of section II(a) of this proposed exemption permit the lending of securities by an Index Fund or a Model-Driven Fund, managed by State Street or one of its divisions or U.S. affiliates, to members of the SSB Group or to the Clearing Broker. In this regard, the Applicants submit that it would be in the interest of such Index Funds and Model-Driven Funds to allow such funds to lend securities, as this would increase the securities lending opportunities available to such funds and enable such funds to generate additional securities lending revenue.

In addition, the Applicants request that the proposed exemption incorporate various modifications to specific terms and conditions, as set forth in PTE 97–63, including the following:

1. Modification of the language of Condition (f), as set forth in PTE 97–63, such that any reference to PTE 81–6 and PTE 82–63 also refer to such class exemptions as they may be amended from time to time or, alternatively, refer to any superseding class exemption that may be issued to cover securities lending by employee benefit plans. The Applicants maintain that the request is consistent with the Department's approach taken in Condition (d) of PTE 97–63 with respect to eligible collateral for securities loans.

2. Modification of the language in Condition (g), as set forth in PTE 97–63, to clarify that State Street is not required to indemnify the Client Plans against any potential investment losses associated with the investment of cash collateral received by such Client Plan in connection with securities lending transactions. The Applicants maintain that the request incorporates language previously provided by the Department in an interpretive letter relating to PTE 97–63.[4]

3. Change in the language of Condition (j), as set forth in PTE 97–63, to modify the plan size requirement in a context of master trusts and collective investment funds. In this regard, Condition (j), as set forth in PTE 97–63, provides that only Client Plans with total assets having an aggregate market value of at least $50 million are permitted to lend securities to the SSB Group. The Applicants note that in recent years the Department, in various class exemptions and individual exemptions, has recognized that the plan size requirement should be adjusted in the case of two or more Client Plans whose assets are commingled for investment purposes in a master trust or collective fund, provided certain conditions are satisfied. Accordingly, the Applicants request that the language in section II(j) of this proposed exemption address master trusts and collective funds in a comparable manner. It is represented that the specific language suggested by the Applicants for this purpose is substantially similar to that found in Prohibited Transaction Exemption 2002–45 (PTE 2002–45) granted to Deutsche Bank AG, as amended.[5]

(4) Modification of the language of Condition (l), as set forth in PTE 97–63, to require quarterly, rather than

[4] Letter from Ivan L. Strasfeld, Director, Office of Exemption Determinations, U.S. Department of Labor, to William A. Schmidt, Esq. and Eric Berger, Esq. (February 27, 2001) (C–9199).

[5] PTE 2002–45; granted (67 FR 59564, September 23, 2002, as corrected, 67 FR 69046, November 14, 2002); proposed (67 FR 9070, February 27, 2002); application no. D–10924.

monthly, reporting. The Applicants maintain that this request is consistent with the approach approved by the Department in PTE 2002–45, and would make the provision of such reports to all Client Plans more administratively feasible.

The Applicants also request the addition of the following conditions to the requirements of this proposed exemption:

(1) A new section II(p) which would permit certain authorizations and approvals required or contemplated by this proposed exemption to be obtained by a negative consent procedure, provided that an initial affirmative authorization and approval was obtained from an independent fiduciary of each Client Plan. In this regard, the Applicants maintain that a requirement that affirmative approval be obtained from the independent fiduciary of each Client Plan for each change in the securities lending program imposes unnecessary administrative burdens. In the opinion of the Applicants, it is appropriate for such subsequent authorizations and approvals to be obtained by means of a procedure whereby each independent fiduciary of a Client Plan receives full disclosure of all of the required information and has a reasonable opportunity to object. Failure by an independent fiduciary to object within a prescribed time period would be deemed to constitute authorization and approval; and

(2) A new section II(q) which would set forth special authorization and approval rules in the context of certain commingled Index Funds and commingled Model-Driven Funds in which Client Plans invest and for which State Street or a U.S. affiliate serves as a trustee, custodian, and/or manager (collectively, the Commingled Index Fund(s) and the Commingled Model-Driven Funds(s)). It is represented that these special rules are appropriate in order to avoid the type of administrative burden and disruption that could result from including a requirement that an independent fiduciary of each Client Plan that participates in a Commingled Index Fund or Commingled Model-Driven Fund must give affirmative authorization or approval before a securities lending program (or a change in such program) can be implemented with respect to such fund.

Further, the Applicants have requested a special rule applicable to any employee benefit plans maintained by State Street (or a U.S. affiliate) for its own employees (the State Street Plan(s)) that participate in a Commingled Index Fund or a Commingled Model-Driven Fund. In this regard, the Applicants have requested that in the case of a State Street Plan that has invested in a Commingled Index Fund or Commingled Model-Driven Fund, the requirement that the fiduciary be independent shall not apply; provided that at all times the holdings of all State Street Plans invested in such fund in the aggregate comprise less than 10% of the assets of such fund.

In addition, the Applicants have suggested a number of definitions for terms utilized in this proposed exemption. These definitions are set forth in section III of this proposed exemption.

Finally, the Department has determined to include the following conditions to this proposed exemption which provide additional safeguards for the Client Plans:

(1) A new section II(s) and a new section II(t) concerning the requirement that the Applicants establish and maintain certain records for a period of six years; and

(2) A new section II(o) which would require that at least 50% of the dollar value of all securities lending transactions negotiated by GSL be negotiated with borrowers unrelated to both State Street and the Clearing Broker. The language of section II(o), as set forth in this proposed exemption, tracks the language that was included in the Summary of Facts and Representations relating to PTE 97–63 (62 FR 51684, at 51686, October 2, 1997), but which did not appear in the operative language or conditions of PTE 97–63.

It is represented that the proposed exemption would be administratively feasible, because it involves identifiable transactions which will require minimal on-going monitoring by the Department. Specifically, it is represented that any loans of securities made pursuant to this proposed exemption are clearly identifiable and do not raise any issues from the perspective of administrative feasibility that are any different from the issues raised by PTE 97–63. Further, the Applicants maintain that the requested exemption incorporates approaches and concepts that the Department has utilized in other comparable contexts and has determined to be administratively feasible in those contexts.

It is represented that the proposed exemption is in the interest of affected Client Plans, because the ability to lend securities to the Clearing Broker in situations where the Affiliated Broker Dealer is acting as the Introducing Broker will enable the Client Plans to have access to the additional securities lending opportunities generated by the prime brokerage business of the Introducing Broker. Such additional securities lending opportunities will, in turn, enable the Client Plans to generate additional securities lending revenue.

The proposed exemption is protective of the Client Plans, because it provides all of the same protections for the Client Plans as does PTE 97–63, including, without limitation, the collateral requirement contained in Condition (d) of PTE 97–63 and the indemnity requirement imposed by Condition (g) of PTE 97–63.

In summary, the Applicants represent that the proposed replacement of PTE 97–63 satisfies the statutory criteria for an exemption under section 408(a) of the Act for the following reasons:

a. The proposed exemption will be as administratively feasible as PTE 97–63 and will provide all of the same benefits and protections as PTE 97–63;

b. To the extent that securities are lent to the Clearing Broker, the Client Plans will be able to look to the creditworthiness of both the Clearing Broker (as the borrower, pursuant to the terms of the securities loan agreement) and the SSB Group (as indemnitor, pursuant to section II(g) of this proposed exemption);

c. The proposed exemption will benefit Client Plans in that it will enable them to take advantage of additional securities lending opportunities that will be generated by the prime brokerage business of the Affiliated Broker Dealer during any period that the such broker-dealer acts only as an Introducing Broker which, in turn, will permit the Client Plans to generate incremental securities lending revenue; and

d. For each Client Plan, neither the SSB Group, the Clearing Broker, nor any affiliate of the SSB Group or the Clearing Broker will have or exercise discretionary investment authority or control with respect to the investment of the assets of such Client Plan involved in the transaction or render investment advice with respect to such assets, including a Client Plan's acquisition or disposition of securities available for loan, except to the extent that State Street or a division or affiliate of State Street exercises discretionary authority or control or renders investment advice in connection with an Index Fund or Model-Driven Fund in which Client Plans invest.

Notice to Interested Persons

Notification of the publication of the notice in the **Federal Register** will be mailed by first class mail to sponsors of the Client Plans who participate in securities lending transactions, as

described herein. Such notification will be given within 15 days of the publication of the notice in the **Federal Register**. The notification will contain a copy of the notice, as published in the **Federal Register**, and a copy of the supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2). The supplemental statement will inform interested persons of their right to comment on and/or to request a hearing with respect to the pending exemption. Written comments and hearing requests are due within 45 days of the publication of the notice in the **Federal Register**.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which require, among other things, a fiduciary to discharge his or her duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirements of section 401(a) of the Code that the plan operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption can be granted under section 408(a) of the Act and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interest of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) This proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory or administrative exemptions. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) This proposed exemption, if granted, is subject to the express condition that the summary of facts and representations, as set forth in this notice, and the summary of facts and representations, as set forth in the notice of proposed exemption relating to PTE 97–63, accurately describe the material terms of the transactions to be consummated pursuant to this exemption.

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemption to the address above, within the time frame set forth above, after the publication of this proposed exemption in the **Federal Register**. All comments will be made a part of the record. Comments received will be available for public inspection with the referenced application at the address set forth above.

Proposed Exemption

Based on the facts and representations set forth in the application, under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990), the Department of Labor (the Department) proposes to replace Prohibited Transaction Exemption 97–63 (PTE 97–63), as set forth below.

I. Transactions

(a) The restrictions of sections 406(a)(1)(A) through (D), 406(b)(1), and 406(b)(2) of the Employee Retirement Income Security Act of 1974 (the Act) and the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1986 (the Code), by reason of 4975(c)(1)(A) through (E) of the Internal Revenue Code of 1986 (the Code),[6] shall not apply to the lending of securities:

(1) To State Street Bank and Trust Company (State Street), acting through its Financial Markets Group (FMG) (formerly the Money Market Division of the Capital Markets Area) or acting through any other division or United States (U.S.) domiciled affiliate, as defined in this exemption in section III(a)(1), below, of State Street that is a successor to the activities of FMG; or

(2) To any U.S. registered broker-dealers affiliated with State Street (the Affiliated Broker Dealer(s));[7] by an employee benefit plan (the Client Plan(s)), including any commingled investment fund holding plan assets, for which State Street, through its Global Securities Lending Division or any other similar division of State Street or U.S. affiliate of State Street or of its parent (collectively, GSL) acts as securities lending agent (or sub-agent);[8]

(b) The restrictions of sections 406(a)(1)(A) through (D), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section of 4975 of the Code, by reason of 4975(c)(1)(A) through (E) of the Code, shall not apply to the receipt of compensation by GSL in connection with any securities lending transaction, as described, above, in section I(a) of this exemption; and

(c) The restrictions of section 406 of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of 4975(c)(1) of the Code shall not apply to an arrangement whereby a U.S. registered broker-dealer affiliated with State Street (the Introducing Broker) receives compensation from the Clearing Broker in connection with, or as a direct or indirect result of, the lending of securities to the Clearing Broker by an employee benefit plan for which GSL acts as securities lending agent; provided that the conditions, set forth in section II, below, are satisfied.

II. Conditions

Section I of this exemption applies only if the conditions of section II of this exemption are satisfied.

(a) Neither State Street, the SSB Group, GSL, the Clearing Broker, nor any other division or U.S. affiliate of State Street or of the Clearing Broker has or exercises discretionary authority or control with respect to the investment of the assets of Client Plans involved in the transactions which are the subject of this exemption (other than with respect to the investment of cash collateral after securities have been loaned and collateral received), nor renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to such assets, including decisions concerning the acquisition or disposition of securities available for loan by a Client Plan.

Section II(a) of this exemption will be deemed satisfied notwithstanding the fact that State Street or any division or

[6] For purposes of this exemption, references to specific provisions of title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

[7] FMG, any division or U.S. affiliate of State Street that becomes a successor to the activities of FMG, and the Affiliated Broker Dealers are collectively referred to, herein, as ''the SSB Group.''

[8] For the sake of simplicity, future references to GSL's performance of services as securities lending agent should be deemed to include its parallel performance as securities lending sub-agent, and references to Client Plans should be deemed to refer to plans for which GSL is acting as sub-agent with respect to securities lending activities, unless otherwise indicated specifically or by the context of reference.

affiliate of State Street has or exercises discretionary authority or control or renders investment advice in connection with an index fund (the Index Fund(s)), as defined, below, in section III(d) of this exemption, or a model-driven fund (the Model-Driven Fund(s)), as defined, below, in section III(e) of this exemption, managed by State Street or any division or U.S. affiliate of State Street in which Client Plans invest. An Index Fund or a Model-Driven Fund with multiple Client Plan investors is referred to herein as a commingled Index Fund or a commingled Model-Driven Fund (the Commingled Index Fund(s) or the Commingled Model-Driven Fund(s));

(b) Except as otherwise provided, below, in section II(q) of this exemption with respect to Commingled Index Funds or Commingled Model-Driven Funds, before a Client Plan participates in a securities lending program, and before any loan of securities to the SSB Group or the Clearing Broker is effected, pursuant to this exemption, the fiduciary of the plan who is independent of State Street, GSL, the SSB Group, the Clearing Broker, and any other division or affiliate of State Street or the Clearing Broker must have:

(1) Authorized and approved the securities lending authorization agreement with GSL (the Agency Agreement), where GSL is acting as the direct securities lending agent; or

(2) Authorized and approved the primary securities lending authorization agreement (the Primary Lending Agreement) with the primary lending agent, where GSL is lending securities under a sub-agency arrangement with the primary lending agent;[9] and

(3) Approved the general terms of the securities loan agreement (the Loan Agreement) between the plan and the SSB Group or the Clearing Broker, as applicable, the specific terms of which are negotiated and entered into by GSL;

(c)(1) Each Client Plan may terminate the Agency Agreement or the Primary Lending Agreement at any time, without penalty to such Client Plan, on five business days notice, whereupon the borrower shall deliver certificates for securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities) to the Client Plan within: (A) The customary delivery period for such securities, (B) five business days, or (C) the time negotiated for such delivery by the Client Plan and the borrower, whichever is lesser. With respect to a Commingled Index Fund or a Commingled Model-Driven Fund in which a Client Plan invests, termination is pursuant to the procedure, as set forth, below, in section II(q) of this exemption;

(2) If any event of default occurs (*e.g.*, a loan is terminated and the borrower fails to return the borrowed securities or the equivalent thereof within the time described, above, in section II(c)(1) of this exemption), to the extent that (A) liquidation of the pledged collateral, or (B) additional cash received from the SSB Group or the Clearing Broker, as applicable, does not provide sufficient funds on a timely basis, a Client Plan, including a Commingled Index Fund or a Commingled Model-Driven Fund in which a Client Plan invests, will have the right under the terms of the Loan Agreement to purchase securities identical to the borrowed securities (or their equivalent as discussed above) and may apply the collateral to the payment of the purchase price, any other obligations of the borrower under the agreement, and any expenses associated with the sale and/or purchase. If the collateral is insufficient to accomplish such purchase, State Street will indemnify the Client Plan, including a Client Plan invested in a Commingled Index Fund or Commingled Model-Driven Fund, pursuant to section II(g) of this exemption;

(d) Each Client Plan or Commingled Index Fund or Commingled Model-Driven Fund in which a Client Plan invests will receive from the SSB Group or the Clearing Broker, as applicable, (either by physical delivery, or by book entry in a securities depository, wire transfer or similar means) by the close of business on or before the day the loaned securities are delivered to the SSB Group or the Clearing Broker, as applicable, collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, an irrevocable bank letter of credit issued by a person other than State Street, the Clearing Broker, or an affiliate thereof, or any combination thereof, or other collateral permitted under PTE 81–6 (as amended from time to time or, alternatively, any superseding class exemption that may be issued to cover securities lending by employee benefit plans). The collateral will be held on behalf of a Client Plan in a manner that causes such collateral to be (i) segregated from and not commingled with the general assets of State Street, the Clearing Broker, or any of their affiliates, and (ii) identifiable and reachable by such Client Plan;

(e) The market value of the collateral (or in the case of a letter of credit the stated amount) must, as of the close of business on the preceding business day, initially equal at least 102 percent (102%) of the market value of the loaned securities. If the market value of the collateral, on the close of trading on a business day, is less than 100 percent (100%) (or such greater percentage as agreed to by the parties) of the market value of the loaned securities at the close of business on that day, the SSB Group or the Clearing Broker, as applicable, is required to deliver by the close of business on the following day sufficient additional collateral such that the market value of the collateral will again equal at least 102 percent (102%). The applicable Loan Agreement will give Client Plans or a Commingled Index Fund or Commingled Model-Driven Funds in which a Client Plan invests a continuing security interest in, title to, or the rights of a secured creditor with respect to the collateral and a lien on the collateral. GSL will monitor the level of the collateral daily;

(f) All GSL's procedures regarding securities lending activities will at a minimum conform to PTE 81–6 and PTE 82–63 (as amended from time to time or, alternatively, any superseding class exemption that may be issued to cover securities lending by employee benefit plans);

(g) State Street will agree to indemnify and hold harmless each lending Client Plan (including the sponsor and fiduciaries of each Client Plan) and any Client Plan invested in a Commingled Index Fund or Commingled Model-Driven Fund against any and all damages, losses, liabilities, costs, and expenses (including attorneys' fees) which such plans may incur or suffer directly arising out of the lending of the securities to the SSB Group or the Clearing Broker, as applicable; provided that this condition does not require State Street to indemnify a plan against any potential investment losses associated with the investment of cash collateral received by such Client Plan (or by such Commingled Index Fund or Commingled Model-Driven Fund) in connection with such securities lending transactions;

(h) Each Client Plan, including a Commingled Index Fund or Commingled Model-Driven Fund in which a Client Plan invests, will receive the equivalent of all distributions made to holders of the borrowed securities during the term of any loan, including,

[9] The Department, herein, is not providing relief for securities lending transactions engaged in by primary lending agents, other than GSL, beyond that provided, pursuant to Prohibited Transaction Exemption 81–6 (PTE 81–6) (46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987) and Prohibited Transaction Exemption 82–63 (PTE 82–63) (47 FR 14804, April 6, 1982).

but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits and rights to purchase additional securities, or other distributions;

(i) Each Client Plan, including a Client Plan invested in a Commingled Index Fund or Commingled Model-Driven Fund, will receive prior to any approval of the lending of securities to the SSB Group or the Clearing Broker, as applicable, a copy of this notice of proposed exemption (the notice), a copy of the final exemption, if granted, a copy of PTE 97–63, and a copy of the notice of proposed exemption related to PTE 97–63 (the previous notice);

(j) Only Client Plans with total assets having an aggregate market value of at least $50 million will be permitted to lend securities to the SSB Group or to the Clearing Broker, as applicable; provided, however that—

(1) In the case of two or more Client Plans which are maintained by the same employer, controlled group of corporations or employee organization, whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are ''plan assets'' under 29 CFR 2510.3–101 (the Plan Asset Regulation), which entity is engaged in a securities lending arrangement with GSL, the foregoing $50 million requirement shall be deemed satisfied, if such trust or other entity has aggregate assets which are in excess of $50 million; provided that if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the $50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of $100 million.

(2) In the case of two or more Client Plans which are not maintained by the same employer, controlled group of corporations or employee organization, whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are ''plan assets'' under the Plan Asset Regulation, which entity is engaged in a securities lending arrangement with GSL, the foregoing $50 million requirement is satisfied, if such trust or other entity has aggregate assets which are in excess of $50 million (excluding the assets of any Client Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Client Plan or an employee organization whose members are covered by such Client Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

(A) Has full investment responsibility with respect to plan assets invested therein; and

(B) Has total assets under its management and control, exclusive of the $50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of $100 million.

(3) In the case of two or more Client Plans whose assets are commingled for investment purposes in an entity, whether or not through an entity described, above, in section II(j)(1) or (j)(2) of this exemption, the $50 million requirement shall be deemed satisfied if 50 percent (50%) or more of the units of beneficial interest in such entity are held by investors each having total net assets of at least $50 million. Such investors may include Client Plans, entities described, above, in section II(j)(1) or (j)(2) of this exemption, or other investors that are not employee benefit plans covered by section 406 of the Act, or section 4975 of the Code.

In addition, none of the entities described above are formed for the sole purpose of making loans of securities;

(k) The terms of each loan of securities by a Client Plan or by a Commingled Index Fund or Commingled Model-Driven Fund in which a Client Plan invests to the SSB Group or the Clearing Broker, as applicable, will be at least as favorable to the plan as those of a comparable arm's-length transaction between unrelated parties;

(l) Each Client Plan, including a Client Plan invested in a Commingled Index Fund or Commingled Model-Driven Fund, will receive quarterly reports with respect to the securities lending transactions which are the subject of this exemption, including but not limited to the information described in paragraph 26 of the previous notice, so that an independent fiduciary of the plan may monitor the securities lending transactions with the SSB Group and, if applicable, the Clearing Broker. In the event the identity of the Clearing Broker has changed since the issuance of the report for the immediately preceding calendar quarter, the report for the current calendar quarter must contain name of the new Clearing Broker and the most recently available audited and unaudited financial statements of such Clearing Broker;

(m) Except in the case of a Commingled Index Fund or Commingled Model-Driven Fund subject to the requirements, as set forth, below, in section II(q) of this exemption, before entering into the Loan Agreement and before a Client Plan lends any securities to the SSB Group or to the Clearing Broker, as applicable, an independent fiduciary of the Client Plan will receive sufficient information, concerning the financial condition of State Street and, if applicable, the Clearing Broker, including but not limited to the most recently available audited and unaudited financial statements of State Street's parent corporation and, if applicable, the Clearing Broker. In the event of a change in the identity of the Clearing Broker, the name of such Clearing Broker and the information required by this section (m) with respect to the new Clearing Broker must be provided to the independent fiduciary of the Client Plan before such Client Plan lends any securities to the new Clearing Broker;

(n) Except in the case of a Commingled Index Fund or Commingled Model-Driven Fund subject to the requirements, as set forth, below, in section II(q) of this exemption, the SSB Group and, if applicable, the Clearing Broker, will provide to a Client Plan prompt notice at the time of each loan by such plan of any material adverse changes in State Street's and, if applicable, the Clearing Broker's financial condition, since the date of the most recently furnished financial statements.

If any such material adverse changes have taken place, GSL will not make any further loans to the Affiliated Broker Dealers and, if applicable, the Clearing Broker, unless an independent fiduciary of the Client Plan is provided notice of the material change and approves the continuation of the lending arrangement in view of the changed financial condition.

If the independent fiduciary of a Client Plan not invested in a Commingled Index Fund or Commingled Model-Driven Fund objects to any material adverse change, as disclosed pursuant to section II(n) of this exemption, such plan may terminate its participating in the Agency Agreement or the Primary Lending Agreement, without penalty to such plan, pursuant to section II(c), above, of this exemption. In the case of a Client Plan invested in a Commingled Index Fund or Commingled Model-Driven Fund, termination is pursuant to the procedure described, below, in section II(q)(2), of this exemption;

(o) With respect to any calendar quarter, at least 50 percent (50%) or more of the outstanding dollar value of securities loans negotiated on behalf of all securities lending clients of GSL will be to borrowers unrelated to both State Street and the Clearing Broker;

(p) If an independent fiduciary of a Client Plan has given the initial affirmative authorization and approval for such plan to engage in securities lending transactions, pursuant to the terms of PTE 97–63, or pursuant to section II(b), above, of this exemption, then any subsequent authorization or approval contemplated under this exemption shall be deemed to have been given, if such independent fiduciary has not objected in writing to GSL within 30 days following disclosure to the independent fiduciary of all material information required in connection with said authorization or approval, a statement apprizing the independent fiduciary that PTE 97–63 has been replaced by this exemption, and a copy of this notice, and a copy of the final exemption, if granted;

(q) In the case of a Commingled Index Fund or Commingled Model-Driven Fund in which a Client Plan invests:

(1) The requirement, as set forth, above, in section II(b) of this exemption, shall not apply, provided that the information described in sections II(b), II(i), and II(m), above, of this exemption, including a description of the proposed securities lending arrangement, shall be furnished by GSL to a fiduciary who is independent of State Street, GSL, the SSB Group, the Clearing Broker, and any other division or affiliate of State Street or the Clearing Broker with respect to each Client Plan whose assets are invested in the Commingled Index Fund or Commingled Model-Driven Fund, not less than 30 days prior to implementation of any such securities lending arrangement, or any material changes thereto, and, thereafter, upon the reasonable request of the independent fiduciary of a Client Plan whose assets are invested in a Commingled Index Fund or Commingled Model-Driven Fund.

In the event of a material adverse change in the financial condition of the SSB Group, or the Clearing Broker, as applicable, GSL will make a decision, using the same standards of credit analysis GSL would use in evaluating unrelated borrowers, whether to terminate existing loans and whether to continue making additional loans to the SSB Group, or the Clearing Broker, as applicable.

For purposes of section II(q) of this exemption, any requirement that the fiduciary be independent of State Street and its affiliates shall not apply in the case of an employee benefit plan sponsored and maintained by State Street and/or an affiliate for its own employees (the State Street Plan(s)), as defined, below, in section III(c) of this exemption; provided such plan is invested in a Commingled Index Fund or Commingled Model-Driven Fund, and provided further that at all times the value of the aggregate holdings of all State Street Plans in such fund comprises less than 10% of the value of the total assets of such fund;

(2) In the event that the independent fiduciary of a Client Plan whose assets are invested in the Commingled Index Fund or Commingled Model-Driven Fund submits a notice in writing within 30 days after receipt of notification of implementation of any such securities lending arrangement, or any material changes thereto, to GSL, as securities lending agent to the Commingled Index Fund or Commingled Model-Driven Fund, objecting to the implementation of, material change in, or continuation of the securities lending arrangement, the Client Plan on whose behalf the objection was tended is given the opportunity to terminate its investment in the Commingled Index Fund or Commingled Model-Driven Fund, without penalty to such Client Plan, no later than 35 days after the notice of withdrawal is received.

In the case of a Client Plan that elects to withdraw pursuant to the foregoing, such withdrawal shall be effected prior to the implementation of, or material change in, the securities leading arrangement; but an existing securities lending arrangement need not be discontinued by reason of such Client Plan electing to withdraw. If a Client Plan's withdrawal necessitates a return of securities to the Commingled Index Fund or Commingled Model-Driven Fund, the SSB Group or the Clearing Broker, as applicable, will transfer securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, or merger of the issuer of the borrowed securities) to the Commingled Index Fund or Commingled Model-Driven Fund within:

(A) The customary delivery period for such securities;

(B) Five business days; or

(C) The time negotiated for such delivery by GSL, as lending agent to the Commingled Index Fund or Commingled Model-Driven Fund, and the SSB Group or Clearing Broker, as applicable, whichever is least; and

(3) In the case of a Client Plan whose assets are proposed to be invested in a Commingled Index Fund or Commingled Model-Driven Fund subsequent to the implementation of the securities lending arrangement, the Client Plan's investment in a Commingled Index Fund or Commingled Model-Driven Fund shall be authorized in the manner described, above, in section II(b) of this exemption;

(4) The provisions of section II(q) of this exemption shall not apply to a Commingled Index Fund or Commingled Model-Driven Fund, if more than 10% of the ownership interests in such fund are held by State Street Plans;

(5) In the case of a Commingled Index Fund or Commingled Model-Driven Fund subject to the requirements of section II(q) of this exemption, GSL will furnish upon reasonable request to the independent fiduciary of any Client Plan invested in such fund,[10] the most recently available audited and unaudited financial statements of the parent corporation of State Street and, if applicable, the Clearing Broker (or any new Clearing Broker) prior to the authorization of the securities lending program, and annually after such authorization;

(r) In return for lending securities, a Client Plan, including a Client Plan invested in a Commingled Index Fund or Commingled Model-Driven Fund, either—

(1) Receives a reasonable fee, which is related to the value of the borrowed securities and the duration of the loan; or

(2) Has the opportunity to derive compensation through the investment of cash collateral. (Under such circumstances, such plan may pay a loan rebate or similar fee to the SSB Group or the Clearing Broker, as applicable, if such fee is not greater than the fee such plan would pay in a comparable arm's length transaction with an unrelated party);

(s) State Street and/or its affiliates maintain, or cause to be maintained, within the United States for a period of six years from the date of each transaction which is subject to this exemption, in a manner that is convenient and accessible for audit and examination, such records as are necessary to enable the persons described, below, in section II(t)(1), to determine whether the conditions of

[10] The Department notes that it is the responsibility of the independent fiduciary for the Client Plan to periodically monitor any material changes in the securities lending program, including but not limited to a change in the Clearing Broker or in the Clearing Broker's financial status, that may occur after an initial authorization to participate in the program, pursuant to this exemption.

this exemption have been met, except that—

(1) This record-keeping condition shall not be violated if, due to circumstances beyond the control of State Street and/or its affiliates, the records are lost or destroyed prior to the end of the six-year period; and

(2) No party in interest other than State Street and its affiliates shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by section II(t)(1) of this exemption; and

(t)(1)Except as provided in section II(t)(2), below, of this exemption and notwithstanding any provisions of sections (a)(2) and (b) of section 504 of the Act, the records referred to in section II(s) of this exemption are unconditionally available at their customary location for examination during normal business hours by:

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the Securities and Exchange Commission;

(B) Any fiduciary of a participating Client Plan, a State Street Plan, or any duly authorized representative of such fiduciary;

(C) Any contributing employer to any participating Client Plan, State Street Plan, or any duly authorized employee or representative of such employer; and

(D) Any participant or beneficiary of any participating Client Plan, State Street Plan, or any duly authorized representative of such participant or beneficiary.

(2) None of the persons described above in section II(t)(1)(B)–(t)(1)(D) are authorized to examine the trade secrets of State Street or its affiliates or commercial or financial information which is privileged or confidential.

III. Definitions

For purposes of this proposed exemption, the following definition shall apply:

(a) The term, ''affiliate'' or ''affiliates,'' means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee;

(b) The term, ''control,'' means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(c) The term, ''State Street Plan(s),'' refer to employee benefit plans covered by the Act sponsored and maintained by State Street and/or an affiliate for its own employees;

(d) The term, ''Index Fund(s),'' refers to any investment fund, account or portfolio sponsored, maintained, trusteed, or managed by State Street or a U.S. affiliate, in which one or more investors invest, and

(1) Which is designed to track the rate of return, risk profile and other characteristics of an Index, as defined, below, in section III(f) of this exemption, by either:

(A) Replicating the same combination of securities which compose such Index, or

(B) Sampling the securities which compose such Index based on objective criteria and data;

(2) For which State Street or its affiliate does not use its discretion, or data within its control, to affect the identity or amount of securities to be purchased or sold;

(3) That contains ''plan assets'' subject to the Act, pursuant to the Plan Asset Regulation; and

(4) That involves no agreement, arrangement, or understanding regarding the design or operation of the fund which is intended to benefit State Street or its affiliate or any party in which State Street or its affiliate may have an interest;

(e) The term, ''Model-Driven Fund(s),'' refers to any investment fund, account or portfolio sponsored, maintained, trusteed, or managed by State Street or a U.S. affiliate, in which one or more investors invest, and

(1) Which is composed of securities the identity of which and the amount of which are selected by a computer model that is based on prescribed objective criteria using independent third-party data, not within the control of State Street or an affiliate, to transform an Index;

(2) Which contains ''plan assets'' subject to the Act, pursuant to the Plan Asset Regulation; and

(3) That involves no agreement, arrangement or understanding regarding the design or operation of the fund or the utilization of any specific objective criteria which is intended to benefit State Street, any affiliate of State Street, or any party in which State Street or any affiliate may have an interest;

(f) The term, ''Index,'' refers to a securities index that represents the investment performance of a specific segment of the public market for equity or debt securities in the United States and/or foreign countries, but only if—

(1) The organization creating and maintaining the index is—

(A) Engaged in the business of providing financial information, evaluation, advice or securities brokerage services to institutional clients,

(B) A publisher of financial news or information, or

(C) A public stock exchange or association of securities dealers;

(2) The index is created and maintained by an organization independent of State Street; and

(3) The index is a generally accepted standardized index of securities which is not specifically tailored for the use of State Street; and

(g) The term, ''Clearing Broker,'' means a U.S. broker-dealer registered under the Securities Exchange Act of 1934 that is unrelated to State Street, that has net capital equal to at least $10 million and that regularly serves as a clearing broker for introducing brokers in the ordinary course of its business, but only in the context, and to the extent, of its service as a clearing broker for an Affiliated Broker Dealer that is acting as introducing broker.

For a complete statement of the facts and representations supporting the Department's decision to grant PTE 97–63, refer to the proposed exemption and the grant notice that are cited above.

Signed in Washington, DC, this 3rd day of February, 2003.

Ivan L. Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 03–2962 Filed 2–5–03; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11059]

Notice of Proposed Individual Exemption To Replace Prohibited Transaction Exemptions (PTEs) 81–56, 85–19 and 89–5 Involving the Truman Arnold Companies Retirement Plan and Trust (the Plan) Located in Texarkana, TX

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Notice of proposed individual exemption to replace PTEs 81–56, 85–19 and 89–5.

SUMMARY: This document contains a notice of pendency before the

Department of Labor (the Department) of a proposed individual exemption which, if granted, will replace PTEs 81–56 (46 FR 36273, July 17, 1981), 85–19 (50 FR 3045, January 23, 1985) and PTE 89–5 (54 FR 4348, January 30, 1989). These are individual exemptions (the Prior Exemptions) that were previously issued by the Department to the Truman Arnold Companies (the Employer), a party in interest with respect to the Plan. Each of the Prior Exemptions permitted the Employer to contribute and/or lease from the Plan certain improved real property (the Properties) under the provisions of three distinct written leases.

If granted, the proposed exemption will incorporate many of the facts and representations contained in the Prior Exemptions and update information to the extent there have been changes. Because it appears that PTE 81–56 expired on September 30, 1999, and the parties have been not been covered by an administrative exemption since that time, the proposed exemption will provide retroactive exemptive relief from October 1, 1999, until September 30, 2002. In addition, to resolve uncertainty regarding the expiration dates of the leases described in PTEs 81–56 and PTE 85–19, the proposed exemption merges the leases, along with the lease described in PTE 89–5, under a new master lease (the Master Lease) and provides retroactive exemptive relief, effective October 1, 2002, with respect to such past and continued lease arrangements. This will ensure that the subject Properties are, at all times, covered by an administrative exemption.

Further, the proposed exemption will permit the replacement of AmSouth Bank (AmSouth), the Plan's former independent fiduciary, with Regions Bank (Regions), the Plan's current trustee. Thus, the proposed exemption will affect participants and beneficiaries of the Plan, as well as Plan fiduciaries.

EFFECTIVE DATE: If granted, this proposed exemption will be effective from October 1, 1999, until September 30, 2002, with respect to the leasing arrangement described in PTE 81–56. In addition, the proposed exemption will apply retroactively from October 1, 2002, with respect to the consolidation of the properties described in the Prior Exemptions under the Master Lease.

DATES: Written comments and requests for a public hearing should be received by the Department on or before March 24, 2003.

ADDRESSES: All written comments and requests for a public hearing (preferably, three copies) should be sent by mail to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, (Attention: Notice of Proposed Individual Exemption to Replace Prohibited Transaction Exemptions 81–56, 85–19 and 89–5 Involving the Truman Arnold Companies Retirement Plan and Trust; Application No. D–11059). Interested persons are also invited to submit comments and/or hearing requests to the Department by facsimile to (202) 219–0204 or by electronic mail to *moffitb@pwba.dol.gov* by the end of the scheduled comment period. The application pertaining to the exemptive relief proposed herein and the comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, telephone (202) 693–8556. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Notice is hereby given of the pendency before the Department of a proposed exemption that will replace PTEs 81–56, 85–19 and 89–5. The Prior Exemptions provided exemptive relief from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and from the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1986 (the Code). The proposed exemption has been requested in an application filed on behalf of the Plan pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Accordingly, this proposed exemption is being issued solely by the Department.

I. Background

The Plan is a defined contribution plan with 369 participants as of September 30, 2002. Also as of September 30, 2002, the Plan had total assets with a fair market value of $11,080,680. The Plan is sponsored by the Truman Arnold Companies, which are engaged in the petroleum wholesale business in Texarkana, Texas. Currently, Regions of Texarkana, Texas serves as the Plan trustee and the independent fiduciary for the leasing arrangements described herein.

Between 1981 and 1989, the Department granted the Prior Exemptions which provided exemptive relief primarily from the prohibited transaction provisions of sections 406(a), 406(b)(1) and (b)(2) of the Act [1] and from the sanctions resulting from the application of section 4975 of the Code, as amended, by reason of section 4975(c)(1)(A) through (E) of the Code. Specifically, PTE 81–56 permitted the Employer, which was then known as the ''Truman Arnold Distributing Company, Inc.,'' to contribute to the Plan a parcel of real property and the improvements situated thereon (the New Facilities Property), as part of the Employer's annual contribution to the Plan. The New Facilities Property is located on South Robison Road in Texarkana, Texas and it is contiguous to other property also owned by the Plan and leased to the Employer and its sister corporation, Truman Arnold Transport Company, Inc. (Transport) for use as the Employer's headquarters. During 1979, the Employer purchased the land portion of the New Facilities Property for $33,667 from unrelated parties and subsequently caused a building to be constructed thereon for $219,372, or an aggregate cost of $253,039. As of September 30, 1979, the Plan had $692,797 in total assets and as of March 12, 1980, it had 80 participants.

PTE 81–56 also permitted the Employer to lease the New Facilities Property from the Plan under the provisions of a written, triple-net lease for an initial annual rental of $37,800. Taxes, insurance or other costs incident to the ownership of the New Facilities Property were to result in a corresponding increase in the amount of the rental payment under the lease.

An independent appraisal report was prepared of the New Facilities Property on November 17, 1980, by Jim Freeman of P.M. Brown, Inc. Realtors in Texarkana, Texas. Mr. Freeman, a qualified independent appraiser and a senior member of both the American Society of Appraisers and the American Association of Certified Appraisers, placed the gross fair market rental value of such property at $38,405 and its net rental value (after expenses) at $34,560.

[1] It should be noted that exemptive relief from section 407(a) of the Act is also provided in PTE 81–56.

Thus, the initial net rental income to the Plan of $37,800 exceeded Mr. Freeman's net income estimate.

Mr. Freeman also placed the fair market value of the New Facilities Property at $270,000 as of November 17, 1980. This represented a $15,000 increase over an earlier appraisal which he had completed in February 1980. In an addendum to the November 1980 appraisal, Mr. Freeman represented that the New Facilities Property was a multipurpose property that could be easily converted to other uses.

Commercial National Bank in Shreveport, Louisiana (Commercial) was appointed as independent fiduciary to monitor both the contribution and subsequent leasing of the New Facilities Property on behalf of the Plan. Commercial was vested with full authority and responsibility to take all actions necessary to protect the interests of the Plan. Commercial, through its President and Chief Executive Officer, James E. Burt III, represented that it had over $700 million in assets and that it maintained no financial or other relationship with either the Employer or its principal shareholder, Mr. Truman Arnold. Commercial also represented that it had reviewed the transaction and determined that it was in the best interests of the Plan and its participants and beneficiaries.

Although the Employer was authorized to lease the New Facilities Property from the Plan until September 30, 1984, it was permitted to extend the lease for three, additional five year terms, provided Commercial approved each successive renewal option. The monthly rental payments for the New Facilities Property were again established on the basis of an independent appraisal conducted once every three years and Commercial was responsible for selecting the independent appraiser. Further, at each lease adjustment period, a lease payment could not be less than that of the preceding three year term, or less than 14 percent of the fair market value of the New Facilities Property. Finally, the Employer and Mr. Arnold agreed to indemnify the Plan against any decrease in the fair market value of the New Facilities Property below the Plan's original cost basis.

PTE 81–56 expired on September 30, 1999.

PTE 85–19 allowed the Plan, which had net assets of $2.4 million and 182 participants as of September 30, 1983, to continue leasing the land and buildings comprising the Employer's Texarkana, Texas headquarters (the Home Site Property) after June 30, 1984, under the provisions of a new lease. Previously, the Plan had been leasing the Home Site Property to the Employer and Transport under a transitional rule lease that was subject to the provisions of section 414(c)(2) of the Act.[2] However, in order to continue the leasing arrangement, the Employer requested an administrative exemption from the Department on essentially the same terms and conditions as those contained in PTE 81–56.

Mr. Freeman, the independent appraiser utilized in PTE 81–56, placed the fair market value of the Home Site Property at $256,000 as of September 15, 1983. He also determined that the gross fair market rental value of the Home Site Property was $33,480 per year and, adjusting such property for taxes, insurance, maintenance and management expenses, determined that the net fair market rental value of the Home Site Property was $28,705 per year. Further, Mr. Freeman opined that the Home Site Property was a multipurpose property that could easily be adapted to other uses.

In addition to determining the fair market rental value of the Home Site Property, Mr. Freeman placed the fair market value of such property at $256,000 as of September 15, 1983. Thus, the value of the New Facilities Property, whose lease was covered by PTE 81–56 and the Home Site Property, whose lease was covered by PTE 85–19, totaled $566,000 and constituted 23.5 percent of the Plan's assets at that time.

As in PTE 81–56, Commercial, acting as the independent fiduciary, negotiated the lease prior to July 1, 1984. The lease was a triple-net lease having a primary term of five years with three, additional five year renewal terms that could be exercised solely at Commercial's discretion. The initial annual rental under the lease was set at $35,840 based upon an independent appraisal and it provided a 14 percent rate of return to the Plan. Every third year of the lease term, the fair market rental value of the Home Site Property was to be adjusted by an independent appraiser selected by Commercial. Again the rental rate would be the greater of the fair market rental rate, as determined by the independent appraiser, or 14 percent of the fair market value of the Home Site Property. The Employer agreed to maintain adequate fire and casualty insurance on the Home Site Property, as determined by Commercial, with the Plan named as the loss payee of such insurance. Further, the Employer and Mr. Arnold agreed to indemnify the Plan against any decrease in the fair market value of the Home Site Property if it fell below its $256,000 fair market value.

Commercial, which had exclusive oversight authority over the leasing and potential sale of the Home Site Property, concluded that the Plan should retain the property after reviewing the Plan's financial records and asset portfolio. Commercial also concluded that the terms of the lease were arm's length and found the guaranteed 14 percent rate of return to be an attractive feature of the lease. Moreover, Commercial examined the Employer's past lease payment records and financial statements. Based upon such information, Commercial discovered that the Employer had never defaulted on any rental payments and it concluded that the Employer was a responsible lessee and financially healthy.

Finally, PTE 89–5 permitted the Employer to construct, contribute to the Plan (which had 214 participants and net assets of $5,029,632 as of September 30, 1987), and then lease from the Plan two buildings (the Buildings) located on the Home Site Property. PTE 89–5 also permitted the Employer and Mr. Arnold to indemnify the Plan against any decrease in the fair market value of the Buildings. PTE 89–5 became effective as of June 1, 1988.

Under the terms of its lease of the Home Site Property and with Commercial's approval, the Employer constructed the Buildings which connected the original office building portion of the Home Site Property at a total cost of $556,000. The Buildings were subsequently appraised by Mr. Freeman as having a combined fair market value of $587,000 as of October 1, 1987.

On June 1, 1988, the Employer, with Commercial's approval as independent fiduciary, contributed the Buildings to the Plan as part of its annual contribution and then leased back the Buildings from the Plan under a written lease. The subject lease is a triple net lease. It had an initial term of five years, also commencing June 1, 1988, and it has three renewal options, each of five years' duration. The initial annual rental under the lease, as determined by an independent appraisal, was $82,188. The rental amount was also equal to 14 percent of the appraised fair market value of the Buildings.

The lease provided for fair market rental adjustments every three years, again pursuant to an independent appraisal. Although the rental payments

[2] In relevant part, section 414(c)(2) of the Act states that the provisions of sections 406 and 407(a) of the Act would not apply until June 30, 1984, to a lease or joint use of property involving a plan and a party in interest pursuant to a binding contract in effect on July 1, 1974 (or pursuant to renewals of such contract).

for each adjustment period were required to represent 14 percent of the appraised value of the Buildings, in no event could the lease payments be less than that of the preceding three year period. The lease required the Employer to maintain fire and casualty insurance on the Buildings and to name the Plan as the loss payee. As in the other two Prior Exemptions, both Mr. Arnold and the Employer agreed to indemnify the Plan against any decrease in the fair market value of the Buildings below their $567,000 appraised value.

Commercial was again designated as the independent fiduciary to approve and monitor the contribution and leaseback transactions on behalf of the Plan and to determine whether it would be appropriate to sell the Buildings. Commercial concluded that the transactions were in the best interests of the Plan and its participants and beneficiaries and found the Buildings to be of high quality. Moreover, Commercial examined the Plan's financial records and asset portfolio and concluded that the Plan had sufficient liquidity. Finally, Commercial determined that the terms of the lease were arm's length, the Employer was financially solvent and had never defaulted on rental payments to the Plan, and the Buildings were readily adaptable to other uses.

It is represented that there were never any defaults or delinquencies on the part of the Employer under its respective leases with the Plan. It is also represented that the terms and conditions of the leases were always complied with by the parties.

II. Replacement of Leases Described in the Prior Exemptions

When the Prior Exemptions were granted, it was the Employer's understanding that the New Facilities Property, the Home Site Property and the Buildings (collectively, the Properties) could be wrapped into a single lease such that the last lease would encompass all of the Properties. This mistake resulted in both a prohibited leasing arrangement with respect to the New Facilities Property and an inconsistency in the actual termination date of the lease involving the Home Site Property.

As stated above, PTE 81–56, permitted the Employer to lease the New Facilities Property from the Plan until September 30, 1984. However, the Employer was allowed to extend the lease for three additional five year terms, provided Commercial approved each such extension. Because the Employer extended the lease for the additional terms, it appears that the lease expired on September 30, 1999. As a result, the Employer continued to lease the New Facilities Property from the Plan without the benefit of an administrative exemption, even though the Employer represents that it had always been compliant with the other terms and conditions of the lease.

With the exception of its July 1, 1984, commencement date, the lease described in PTE 85–19 was based on terms that are identical to those described in PTE 81–56. However, it appears that both the lease (including all applicable extensions) is due to expire on June 30, 2004.[3] Nevertheless, it is represented that the Employer expected, with the approval of the independent fiduciary, to be able to extend such lease until June 30, 2008. Assuming the extension is approved by the independent fiduciary, the leasing arrangement would be prohibited, inasmuch as it would not be covered by an administrative exemption.

To correct the inconsistencies in the termination dates of the leases described in PTEs 81–56 and 85–19, and to consolidate these leases, with the lease described in PTE 89–5, into one master lease, the Plan and the Employer entered into a new leasing arrangement with respect to the Properties, effective October 1, 2002. Accordingly, an administrative exemption is requested from the Department to cover this past and continued leasing arrangement.

The Master Lease has a primary term of three years, which commenced on October 1, 2002, and will end on September 30, 2005. Under the Master Lease, the Employer is required to pay the Plan a monthly rental of $14,933.33 on the first day of each calendar month. The Master Lease may be renewed by the Employer for four additional three year terms, exercisable solely at the discretion of Regions, as independent fiduciary for the Plan. The monthly lease payments for each such renewal term are to be established by an independent appraisal. Regions is also responsible for selecting the independent appraiser to conduct the appraisals for the Plan. As in the provisions of the Prior Leases, the rental installments due for the renewal terms will be in an amount equal to a 14 percent return upon the appraised value of the properties covered under the Master Lease, and in no event will the lease payments be less than that of the preceding three year period. During each renewal term, all monthly rental installments will be due and payable on the first day of each month. In addition, the Employer is required to pay for all utilities, taxes and assessments, and to insure the Properties against loss.

As of August 27, 2002, the Properties that are subject to the Master Lease, had a combined fair market value of $1,280,000 according to an independent appraisal report prepared by Messrs. P.M. Brown, ASA, CRA, and Michael Hendrix, qualified, independent appraisers affiliated with the real estate appraisal firm of P.M. Brown Real Estate Appraisers, located in Texarkana, Texas. The appraisers also confirmed that in their opinion, net fair market rentals on comparable properties within the Texarkana marketing area were equal to or less than 14 percent of the market value of the subject Properties. Thus, the monthly fair market rental value of the Properties was set at $14,933.33 on the commencement date of the Master Lease.[4]

III. Independent Fiduciary Changes

Since the Prior Exemptions were granted, several unrelated banks succeeded Commercial as the independent fiduciary for the Plan with respect to the leases. In this regard, during 1990, Commercial was acquired by the Deposit Guaranty Bank (Deposit). In 1998, Deposit merged with First American Bank (First American). During 1999, First American merged with AmSouth. In each instance, these banks succeeded to the independent fiduciary responsibilities of Commercial under applicable banking laws. It is also represented that there were never any time lags between the departure and replacement of these independent fiduciaries.

On December 17, 2002, the Employer appointed Regions, the Plan's current trustee,[5] as the successor independent fiduciary to AmSouth with respect to oversight of the Master Lease. Regions was selected by the Employer to serve as the independent fiduciary for the Plan for reasons of administrative convenience and to facilitate the handling of Plan-related matters. Moreover, Regions is not charging the Plan any additional fees for services

[3] The Employer, however, determined that the lease would expire on June 30, 2003.

[4] To the extent that the amount of rent paid by the Employer to the Plan under the Master Lease exceeds the fair market rental value of the subject Properties, the Employer represents that such excess rent, if any, when combined to the balance of the annual additions to the Plan, will not exceed the limitations prescribed by section 415 of the Code.

[5] The Plan's former trustee was State First National Bank (State First) of Texarkana, Texas. On March 10, 1994, State First was merged into First Commercial Corporation (First Commercial). On July 31, 1998, First Commercial was merged into Regions Bank Financial Corporation, the parent of Regions. On that same date, Regions also became the Plan trustee.

rendered as an independent fiduciary, aside from its trustee duties.

Regions, a subsidiary of Regions Bank Financial Corporation, a major Southern bank holding company, is one of the 25 largest banking companies in America with current assets in excess of $39 billion. Of these total assets, the Trust Division of Regions holds more than $23.5 billion in trust assets and the assets of the Plan constitute approximately 0.05 percent of Regions' total trust assets.

Mr. Arnold, the principal owner of the Employer, maintains a checking account with Regions. However, the total balance of Mr. Arnold's account with Regions represents a negligible portion of the bank's total deposits. In addition, the Employer maintains a checking account with Regions but funds are swept to another bank on a daily basis, so a zero balance is maintained. Further, neither Mr. Arnold nor the Employer has a lending relationship with Regions and no officer or director of Regions sits on the Board of Directors of the Employer or vice versa. Finally, there are no familial relationships existing between Mr. Arnold, his son, and Regions or between the Employer and Regions.

Regions represents that it is knowledgeable and experienced with lease transactions and it maintains a staff of qualified trust and investment professionals who provide legal, portfolio management and consulting services to clients.

As the successor independent fiduciary under the Prior Exemptions and the Master Lease, Regions has agreed to (a) represent the interests of the Plan for the duration of the initial term of the Master Lease and during each renewal term; (b) monitor the transactions on the Plan's behalf; (c) enforce compliance with all conditions of the leases; and (d) ensure that the transactions remain in the best interest of the Plan and protective of the Plan's participants and beneficiaries. In addition, Regions has also reviewed the Prior Exemptions and has evaluated the terms and conditions of the subject leases. Based upon this review, Regions believes the leasing arrangements should be continued under the Master Lease.

IV. Other Modifications

The Department has modified the operative language of the proposed exemption in order to clarify the relevant terms of the Master Lease and the role of the independent fiduciary, thereby replacing the Prior Exemptions:

If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply, (1) effective October 1, 1999, until September 30, 2002, to the leasing by the Plan of a parcel of real property and the improvements thereon (the New Facilities Property), as described in Prohibited Transaction Exemption (PTE) 81–56 (46 FR 36273, July 17, 1981), to the Truman Arnold Companies, Inc. (the Employer), a party in interest with respect to the Plan; and (2) to the leasing, effective October 1, 2002, by the Plan to the Employer, under the provisions of a master lease (the Master Lease) of the New Facilities Property, another parcel of real property and the improvements comprising the Employer's headquarters (the Home Site Property), as described in PTE 85–19 (50 FR 3045, January 23, 1985), and two buildings (the Buildings) constructed on the Home Site Property and described in PTE 89–5 (54 FR 4348, January 30, 1989). (The New Facilities Property, the Home Site Property and the Buildings are collectively referred to herein as the ''Properties.'')

This proposed exemption is subject to the following conditions:

(a) The terms of the Master Lease remain at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party.

(b) The Employer is obligated under the terms of the Master Lease for expenses incurred by the Properties, including taxes and assessments, maintenance, insurance and utilities.

(c) The interests of the Plan with regard to the Master Lease are, at all times, represented by an independent fiduciary. Such independent fiduciary—

(i) Represents the interests of the Plan for the remaining duration of the Master Lease;

(ii) Monitors the terms and conditions of the Master Lease on behalf of the Plan;

(iii) Enforces compliance with all conditions of the Master Lease;

(iv) Ensures that the Master Lease remains in the best interest of the Plan and protective of the Plan's participants and beneficiaries;

(v) Following review and evaluation of the Master Lease, determines that the retention of the Properties by the Plan and the continued leasing of such Properties to the Employer are in the best interest of the Plan and its participants and beneficiaries;

(vi) Adjusts the rental rate under the Master Lease every third year such lease is in effect based upon independent appraisals of the Properties and ensures that the rentals equal the greater of 14 percent of the fair market value of the Properties or the prior rental amounts paid; and

(vii) Takes all actions that are necessary and proper to enforce and protect the rights of the Plan and its participants and beneficiaries.

(d) The rental rate under the Master Lease, during its initial term and each renewal term remains at 14 percent of the fair market value of the Properties, which amount is not less than the current fair market value of such Properties;

(e) The aggregate fair market value of the Properties that are subject to the Master Lease, at no time, exceeds 25 percent of the Plan's assets.

Tax Consequences of Transaction

The Department of the Treasury has determined that if a transaction between a qualified employee benefit plan and its sponsoring employer (or affiliate thereof) results in the plan either paying less than or receiving more than fair market value, such excess may be considered to be a contribution by the sponsoring employer to the plan and, therefore, must be examined under applicable provisions of the Code, including section 401(a)(4), 404 and 415.

Notice to Interested Persons

Notice of the proposed exemption will be provided to interested persons within 14 days of the publication of the notice of proposed exemption in the **Federal Register**. With respect to active employees of the Employer, notice will be delivered in writing at such employees' place of employment. With respect to retired employees or participants having deferred vested interests in the Plan, notice will be provided by first class mail. The notice will include a copy of the notice of proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required under 29 CFR 2570.43(b)(2), which shall inform interested persons of their right to comment on and/or to request a hearing with respect to the proposed exemption. All written comments and/or requests for a hearing are due within 44 days after the date of publication of the pendency notice in the **Federal Register**.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which require, among other things, a fiduciary to discharge his or her duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirements of section 401(a) of the Code that the plan operate for the exclusive benefit of the employees of

the employer maintaining the plan and their beneficiaries;

(2) The proposed exemption, if granted, will not extend to transactions prohibited under section 406(b)(3) of the Act and section 4975(c)(1)(F) of the Code;

(3) Before an exemption can be granted under section 408(a) of the Act and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interest of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan;

(4) This proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory or administrative exemptions. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(5) This proposed exemption, if granted, is subject to the express condition that the facts and representations set forth in the Prior Exemptions and this notice, accurately describe, where relevant, the material terms of the transactions to be consummated pursuant to this exemption.

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemption by regular mail, electronic mail or facsimile to the addresses or facsimile number noted above, within the time frame set forth above, after the publication of this proposed exemption in the **Federal Register**. All comments will be made a part of the record. Comments received will be available for public inspection with the referenced applications at the address set forth above.

Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting the requested exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990).

If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply, (1) effective October 1, 1999, until September 30, 2002, to the leasing by the Plan of a parcel of real property and the improvements thereon (the New Facilities Property), as described in Prohibited Transaction Exemption (PTE) 81–56 (46 FR 36273, July 17, 1981), to the Truman Arnold Companies, Inc. (the Employer), a party in interest with respect to the Plan; and (2) effective October 1, 2002, with respect to the leasing by the Plan to the Employer, under the provisions of a master lease (the Master Lease) of the New Facilities Property, another parcel of real property and the improvements comprising the Employer's headquarters (the Home Site Property), as described in PTE 85–19 (50 FR 3045, January 23, 1985), and two buildings (the Buildings) constructed on the Home Site Property, as described in PTE 89–5 (54 FR 4348, January 30, 1989). (The New Facilities Property, the Home Site Property and the Buildings are collectively referred to herein as the ''Properties.'')

This proposed exemption is subject to the following conditions:

(a) The terms of the Master Lease remain at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party.

(b) The Employer is obligated under the terms of the Master Lease for expenses incurred by the Properties, including taxes and assessments, maintenance, insurance and utilities.

(c) The interests of the Plan with regard to the Master Lease are, at all times, represented by an independent fiduciary. Such independent fiduciary—

(i) Represents the interests of the Plan for the remaining duration of the Master Lease;

(ii) Monitors the terms and conditions of the Master Lease on behalf of the Plan;

(iii) Enforces compliance with all conditions of the Master Lease;

(iv) Ensures that the Master Lease remains in the best interest of the Plan and protective of the Plan's participants and beneficiaries;

(v) Following review and evaluation of the Master Lease, determines that the retention of the Properties by the Plan and the continued leasing of such Properties to the Employer are in the best interest of the Plan and its participants and beneficiaries;

(vi) Adjusts the rental rate under the Master Lease every third year such lease is in effect based upon independent appraisals of the Properties and ensures that the rentals equal the greater of 14 percent of the fair market value of the Properties or the prior rental amounts paid; and

(vii) Takes all actions that are necessary and proper to enforce and protect the rights of the Plan and its participants and beneficiaries.

(d) The rental rate under the Master Lease, during its initial term and each renewal term remains at 14 percent of the fair market value of the Properties, which amount is not less than the current fair market value of such Properties;

(e) The aggregate fair market value of the Properties that are subject to the Master Lease, at no time, exceeds 25 percent of the Plan's assets.

The availability of this proposed exemption is subject to the express condition that the material facts and representations contained in the application for exemption are true and complete and accurately describe all material terms of the transactions. In the case of continuing transactions, if any of the material facts or representations described in the applications change, the exemption will cease to apply as of the date of such change. In the event of any such change, an application for a new exemption must be made to the Department.

For a more complete statement of the facts and representations supporting the Department's decision to grant the Prior Exemptions, refer to the proposed exemptions and the grant notices which are cited above.

Signed in Washington, DC, this 3rd day of February, 2003.

Ivan L. Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, Department of Labor.

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DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974, as amended, the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) issued during the period of January, 2003.

In order for an affirmative determination to be made and a certification of eligibility to apply for worker adjustment assistance to be issued, each of the group eligibility

requirements of section 222 of the Act must be met.

(1) That a significant number or proportion of the workers in the workers' firm, or an appropriate subdivision thereof, have become totally or partially separated, or are threatened to become totally or partially separated; and

(2) That sales or production, or both, of the firm or sub-division have decreased absolutely, and

(3) That increases of imports of articles like or directly competitive with articles produced by the firm or appropriate subdivision have contributed importantly to the separations, or threat thereof, and to the absolute decline in sales or production of such firm or subdivision.

Negative Determinations for Worker Adjustment Assistance

In each of the following cases the investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

TA–W–42,254; American Fibers and Yarns Co., Rocky Mount, NC
TA–W–42,224; Radio Frequency Systems, Conditioning Div., Including Leased Workers at Strategic Staffing and Selectemp, Corvallis, OR
TA–W–42,286; Best Manufacturing Co., Fayette, AL: September 14, 2001.
TA–W–41,624; ADC Telecommunications, 1000 Valley Park Drive, Shakopee, MN
TA–W–42,278; Owen Development Corp. d/b/a Intra, Spartanburg, SC

In the following case, the investigation revealed that the criteria for eligibility have not been met for the reasons specified.

Increased imports did not contribute importantly to worker separations at the firm.

TA–W–42,324; United Plastic Group, Inc., Bensenville, IL
TA–W–42,004; IBM Corp., Microelectronics Div., Essex Junction, VT

In the following cases, the investigation revealed that the criteria for eligibility have not been met for the reasons specified.

The investigation revealed that criterion (a)(2)(A) (I.B.) (No Sales or Production declines) and (a) (2)(B) (II.B) (No shift in production to a foreign country) have not been met.

TA–W–50,025; Andrew Corp., Orland Park, IL

The investigation revealed that criterion (a)(2)(A) (I.C.) (Increased imports) and (a) (2)(B) (II.B) (No shift in production to a foreign country) have not been met.

TA–W–50,015; Houlton International Corp., Houlton, ME
TA–W–50,231; Snorkel International, a division of Omniquip Textron, Inc., Elwood, KS
TA–W–50,281; U.S. Manufacturing Corp., Bad Axe, MI
TA–W–50,449; PTC Alliance, Darlington, PA
TA–W–50,114l; Cadmus Mack (CPS), East Stroudsburg, PA
TA–W–50,312; Intertape Polymer Group, Nenasha Div., Menasha, WI
TA–W–50,185; Smurfit-Stone Container Corp., Corrugated Container Div., Milwaukee, WI

The investigation revealed that criterion (a)(2)(A) (I.C.) (Increased imports) was not met.

TA–W–50,270; Kreuter Manufacturing Co., Inc., New Paris, IN
TA–W–50,307; Xerox Corp., Xerox Supplies Business Group, Supplies Development Unit, Oklahoma City, OK

The workers firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–50,352; Spherion Atlanta Enterprises, LLC, Wilmington, NC
TA–W–50,423; L.A. Darling Co. (LAD), a Member of Marmon Retail Services, Pocahontas, AR
TA–W–50,210; Convergys, Technical Support Services, Jacksonville, FL
TA–W–50,471; MGM Transport Corp., Totowa, NJ
TA–W–50,481; Nautilus HPS, Inc., Independence, VA
TA–W–50,486; Electronic Data Systems Corp., I Solutions Center, Fairborn, OH
TA–W–50,246; Orcom Solutions, Inc., Bend, OR
TA–W–50,518; Bangor and Aroostook Railroad Co., Hermon, ME
TA–W–50,485; Oshkosh B'Gosh, Inc., Miami Trim Warehouse, Medley, FL
TA–W–50,565; ABM Janitorial Services, Greenville, SC

The investigation revealed that criteria (2) has not been met. The workers' firm (or subdivision) is not a supplier or downstream producer for trade-affected companies.

TA–W–50,472; Sharon Tube Co., Sharon, PA

The investigation revealed that criteria (2) has not been met. The workers' firm (or subdivision) is not an upstream supplier of components for trade-affected companies.

TA–W–50,386; Burelbach Industries, Inc., Rickreal, OR
TA–W–50,213; Fishercast, Inc., a Division of Fisher Gauge Ltd.,Watertown, NY
TA–W–50,217; Emerald Creek Garnet Ltd., a subsidiary of WGI Heavy Minerals, Inc., Fernwood, ID
TA–W–50,494; Manufacturers' Services Limited (MSL), Arden Hills, MN

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued; the date following the company name and location of each determination references the impact date for all workers of such determination.

TA–W–42,054; Treesource Industries, Inc., d/b/a Spanaway Lumber, Tacoma, WA: August 21, 2001.
TA–W–42,232; Nilfisk-Advance, Inc., Plymouth, MN: September 26, 2001.
TA–W–42,149; Modine Manufacturing Co., Knoxville, TN: August 16, 2001.

The following certifications have been issued. The requirements of (a)(2)(A) (increased imports) of Section 222 have been met.

TA–W–50,086; J.C. Apparel, Inc., A.K.A. American Apparel, Sebastopol, MS: November 14, 2001.
TA–W–50,402; Tillotson Healthcare Corp., Dixville Notch, NH: November 21, 2001.
TA–W–50,290; Sipex Corp., Billerica, MA: November 6, 2001.
TA–W–50,278; Dennis Windings, Inc., Wilkes-Barre, PA: December 3, 2001.
TA–W–50,258 &A, B; Weyerhaeuser Co., Cascase Operations, Softwood Lumber Div., Enumclaw, WA, Snoqualmie, WA and Tacoma, WA: December 2, 2001.
TA–W–50,147; Sanmina-SCI Corp., Printed Circuit Board Div., Tech Center East, Ward Hill, MA: November 14, 2001.
TA–W–50,100; Smith Systems Manufacturing Co., Princeton, MN: November 12, 2001.
TA–W–50,480; Miller Bag Co., Minneapolis, MN: December 23, 2001.
TA–W–50,361; OEM Shades, Inc., Ford City, PA: December 13, 2001.
TA–W–50,298; SPX Corp., Valves and Controls Div., Sartell, MN: November 15, 2001.
TA–W–50,509; Sensient Colors, Inc., a subsidiary of Sensient Technologies Corp., Crompton Corp., Birdsboro, PA: December 20, 2001.
TA–W–50,385; Santini Corp., Leoma, TN: December 17, 2001.
TA–W–50,198; Vaagen Brother Lumber, Inc., Republic, WA: November 25, 2001.

TA–W–50,224; Upstate Printed Circuits, Inc., Syracuse, NY: November 30, 2001.
TA–W–50,084; Henry Pratt Co., Dixon, IL: November 7, 2001.
TA–W–50,084; Long Manufacturing, Thermal Products Div., a Div. of Dana Corp., Sheffield, PA: December 10, 2001.
TA–W–50,151; SIG Doyboy, In., a subsidiary of SIG Pack International, New Richmond, WI: November 20, 2001.

The following certifications have been issued. The requirements of (a)(2)(B) (shift in production) of Section 222 have been met.

TA–W–50,050; Advanced Energy Industries, Inc. (AE), Advanced Energy—Flow Products, (Aera Products—TX), Austin, TX: November 8, 2001.
TA–W–50,394; Micro Component Technology, Inc. (MCT), St. Paul, MN: December 18, 2001.
TA–W–50,359; General Chemical Group, Manistee, MI: December 13, 2001.
TA–W–50,159; Pliant Solutions, Ft. Edward, NY: November 13, 2001.
TA–W–50,324; Smith Aerospace, Inc., Display and Control Systems, Malvern Div., a Subsidiary of Smiths Group LLP, Malvern, PA: December 9, 2001.
TA–W–50,223; Alcoa Fujikura LTD, Photonics Div., Allentown, PA: December 2, 2001.
TA–W–50,244; Medtronics Corp., a Vascular World Medical Div., Sunrise, FL: November 27, 2001.
TA–W–50.546; Emerson Tool Co., Paris, TN: January 10, 2002,
TA–W–50,405; Dorr-Oliver Eimco USA, Inc., Salt Lake City, UT: December 20, 2001.
TA–W–50,190; Powder Processing and Technology, LLC, Valparaiso, IN: November 20, 2001.
TA–W–50,036; Nortel Networks, Department #2446, Research Triangle Park, NC: November 5, 2001.
TA–W–50,095; Johnson Controls, Inc., Controls Group, Kennesaw, GA: November 3, 2001.
TA–W–50,183; Donaldson Co., Inc., Port Huron, MI: November 19, 2001.
TA–W–50,296; TRW Automotive, Engine Components Div., Danville, PA: December 12, 2002
TA–W–50,318; Fairfield Manufacturing Co, Inc., Lafayette, IN: November 28, 2002.
TA–W–50356; Key Plastics LLC, Port Huron, MI: December 1, 2001.

The following certification have been issued. The requirement of upstream supplier to trade certified primary firm as been met.

TA–W–50,163; Seadrift Coke, L.P., a subsidiary of the Carbide/Graphite Group, Port Lavaca, TX: November 21, 2001.
TA–W–50,227; The Fabricating Source, Inc., Youngstown, OH: November 19, 2001
TA–W–50,182; TSCO/Tube Specialties Co., Inc., Troutdale, OR: November 20, 2001.
TA–W–50,135; Punch Components, Inc., Lima, OH: November 12, 2001.
TA–W–50,010; Vulcan Chemicals, Workers Producing R–22 and Chloroform, Wichita, KS: November 4, 2001.

The following certification has been issued. The requirement of downstream finisher to trade certified primary firm has been met.

TA–W–50,199; J. Dreier Enterprises, LTD, New Brighton, MN: November 19, 2001

Also, pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance hereinafter called (NAFTA–TAA) and in accordance with Section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act as amended, the Department of Labor presents summaries of determinations regarding eligibility to apply for NAFTA–TAA issued during the month of January, 2003.

In order for an affirmative determination to be made and a certification of eligibility to apply for NAFTA–TAA the following group eligibility requirements of section 250 of the Trade Act must be met:

(1) That a significant number or proportion of the workers in the workers' firm, or an appropriate subdivision thereof, (including workers in any agricultural firm or appropriate subdivision thereof) have become totally or partially separated from employment and either—

(2) That sales or production, or both, of such firm or subdivision have decreased absolutely,

(3) That imports from Mexico or Canada of articles like or directly competitive with articles produced by such firm or subdivision have increased, and that the increases imports contributed importantly to such workers' separations or threat of separation and to the decline in sales or production of such firm or subdivision; or

(4) That there has been a shift in production by such workers' firm or subdivision to Mexico or Canada of articles like or directly competitive with articles which are produced by the firm or subdivision.

Negative Determinations NAFTA–TAA

In each of the following cases the investigation revealed that criteria (3) and (4) were not met. Imports from Canada or Mexico did not contribute importantly to workers' separations. There was no shift in production from the subject firm to Canada or Mexico during the relevant period.

NAFTA–TAA–07635; Plastic Products Co., Inc., Moline, IL.
NAFTA–TAA–07574; Radio Frequency Systems, Conditioning Div., including leased workers at Strategic Staffing and Selectemp, Corvallis, OR
NAFTA–TAA–06227; ADC Telecommunications, 1000 Valley Park Drive, Shakopee, MN
NAFTA–TAA–07624; Pohlman Foundry Co., Inc., Buffalo, NY
NAFTA–TAA–06487; Disa Industries, Holly, MI
NAFTA–TAA–07577; Decatur Mold Tool and Engineering, Inc., Southeast Div., Sanford, NC
NAFTA–TAA–07641; Nutramax Oral Care, Florence, MA
NAFTA–TAA–07631; United Plastics Group, Bensenville, IL
NAFTA–TAA–07548; ADC Telecommunications, Inc., U.S. Photonics Engineering and Manufacturing, Vadnais Heights, MN
NAFTA–TAA–07602; Anderson Packaging, Inc., Rockford, IL
NAFTA–TAA–07630; Owen Development Corp., d/b/a Intra, Spartanburg, SC

Affirmative Determinations NAFTA–TAA

NAFTA–TAA–06499; Treesource Industries, Inc., d/b/a Spanaway Lumber, Tacoma, WA: August 21, 2001.
NAFTA–TAA–07615; Sermatech Manufacturing, Mal Tool Div., Manchester, CT: September 24, 2001.
NAFTA–TAA–06440; ADC Telecommunications, 1087 Park Place, Shakopee, MN: June 11, 2001.
NAFTA–TAA–06490; IBM Corp., Microelectronics Div., Essex Junction, VT: August 14, 2001.
NAFTA–TAA–07652; Pacific Electricord, a subsidiary of Leviton Manufacturing Co., Gardena, CA: October 4, 2001.

I hereby certify that the aforementioned determinations were issued during the months of January, 2003. Copies of these determinations are available for inspection in Room C–5311, U.S. Department of Labor, 200

Constitution Avenue, NW., Washington, DC 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: January 24, 2003.

Edward A. Tomchick,

Director, Division of Trade Adjustment Assistance.

[FR Doc. 03–2847 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–42,107]

Bath Unlimited, Inc., a Division of Masco Corporation Doing Business as Melard Manufacturing Corporation, Passaic, New Jersey; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on October 4, 2002, applicable to workers of Bath Unlimited, Inc., a Division of MASCO Corp., Passaic, New Jersey. The notice was published in the **Federal Register** on November 5, 2002 (67 FR 67418).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of showerhead and plumbing repair products.

New information provided by the State shows that Bath Unlimited is doing business as Melard Manufacturing Corporation as of January 1, 2002. Information also shows that workers separated from employment at the subject firm had their wages reported under a separate unemployment insurance (UI) tax account for Melard Manufacturing Corporation.

Accordingly, the Department is amending the certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of Bath Unlimited, Inc. who were adversely affected by imports. The amended notice applicable to TA–W–42,107 is hereby issued as follows:

''All workers of Bath Unlimited, Inc., a division of MASCO Corp., doing business as Melard Manufacturing Corporation, Passaic, New Jersey, who became totally or partially separated from employment on or after August 28, 2001, through October 4, 2004, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.''

Signed at Washington, DC this 13th day of January 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2865 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–50,167]

Bike Athletic Company, Knoxville, TN; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on December 4, 2002, applicable to workers of Bike Athletic Company, Cutting Department, Knoxville, Tennessee. The notice was published in the **Federal Register** on December 23, 2002 (67 FR 78256).

The Union of Needletrades, Industrial and Textile Employees, Tennessee/Kentucky requested that the Department expand the certification to include all workers of the subject firm. The Department reviewed the certification for workers of the subject firm. The findings show that the Department issued certification coverage to all workers of the subject firm's Cutting Department.

The investigation conducted for the subject firm was on behalf of workers manufacturing (cut fabric) men's and women's athletic team apparel. The investigation revealed that company imports of men's and women's athletic team apparel increased while production and employment declined during the period of the investigation, thus impacting all workers of the subject firm.

It is the intent of the Department to include all workers of Bike Athletic Company adversely affected by increased imports. Therefore, the Department is amending the certification determination to correctly identify the worker group to read all workers.

The amended notice applicable to TA–W–50,167 is hereby issued as follows:

''All workers of Bike Athletic Company, Knoxville, Tennessee who became totally or partially separated from employment on or after November 21, 2001, through December 4, 2004, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.''

Signed at Washington, DC this 14th day of January 2003.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2862 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–41,060; TA–W–41,060A; TA–W–41,060B; TA–W–41,060C; TA–W–41,060D; TA–W–41,060E; and TA–W–41,060F]

Brooks Instruments, a Division of Emerson Process Management, Hatfield, Pennsylvania; Grayson, Georgia; Eden Prairie, Minnesota; Plantation, Florida; Boulder, Colorado; Houston Sales Office, Houston, Texas; Austin Sales Office, Austin, Texas; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on April 9, 2002, applicable to workers of Brooks Instrument, a Division of Emerson Process Management, Hatfield, Pennsylvania. The notice was published in the **Federal Register** on April 24, 2002 (67 FR 20166).

At the request of the company, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of sensors for flow meters.

Information shows that worker separations occurred at the Grayson, Georgia, Eden Prairie, Minnesota, Plantation, Florida, Boulder, Colorado, Houston Sales Office, Houston, Texas, Austin Sales Office, Austin, Texas locations of the subject firm. These locations provide sales and engineering support services for the subject firm's production facility in Hatfield, Pennsylvania.

Accordingly, the Department is amending the certification to included workers of the Brooks Instruments, a Division of Emerson Process Management, Grayson, Georgia, Eden Prairie, Minnesota, Plantation, Florida, Boulder, Colorado, Houston Sales Office, Houston, Texas, and the Austin Sales Office, Austin, Texas.

The intent of the Department's certification is to include all workers of Brooks Instruments, a Division of Emerson Process Management adversely affect by increased imports.

The amended notice applicable to TA–W–41,061 is hereby issued as follows:

''All workers of Brooks Instruments, a Division of Emerson Process Management, Hatfield, Pennsylvania (TA–W–41,060), Grayson, Georgia (TA–W–41,060A), Eden Prairie, Minnesota (TA–W–41,060B), Plantation, Florida (TA–W–41,060C), Boulder, Colorado (TA–W–41,060D), Houston Sales Office, Houston, Texas (TA–W–41,060E), and the Austin Sales Office, Austin, Texas (TA–W–41,060F), who became totally or partially separated from employment on or after February 7, 2001, through April 9, 2004, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.''

Signed at Washington, DC this 14th day of January 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2867 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–50,094 and TA–W–50,094A]

Chiquola Industrial Products Group LLC, Honea Path, South Carolina and Chiquola Industrial Products Group LLC, Abbeville, South Carolina; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on December 19, 2002, applicable to workers of Chiquola Industrial Products Group LLC, Honea Path, South Carolina. The notice will soon be published in the **Federal Register**.

At the request of a company official, the Department reviewed the certification for workers of the subject firm. The workers produced industrial fabrics. Information contained in the record shows that the company intended workers in Abbeville, South Carolina to be included in the certification. The workers at both South Carolina locations are considered by the company as one worker group. Data collected from the company official were for both locations.

It is the Department's intent to include all workers of Chiquola Industrial Products Group LLC, adversely affected by increased imports. Accordingly, the Department is amending the certification to include all workers of Chiquola Industrial Products Group LLC, located in Abbeville, South Carolina.

The amended notice applicable to TA-W–50,094 is hereby issued as follows:

''All workers of Chiquola Industrial Products Group LLC, Honea Path, South Carolina (TA–W–50,094) and Abbeville, South Carolina (TA–W–50,094A), who became totally or partially separated from employment on or after November 5, 2001, through December 19, 2004, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.''

Signed at Washington, DC, this 14th day of January, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2863 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–50,273]

Harvard Industries, Inc., Corporate Headquarters, Lebanon, New Jersey; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on December 9, 2002 in response to a worker petition that was filed on behalf of workers at Harvard Industries, Inc., Corporate Headquarters, Lebanon, New Jersey.

An active certification covering the petitioning group of workers is already in effect (TA–W–41,871, as amended). Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 17th day of January 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2849 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–41,871 and 871A]

Harvard Industries, Inc., Albion Division, Albion, Michigan and Harvard Industries, Inc., Corporate Headquarters, Lebanon, New Jersey; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Notice of Certification Regarding Eligibility to Apply for Worker Adjustment Assistance on September 10, 2002, applicable to workers of Harvard Industries, Inc., Albion Division, Albion, Michigan. The notice was published in the **Federal Register** on September 27, 2002 (67 FR 61161).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The company reports that worker separations occurred at the Corporate Headquarters located in Lebanon. New Jersey. The workers at the Lebanon, New Jersey location provide support services (legal, payroll, human resources, tax, etc.) supporting the production of auto parts, castings and stampings at the Albion Division, Albion, Michigan facility of the subject firm.

Based on these findings, the Department is amending the certification to include workers of Harvard Industries, Inc., Corporate Headquarters, Lebanon, New Jersey.

The intent of the Department's certification is to include all workers of Harvard Industries, Albion Division, who were adversely affected by increased customer imports.

The amended notice applicable to TA–W–41,871 is hereby issued as follows:

''All workers of Harvard Industries, Inc., Albion Division, Albion, Michigan (TA–W–41,871), and Harvard Industries, Inc., Corporate Headquarters, Lebanon, New Jersey (TA–W–41,871A), who became totally or partially separated from employment on or after June 27, 2001, through September 10, 2004, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.''

Signed at Washington, DC, this 17th day of January 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2850 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–U

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–50,430]

L'Art De La Mode, Inc. Carlstadt, New Jersey; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on January 2, 2003 in response to a worker petition filed by a state workforce agency on behalf of workers at L'Art De La Mode, Inc., Carlstadt, New Jersey.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation would serve no useful purpose and the investigation has been terminated.

Signed at Washington, DC, this 24th day of January 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2843 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–40,666]

Loren Castings, Inc., Loren Industries Including Leased Workers of ADP Totalsource, Hollywood, Florida; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on July 19, 2002, applicable to workers of Loren Castings, Inc., Loren Industries, Hollywood, Florida. The notice was published in the **Federal Register** on August 7, 2002 (67 FR 51295).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. Information provided by the State shows that some employees of Loren Castings, Inc., Loren Industries were leased from ADP Totalsource to produce jewelry at the Hollywood, Florida facility of the subject firm.

Based on these findings, the Department is amending the certification to include leased workers of ADP Totalsource producing jewelry at the Hollywood, Florida location of the subject firm.

The intent of the Department's certification is to include all workers of Loren Castings, Inc., Loren Industries adversely affected by increased imports.

The amended notice applicable to TA–W–40,666 is hereby issued as follows:

''All workers of Loren Castings, Inc., Loren Industries, Hollywood, Florida, engaged in employment related to the production of jewelry, including leased workers of ADP Totalsource, engaged in employment related to the production of jewelry at Loren Castings, Inc., Loren Industries, Hollywood, Florida, who became totally or partially separated from employment on or after December 4, 2000, through July 19, 2004, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.''

Signed at Washington, DC this 15th day of January 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2868 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–41,084 and TA–W–41,084A]

Milady Bridals, Incorporated, Union City, New Jersey, and Milady Bridals, Incorporated, New York, New York; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on May 24, 2002, applicable to workers of Milady Bridals, Incorporated, Union City, New Jersey. The notice was published in the **Federal Register** on June 11, 2002 (67 FR 40006).

At the request of the company, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of bridal gowns and bridesmaids' dresses.

Information shows that worker separations occurred at the New York, New York location of the subject firm. The workers provide administrative support functions and accounting for the subject firm's production facility located in Union City, New Jersey.

Accordingly, the Department is amending the certification to include workers of the Milady Bridals, Incorporated, New York, New York.

The intent of the Department's certification is to include all workers of Milady Bridals, Incorporated adversely affected by increased imports.

The amended notice applicable to TA-W–41,084 is hereby issued as follows:

''All workers of Milady Bridals, Incorporated, Union City, New Jersey (TA–W–41,084) and Milady Bridals, Incorporated, New York, New York (TA–W–41,084A), who became totally or partially separated from employment on or after February 14, 2001, through May 24, 2004, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.''

Signed at Washington, DC this 17th day of January 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2866 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–42,190]

Pechiney Rolled Products, Ravenswood, West Virginia; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on September 30, 2002 in response to a worker petition which was filed on September 30, 2002 on behalf of workers at Pechiney Rolled Products, Ravenswood, West Virginia.

At the request of the petitioner, the petition has been withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 23rd day of January, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2846 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–40,075]

Pohlman Foundry Company, Inc., Freedom Services, Inc., Buffalo, NY; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for

Worker Adjustment Assistance on March 27, 2002, applicable to workers of Pohlman Foundry Company, Inc., Buffalo, New York. The notice was published in the **Federal Register** on April 5, 2002 (67 FR 16442).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers were engaged in the production of steel and cast iron castings.

New information shows that workers of Freedom Services, Inc. provided payroll function services for Pohlman Foundry Company, Inc., Buffalo, New York. Information also shows that workers separated from employment at the subject firm had their wages reported under a separate unemployment insurance (UI) tax account for Freedom Services, Inc.

Therefore, the certification is being amended to include workers at the Buffalo, New York location whose wages were reported to the Freedom Services, Inc. tax account.

The intent of the Department's certification is to include all workers of Pohlman Foundry Company, Inc. who were adversely affected by increased imports.

The amended notice applicable to TA–W–40,075 is hereby issued as follows:

''All workers of Pohlman Foundry Company, Inc., Freedom Services, Inc., Buffalo, New York who became totally or partially separated from employment on or after September 6, 2000, through March 27, 2004, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.''

Signed at Washington, DC this 17th day of January 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2869 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–42,140]

SPX Valves & Controls Division Sartell, Minnesota; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on September 16, 2002, in response to a filed on behalf of workers SPX, Valves & Controls Division, Sartell, Minnesota.

The petitioning group of workers are under a current certification which was issued on January 15, 2003 (TA–W–50,298). Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 23rd day of January, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2845 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–50,556]

Stora Enso North America Wisconsin Rapids, Wisconsin; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on January 13, 2003, in response to a worker petition filed by a company official on behalf of workers at Stora Enso North America, Wisconsin Rapids, Wisconsin.

The petitioning group of workers is covered by an active certification issued on March 12, 2001 and which remains in effect (TA–W–38,305). Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 21st day of January 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2844 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–42,343 and TA–W–42,343A]

Wolverine World Wide, Inc. Formerly Frolic Footwear, A Division of Wolverine Manufacturing Group, Arkansas Operations, Monette, Arkansas; Wolverine World Wide, Inc. Formerly Frolic Footwear, A Division of Wolverine Manufacturing Group, Arkansas Operations, Jonesboro, Arkansas; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Notice of Certification Regarding Eligibility to Apply for Worker Adjustment Assistance on December 13, 2002, applicable to workers of Wolverine World Wide, Inc., formerly Frolic Footwear, a Division of Wolverine Manufacturing Group, Arkansas operations, Monette, Arkansas. The notice will be published soon in the **Federal Register**.

At the request of the company, the Department reviewed the certification for workers of the subject firm. The company reports that worker separations occurred at the Jonesboro, Arkansas location of Wolverine World Wide, Inc., Arkansas Operations. The Jonesboro, Arkansas location produces cut to fit upper component parts needed for the production of house slippers and clog slippers at the Monette, Arkansas location of the subject firm.

Based on these findings, the Department is amending the certification to include workers of the Jonesboro, Arkansas location of Wolverine World Wide, Inc., Arkansas Operations.

The intent of the Department's certification is to include all workers of Wolverine World Wide, Inc., Arkansas Operations who were adversely affected by increased imports.

The amended notice applicable to TA–W–42,343 is hereby issued as follows:

''All workers of Wolverine World Wide, Inc., formerly Frolic Footwear, a Division of Wolverine Manufacturing Group, Arkansas Operations, Monette, Arkansas (TA–W–42,343), and Jonesboro, Arkansas (TA–W–42,343A), who became totally or partially separated from employment on or after October 23, 2001, through December 13, 2004, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.''

Signed at Washington, DC this 13th day of January 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2864 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–37,937]

Wolverine Worldwide, Inc., Kirksville, Missouri; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the

Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on August 31, 2000, applicable to workers of Wolverine Worldwide, Inc., Kirksville, Missouri. The notice was published in the **Federal Register** on September 22, 2000 (65 FR 57386).

At the request of the company and the State agency, the Department reviewed the certification for workers of the subject firm. New information shows that Mr. Clifford Lumsden was retained at the subject firm as a security guard/maintenance personnel until the plant closed in September 2002 resulting in Mr. Lumsden's termination. Information also shows that Mr. Lumsden was separated from the subject firm after the August 31, 2002 expiration date of previous certification.

The intent of the Department's certification is to include all workers of Wolverine Worldwide, Inc. who were adversely affected by increased imports. Therefore, the Department is amending the certification to extend coverage through October 31, 2002 to include Mr Clifford Lumsden.

The amended notice applicable to TA–W–37,937 is hereby issued as follows:

''All workers of Wolverine Worldwide, Inc., Kirksville, Missouri, who became totally or partially separated from employment on or after July 17, 1999, through October 31, 2002, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.''

Signed at Washington, DC this 24th day of January 2003.

Edward A. Tomchick,

Director, Division of Trade Adjustment Assistance.

[FR Doc. 03–2870 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6879]

State of Alaska Commercial Fisheries Entry Commission Permit #59419M, Naknek, Alaska; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #59419M, Naknek, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2851 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6881]

State of Alaska Commercial Fisheries Entry Commission Permit #59452H, Naknek, Alaska; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #59452H, Naknek, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2852 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6882]

State of Alaska Commercial Fisheries Entry Commission Permit #57197L, Naknek, Alaska; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with Section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #57197L, Naknek, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2853 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6885]

State of Alaska Commercial Fisheries Entry Commission Permit #62009Q, Naknek, Alaska; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #62009Q, Naknek, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2854 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6886]

State of Alaska Commercial Fisheries Entry Commission Permit No. 68340V Naknek, Alaska; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with Section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit No. 68340V, Naknek, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2855 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6889]

State of Alaska Commercial Fisheries Entry Commission Permit No. 60111L Naknek, Alaska; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with Section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit No. 60111L, Naknek, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2856 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6891]

State of Alaska Commercial Fisheries Entry Commission Permit No. 58282J, Naknek, Alaska; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with Section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit No. 58282J, Naknek, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2857 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6894]

State of Alaska Commercial Fisheries Entry Commission Permit No. 57729N, Naknek, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with Section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit No. 57729N, Naknek, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2858 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6895]

State of Alaska Commercial Fisheries Entry Commission Permit No. 56999Q, Naknek, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with Section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit No. 56999Q, Naknek, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2859 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6929]

State of Alaska Commercial Fisheries Entry Commission Permit No. 66590F, New Stuyahok, Alaska; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with Section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit No. 66590F, New Stuyahok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2860 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6900]

State of Alaska Commercial Fisheries Entry Commission Permit 61341V, Naknek, Alaska; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002, in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit No. 61341V, Naknek, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2888 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6902]

State of Alaska Commercial Fisheries Entry Commission Permit No. 61438E, Naknek, Alaska; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002, in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit No. 61438E, Naknek, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2889 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6904]

State of Alaska Commercial Fisheries Entry Commission Permit No. 58226Q, Naknek, Alaska; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002, in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit No. 58226Q, Naknek, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2890 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6905]

State of Alaska Commercial Fisheries Entry Commission Permit #61176J, Naknek, Alaska; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002, in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit No. 61176J, Naknek, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2891 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6908]

State of Alaska Commercial Fisheries Entry Commission Permit #57954M, New Stuyahok, Alaska; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002, in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #57954M, New Stuyahok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2892 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6909]

State of Alaska Commercial Fisheries Entry Commission Permit #55926G, New Stuyahok, Alaska; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002, in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #55926G, New Stuyahok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2893 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6910]

State of Alaska Commercial Fisheries Entry Commission Permit #59312H; New Stuyahok, Alaska; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #59312H, New Stuyahok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2894 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6911]

State of Alaska Commercial Fisheries Entry Commission Permit #65630C; New Stuyahok, Alaska; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with Section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #65630C, New Stuyahok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2895 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6913]

State of Alaska Commercial Fisheries Entry Commission Permit #56717H, New Stuyahok, Alaska; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #56717H, New Stuyahok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2896 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6915]

State of Alaska Commercial Fisheries Entry Commission Permit #67327X, New Stuyahok, Alaska; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with Section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #67327X, New Stuyahok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2897 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6917]

State of Alaska Commercial Fisheries Entry Commission Permit #63691J, New Stuyahok, Alaska; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with Section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #63691J, New Stuyahok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2898 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6918]

State of Alaska Commercial Fisheries Entry Commission Permit #56223Q, New Stuyahok, Alaska; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with Section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #56223Q, New Stuyahok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2899 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6920]

State of Alaska Commercial Fisheries Entry Commission Permit #59026X, New Stuyahok, Alaska; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #59026X, New Stuyahok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2900 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6921]

State of Alaska Commercial Fisheries Entry Commission Permit # 51469K, New Stuyahok, Alaska; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with Section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #51469K, New Stuyahok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2901 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6922]

State of Alaska Commercial Fisheries Entry Commission Permit #66411G, New Stuyahok, Alaska; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #66411G, New Stuyahok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2902 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6924]

State of Alaska Commercial Fisheries Entry Commission Permit #56219X, New Stuyahok, Alaska; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #56219X, New Stuyahok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2903 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6925]

State of Alaska Commercial Fisheries Entry Commission Permit No. 63414L, New Stuyahok, Alaska; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit No. 63414L, New Stuyahok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2904 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6926]

State of Alaska Commercial Fisheries Entry Commission Permit No. 60396X; New Stuyahok, Alaska; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA-TAA and in accordance with section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit No. 60396X, New Stuyahok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2905 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6927]

State of Alaska Commercial Fisheries Entry Commission Permit No. 61228N; New Stuyahok, Alaska; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit No. 61228N, New Stuyahok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2906 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6928]

State of Alaska Commercial Fisheries Entry Commission Permit No. 64737J; New Stuyahok, Alaska; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit No. 64737J, New Stuyahok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 29th day of November, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2907 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–06445, NAFTA–06445A, NAFTA–06445B, and NAFTA–06445C]

Creo Americas, Inc., Subsidiary of Creo, Inc., Bedford, Massachusetts; Creo Americas, Inc., Subsidiary of Creo, Inc., Atlanta Regional Office, Atlanta, Georgia; Creo Americas, Inc., Subsidiary of Creo, Inc., Chicago Regional Office, Itasca, Illinois; Creo Americas, Inc., Subsidiary of Creo, Inc., Irvine Regional Office, Irvine, California; Amended Certification Regarding Eligibility To Apply for NAFTA–Transitional Adjustment Assistance

In accordance with section 250(a), subchapter D, chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), the Department of Labor issued a Certification of Eligibility to Apply for NAFTA Transitional Adjustment Assistance on October 15, 2002, applicable to workers of Creo Americas, Inc., a Subsidiary of Creo, Inc., Bedford, Massachusetts. The notice was published in the **Federal Register** on November 5, 2002 (67 FR 67422).

At the request of the company, the Department reviewed the certification for workers of the subject firm. The company reports that worker separations occurred at the Atlanta Regional Office, Atlanta, Georgia, Chicago Regional Office, Itasca, Illinois and the Irvine Regional Office, Irvine, California of Creo Americas, Inc., a subsidiary of Creo, Inc. The workers are employed in administrative functions directly supporting the production of digital proofing hardware, software, ink and paper.

The intent of the Department's certification is to include all workers of Creo Americas, Inc., a subsidiary of Creo, Inc. affected by a shift in production to Canada.

Accordingly, the Department is amending the certification to include workers of Creo Americas, Inc., a subsidiary of Creo, Inc., Atlanta Regional Office, Atlanta, Georgia, Chicago Regional Office, Itasca, Illinois and the Irvine Regional Office, Irvine, California.

The amended notice applicable to NAFTA–06445 is hereby issued as follows:

''All workers of Creo Americas, Inc., a subsidiary of Creo, Inc., Bedford, Massachusetts (NAFTA–06445), Atlanta Regional Office, Atlanta, Georgia (NAFTA–06445A), Chicago Regional Office, Itasca, Illinois (NAFTA–06445B), and Irvine Regional Office, Irvine, California (NAFTA–06445C), who became totally or partially separated from employment on or after August 2, 2001, through October 15, 2004, are eligible to apply for NAFTA–TAA under Section 250 of the Trade Act of 1974.''

Signed in Washington, DC, this 23rd day of January, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2848 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–7634 and NAFTA–7634A]

Wolverine World Wide, Inc. Formerly Frolic Footwear, a Division of Wolverine Manufacturing Group, Arkansas Operations, Monette, AR; and Wolverine World Wide, Inc. Formerly Frolic Footwear, a Division of Wolverine Manufacturing Group, Arkansas Operations, Jonesboro, AR; Amended Certification Regarding Eligibility To Apply for NAFTA–Transitional Adjustment Assistance

In accordance with Section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), the Department of Labor issued a Certification of Eligibility to Apply for NAFTA Transitional Adjustment Assistance on December 3, 2002, applicable to workers of Wolverine World Wide, Inc., formerly Frolic Footwear, a Division of Wolverine Manufacturing Group, Arkansas Operations, Monette, Arkansas. The notice was published in the **Federal Register** on December 23, 2002 (67 FR 78257).

At the request of the company, the Department reviewed the certification for workers of the subject firm. The company reports that worker separations occurred at the Jonesboro, Arkansas location of Wolverine World Wide, Inc., Arkansas Operations. The Jonesboro, Arkansas location produces cut to fit upper component parts needed for the production of house slippers and clog slippers at the Monette, Arkansas location of the subject firm.

Based on these findings, the Department is amending the certification to include workers of the Jonesboro, Arkansas location of Wolverine World Wide, Inc., Arkansas Operations.

The intent of the Department's certification is to include all workers of Wolverine World Wide, Arkansas

Operations affected by the shift in production of house slippers and clog slippers to Mexico.

The amended notice applicable to NAFTA–07634 is hereby issued as follows:

''All workers of Wolverine World Wide, Inc., formerly Frolic Footwear, a Division of Wolverine Manufacturing Group, Arkansas Operations, Monette, Arkansas (NAFTA–7634), and Jonesboro, Arkansas (NAFTA–7634A), who became totally or partially separated from employment on or after October 23, 2001, through December 3, 2004, are eligible to apply for NAFTA–TAA under Section 250 of the Trade Act of 1974.''

Signed in Washington, DC this 13th day of January 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–2861 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–30–P

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: Statement of Recovery Forms (CA/EN–1108, EB/EN–1108, CA/EN–1122). 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 April 7, 2003.

ADDRESSES: Ms. Hazel M. Bell, U.S. Department of Labor, 200 Constitution Ave., NW., Room S–3201, Washington, DC 20210, telephone (202) 693–0418, fax (202) 693–1451, Email *hbell@fenix2.dol-esa.gov.* Please use only one method of transmission for comments (mail, fax, or Email).

SUPPLEMENTARY INFORMATION:

I. *Background:* Under section 8131 a Federal employee can sustain a work-related injury, for which he or she is eligible for compensation under the Federal Employees' Compensation Act (FECA), under circumstance that create a legal liability in some third party to pay damages for the same injury. When this occurs, section 8131 of the FECA (5 U.S.C. 8131) authorizes the Secretary of Labor to either require the employee to assign his or her right of action to the United States or to prosecute the action. When the employee receives a payment for his or her damages, whether from a final court judgment on or a settlement of the action, section 8132 of the FECA (5 U.S.C. 8132) provides that the employee ''shall refund to the United States the amount of compensation paid by the United States * * *'' To enforce the United States' statutory right to this refund, the Office of Workers' Compensation Programs (OWCP) has promulgated regulations that require both the reporting of these types of payments (20 CFR 10.710) and the submission of the type of detailed information necessary to calculate the amount of the required refund (20 CRF 10.707(e)). The information collected by Form CA/EN–1122 is requested from the claimant if he or she received a payment for damages without hiring an attorney. Form CA/EN–1108 requests this information from the attorney if one was hired to bring suit against the third party. Form EB/EN–1108 request the same information as the CA/EN–1108 if the claimant's attorney contacts the Office of the Solicitor (SOL) directly.

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 approval to collect this information in order to exercise its responsibility to enforce the United States' right to this refund. These forms will be used to obtain information about amounts received as the result of a final judgment in litigation, or a settlement of the litigation, brought against a third party who is liable for damages due to compensable work-related injury.

Type of Review: New Collection.

Agency: Employment Standards Administration.

Title: Statement of Recovery Forms.

OMB Number: 1215–.

Agency Number: CA/EN–1108, EB/EN–1108, CA/EN–1122.

Affected Public: Business or other for-profit, individuals or households.

Form/requirement	Respondents/ responses	Time per response (in minutes)	Burden hours
CA/EN–1108	2,720	30	1,360
EB/EN–1108	160	30	80
CA/EN–1122	320	15	80

Total Respondents/Responses: 3,200.

Frequency: As needed.

Estimated Total Burden Hours: 1,520.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $1,280.

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 31, 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. 03–2842 Filed 2–5–03; 8:45 am]

BILLING CODE 4510–CH–P

OFFICE OF MANAGEMENT AND BUDGET

Federal Activities Inventory Reform Act of 1998; Public Availability of Year 2002

SUBJECT: Public Availability of Year 2002 Agency Inventories Under the Federal Activities Inventory Reform Act of 1998 (Pub. L. 105–270) (''FAIR Act'').

AGENCY: Office of Management and Budget; Executive Office of the President.

ACTION: Notice of public availability of agency inventories of activities that are not inherently governmental and of activities that are inherently governmental.

SUMMARY: Agency inventories of activities that are not inherently governmental are now available to the public from the agencies listed below, in accordance with the ''Federal Activities Inventory Reform Act of 1998'' (Pub. L. 105–270) (''FAIR Act''). Agency inventories of activities that are inherently governmental are also now available to the public from the agencies listed below. This is the third release of the 2002 FAIR Act inventories. The Office of Federal Procurement Policy has made available a summary FAIR Act User's Guide through its Internet site: *http://www.whitehouse.gov/OMB/procurement/index.html.* The User's Guide should help interested parties review 2002 FAIR Act inventories, and gain access to agency inventories through agency Web site addresses.

The FAIR Act requires OMB to publish an announcement of public availability of agency inventories of activities that are not inherently governmental upon completion of OMB's review and consultation process concerning the content of the agencies' inventory submissions. After review and consultation with OMB, the agency inventories are made available to the public. Interested parties who disagree with the agency's initial judgment can challenge the inclusion or the omission of an activity on the list and, if not satisfied with this review, may also demand a higher agency review/appeal.

Mitchell E. Daniels, Jr.,

Director.

Attachment:

THIRD FAIR ACT RELEASE 2002

Agency	Contact
American Battle Monuments Commission	Vincent Scatamacchia (703) 696–6898, William Athas (703) 696–6869, *www.abmc.gov*.
Arlington National Cemetery	Rory Smith (703) 614–5060 *www.arlingtoncemetery.org*.
Armed Forces Retirement Home	Steve McManus (202) 730–3533, *www.afrh.com*.
Chemical Safety and Hazard Investigation Board	Bea Robinson, (202) 261–7627, *www.csb.gov*.
Defense Nuclear Facilities Safety Board	Kenneth M. Pusateri (202) 694–7000, *www.dnfsb.gov*.
Department of Agriculture	Barbara McNeal (202) 720–0995, *www.usda.gov/ocfo*.
Department of Agriculture, IG	Delmas R. Thornsbury (202) 720–4474, *www.usda.gov/oig*.
Department of Commerce	Edna Campbell (202) 482–4115, *www.osec.doc.gov/oebam/fair/*.
Department of Defense	Paul Soloman (703) 824–2692 (Hotline #), *http://web.lmi.org/fairnet/*. *Note:* The POC for individual DOD components can be obtained from the DOD Web site.
Department of Energy	Mark Hively, (202) 586–5655, *www.ma.mbe.doe.gov/a–76*.
Department of Justice	Larry Silvis, (202) 616–3754, *www.usdoj.gov/jmd/pe/preface.htm*.
Department of Labor	Kathy Alejandro, (202) 693–4026, *www.dol.gov/OASAM/programs/boc/welcome2boc.html*.
Department of State	Eugene Batt (202) 663–2325, *www.state.gov*.
Department of Transportation	Barbara Fallat, (202) 366–4974, *www.dot.gov/ost/m60/FairAct*.
Farm Credit Administration	Philip Shebest, (703) 883–4146, *www.fca.gov*.
Federal Election Commission	John O'Brien, (202) 694–1216, *www.fec.gov*.
Federal Energy Regulatory Commission	Kimberly F. Fernandez, (202) 502–8302, *www.ferc.gov*.
Federal Labor Relations Authority	Kevin Kopper, (202) 482–6690 (ext. 425), *www.flra.gov/reports/fair_inv02.cmmrcl.html*.
Federal Maritime Commission	JoAnn Baca, (202) 523–5800, *www.fmc.gov*.
General Services Administration	Paul Boyle (202) 501–0324, *www.gsa.gov/Portal/content/orgs_content.jsp? contentOID=123082&contentType=1005*.
Marine Mammal Commission	Suzanne Montgomery (301) 504–0087.
Nuclear Regulatory Commission	Mark J. Flynn (301) 415–6736, *www.nrc.gov/who-we-are/contracting/inventory-report*.
Nuclear Regulatory Commission, IG	David Lee (301) 415–5930, *www.nrc.gov/insp-gen/fairact-inventory.html*.
Nuclear Waste Technical Review Board	Joyce M. Dory (703) 235–4473, *www.nwtrb.gov*.
Office of Federal Housing Enterprise Oversight	Jill Weide, (202) 414–3813, *www.ofheo.gov*.
Office of Government Ethics	Sean Donohue, (202) 208–8000, x1217, *www.usoge.gov*.
Office of Personnel Management	Steven VanRees, (202) 606–2200, *www.opm.gov/procure*.
Selective Service System	Freida Brockington (703) 605–4081, *www.sss.gov*.
Small Business Administration	Robert Moffitt, (202) 205–6610, *www.sba.gov/fair*.
Smithsonian Institution	Alice Maroni (202) 275–2020, *www.si.edu*.
Social Security Administration	Phil Kelly (410) 965–4656, *www.ssa.gov/*.
U.S. Agency for International Development	Debra Lewis, (202) 712–0936, *www.usaid.gov/procurement_bus_opp/*.
U.S. Agency for International Development, Office of the Inspector General.	Cheryl Woodard, (202) 712–4129, *www.usaid.gov/procurement_bus_opp/*.

[FR Doc. 03–2827 Filed 2–5–03; 8:45 am]
BILLING CODE 3110–01–P

OFFICE OF MANAGEMENT AND BUDGET

Discount Rates for Cost-Effectiveness Analysis of Federal Programs

AGENCY: Office of Management and Budget.

ACTION: Revisions to Appendix C of OMB Circular A–94.

SUMMARY: The Office of Management and Budget revised Circular A–94 in 1992. The revised Circular specified certain discount rates to be updated annually when the interest rate and inflation assumptions used to prepare the budget of the United States Government were changed. These discount rates are found in Appendix C of the revised Circular. The updated discount rates are shown below. The discount rates in Appendix C are to be used for cost-effectiveness analysis, including lease-purchase analysis, as specified in the revised Circular. They do not apply to regulatory analysis.

DATES: The revised discount rates are effective immediately and will be in effect through January 2004.

FOR FURTHER INFORMATION CONTACT: Robert B. Anderson, Office of Economic Policy, Office of Management and Budget, (202) 395–3381.

James D. Foster,

Associate Director for Economic Policy, Office of Management and Budget.

Appendix C

(Revised February 2003) Discount Rates for Cost-Effectiveness, Lease Purchase, and Related Analyses

Effective Dates. This appendix is updated annually around the time of the President's budget submission to Congress. This version of the appendix is valid through the end of January 2004. A copy of the updated appendix can be obtained in electronic form through the OMB home page at *http://www.whitehouse.gov/omb/circulars/a094/a94_appx-c.html,* the text of the main body of the Circular is found at *http://www.whitehouse.gov/omb/circulars/a094/a094.html,* and a table of past years' rates is located at *http://www.whitehouse.gov/omb/circulars/a094/DISCHIST-2003.pdf.* Updates of the appendix are also available upon request from OMB's Office of Economic Policy (202–395–3381).

Nominal Discount Rates. A forecast of nominal or market interest rates for 2003 based on the economic assumptions from the 2004 Budget are presented below. These nominal rates are to be used for discounting nominal flows, which are often encountered in lease-purchase analysis.

NOMINAL INTEREST RATES ON TREASURY NOTES AND BONDS OF SPECIFIED MATURITIES

[in percent]

3-Year	5-Year	7-Year	10-Year	30-Year
3.1	3.6	3.9	4.2	5.1

Real Discount Rates. A forecast of real interest rates from which the inflation premium has been removed and based on the economic assumptions from the 2004 Budget are presented below. These real rates are to be used for discounting real (constant-dollar) flows, as is often required in cost-effectiveness analysis.

REAL INTEREST RATES ON TREASURY NOTES AND BONDS OF SPECIFIED MATURITIES

[in percent]

3-Year	5-Year	7-Year	10-Year	30-Year
1.6	1.9	2.2	2.5	3.2

Analyses of programs with terms different from those presented above may use a linear interpolation. For example, a four-year project can be evaluated with a rate equal to the average of the three-year and five-year rates. Programs with durations longer than 30 years may use the 30-year interest rate.

[FR Doc. 03–2965 Filed 2–5–03; 8:45 am]
BILLING CODE 3110–01–P

RAILROAD RETIREMENT BOARD

Proposed Collection; Comment Request

SUMMARY: In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

Comments are invited on: (a) Whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques of other forms of information technology.

Title and purpose of information collection: Employee Representative's Status and Compensation Reports; OMB 3220–0014. Under Section 1(b)(1) of the Railroad Retirement Act (RRA), the term ''employee'' includes an individual who is an employee representative. As defined in Section 1(c) of the RRA, an employee representative is an officer or official representative of a railroad labor organization other than a labor organization include in the term ''employer,'' as defined in the RRA, who before or after August 29, 1935, was in the service of aN employer under the RRA and who is duly authorized and designated to represent employees in accordance with the Railway Labor Act, or, any individual who is regularly assigned to or regularly employed by such officer or official representative in connection with the duties of his or her office. The requirements relating to the application for employee representative status and the periodic reporting of the compensation resulting from such status is contained in 20 CFR 209.10.

The RRB utilizes Forms DC–2a, Employee Representative's Status Report, and DC–2, Employee Representative's Report on Compensation to obtain the information needed to determine employee representative status and to maintain a record of creditable service and compensation resulting from such status. Completion is required to obtain or retain a benefit. One response is requested of each respondent.

No changes are proposed to Form DC–2a and Form DC–2. The completion time for Form DC–2 is estimated at 30 minutes per response. The RRB estimates that approximately 65 Form DC–2's are received annually. The RRB estimates that less than 10 Form DC–2a's are received annually.

Additional Information or Comments: To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, please call the RRB Clearance Officer at (312) 751–3363. Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–2092. Written comments should be received within 60 days of this notice.

Chuck Mierzwa,

Clearance Officer.

[FR Doc. 03–2822 Filed 2–5–03; 8:45 am]
BILLING CODE 7905–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–27646]

Filings Under the Public Utility Holding Company Act of 1935, As Amended (''Act'')

January 31, 2003.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by February 25, 2003, to the Secretary, Securities and Exchange Commission, Washington, DC 20549–0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After February 25, 2003, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Northeast Utilities (70–10051)

Northeast Utilities (''NU''), a registered holding company under the Act, 107 Selden Street, Berlin, Connecticut 01037, (''Applicant''), has filed a declaration (''Declaration'') with the Commission under sections 6(a), 7, 32 and 33 of the Act.

NU requests authority through the period ending June 30, 2005 (''Authorization Period''), to: (a) Issue from time to time unsecured long-term debt securities (''Long-term Debt'') in an aggregate amount at any time outstanding not to exceed $600 million, and (b) enter into hedging transactions (''Interest Rate Hedges'') with respect to existing indebtedness of NU and its nonutility subsidiaries [1] (''Nonutility Subsidiaries'') in order to manage and minimize interest rate costs and enter into hedging transactions with respect to future expected debt issuances (''Anticipatory Hedges'') in order to lock in then current interest rates and/or manage interest rate risk exposure.

I. Long-Term Debt

NU requests authorization to issue Long-term Debt, the proceeds of which will enable NU to reduce or refinance short-term debt with more permanent capital and provide a source of future financing for the operations of and investments in Nonutility Subsidiaries that are exempt under the Act. Long-term Debt of NU may be in the form of unsecured notes (''Debentures'') issued in one or more series. The Debentures of any series will: (i) Have a maturity ranging from one to 50 years, (ii) bear interest at a rate not to exceed 500 basis points over the yield to maturity of a U.S. Treasury security having a remaining term approximately equal to the term of the series of Debentures, (iii) be subject to optional and/or mandatory redemption, in whole or in part, at par or at various premiums above or discounts below the principal amount, (iv) be entitled to mandatory or optional sinking fund provisions, and (v) may provide for reset of the coupon according to a remarketing arrangement. Long-term Debt of NU also may be in the form of bank lines of credit (''Bank Lines''). Bank Lines will have maturities of not more than five years from the date of each borrowing and the effective cost of these loans will not exceed at the time of issuance 500 basis points over LIBOR. The maturity dates, interest rates, call, redemption and sinking fund provisions and conversion features, if any, with respect to the Debentures of a particular series, as well as any associated placement, underwriting or selling agent fees, commissions and discounts, if any, will be established by negotiation or competitive bidding and reflected in the applicable supplemental indenture or officer's certificate and purchase agreement or underwriting agreement setting forth the terms.

NU contemplates that the Debentures would be issued and sold directly to one or more purchasers in privately negotiated transactions or to one or more investment banking or underwriting firms or other entities that would resell the Debentures without registration under the 1933 Act, in reliance upon one or more applicable exemptions from registration or to the public either (i) through underwriters selected by negotiation or competitive bidding or (ii) through selling agents acting either as agent or principal for resale to the public, either directly or through dealers.

II. Hedges

NU requests authorization to enter into Interest Rate Hedges in connection with indebtedness of NU or its Nonutility Subsidiaries, subject to certain limitations and restrictions as proposed in the Declaration, in order to reduce or manage interest rate costs and risks and to generate parent-level cash and earnings. Interest Rate Hedges would only be entered into with counterparties (''Approved Counterparties'') whose senior unsecured debt ratings, or the senior unsecured debt ratings of the parent companies of the counterparties, as published by Standard and Poor's Ratings Group, are equal to or greater than BBB, or an equivalent rating from Moody's Investors Service or Fitch IBCA. Interest Rate Hedges will involve the use of financial instruments commonly used in the capital markets, such as interest rate swaps, locks, caps, collars, floors, and other similar appropriate instruments. The transactions would be for fixed periods and stated notional amounts. In no case will the notional principal amount of any interest rate swap exceed that of the underlying debt instrument. NU will not engage in speculative transactions as that term is described in Financial Accounting Standard 133. Transaction fees, commissions and other amounts payable to the counterparty or exchange (excluding, however, the swap or option payments) in connection with an Interest Rate Hedge will not exceed those generally obtainable in competitive markets for parties of comparable credit quality.

In addition, NU requests authorization to enter into Anticipatory Hedges in connection with anticipated debt offerings of NU and its Nonutility Subsidiaries, subject to certain limitations and restrictions set forth in the Declaration. Anticipatory Hedges would only be entered into with Approved Counterparties, and would be utilized to fix and/or manage the interest rate risk associated with any new Long-term Debt issuance of its own or of its Nonutility Subsidiaries through (i) a forward sale of exchange-traded U.S. Treasury futures contracts, U.S. Treasury Securities and/or a forward swap (''Forward Sale''), (ii) the purchase of put options on U.S. Treasury Securities (''Put Options Purchase''),

[1] Nonutility Subsidiaries will include exempt wholesale generators (''EWGs'') as defined in the Act, foreign utility companies (''FUCOs'') as defined in the Act, nonutility companies exempt under rule 58 of the Act (''rule 58 Subsidiaries''), exempt telecommunications companies (''ETCs'') and other competitive companies.

(iii) a Put Options Purchase in combination with the sale of call options on U.S. Treasury Securities (a ''Zero Cost Collar''), (iv) transactions involving the purchase or sale, including short sales, of U.S. Treasury Securities, or (v) some combination of a Forward Sale, Put Options Purchase, Zero Cost Collar and/or other derivative or cash transactions, including, but not limited to locks, caps and collars, appropriate for the Anticipatory Hedges. Anticipatory Hedges may be executed on-exchange (''On-Exchange Trades'') with brokers through the opening of futures and/or options positions publicly traded, the opening of over-the-counter positions with one or more counterparties (''Off-Exchange Trades''), or a combination of On-Exchange Trades and Off-Exchange Trades. NU will determine the optimal structure of each Anticipatory Hedge transaction at the time of execution. NU may decide to lock in interest rates and/or limit its exposure to interest rate increases. NU represents that each Interest Rate Hedge and Anticipatory Hedge will qualify for hedge accounting treatment under generally acceptable accounting practices. NU will also comply with the then existing financial disclosure requirements of the Financial Accounting Standards Board associate with hedging transactions.

III. Use of Proceeds

NU will use the proceeds from these financings for general corporate purposes, including (a) investments in its regulated utility companies, (b) investments in EWGs, FUCOs, Rule 58 Subsidiaries, ETCs and other competitive companies, (c) the repayment, redemption, refunding or purchase by NU of its own securities, (d) financing working capital requirements of NU and its subsidiaries, and (e) other corporate purposes.

Ameren Corp. et al. (70–10106)

Ameren Corporation (''Ameren''), a registered holding company under the Act, 1901 Chouteau Avenue, St. Louis, Missouri 63103; the following direct and indirect subsidiaries of Ameren, also at 1901 Chouteau Avenue, St. Louis, Missouri 63103: Union Electric Company, d/b/a AmerenUE (''AmerenUE''), an electric and gas utility company, Ameren Services Company (''Ameren Services''), a service company subsidiary, Ameren Energy, Inc., Ameren ERC, Inc., Ameren Energy Marketing Company, Ameren Energy Fuels and Services Company, and AFS Development Company, LLC, all of which are ''energy-related companies'' within the meaning of rule 58 under the Act, Ameren Development Company and Ameren Energy Resources Company, which are intermediate non-utility holding companies, Ameren Energy Development Company and Ameren Energy Generating Company, which are ''exempt wholesale generators'' (''EWGs'') within the meaning of section 32 of the Act, Ameren Energy Communications, Inc., an ''exempt telecommunications company'' within the meaning of section 34 of the Act, Illinois Materials Supply Co., an ''enterprise zone'' company formed to purchase goods and equipment for Ameren's EWG subsidiaries, and Union Electric Development Company, a wholly-owned non-utility subsidiary of AmerenUE that engages in various energy-related businesses and invests in affordable housing projects; Central Illinois Public Service Company d/b/a AmerenCIPS (''AmerenCIPS''), an electric and gas utility subsidiary of Ameren, and its wholly-owned non-utility subsidiary, CIPSCO Investment Company, which invests in, among other things, affordable housing projects, at 607 East Adams Street, Springfield, Illinois 62739; CILCORP Inc. (''CILCORP''), an exempt holding company and formerly a direct wholly-owned subsidiary of The AES Corporation (''AES''), at 300 Liberty Street, Peoria, Illinois 61602, an exempt holding company under section 3(a)(5) of the Act;[2] the following direct and indirect subsidiaries of CILCORP, also at 300 Liberty Street, Peoria, Illinois 61602: Central Illinois Light Company (''CILCO''), an electric and gas utility company, Central Illinois Generation, Inc. (''CIGI''), an EWG formed by CILCO to acquire substantially all of CILCO's generating assets, CILCORP Investment Management, Inc., which, through subsidiaries manages CILCORP's investments in equipment leases, affordable housing projects and non-regulated independent power projects, CILCORP Ventures, Inc., which through its subsidiary, CILCORP Energy Services, Inc., provides energy-related services and products, QST Enterprises, Inc., which through subsidiaries provides energy and related services in non-regulated retail and wholesale markets, including utility operations and management services to industrial customers of CILCO, and CILCO's wholly-owned non-utility subsidiaries, CILCO Exploration and Development Company and CILCO Energy Corporation, which are engaged in, respectively, exploration and development of gas and oil and other mineral resources and research and development activities relating to new sources of energy; and AES Medina Valley Cogen (No. 4), L.L.C. (''AES Medina Valley''), a limited liability company formerly owned by the AES Corporation (''AES''), its direct and indirect wholly-owned non-utility subsidiaries, AES Medina Valley Cogen (No. 2), an intermediate non-utility subsidiary, and AES Medina Valley Cogen, L.L.C., an EWG, and AES Medina Valley Operations, L.L.C., which provides operating services to AES Medina Valley Cogen, L.L.C., at P.O. Box 230, Mossville, Illinois 61552–0230 (the foregoing companies herein referred to collectively as the ''Applicants''), have filed an application-declaration (''Application'') under sections 6(a), 7, 9(a)(1), 9(c)(3), 10, 12(b), 12(c) and 12(f) of the Act and rules 40, 43, 45 and 54 under the Act.

In a separate proceeding (File No. 70–10078), Ameren received authorization[3] under sections 9(a)(1) and 10 of the Act to acquire from AES all of the issued and outstanding common stock of CILCORP. As explained in that proceeding, CILCO intends to transfer substantially all of its generating assets to CIGI prior to or following Ameren completes its acquisition of CILCORP. Following the acquisition of CILCORP, Ameren will cause CIGI to relinquish EWG status. Thus, Ameren is treating CIGI as an ''electric utility company'' under the Act both for purposes of File No. 70–10078 and this proceeding.

1. Current Authorization

By order dated March 13, 1998[4] (''1998 Financing Order''), AmerenUE and AmerenCIPS are currently authorized for the period through February 27, 2003, to issue and sell commercial paper and to establish credit lines and issue notes thereunder evidencing unsecured short-term borrowings (''Short-term Debt''). AmerenUE is authorized to issue up to $575 million of commercial paper at any one time outstanding and borrow up to $425 million under credit lines. AmerenCIPS is authorized to issue up to $125 million of commercial paper at any one time outstanding and borrow up to $125 million under credit lines. Under the 1998 Financing Order, AmerenUE and AmerenCIPS were also authorized to enter into interest rate hedging

[2] *See* HCAR Nos. 27063 (Aug. 20, 1999) and 27363 (March 23, 2001).

[3] *See* HCAR No. 27645 (Jan. 29, 2003) (''CILCORP Acquisition Order'').

[4] See Ameren Corporation, *et al.*, HCAR No. 26841 (Mar. 13, 1998).

instruments with respect to outstanding indebtedness of those companies.

By order dated March 22, 1999, in File No. 70–9423 (the ''Money Pool Order''),[5] Ameren was authorized to establish and fund loans to AmerenUE, AmerenCIPS and Ameren Services through the Ameren Corporation System Utility Money Pool Agreement (the ''Utility Money Pool'') in order to provide for the short-term cash and working capital needs of these companies.[6] Further, to the extent not exempt under rule 52, AmerenUE, AmerenCIPS, and Ameren Services are authorized to make borrowings from and extend credit to each other pursuant to the Utility Money Pool. Ameren may not make borrowings under the Utility Money Pool. AmerenUE is authorized to borrow up to $500 million at any one time outstanding under the Utility Money Pool.[7]

Ameren states that it also maintains and funds loans to certain of its non-utility subsidiaries pursuant to the Ameren Corporation System Amended and Restated Non-Utility Money Pool Agreement (the ''Non-Utility Money Pool'') in order to provide for the short-term cash and working capital requirements of these subsidiaries.

2. Requested Authorization

The Applicants request authorization for the period through March 31, 2006 (the ''Authorization Period''), (1) to extend and restate the external short-term financing and interest rate hedging authorization of AmerenUE and AmerenCIPS under the 1998 Financing Order, (2) to extend and continue the Utility Money Pool and Non-Utility Money Pool (to be re-designated as the ''Non-Regulated Subsidiary Money Pool'') arrangements,[8] and (3) following Ameren's acquisition of CILCORP, to add CILCO as a participant in the Utility Money Pool and CILCORP, CIGI, certain non-utility subsidiaries of CILCORP (as identified below), and AES Medina Valley and its direct and indirect non-utility subsidiaries as participants in the Non-Regulated Subsidiary Money Pool, in each case subject to all of the existing terms, conditions and limitations of the money pool agreements. Ameren states that it is not requesting any new financing authority in this proceeding.

3. Proposed Sale of Short-Term Debt

Specifically, AmerenUE and AmerenCIPS propose to issue and sell from time to time during the Authorization Period Short-term Debt in an aggregate principal amount at any time outstanding not to exceed, when added to any borrowings by such companies under the Utility Money Pool, $1 billion in the case of AmerenUE and $250 million in the case of AmerenCIPS. Short-term Debt may include commercial paper notes, bank notes, and other forms of short-term indebtedness. All Short-term Debt will have maturities of less than one year from the date of issuance and will be unsecured.

It is stated that the commercial paper will be sold in established domestic or European commercial paper markets. That commercial paper would typically be sold to dealers at the discount rate per annum prevailing at the date of issuance for commercial paper of comparable quality and maturities sold to commercial paper dealers generally. It is expected that the dealers acquiring the commercial paper will reoffer it at a discount to corporate, institutional and, with respect to European commercial paper, individual investors. It is anticipated that the commercial paper will be reoffered to investors such as commercial banks, insurance companies, pension funds, investment trusts, foundations, colleges and universities, finance companies and nonfinancial corporations.

AmerenUE and AmerenCIPS also propose to establish and maintain back-up credit facilities and other credit facilities with banks or other financial institutions to support their commercial paper programs and other credit and/or borrowing facilities generally available to borrowers with comparable credit ratings as they may deem appropriate in light of their needs and existing market conditions providing for revolving credit or other loans and having commitment periods not longer than the Authorization Period. Only the amounts drawn and outstanding under these agreements and facilities will be counted against the proposed limits on Short-term Debt.

The effective cost of money on all Short-term Debt will not exceed at the time of issuance the greater of (i) 300 basis points over the six-month London Interbank Offered Rate (LIBOR), or (ii) a gross spread over six-month LIBOR that is consistent with similar securities of comparable credit quality and maturities issued by other companies. Issuance expenses in connection with any non-competitive offering of Short-term Debt may not exceed 5% of the principal amount.

4. Proposed Interest Rate Hedges

AmerenUE and AmerenCIPS also request authorization to enter into interest rate hedging transactions with respect to outstanding indebtedness (''Interest Rate Hedges''), subject to certain limitations and restrictions, in order to reduce or manage the effective interest rate cost. Interest Rate Hedges would only be entered into with counterparties (''Approved Counterparties'') whose senior debt ratings, or the senior debt ratings of any credit support providers who have guaranteed the obligations of such counterparties, as published by S&P, are equal to or greater than BBB, or an equivalent rating from Moody's or Fitch. In addition, AmerenUE and AmerenCIPS request authorization to enter into interest rate hedging transactions with respect to anticipated debt offerings (the ''Anticipatory Hedges''), subject to certain limitations and restrictions. Those Anticipatory Hedges would only be entered into with Approved Counterparties, and would be utilized to fix the interest rate and/or limit the interest rate risk associated with any new issuance of debt.

It is stated that each Interest Rate Hedge and Anticipatory Hedge will qualify for hedge accounting treatment under the current Financial Accounting Standards Board (''FASB'') guidelines in effect and as determined at the time entered into. Further, the applicants will comply with the Statement of Financial Accounting Standards (''SFAS'') 133 (''Accounting for Derivatives Instruments and Hedging Activities'') and SFAS 138 (''Accounting for Certain Derivative Instruments and Certain Hedging Activities'') or other standards relating to accounting for derivative transactions as are adopted and implemented by the FASB.

5. Utility Money Pool

Ameren, AmerenUE, AmerenCIPS, and Ameren Services seek authorization to continue their participation in the Utility Money Pool, subject to all of the terms, conditions and limitations set forth in the Money Pool Order. AmerenUE requests authority to borrow up to $500 million at any time outstanding under the Utility Money Pool. Ameren will continue to participate in the Utility Money Pool as a lender only and may not make any

[5] See Ameren Corporation, *et al.*, HCAR No. 26993 (Mar. 22, 1999).

[6] Funds advanced by Ameren to the Utility Money Pool are derived from commercial paper sales and other short-term borrowings by Ameren previously authorized in File No. 9877, as well as surplus funds in the treasury of Ameren.

[7] Borrowings by AmerenCIPS under the Utility Money Pool have been approved by the Illinois Commerce Commission (''ICC'') and are therefore exempt under rule 52(a). Borrowings by Ameren Services are exempt under rule 52(b).

[8] In the CILCORP Acquisition Order, CILCORP, CILCO and CIGI have been authorized to issue short-term and long-term securities and to engage in interest rate hedging transactions through March 31, 2006.

borrowings from or receive any extension of credit through the Utility Money Pool. In addition, CILCO proposes to become a participant in the Utility Money Pool upon becoming a subsidiary of Ameren, subject to receiving approval from the Illinois Commerce Commission.

Ameren will continue to fund loans to Utility Money Pool participants with the proceeds of commercial paper sales and other short-term borrowings by Ameren previously authorized by the Commission, as well as Surplus funds in the treasury of Ameren. Ameren is not requesting any new financing authority in this proceeding.

In accordance with the terms and provisions of the Utility Money Pool, funds will be available from the following sources for short-term loans to AmerenUE, AmerenCIPS, CILCO and Ameren Services, from time to time: (1) Surplus funds in the treasuries of AmerenUE, AmerenCIPS, CILCO and Ameren Services, (2) surplus funds in the treasury of Ameren, and (3) proceeds from bank borrowings and the sale of commercial paper by Ameren, AmerenUE, AmerenCIPS, CILCO and Ameren Services (''External Funds''). Funds will be made available from such sources in such other order as Ameren Services, as administrator of the Utility Money Pool, may determine would result in a lower cost of borrowing, consistent with the individual borrowing needs and financial standing of the companies providing funds to the Utility Money Pool.

Utility Money Pool participants that borrow will borrow *pro rata* from each company that lends, in the proportion that the total amount loaned by each such lending company bears to the total amount then loaned through the Utility Money Pool. On any day when more than one fund source (*e.g.*, surplus treasury funds of Ameren and other Utility Money Pool participants (''Internal Funds'') and External Funds), with different rates of interest, is used to fund loans through the Utility Money Pool, each borrower will borrow *pro rata* from each such fund source in the Utility Money Pool in the same proportion that the amount of funds provided by that fund source bears to the total amount of short-term funds available to the Utility Money Pool.

If only Internal Funds are available in the Utility Money Pool, the interest rate applicable to loans of those Internal Funds will be the CD yield equivalent of the 30-day Federal Reserve ''AA'' Non-Financial commercial paper composite rate (or if no such rate is established for that day, then the applicable rate would be the rate for the next preceding day for which such rate was established). If only External Funds are available in the Utility Money Pool, the interest rate applicable to loans of those External Funds will be equal to the lending company's cost for those External Funds (or, if more than one Utility Money Pool participant had made available External Funds on such day, the applicable interest rate will be a composite rate equal to the weighted average of the cost incurred by the respective Utility Money Pool participants for those External Funds). In cases where both Internal Funds and External Funds are concurrently borrowed through the Utility Money Pool, the rate applicable to all loans comprised of such ''blended'' funds will be a composite rate equal to the weighted average of (a) the cost of all Internal Funds contributed by Utility Money Pool participants (as determined pursuant to the second preceding paragraph above) and (b) the cost of all such External Funds (as determined pursuant to the immediately preceding paragraph above).

6. Non-Regulated Subsidiary Money Pool

Ameren also proposes to continue to maintain and fund loans to certain of its non-utility subsidiaries and, following the acquisition of CILCORP and AES Medina Valley, to CILCORP, AES Medina Valley and certain of CILCORP's current direct and indirect non-utility subsidiaries, in accordance with a new Non-Regulated Subsidiary Money Pool Agreement. As is the case with the current Non-Utility Money Pool, Ameren will participate in the Non-Regulated Subsidiary Money Pool solely as a lender and may not make any borrowings from or receive any extension of credit through the Non-Regulated Subsidiary Money Pool. CILCORP also proposes to participate in the Non-Regulated Subsidiary Money Pool as a lender only and will not be permitted to make borrowings from or receive any extension of credit through the Non-Regulated Subsidiary Money Pool. Ameren Services will participate in the Non-Regulated Subsidiary Money Pool (as it currently does in the Non-Utility Money Pool) solely as a borrower.

CIGI also proposes to become a participant in the Non-Regulated Subsidiary Money Pool. It is stated that, although CIGI will be an ''electric utility company'' under the Act once it relinquishes EWG status, for purposes of state regulation in Illinois, CIGI will be considered to be a ''non-regulated'' affiliate of CILCO and therefore cannot participate in the Utility Money Pool. CIGI is requesting authorization to borrow up to $250 million at any time outstanding under the Non-Regulated Subsidiary Money Pool. The interest rate payable on borrowings from and loans to the Non-Regulated Subsidiary Money Pool and the allocation of fees and investment income to participants will be determined in the same manner described above in connection with the Utility Money Pool.

Accordingly, the following direct and indirect subsidiaries of Ameren will be participants in the Non-Regulated Subsidiary Money Pool: Ameren Services (solely as a borrower), Ameren Development Company, Ameren ERC, Inc., Ameren Energy Communications, Inc., Ameren Energy Resources Company, Ameren Energy Development Company, Ameren Energy Generating Company, Ameren Energy Fuels and Services Company, AFS Development Company, LLC, Illinois Materials Supply Co., Union Electric Development Corporation, CIPSCO Investment Company, CILCORP (solely as a lender), CIGI, CILCORP Investment Management Inc., CILCORP Ventures Inc., CILCORP Energy Services Inc., QST Enterprises Inc., CILCO Exploration and Development Company, CILCO Energy Corporation, AES Medina Valley, AES Medina Valley Cogen (No. 2), L.L.C., AES Medina Valley Cogen, L.L.C., and AES Medina Valley Operations, L.L.C.

The Commission is requested to reserve jurisdiction over the participation in the Non-Regulated Subsidiary Money Pool of any other direct or indirect, current or future, non-utility subsidiary of Ameren.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–2947 Filed 2–5–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–25921]

Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

January 31, 2003.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of January, 2003. A copy of each application may be obtained for a fee at the SEC's Public Reference Branch, 450 Fifth St., NW.,

Washington, DC 20549–0102 (tel. (202) 942–8090). An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on February 25, 2003, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549–0609. For Further Information Contact: Diane L. Titus at (202) 942–0564, SEC, Division of Investment Management, Office of Investment Company Regulation, 450 Fifth Street, NW., Washington, DC 20549–0506.

North American Funds [File No. 811–5797]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On November 14, 2001, applicant transferred its assets to SunAmerica Strategic Investment Series, Inc., SunAmerica Style Select Series, Inc., SunAmerica Income Funds, SunAmerica Equity Funds, and SunAmerica Money Market Funds, Inc., based on net asset value. Expenses of $5,808,000 incurred in connection with the reorganization were paid by SunAmerica Asset Management Corp., investment adviser to the acquiring funds.

Filing Dates: The application was filed on October 25, 2002, and amended on January 8, 2003, and January 29, 2003.

Applicant's Address: 286 Congress Street, Boston, MA 02210.

Kala Investment Corp. [File No. 811–3311]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On October 29, 2001, applicant transferred its assets to Pitcairn Tax-Exempt Bond Fund, based on net asset value. Expenses of $46,221 incurred in connection with the reorganization were paid by applicant.

Filing Date: The application was filed on January 24, 2003.

Applicant's Address: 225 West 34th St., New York, NY 10122.

ATC Funds, Inc. [File No. 811–8617]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On November 27, 2002, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $22,440 incurred in connection with the liquidation were paid by Avalon Trust Company, applicant's investment adviser.

Filing Date: The application was filed on January 17, 2003.

Applicant's Address: 125 Lincoln Ave., Suite 100, Santa Fe, NM 87501–2052.

One Fund, Inc. [File No. 811–6675]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On November 15, 2002, applicant made a liquidating distribution to its shareholders based on net asset value. Expenses of approximately $5,000 incurred in connection with the liquidation were paid by applicant.

Filing Dates: The application was filed on January 15, 2003, and amended on January 28, 2003.

Applicant's Address: One Financial Way, Cincinnati, OH 45242.

East West Securities Company, Inc. [File No. 811–10029]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On December 30, 2002, applicant made a liquidating distribution to its shareholder, based on net asset value. Expenses of $3,000 incurred in connection with the liquidation were paid by East West Bank.

Filing Date: The application was filed on January 8, 2003.

Applicant's Address: 415 Huntington Dr., San Marino, CA 91108.

Snoqualmie Asset Fund, Inc. [File No. 811–10087]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On December 31, 2002, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $14,000 incurred in connection with the liquidation were paid by Marion Holdings, Inc.

Filing Date: The application was filed on January 2, 2003.

Applicant's Address: 1201 Third Ave., WMT 1706, Seattle, WA 98101.

Broadway Street Pooled Trust Preferred Fund A [File No. 811–9771]

Summary: Applicant, a closed-end investment company, seeks and order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

Filing Dates: The application was filed on November 26, 2002, and amended on December 20, 2002.

Applicant's Address: 501 North Broadway, St. Louis, MO 63102.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–2830 Filed 2–5–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: [68 FR 5058, January 31, 2003].

STATUS: Closed meeting.

PLACE: 450 Fifth Street, NW., Washington, DC.

DATE AND TIME OF PREVIOUSLY ANNOUNCED MEETING: Wednesday, February 5, 2003 at 2:30 p.m.

CHANGE IN THE MEETING: Additional item.

The following item has been added to the Closed Meeting scheduled for Wednesday, February 5, 2003: amicus consideration.

Commissioner Goldschmid, as duty officer, determined that Commission business required the above change and that no earlier notice thereof was possible.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 942–7070.

Dated: February 4, 2003.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–3117 Filed 2–4–03; 4:04 pm]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47293; File No. SR–ISE–2002–19]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by International Securities Exchange, Inc., Relating to Rules Governing the Intermarket Linkage, and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 Thereto

January 31, 2003.

I. Introduction

On September 24, 2002, the International Securities Exchange, Inc. (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and rule 19b–4 thereunder,[2] a proposed rule change to adopt new Chapter 19 of its rules, governing the operation of the intermarket linkage (the ''Linkage''). The proposed rule change was published for comment in the **Federal Register** on December 26, 2002.[3] The Commission received no comments on the proposed rule change. On January 28, 2003, the Exchange filed Amendment No. 1 to the proposed rule change.[4] This order approves the proposed rule change, provides notice of filing of Amendment No. 1 and grants accelerated approval to Amendment No. 1.

II. Description of Proposal

In general, the proposed rules contain relevant definitions, establish the conditions pursuant to which market makers may enter Linkage orders, impose obligations on the Exchange regarding how it must process incoming Linkage orders, and establish a general standard that members should avoid trade-throughs.[5] The proposed rules establish potential regulatory liability for members who engage in a pattern or practice of trading through other exchanges, whether or not the exchanges traded through participate in the Linkage, provide procedures to unlock and uncross markets, and codify the ''80/20 Test'' contained in section 8(b)(iii) of the Plan for the Purpose of Creating and Operating an Intermarket Options Linkage (the ''Plan''),[6] which provides that a market maker on an Exchange would be restricted from sending principal orders (other than P/A orders, which reflect unexecuted customer orders) through the Linkage if the market maker effects less than 80 percent of specified order flow on the Exchange. The proposed rule change also establishes a fee, which will apply to Principal Orders and Principal Acting as Agent Orders. These fees are the same fees applicable to ISE market makers.

III. Discussion

The Commission has reviewed the ISE's proposed rule change and finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange,[7] and with the requirements of section 6(b).[8] In particular the Commission finds that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest in accordance with section 6(b)(5) of the Act.[9] The Commission also finds that the proposed fee change is consistent with section 6(b)(4) of the Act [10] in that it represents an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

The Commission believes that the rules proposed by the ISE will adequately govern the operation of the Linkage as envisioned in the Plan. The Commission believes that these rules will help to ensure that the Linkage is operated fairly and effectively, in accordance with the principles of the Act and the Plan.

The Commission also finds good cause for approving proposed Amendment No. 1 prior to the 30th day after the date of publication of notice of filing thereof in the **Federal Register**. Amendment No. 1 proposes several changes to the Exchange's original proposal that are designed to conform the Exchange's rules governing linkage more closely to the Plan. The provisions of the Plan have already been subject to notice and comment, and have been approved by the Commission. The changes proposed in Amendment No. 1 do not raise any novel regulatory issues, and therefore, it is appropriate for the Commission to accelerate approval of Amendment No. 1.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 1 to the proposed rule change, including whether Amendment No. 1 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 Amendment No. 1 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 Exchange. All submissions should refer to File No. SR-ISE–2002–19 and should be submitted by February 27, 2003.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[11] that the proposed rule change (SR–ISE–2002–19), be, and hereby is, approved, and that Amendment No. 1 to the proposed

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 47029 (December 18, 2002), 67 FR 78834.

[4] *See* letter from Michael J. Simon, Senior Vice President and General Counsel, ISE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated January 27, 2003 (''Amendment No. 1''). In Amendment No. 1, the Exchange proposed to amend: (1) The definition of ''Linkage Order'' contained in ISE rule 1900 to state that such orders are immediate or cancel orders; (2) ISE rule 1901 to clarify when members may send linkage orders when markets are non-firm; (3) ISE rule 1901 to include a provision regarding mitigation of damages; (4) ISE rule 1902 to clarify language regarding liability for trade-throughs at the end of the trading day and to request approval of this provision only for a one-year pilot period; and (5) ISE rule 1902 to clarify that members may not engage in a pattern or practice of trading through.

[5] Trade-throughs occur when broker-dealers execute customer orders on one exchange at prices inferior to another exchange's disseminated quote.

[6] Approved by the Commission in Securities Exchange Act Release No. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000), as subsequently amended. *See* Securities Exchange Act Release No. 44482 (June 27, 2001), 66 FR 35470 (July 5, 2001) (''Initial Amendment Order'') and Securities Exchange Act Release No. 46001 (May 30, 2002), 67 FR 38687 (June 5, 2002); 47274 (January 29, 2003); and 47298 (January 31, 2003).

[7] In approving this rule proposal, the Commission notes that it has also considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78f(b)(4).

[11] 15 U.S.C. 78s(b)(2).

rule change be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–2949 Filed 2–5–03; 8:45 am]

BILLING CODE 8010–01–U

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47302; File No. SR–NASD–2002–174]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by National Association of Securities Dealers, Inc., Relating to Increasing Dissemination of Debt Securities Transaction Information Under the TRACE Rules

January 31, 2003.

I. Introduction

On December 6, 2002, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder[2] to amend the Rule 6200 Series of the Rules of NASD, which provides for the reporting and dissemination of transaction information in eligible corporate debt securities (''TRACE Rules''). The proposed rule change would provide additional transparency in the corporate bond market by increasing the categories of TRACE-eligible securities for which transaction information is required to be disseminated. NASD amended the proposed rule change on December 18, 2002.[3] Notice of the proposed rule change and Amendment No. 1 thereto was published for comment in the **Federal Register** on December 27, 2002.[4] The Commission received two comment letters regarding the proposal.[5]

This order approves the proposed rule change as amended by Amendment No. 1.

II. Background

On January 23, 2001, the Commission approved the TRACE Rules to establish a corporate bond trade reporting and transaction dissemination facility and to eliminate Nasdaq's Fixed Income Pricing System (''FIPS'').[6] Subsequently, on March 5, 2001, the Commission approved amendments to the TRACE Rules requiring trade reports in transactions between two NASD members to be filed by each member.[7] In addition, on January 3, 2002, the Commission issued a notice stating that certain other amendments to the TRACE Rules had become effective on filing.[8] On June 28, 2002, the Commission approved a proposed rule change to establish fees for the use of TRACE on a pilot basis for six months,[9] and also approved proposed amendments to the TRACE Rules to make technical changes to the TRACE Rules and clarify certain provisions of those Rules prior to implementation of TRACE.[10]

The TRACE Rules became effective on July 1, 2002. On that day, members began to report transactions in TRACE-eligible securities, and the TRACE system began the dissemination of certain reported information. On November 22, 2002, the Commission issued a notice stating that NASD was reducing certain TRACE fees for the fourth quarter of 2002.[11] On December 19, 2002, the Commission issued a notice stating that an extension of the pilot program for TRACE fees to February 28, 2002 and a modification of the pilot effective January 1, 2003 had become effective on filing.[12]

III. Description of the Proposal

NASD is proposing to amend: (1) NASD Rule 6250 to provide for the dissemination of transaction information on additional Investment Grade TRACE-eligible securities under the NASD Rule 6200 Series (also known as the Trade Reporting and Compliance Engine (''TRACE'') Rules);[13] (2) NASD Rule 6210(e) to include the term ''customer'' in the defined term, ''party to the transaction'; (3) NASD Rule 6260 to make minor clarifications; and, (4) in the provisions referenced in (1) through (3) above, to delete the term ''Association'' and to replace it with ''NASD.'' These amendments are discussed in greater detail in the Commission's notice soliciting public comment on this proposal.[14]

In Amendment No. 1, NASD deleted proposed changes to NASD Rule 6230 and NASD Rule 9610(a) that would have allowed members to request exemptive relief from NASD Rule 6230.

IV. Discussion

After careful consideration, the Commission finds that the proposed rule change, as amended by Amendment No. 1, is consistent with the Act and the rules and regulations promulgated thereunder applicable to a registered securities association and, in particular, with the requirements of Section 15A(b)(6).[15] Specifically, the Commission finds that approval of the proposed rule change is consistent with Section 15A(b)(6) of the Act in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and in general, to protect investors and the public interest.[16]

The Commission believes that the proposed rule change will substantially increase the amount of information available to the public and market participants about the corporate debt markets and will clarify other TRACE Rule provisions. NASD stated that if the proposed rule change is approved, over 4,000 TRACE-eligible securities will be

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD, to Katharine A. England, Assistant Director, Division of Market Regulation, SEC, dated December 18, 2002, and enclosures (''Amendment No. 1''). In Amendment No. 1, NASD deleted proposed changes to NASD Rule 6230 and NASD Rule 9610(a) that would have allowed members to request exemptive relief from NASD Rule 6230.

[4] *See* Securities Exchange Act Release No. 47057 (December 19, 2002), 67 FR 79210.

[5] *See* letter from John M. Ramsay, Vice President and Senior Regulatory Counsel, The Bond Market Association (''TBMA''), to Jonathan G. Katz, Secretary, SEC, dated January 16, 2003 (''TBMA's Letter'') and letter from Rene L. Robert, President and CEO, Advantage Data, Inc., to Secretary, SEC, dated January 10, 2003 (''Advantage Data's Letter''). TBMA's Letter and Advantage Data's Letter are described in Section IV, *infra.*

[6] *See* Securities Exchange Act Release No. 43873 (January 23, 2001), 66 FR 8131 (January 29, 2001) (File No. SR–NASD–1999–65). FIPS, which was operated by Nasdaq, collected transaction and quotation information on domestic, registered, non-convertible high-yield corporate bonds.

[7] *See* Securities Exchange Act Release No. 44039 (March 5, 2001), 66 FR 14234 (March 9, 2001) (File No. SR–NASD–2001–04).

[8] *See* Securities Exchange Act Release No. 45229 (January 3, 2002), 67 FR 1255 (January 9, 2002) (File No. SR–NASD–2001–91).

[9] *See* Securities Exchange Act Release No. 46145 (June 28, 2002), 67 FR 44911 (July 5, 2002) (File No. SR–NASD–2002–63).

[10] *See* Securities Exchange Act Release No. 46144 (June 28, 2002), 67 FR 44907 (July 5, 2002) (File No. SR–NASD–2002–46).

[11] *See* Securities Exchange Act Release No. 46893 (November 22, 2002), 67 FR 72008 (December 3, 2002) (SR–NASD–2002–167).

[12] *See* Securities Exchange Act Release No. 47056 (December 19, 2002), 67 FR 79205 (December 27, 2002) (File No. SR–NASD–2002–176).

[13] The terms ''Investment Grade'' and ''TRACE-eligible security'' are defined in TRACE Rule 6210, Definitions, in paragraphs (h) and (a), respectively.

[14] *See supra,* note 4.

[15] 15 U.S.C. 78o–3(b)(6).

[16] In approving this proposed rule change, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

subject to dissemination under NASD Rule 6250, which represents approximately 75% of the current average daily trading volume of Investment Grade TRACE-eligible securities.[17] The proposed rule change substantially exceeds the anticipated increase in dissemination in the second phase of TRACE, ''Phase II,'' described in the original regulatory scheme approved by the SEC.[18] In addition, the proposed amendments are crafted to disseminate transactions in a diverse test group of 90 of the lowest rated Investment Grade TRACE-eligible debt securities to obtain additional empirical data about the impact that dissemination may have on the liquidity of a market or a market sector.

In NASD Rule 6210(e), NASD is proposing to add the term, ''customer,'' to the defined term, ''party to the transaction.'' Under the TRACE Rules, a non-NASD-member customer of a broker-dealer, when buying or selling a security, is considered a ''party to the transaction.'' In addition, for purposes of the Rule, ''customer'' includes a broker-dealer that is not an NASD member.[19] NASD believes, and the Commission agrees, that NASD Rule 6210(e) would be clearer if the term ''customer'' is included in the definition of ''party to the transaction,'' and the Rule clearly states that broker-dealers that are not NASD members are included in the term ''customer.''

As previously noted, the Commission received two comment letters, from TBMA and Advantage Data, on the proposed rule change.[20] Although TBMA generally supported the latest amendments, it proposed one change. TBMA noted that as the proposal was originally filed by NASD with the Commission, it provided that NASD could exempt a member from particular provisions of the TRACE rules for good cause shown, pursuant to NASD's Rule 9600 Series. NASD later amended the proposal to delete this provision. TBMA requested that the exemptive provision be reinstated. After considering TBMA's Letter, the Commission believes that the absence of exemptive authority with respect to TRACE reporting does not make these rules inconsistent with the statute.

Advantage Data's Letter raised a number of specific concerns, including concerns about NASD's mandated use of CUSIP data in TRACE reporting, the ongoing review of NASD's handling of TRACE reporting, the implementation of a permanent fee structure for TRACE, certain delays in disseminating TRACE information and the ownership of derived data. Advantage Data states that vendors and investors should be able to receive TRACE information without having to receive CUSIP data licensed by Standard & Poor's Corporation, and that Advantage Data would like to be allowed to receive TRACE information without receiving CUSIP data via a redistribution vendor. However, the proposal does not appear to prohibit redistribution vendors from removing CUSIP data from the BTDS (TRACE) data feed and providing TRACE data to users and other vendors without the requirement to have a CUSIP subscription.

Advantage Data's Letter also contends that the proposed BTDS Vendor Agreement currently requires a four-hour delay for disseminating delayed TRACE information and that the NASD claims ownership of the TRACE information and ''any derivation thereof'' in the proposed Vendor Agreement. These concerns relate to the vendor agreements rather than to the TRACE Rules. The TRACE vendor agreements were not included as part of this filing. Therefore, the Commission is not approving or disapproving the vendor agreements.

The Commission does consider concerns raised in comments about the vendor agreements in determining whether the proposed rules will operate in a manner consistent with the statute. The Commission does not believe that the impact of the vendor agreement provisions challenged by Advantage Data on the operation of the rules is sufficient to make the proposed rules inconsistent with the statute. The CUSIP license requirement is a relatively narrow limitation on receipt of the data.[21] The dissemination delay and ownership assertions are ancillary to the TRACE service proposed in the filing, with little collateral effect on its operation.

Advantage Data's Letter further states that it does not believe that the TRACE fee structure should be made permanent because it expects that the fees collected by NASD will dramatically increase in the years to come. This proposal does not address the TRACE permanent fee structure. Finally, Advantage Data's Letter raised questions about NASD's ongoing handling of TRACE. The Commission expects to continue its review of NASD's operation of TRACE in the context of future proposed rule filings filed by NASD as well as the Commission's ongoing oversight of NASD as a self-regulatory organization.

V. Conclusion

For the reasons discussed above, the Commission finds that the proposal is consistent with the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–NASD–2002–174), as amended, be and hereby is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[22]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–2945 Filed 2–5–03; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47300; File No. SR–NASD–2003–10]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. To Eliminate SuperMontage Fees for Cancellation and Cancel/Replace of Quotes/Orders

January 31, 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 30, 2003, the National Association of Securities Dealers, Inc. (''NASD''),

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[17] Trading volume is the total par value of all Investment Grade TRACE-eligible securities traded (and reported) each day.

[18] *See* Securities Exchange Act Release No. 43873 (January 23, 2001); 66 FR 8131 (January 29, 2001) (''Approval Order''). In the Approval Order, the SEC approved NASD Rule 6250, which provided that initially, transaction information on publicly offered, Investment Grade bonds with an initial issuance size of $1 billion or greater, and the FIPS 50, would be distributed immediately. The SEC also discussed NASD's plans to phase in the dissemination of additional securities. Under the phase-in schedule, the Bond Transaction Reporting Committee (''BTRC''), an advisory committee of industry representatives, was to advise the NASD Board of Governors regarding liquidity issues. By the end of Phase I, the BTRC was obligated to recommend to the NASD Board ''dissemination protocols for investment grade bonds, starting with the largest issuance size, that, when combined together, make up the top 50% (by dollar volume) of such bonds.'' 66 FR 8131, 8134. Dissemination of these securities was to begin in Phase II. File No. SR–NASD–99–65.

[19] NASD Rule 0120(g) provides generally that the term ''customer'' shall not include a broker or dealer.

[20] *See supra*, note 5.

[21] Of course, if the vendor agreements are viewed by commenters as creating an unreasonable denial of access to TRACE services, that claim can be raised in a review process under Section 19(d) of the Act. 15 U.S.C. 78s(d).

[22] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 has designated this proposal as one establishing or changing a due, fee or other charge imposed by the self-regulatory organization under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the rule effective upon Commission receipt of this filing. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to eliminate certain of the fees for the cancellation and cancel/replace of Quotes/Orders in Nasdaq's SuperMontage system. Nasdaq will implement the rule change on February 3, 2003.

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

Rule 7010. System Services

(a)–(h) No change.

(i) Nasdaq National Market Execution System (SuperMontage)

The following charges shall apply to the use of the Nasdaq National Market Execution System (commonly known as SuperMontage) by members:

Order Entry	
Non-Directed Orders (excluding Preferenced Orders)	No charge.
Preferenced Orders:	
Preferenced Orders that access a Quote/Order of the member that entered the Preferenced Order).	No charge.
Other Preferenced Orders	$0.02 per order entry.
Directed Orders	$0.10 per order entry.
Order Execution	
Non-Directed or Preferenced Order that accesses the Quote/Order of a market participant that does not charge an access fee to market participants accessing its Quotes/Orders through the NNMS:	
Charge to member entering order	$0.003 per share executed (but no more than $120 per trade for trades in securities executed at $1.00 or less per share).
Credit to member providing liquidity	$0.002 per share executed (but no more than $80 per trade for trades in securities executed at $1.00 or less per share).
Non-Directed or Preferenced Order that accesses the Quote/Order of a market participant that charges an access fee to market participants accessing its Quotes/Orders through the NNMS.	$0.001 per share executed (but no more than $40 per trade for trades in securities executed at $1.00 or less per share).
Directed Order	$0.003 per share executed.
Non-Directed or Preferenced Order entered by a member that accesses a Quote/Order of such member.	No charge.
Order Cancellation	
Non-Directed *and Preferenced* Orders [(excluding Preferenced Orders)].	[$0.01 per order cancelled] *No charge.*
[Preferenced Orders]	[$0.01 per order cancelled].
Directed Orders	$0.10 per order cancelled.
[Entry and Maintenance of Quotes/Orders by Nasdaq Quoting Market Participants]	
[Initial entry of Quote/Order]	[No charge].
[Change of Quote/Order due to order execution through SuperMontage].	[No charge].
[Cancel/replace of Quote/Order to increase size]	[No charge].
[Cancel/replace of Quote/Order to change price]	[$0.01].
[Cancel/replace of Quote/Order to decrease size manually]	[$0.01].
[Cancellation of Quote/Order]	[$0.01].
[Cancellation of Quote/Order due to order purge or timeout]	[$0.0075].

(j)–(s) 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. 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

1. Purpose

Nasdaq is proposing to eliminate: (i) The fee for the cancellation and cancel/replace of Quotes/Orders in SuperMontage and (ii) the fee for canceling non-directed and preferenced orders entered into SuperMontage.

Nasdaq first introduced a ''quotation update'' fee in February 2002 in connection with its SuperSOES system, to encourage efficient quoting and to help ensure that system capacity could keep pace with the growth of quotation update volume.[5] With the introduction of SuperMontage, Nasdaq refined the quotation update fee by applying it only for updates that remove liquidity without an execution occurring or that change the price of a Quote/Order.[6]

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See* Securities Exchange Act Release No. 45342 (January 28, 2002), 67 FR 5019 (February 1, 2002) (SR–NASD–2001–96).

[6] *See* Securities Exchange Act Release No. 45906 (May 10, 2002), 67 FR 34965 (May 16, 2002) (SR–NASD–2002–44).

Thus, the fee has not been assessed for changes to SuperMontage Quotes/Orders that add liquidity or that occur when an order execution occurs.

Nasdaq has recently made several enhancements to the capacity of its network systems. Specifically, hardware upgrades and improvements in system architecture have resulted in a doubling of quote update processing capability since the time when the fee was first introduced. In addition, the decision of several electronic communications networks not to participate in SuperMontage will result in a decrease in Nasdaq's quote update traffic. As a result of these factors, Nasdaq has determined that the elimination of the quote update fee is unlikely to result in a volume of quotation updates that will strain the capacity of Nasdaq's systems. Accordingly, Nasdaq is eliminating the fee in order to lower the overall cost of market participants' use of SuperMontage. Nasdaq is also eliminating the fees for cancellation of non-directed and preferenced orders entered into SuperMontage, to allow a further reduction of market participants' costs.[7]

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[8] including Section 15A(b)(5) of the Act,[9] which requires that the rules of the NASD provide 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 on 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.

[7] The elimination of order cancellation fees is correlative to the elimination of the fee for cancellation of Quotes/Orders, since Nasdaq's billing systems are not currently programmed to distinguish between cancellation messages that relate to orders entered as non-directed or preferenced orders and those that are entered as Quotes/Orders.

[8] 15 U.S.C. 78o–3.

[9] 15 U.S.C. 78o–3(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee, or other charge and, therefore, has become effective immediately pursuant to Section 19(b)(3)(A)(ii) of the Act [10] and Rule 19b–4(f)(2) thereunder.[11] At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference 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–2003–10 and should be submitted by February 27, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–2946 Filed 2–5–03; 8:45 am]

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[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 19b–4(f)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47301; File No. SR–NASD–2002–173]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change and Amendment Nos. 1, 2, and 3 Thereto by the National Association of Securities Dealers, Inc. To Establish a 90-Day Pilot Program To Allow NNMS Order Entry Firms To Enter Non-Marketable Limit Orders Into SuperMontage Using the SIZE MMID

January 31, 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 2, 2002, 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'') a proposed rule change, as described in Items I and II below, which Items have been prepared by Nasdaq. The NASD amended its proposal on December 23, 2002,[3] January 29, 2003,[4] and January 30, 2003.[5] The Commission is publishing

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] *See* letter from Edwards S. Knight, Executive Vice President and General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation (''Division''), Commission, dated December 20, 2002, replacing the original Form 19b-4 in its entirety (''Amendment No. 1''). In Amendment No. 1, Nasdaq clarified that NNMS Order Entry Firms would be allowed to enter multiple orders (with or without reserve size) at single or multiple price levels and be subject to automatic execution functionality of the system. Nasdaq also explained that any order entered by a NNMS Order Entry Firm that created a locked/crossed market would be processed like other locking/crossing quotes/orders as set forth in Rule 4710(b)(3). Furthermore, Nasdaq made corrections to its rule text and requested accelerated approval of the proposed rule change on a 90-day pilot basis.

[4] *See* letter from Edwards S. Knight, Executive Vice President and General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated January 29, 2003, replacing in its entirety the original Form 19b-4 and Amendment No. 1 (''Amendment No. 2''). In Amendment No. 2, Nasdaq represented that additional programming to distinguish NNMS Order Entry Firms from Nasdaq Quoting Market Participants for internalization purposes would be implemented on or before April 28, 2003. Furthermore, Nasdaq provided additional rational for its request for accelerated approval by the Commission, and made corrections to its rule text.

[5] *See* letter from Thomas P. Moran, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated January 30, 2003 (''Amendment No. 3''). In Amendment No. 3, Nasdaq made conforming changes to its definitions in Rule 4701 and made corrections in Rule 4710(b)(1)(B) to incorporate the changes made under the proposed rule change, as amended.

this notice to solicit comments on the proposed rule change and Amendment Nos. 1, 2 and 3 from interested persons and to approve the proposal, as amended, on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to allow NNMS Order Entry Firms (''OE Firms'') to enter non-marketable limit orders into SuperMontage using the SIZE Market Maker Identifier (''SIZE MMID'' or ''SIZE'') for a 90-day pilot period that commences on February 10, 2003.[6] The proposed rule language follows. Proposed new language is italicized; proposed deletions are [bracketed].

* * * * *

4701. Definitions—Unless stated otherwise, the terms described below shall have the following meaning:

* * * * *

(a) The term ''Displayed Quote/Order'' shall mean both Attributable and Non-Attributable (as applicable) Quotes/Orders transmitted to Nasdaq by Quoting Market Participants *or NNMS Order Entry Firms.*

* * * * *

(o) The term ''Non-Attributable Quote/Order'' shall mean a bid or offer Quote/Order that is entered by a Nasdaq Quoting Market Participant *or NNMS Order Entry Firm* and is designated for display (price and size) on an anonymous basis in the Nasdaq Order Display Facility.

* * * * *

(w) The term ''NNMS Order Entry Firm'' shall mean a member of the Association who is registered as an Order Entry Firm for purposes of participation in NNMS [which permits the firm to enter orders for execution against NNMS Market Makers].

* * * * *

(bb) The term ''Quote/Order'' shall mean a single quotation or shall mean an order or multiple orders at the same price submitted to Nasdaq by a Nasdaq Quoting Market Participant *or NNMS Order Entry Firm* that is displayed in the form of a single quotation. Unless specifically referring to a UTP Exchange's agency Quote/Order (as set out in Rule 4710(f)(2)(b)), when this term is used in connection with a UTP Exchange, it shall mean the best bid and/or the best offer quotation transmitted to Nasdaq by the UTP Exchange.

* * * * *

(dd) The term ''Reserve Size'' shall mean the system-provided functionality that permits a Nasdaq Quoting Market Participant *or NNMS Order Entry Firm* to display in its Displayed Quote/Order part of the full size of a proprietary or agency order, with the remainder held in reserve on an undisplayed basis to be displayed in whole or in part after the displayed part is reduced by executions to less than a normal unit of trading.

* * * * *

4706. Order Entry Parameters

(a) Non-Directed Orders—(1) General. The following requirements shall apply to Non-Directed Orders Entered by NNMS Market Participants: (A) An NNMS Participant may enter into the NNMS a Non-Directed Order in order to access the best bid/best offer as displayed in Nasdaq. (B) A Non-Directed Order must be a market or limit order, must indicate whether it is a buy, short sale, short-sale exempt, or long sale, and [if entered by a Quoting Market Participant] may be designated as ''Immediate or Cancel'', or as a ''Day'' or a ''Good-till-Cancelled'' order. If a priced order designated as ''Immediate or Cancel'' (''IOC'') is not immediately executable, the unexecuted order (or portion thereof) shall be returned to the sender. If a priced order designated as a ''Day'' order is not immediately executable, the unexecuted order (or portion thereof) shall be retained by NNMS and remain available for potential display/execution until it is cancelled by the entering party, or until 4:00 p.m. Eastern Time on the day such order was submitted, whichever comes first, whereupon it will *be* returned to the sender. If the order is designated as ''Good-till-Cancelled'' (''GTC''), the order (or unexecuted portion thereof) will be retained by NNMS and remain available for potential display/execution until cancelled by the entering party, or until 1 year after entry, whichever comes first. Starting at 7:30 a.m., until the 4:00 p.m. market close, IOC and Day Non-Directed Orders may be entered into NNMS (or previously entered orders cancelled), but such orders entered prior to market open will not become available for execution until 9:30 a.m. Eastern Time. GTC orders may be entered (or previously entered GTC orders cancelled) between the hours 7:30 a.m. to 6:30 p.m. Eastern Time, but such orders entered prior to market open, or GTC orders carried over from previous trading days, will not become available for execution until 9:30 a.m. Eastern Time. Exception: Non-Directed Day and GTC orders may be executed prior to market open if required under Rule 4710(b)(3)(B).

(C) The system will not process a Non-Directed Order to sell short if the execution of such order would violate NASD Rule 3350.

(D) Non-Directed Orders will be processed as described in Rule 4710.

(E) The NNMS shall not accept Non-Directed Orders that are All-or-None, or have a minimum size of execution.

(F) A NNMS Market Participant may enter a Non-Directed Order that is either a market order or a limit order prior to the market's open. Market orders and limit orders designated as Immediate or Cancel orders shall be held in a time-priority queue that will begin to be processed by NNMS at market open. If an Immediate or Cancel limit order is unmarketable at the time it reaches the front of time-priority processing queue, it will be returned to the entering market participant. Limit orders that are not designated as Immediate or Cancel orders shall be retained by NNMS for potential display in conformity with Rule 4707(b) and/or potential execution in conformity with Rule 4710(b)(1)(B).

(2) Entry of Non-Directed Orders by NNMS Order Entry Firms—In addition to the requirements in paragraph (a)(1) of this rule, the following conditions shall apply to Non-Directed Orders entered by NNMS Order-Entry Firms:

(A) All Non-Directed orders shall be designated as Immediate or Cancel, *GTC or Day but shall be required to be entered as Non-Attributable if not entered as IOC.* [As such] *For IOC Orders,* if after entry into the NNMS of a Non-Directed Order that is marketable, the order (or the unexecuted portion thereof) becomes non-marketable, the system will return the order (or unexecuted portion thereof) to the entering participant.

(B) A Non-Directed Order that is either a market order or a limit order may be entered prior to the market's open. Such limit and market orders will be held in a time-priority queue that will begin to be processed at market open. [If a] *A* limit order *that is designated as IOC and* is not marketable at the time it reaches the front of the time-priority processing queue [, it] will be returned to the entering participant.

(b) through (e) No Change.

* * * * *

4707. Entry and Display of Quotes/Orders

(a) Entry of Quotes/Orders—Nasdaq Quoting Market Participants may enter Quotes/Orders into the NNMS*, and NNMS Order Entry Firms may enter*

[6] This filing also makes certain non-substantive corrective and conforming changes to the written rules of the NNMS.

Non-Attributable Orders into the NNMS, subject to the following requirements and conditions:

(1) Nasdaq Quoting Market Participants shall be permitted to transmit to the NNMS multiple Quotes/Orders at a single as well as multiple price levels. Such Quote/Order shall indicate whether it is an ''Attributable Quote/Order'' or ''Non-Attributable Quote/Order,'' and the amount of Reserve Size (if applicable). *NNMS Order Entry Firms shall be permitted to transmit to NNMS multiple Non-Attributable Quotes/Orders at a single as well as multiple price levels and the amount of Reserve Size (if applicable).*

(2) Upon entry of a Quote/Order into the system, the NNMS shall time-stamp it, which time-stamp shall determine the ranking of the Quote/Order for purposes of processing Non-Directed Orders as described in Rule 4710(b). For each subsequent size increase received for an existing quote at a given price, the system will maintain the original time-stamp for the original quantity of the quote and assign a separate time-stamp to that size increase.

(3) Consistent with Rule 4613, an NNMS Market Maker is obligated to maintain a two-sided Attributable Quote/Order at all times, for at least one normal unit of trading.

(4) Nasdaq Quoting Market Participants may continue to transmit to the NNMS only their best bid and best offer Attributable Quotes/Orders. Notwithstanding NASD Rule 4613 and subparagraph (a)(1) of this rule, nothing in these rules shall require a Nasdaq Quoting Market Participant to transmit to the NNMS multiple Quotes/Orders.

(b) Display of Quotes/Orders in Nasdaq—The NNMS will display [a Nasdaq Quoting Market Participant's] Quotes/Orders *submitted to the system* as follows:

(1) Attributable Quotes/Orders—The price and size of a Nasdaq Quoting Market Participant's best priced Attributable Quote/Order on both the bid and offer side of the market will be displayed in the Nasdaq Quotation Montage under the Nasdaq Quoting Market Participant's MMID, and also will be displayed in the Nasdaq Order Display Facility as part of the aggregate trading interest at a particular price when the price of such Attributable Quote/Order falls within the number of price levels authorized for aggregation and display pursuant to Rule 4701(ee) on either side of the market. Upon execution or cancellation of the Nasdaq Quoting Market Participant's best-priced Attributable Quote/Order on a particular side of the market, the NNMS will automatically display the participant's next best Attributable Quote/Order on that side of the market.

(2) Non-Attributable Quotes/Orders—The price and size of a Nasdaq Quoting Market Participant's *and NNMS Order Entry Firm's* Non-Attributable Quote/Order on both the bid and offer side of the market will be displayed in the Nasdaq Order Display Facility as part of the aggregate trading interest at a particular price when the price of such Non-Attributable Quote/Order falls within the number of price levels authorized for aggregation and display pursuant to Rule 4701(ee) on either side of the market. A Non-Attributable *Quote/*Order will not be displayed in the Nasdaq Quotation Montage under the Nasdaq Quoting Market Participant's MMID. Non-Attributable Quotes/Orders that are the best priced Non-Attributable bids or offers in the system will be displayed in the Nasdaq Quotation Montage under an anonymous MMID, which shall represent and reflect the aggregate size of all Non-Attributable Quotes/Orders in Nasdaq at that price level. Upon execution or cancellation of a Nasdaq Quoting Market Participant's *or NNMS Order Entry Firm's* Non-Attributable Quote/Order, the NNMS will automatically display a Non-Attributable Quote/Order in the Nasdaq Order Display Facility (consistent with the parameters described above) if it falls within the number of price levels authorized for aggregation and display pursuant to Rule 4701(ee) on either side of the market.

(3) Exceptions—The following exceptions shall apply to the display parameters set forth in paragraphs (1) and (2) above:

(A) Odd-lots, Mixed Lots, and Rounding—The Nasdaq system (and all accompanying data feeds) shall be capable of displaying trading interest in round lot amounts. For quote display purposes, Nasdaq will aggregate all shares, including odd-lot share amounts, entered by a Quoting Market Participant *and NNMS Order Entry Firm* at a single price level and then round that total share amount down to the nearest round-lot amount for display and dissemination, consistent with subparagraphs (b)(1) and (b)(2) of this rule. Though rounded, any odd-lot portion of a [Quoting Market Participant's trading interest] *Quote/Order* that is not displayed as a result of this rounding process will remain in the system, with the time-priority of their original entry, and be continuously available for execution. Round-lots that are subsequently reduced by executions to a mixed lot amount will likewise be rounded for display purposes by the system to the nearest round-lot amount at that same price level. Any odd-lot number of shares that do not get displayed as a result of this rounding will remain in the system with the time-priority of their original entry and thus be continuously available for execution. If executions against an Attributable Quote/Order result in there being an insufficient (odd-lot) amount of shares at a price level to display an Attributable Quote/Order for one round-lot, the system will display the Quoting Market Participant's next best priced Attributable Quote/Order consistent with Rule 4710(b)(2). If all Attributable Quotes/Orders on the bid and/or offer side of the market are exhausted so that there are no longer any Attributable Quotes/Orders, the system may refresh a market maker's exhausted bid or offer quote using the process set forth in Rule 4710(b)(5). With the exception of Legacy Quotes, odd-lot remainders that are not displayed will remain in the system at their original price levels and continue to be available for execution.

(c) through (e) No Change.

* * * * *

4710. Participant Obligations in NNMS

(a) No Change.

(b) Non-Directed Orders.

(1) General Provisions—A Quoting Market Participant in an NNMS Security, as *well as NNMS Order Entry Firms,* shall be subject to the following requirements for Non-Directed Orders:

(A) Obligations For each NNMS security in which it is registered, a Quoting Market Participant must accept and execute individual Non-Directed Orders against its quotation, in an amount equal to or smaller than the combination of the Displayed Quote/Order and Reserve Size (if applicable) of such Quote/Order, when the Quoting Market Participant is at the best bid/best offer in Nasdaq. *This obligation shall also apply to the Non-Attributable Quotes/Orders of NNMS Order Entry Firms. Quoting Market Participants, and NNMS Order Entry Firms,* shall participate in the NNMS as follows:

(i) NNMS Market Makers, [and] NNMS Auto-Ex ECNs*, and NNMS Order Entry Firms to the extent they enter a Non-Attributable Quote/Order* shall participate in the automatic-execution functionality of the NNMS, and shall accept the delivery of an execution up to the size of the participant's Displayed Quote/Order and Reserve Size.

(ii) NNMS Order-Delivery ECNs shall participate in the order-delivery functionality of the NNMS, and shall accept the delivery of an order up to the size of the NNMS Order-Delivery ECN's Displayed Quote/Order and Reserve Size. The NNMS Order-Delivery ECN

shall be required to execute the full size of such order (even if the delivered order is a mixed lot or odd lot) unless that interest is no longer available in the ECN, in which case the ECN is required to execute in a size equal to the remaining amount of trading interest available in the ECN.

(iii) UTP Exchanges that choose to participate in the NNMS shall do so as described in subparagraph (f) of this rule and as otherwise described in the NNMS rules and the UTP Plan.

(B) Processing of Non-Directed Orders—Upon entry of a Non-Directed Order into the system, the NNMS will ascertain who the next Quoting Market Participant *or NNMS Order Entry Firm* in queue to receive an order is (based on the algorithm selected by the entering participant, as described in subparagraph (b)(B)(i)–(iii) of this rule), and shall deliver an execution to Quoting Market Participants *or NNMS Order Entry Firms* that participate in the automatic-execution functionality of the system, or shall deliver a Liability Order to Quoting Market Participants that participate in the order-delivery functionality of the system; provided however, that the system always shall deliver an order (in lieu of an execution) to the Quoting Market Participant next in queue when the participant that entered the Non-Directed Order into the system is a UTP Exchange that does not provide automatic execution against its Quotes/Orders for Nasdaq Quoting Market Participants and NNMS Order Entry Firms. Non-Directed Orders entered into the NNMS system shall be delivered to or automatically executed against Quoting Market Participants' *or NNMS Order Entry Firms'* Displayed Quotes/Orders and Reserve Size in strict price/time priority, as described in the algorithm contained in subparagraph (b)(B)(i) of this rule. Alternatively, an NNMS Market Participant can designate that its Non-Directed Orders be executed based on a price/time priority that considers ECN quote-access fees, as described in subparagraphs (b)(B)(ii) of this rule, or executed based on price/size/time priority, as described in subparagraph (b)(B)(iii) of this rule. The individual time priority of each Quote/Order submitted to NNMS shall be assigned by the system based on the date and time such Quote/Order was received. Remainders of Quote/Orders reduced by execution, if retained by the system, shall retain the time priority of their original entry. For purposes of the execution algorithms described in paragraphs (i), (ii) and (iii) below, ''Displayed Quotes/Orders'' shall also include any odd-lot, odd-lot portion of a mixed-lot, or any odd-lot remainder of a round-lot(s) reduced by execution, share amounts that while not displayed in the Nasdaq Quotation Montage, remain in system and available for execution.

(i) Default Execution Algorithm—Price/Time—The system will default to a strict price/time priority within Nasdaq, and will attempt to access interest in the system in the following priority and order:

(a) Displayed Quotes/Orders of NNMS Market Makers[,] *and* NNMS ECNs, *displayed Non-Attributable Quotes/Orders of NNMS Order Entry Firms,* and *displayed* non-attributable agency Quotes/Orders of UTP Exchanges (as permitted by subparagraph (f) of this rule), in time priority between such participants' Quotes/Orders[:]*;*

(b) Reserve Size of Nasdaq Quoting Market Participants *and NNMS Order Entry Firms,* in time priority between such participants' Quotes/Orders; and

(c) Principal Quotes/Orders of UTP Exchanges, in time priority between such participants' Quotes/Orders.

(ii) Price/Time Priority Considering Quote-Access Fees—If this option[s] is chosen, the system will attempt to access interest in the system in the following priority and order:

(a) Displayed Quotes/Orders of NNMS Market Makers, *displayed Non-Attributable Quotes/Orders of NNMS Order Entry Firms, displayed Quotes/Orders of* NNMS ECNs that do not charge a separate quote-access fee to non-subscribers, and non-attributable agency Quotes/Orders of UTP Exchanges (as permitted by subparagraph (f) of this rule), as well as Quotes/Orders from NNMS ECNs that charge[s] a separate quote-access fee to non-subscribers where the ECN entering such Quote/Order indicates that the price improvement offered by the specific Quote/Order is equal to or exceeds the separate quote-access fee the ECN charges, in time priority between such participants' Quotes/Orders;

(b) Displayed Quotes/Orders of NNMS ECNs that charge a separate quote-access fee to non-subscribers, in time priority between such participants' Quotes/Orders;

(c) Reserve Size of NNMS Market Makers *and NNMS Order Entry Firms,* and NNMS ECNs that do not charge a separate quote-access fee to non-subscribers, as well as Reserve Size of Quotes/Orders from NNMS ECNs that charge[s] a separate quote-access fee to non-subscribers where the ECN entering such Quote/Order has indicated that the price improvement offered by the specific Quote/Order is equal to or exceeds the separate quote-access fee the ECN charges, in time priority between such participants' Quotes/Orders;

(d) Reserve Size of NNMS ECNs that charge a separate quote-access fee to non-subscribers, in time priority between such participants' Quotes/Orders; and

(e) Principal Quotes/Orders of UTP Exchanges, in time priority between such participants' Quotes/Orders.

(iii) Price/Size Priority—If this option is chosen, Non-Directed Orders shall be executed in price/size/time priority against:

(a) Displayed Quotes/Orders of NNMS Market Makers, *displayed Non-Attributable Quotes/Orders of NNMS Order Entry Firms, displayed Quotes/Orders of* NNMS ECNs, and non-attributable agency Quotes/Orders of UTP Exchanges (as permitted by subparagraph (f) of this rule), in price/size/time priority between such participants' Quotes/Orders[:] ;

(b) the Reserve Size of Nasdaq Quoting Market Participants *and NNMS Order Entry Firms,* in price/size/time priority between such participants' Quotes/Orders, which size priority shall be based on the size of the Displayed Quote/Order, and not on the amount held in Reserve Size; and

(c) Principal Quotes/Orders of UTP Exchanges, in price/size/time priority between such participants' Quotes/Orders.

(iv) Exceptions—The following exceptions shall apply to the above execution parameters:

(a) If a Nasdaq Quoting Market Participant enters a Non-Directed Order into the system, before sending such Non-Directed Order to the next Quoting Market Participants in queue, the NNMS will first attempt to match off the order against the Nasdaq Quoting Market Participant's own Quote/Order if the participant is at the best bid/best offer in Nasdaq. *Effective February 10, 2003, until April 28, 2003 (or such earlier date as determined by Nasdaq with appropriate notice to the Securities and Exchange Commission and market participants), this processing shall also apply to Non-Directed Orders of NNMS Order Entry Firms. Thereafter, this exception shall not apply to Non-Directed Orders entered by NNMS Order Entry Firms.*

(b) If an NNMS Market Participant enters a Preferenced Order, the order shall be executed against (or delivered in an amount equal to) both the Displayed Quote/Order and Reserve Size of the Quoting Market Participant to which the order is being directed, if that Quoting Market Participant is at the best bid/best offer when the Preferenced

Order is next in line to be delivered (or executed). Any unexecuted portion of a Preferenced Order shall be returned to the entering NNMS Market Participant. If the Quoting Market Participant is not at the best bid/best offer when the Preferenced Order is next in line to be delivered (or executed), the Preferenced Order shall be returned to the entering NNMS Market Participant.

(c) If an NNMS Market Participant enters a Quote or Non-Directed Order that would result in NNMS either: (1) Delivering an execution to a Quoting Market Participant(s) *or an NNMS Order Entry Firm* that participates in the automatic-execution functionality of the system at a price substantially away from the current inside bid/offer in that security; or (2) delivering a Liability Order to a Quoting Market Participant(s) that participates in the order-delivery functionality of the system at a price substantially away from the current inside bid/offer in that security, the system shall instead process only those portions of the order that will not result in either an execution or delivery at a price substantially away from the current inside best bid/offer in the security and return the remainder to the entering party. For purposes of this subsection only, an execution or delivery based on a sell order shall be deemed to be substantially away from the current inside bid if it is to be done at a price lower than a break-price established by taking the inside bid, reducing it by 10% of the bid's value, and then subtracting $0.01. For example, in a stock with a current inside bid of $10.00, the maximum price at which a single sell order could be executed would be $8.99 calculated as follows: ($10.00 − ($10.00 × .10 e.g $1) − $.01 = $8.99). For offers, an execution or delivery based on a buy order shall be deemed to be substantially away from the current inside offer if it is done a price higher than a break-price established by taking the inside offer, adding 10% of the offer's value to it, and then adding $0.01. For example, in a stock with a current inside offer of $10.00, the highest price at which a single sell order could be executed would be $11.01 calculated as follows: ($10.00 + ($10.00 × .10 e.g. $1) + $.01 = $11.01.

(C) through (D) No Change.

(2) Refresh Functionality.

(A) Reserve Size Refresh—Once a Nasdaq Quoting Market Participant's *or NNMS Order Entry Firm's* Displayed Quote/Order size on either side of the market in the security has been decremented to an amount less than one normal unit of trading due to NNMS processing, Nasdaq will refresh the displayed size out of Reserve Size to a size-level designated by the Nasdaq Quoting Market Participant *or NNMS Order Entry Firm,* or in the absence of such size-level designation, to the automatic refresh size. The amount of shares taken out of reserve to refresh display size shall be added to any shares remaining in the Displayed Quote/Order and shall be of an amount that when combined with the number of shares remaining in the Nasdaq Quoting Market Participant's Displayed Quote/Order before it is refreshed will equal the displayed size-level designated by the Nasdaq Quoting Market Participant or, in the absence of such size-level designation, to the automatic refresh size. If there are insufficient shares available to produce a Displayable Quote/Order, the Nasdaq Quoting Market Participant's Quote/Order, and any odd-lot remainders, will be refreshed, updated, or retained, in conformity with NNMS Rules 4707 and 4710 as appropriate. To utilize the Reserve Size functionality, a minimum of 100 shares must initially be displayed in the Nasdaq Quoting Market Participant's *or NNMS Order Entry Firm's* Displayed Quote/Order, and the Displayed Quote/Order must be refreshed to at least 100 shares. This functionality will not be available for use by UTP Exchanges.

(B) Auto Quote Refresh (''AQR'')—No Change.

(3) Entry of Locking/Crossing Quotes/Orders The system shall process locking/crossing Quotes/Orders as follows:

(A) Locked/Crossed Quotes/Orders During Market Hours—If during market hours, a [Quoting Market] [P]participant enters into the NNMS a Quote/Order that will lock/cross the market (as defined in NASD Rule 4613(e)), the system will not display the Quote/Order as a quote in Nasdaq; instead the system will treat the Quote/Order as a marketable limit order and enter it into the system as a Non-Directed Order for processing (consistent with subparagraph (b) of this rule) as follows:

(i) For locked-market situations, the order will be routed to the Quoting Market Participant *or NNMS Order Entry Firm* next in queue who would be locked, and the order will be executed (or delivered for execution) at the lock price;

(ii) For crossed-market situations, the order will be entered into the system and routed to the next Quoting Market Participants *or NNMS Order Entry Firms* in queue who would be crossed, and the order will be executed (or delivered for execution) at the price of the Displayed Quote/Order that would have been crossed.

Once the lock/cross is cleared, if the participant's order is not completely filled, the system will reformat the order and display it in Nasdaq (consistent with the parameters of the Quote/Order) as a Quote/Order on behalf of the entering Quoting Market Participant *or Order Entry Firm.*

(B) No Change.

(4) through (8) No Change.

(c) No Change.

(d) NNMS Order Entry Firms.

All entries in NNMS shall be made in accordance with the procedures and requirements set forth in the NNMS User Guide *and these rules*. Orders may be entered in NNMS by the NNMS Order Entry Firm through either its Nasdaq terminal or computer interface. The system will transmit to the firm on the terminal screen and printer, if requested, or through the computer interface, as applicable, an execution report generated immediately following the execution.

(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, as amended, and discussed any comments it received on the proposed rule change, as amended. The text of these statements may be examined at the places specified in Item III 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

1. Purpose

Currently, OE Firms must designate all limit orders they enter into SuperMontage as ''Immediate-or-Cancel'' (''IOC''). This designation, while allowing such orders to potentially execute if marketable when they reach the front of the SuperMontage processing queue, also instructs the system to return the order to the OE Firms if the order's price precludes an immediate execution. In short, OE Firms can enter market orders and marketable limit orders, but cannot enter non-marketable limit orders. Nasdaq believes that the result is that all SuperMontage participants are deprived

of the additional liquidity these rejected orders represent and the supply/demand information they provide the market as a whole.

In response to both the negative market impacts rejection of these orders engender, and requests from order entry market participants for enhanced access to the SuperMontage system, Nasdaq proposes that OE Firms be permitted to voluntarily enter non-marketable limit orders into SuperMontage without the IOC designation and have such order retained for potential execution [7] through display under the SIZE MMID [8] on a pilot basis for 90-days commencing February 10, 2003.

With one exception, Non-Attributable Orders entered into the system by OE Firms would be processed in the same manner as other non-attributable orders placed into SIZE by NNMS Market Makers. The only exception would be that, unlike the quotes/orders of Nasdaq Quoting Market Participants, SuperMontage would not first attempt to have Non-Attributable Orders submitted by OE Firms match off against orders entered by the same OE Firm on the other side of the market. Instead, OE Firm orders would execute based solely on the algorithm selected by the entering party (price/time, price/time with fee consideration, or price/size) against the quotes/orders of other SuperMontage users—including orders from the same OE firm entered on the other side of the market. However, the technology to support this functionality will not be available at the start of the pilot program on February 10, 2003. Instead, for a limited period, OE Firms would have their orders processed in a manner similar to Nasdaq Quoting Market Participants in that the system would first attempt to match off OE Firm orders against orders from the same OE Firm on the other side of the market. Nasdaq is working to program its system and formally commits to having the technology in place to inhibit this automatic matching, as proposed in this filing, on or before April 28, 2003.

Under the proposal, OE Firms would be allowed to enter multiple orders (with or without reserve size) at single or multiple price levels, and such orders would be subject to the automatic execution functionality of the system. If any order entered by an OE Firm would create a locked/crossed market, such orders would be processed like other locking/crossing quotes/orders as set forth in NASD Rule 4710(b)(3).

Nasdaq believes that the above proposal is an important step in its ongoing process to make its systems more accessible to all NASD member firms, while ensuring that market participants who undertake the burdens of continuous liquidity provision are provided benefits commensurate with their activities. Nasdaq believes that most important, however, are the improvements to market quality that can be expected from the proposed rule change's swift implementation. In addition to enhanced liquidity and informational benefits, retention of non-marketable limit orders from OE Firms in SuperMontage can be expected, in Nasdaq's view, to reduce fragmentation of trading interest, thereby improving execution quality and speed and shrinking the costs market participants now incur when searching for trading partners in multiple venues. Finally, to the extent that any currently rejected OE Firm order is retained, Nasdaq believes that it would reduce the potential for locked/crossed markets that can occur if such rejected trading interest is subsequently displayed in an unlinked market center and thus does not benefit from SuperMontage processing that eliminated locks or crosses among all quotes and orders residing in the system.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with Section 15A of the Act [9] in general, and furthers the objectives of Section 15A(b)(6)[10] in particular, in that it is 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.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change, as amended, 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 were neither solicited nor received.

III. 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 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–2002–173 and should be submitted by February 27, 2003.

IV. Commission Findings and Order Granting Accelerated Approval of the Proposed Rule Change

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 and, in particular, with the requirements of Section 15A(b)(6) of the Act,[11] in that it is 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.[12] The Commission believes that allowing OE Firms to enter non-marketable limit orders into SuperMontage using the SIZE MMID should provide greater

[7] Under the proposal, OE Firms would be able to designate orders as IOC, ''Good-till-Cancelled,'' or ''Day.''

[8] The SIZE MMID is the anonymous MMID that represents the aggregate size of all Non-Attributable Quotes and Orders entered by market participants in Nasdaq at a particular price level. Non-Attributable Quotes/Orders are not displayed in the Nasdaq Quotation Montage using the market participant's MMID. Instead, the SIZE MMID is displayed and represents the aggregate, Non-Attributable trading interest at a particular price level in the Nasdaq Quotation Montage. Telephone conversation between Thomas P. Moran, Associate General Counsel, Nasdaq, and Marc F. McKayle, Special Counsel, Division, Commission, on January 30, 2003 (making corrections to the text in the footnote).

[9] 15 U.S.C. 78*o*–3.

[10] 15 U.S.C. 78*o*–3(b)(6).

[11] 15 U.S.C. 78*o*–3(b)(6).

[12] In approving the proposed rule, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

access to the system by all NASD members, as well as encourage OE Firms to enter orders into SuperMontage and thereby increase liquidity in the market to the benefit of all market participants. Further, even though the orders of OE Firms will not be matched off against orders entered by the same OE Firm on the other side of the market,[13] Nasdaq has represented that in all other respects, Non-Attributable Orders entered by OE Firms will be processed in the same manner as other non-attributable orders placed into SIZE by NNMS Market Makers. As a result, the Commission believes that OE Firms will have far greater access to the SuperMontage then currently exists.

The Commission further believes that the proposal is consistent with the goals of Section 11A(a)(1)(C), particularly Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly market to assure the economically efficient execution of securities transactions. The proposal should provide OE Firms with greater flexibility to reflect buying and selling interest at various price levels by entering Non-Attributable Orders directly into SuperMontage, instead of relying on electronic communications networks and NNMS Market Makers to post their trading interest.

Accordingly, the Commission finds good cause, pursuant to Sections 15A(b)(6) and 19(b)(2) of the Act,[14] for approving the proposed rule change, as amended, prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission believes that accelerated approval of the pilot will enable Nasdaq to allow OE Firms to enter orders into Nasdaq and thereby, remove a barrier to access to the SuperMontage, while enabling the Commission, NASD, Nasdaq, and market participants to gain actual experience with the pilot before the Commission considers permanent approval of the pilot.[15] As a result, market participants will be able to better assess the impact of the proposal and offer insightful and valuable public comment on the pilot. Further, the Commission notes that several commenters suggested that OE Firms be allowed to enter orders directly into the order display facility as part of the original public comment process on the SuperMontage proposal.[16] The Commission notes that the proposed rule change addresses those comments.

[13] Nasdaq's proposed rule change would eliminate the ability of OE Firms to use this feature no later than April 28, 2003.

[14] 15 U.S.C. 78*o*–3(b)(6) and 78s(b)(2).

[15] The Commission notes that approval of the pilot should not be interpreted as suggesting that the Commission is predisposed to approving the proposal on a permanent basis if requested by the NASD.

[16] *See* Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2001).

I. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[17], that the proposed rule change, as amended, (File No. SR–NASD–2002–173) be, and it hereby is, approved on an accelerated basis, as a 90-day pilot beginning on February 10, 2003 and expiring on May 12, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[18]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–2950 Filed 2–5–03; 8:45 am]

BILLING CODE 8010–01–P

[17] 15 U.S.C. 78s(b)(2).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47295; File No. SR–PCX–2002–64]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by Pacific Exchange, Inc., Relating to Rules Governing the Intermarket Linkage, and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 Thereto

January 31, 2003.

I. Introduction

On September 26, 2002, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b-4 thereunder,[2] a proposed rule change to adopt new rules, governing the operation of the intermarket linkage (the ''Linkage''). The proposed rule change was published for comment in the **Federal Register** on December 26, 2002.[3] The Commission received no comments on the proposed rule change. On January 29, 2003, the Exchange filed Amendment No. 1 to the proposed rule change.[4] This order approves the proposed rule change, provides notice of filing of Amendment No. 1 and grants accelerated approval to Amendment No. 1.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] *See* Securities Exchange Act Release No. 47026 (December 18, 2002), 67 FR 78843.

[4] *See* letter from Mai S. Shiver, Senior Attorney, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated January 28, 2003 (''Amendment No. 1''). In Amendment No. 1, the Exchange proposed to amend: (1) The definition of ''Linkage Order'' contained in PCX Rule 6.92(a)(12) to state that such orders are immediate or cancel orders; (2) PCX Rule 6.93(e) to clarify the Lead Market Market's obligation to address a linkage order when such order is not eligible to be automatically executed; (3) PCX Rule 6.94(a) to clarify language regarding liability for trade-throughs at the end of the trading day and to request approval of this provision only for a one-year pilot period; and (4) PCX Rule 6.94(e) to clarify that members may not engage in a pattern or practice of trading through.

II. Description of Proposal

In general, the proposed rules contain relevant definitions, establish the conditions pursuant to which market makers may enter Linkage orders, impose obligations on the Exchange regarding how it must process incoming Linkage orders, and establish a general standard that members should avoid trade-throughs.[5] The proposed rules establish potential regulatory liability for members who engage in a pattern or practice of trading through other exchanges, whether or not the exchanges traded through participate in the Linkage, provide procedures to unlock and uncross markets, and codify the ''80/20 Test'' contained in section 8(b)(iii) of the Plan for the Purpose of Creating and Operating an Intermarket Options Linkage (the ''Plan''),[6] which provides that a market maker on an Exchange would be restricted from sending principal orders (other than P/A orders, which reflect unexecuted customer orders) through the Linkage if the market maker effects less than 80 percent of specified order flow on the Exchange.

III. Discussion

The Commission has reviewed the PCX's proposed rule change and finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange,[7] and with the requirements of section 6(b).[8] In particular the Commission finds that the proposed rule change is designed to

[5] Trade-throughs occur when broker-dealers execute customer orders on one exchange at prices inferior to another exchange's disseminated quote.

[6] Approved by the Commission in Securities Exchange Act Release No. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000), as subsequently amended. *See* Securities Exchange Act Release No. 44482 (June 27, 2001), 66 FR 35470 (July 5, 2001) (''Initial Amendment Order'') and Securities Exchange Act Release No. 46001 (May 30, 2002), 67 FR 38687 (June 5, 2002); 47274 (January 29, 2003); and 47298 (January 31, 2003).

[7] In approving this rule proposal, the Commission notes that it has also considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78f(b).

prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest in accordance with section 6(b)(5) of the Act.[9]

The Commission believes that the rules proposed by the PCX will adequately govern the operation of the Linkage as envisioned in the Plan. The Commission believes that these rules will help to ensure that the Linkage is operated fairly and effectively, in accordance with the principles of the Act and the Plan.

The Commission also finds good cause for approving proposed Amendment No. 1 prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Amendment No. 1 proposes several changes to the Exchange's original proposal that are designed to conform the Exchange's rules governing linkage more closely to the Plan. The provisions of the Plan have already been subject to notice and comment, and have been approved by the Commission. The changes proposed in Amendment No. 1 do not raise any novel regulatory issues, and therefore, it is appropriate for the Commission to accelerate approval of Amendment No. 1.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 1 to the proposed rule change, including whether Amendment No. 1 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 Amendment No. 1 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 Exchange. All submissions should refer to File No. SR-PCX–2002–64 and should be submitted by February 27, 2003.

V. Conclusion

It is therefore Ordered, pursuant to section 19(b)(2) of the Act,[10] that the proposed rule change (SR-PCX–2002–64), be, and hereby is, approved, and that Amendment No. 1 to the proposed rule change be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

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BILLING CODE 8010–01–P

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 4272]

Bureau of Educational and Cultural Affairs Request for Grant Proposals: Kyrgyz Republic Educational Partnerships Program in Cultural and Comparative Religious Studies

SUMMARY: The Office of Global Educational Programs of the Bureau of Educational and Cultural Affairs announces an open competition for the Kyrgyz Republic Educational Partnerships Program in Cultural and Comparative Religious Studies. Public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3) may submit proposals to support mutually beneficial partnerships which contribute to the development of instruction in comparative religion, cultural studies/history, computer science and English at the Bishkek Islamic Institute in the Kyrgyz Republic. The means for achieving these objectives may include the exchange of university and college faculty and research scholars, administrators, and advanced students between the Kyrgyz Republic and appropriate U.S. counterpart colleges and universities.

In a program announced in a separate RFGP, the Bureau supports linkages in higher education with partners in the Eurasian states of the former Soviet Union through the FREEDOM Support Educational Partnerships Program. Applicants seeking support for educational partnerships with partners in the Kyrgyz Republic other than the one specified in this RFGP or for fields of study other than those specified in this RFGP should consult the RFGP for the FREEDOM Support Educational Partnerships Program or contact the Bureau's Humphrey Fellowships and Institutional Linkages Branch at (202) 619–5289.

Program Information

Overview: The Kyrgyz Republic Educational Partnerships Program in Cultural and Comparative Religious Studies will fund a three-year project to permit one or more U.S. institutions to work with the Bishkek Islamic Institute. Pending availability of funds, approximately $200,000 is expected to be available under the FREEDOM Support Act for the Kyrgyz Republic Educational Partnerships Program in Cultural and Comparative Religious Studies in FY 2003.

Objectives: Proposals that benefit both partner institutions will be the most competitive, although the benefits do not need to be identical for each partner. The proposal should outline a plan to cooperate with the Bishkek Islamic Institute to: (1) Develop courses and curricula in eligible fields; (2) improve teaching methods; (3) develop educational materials which support new courses and curricula; (4) train teachers or other practitioners in the effective use of these materials; and (5) foster self-sustaining relationships with U.S. academic institutions and educators.

The program should equip the Bishkek Islamic Institute to provide accurate and balanced information about religion, including Islam, and cultural history framed within a contemporary understanding of human rights and the role of cultural and religious pluralism in a democratic society. At the conclusion of the program, teachers at the Bishkek Islamic Institute should be capable of teaching the newly introduced or revised courses and should be able to participate more fully in international dialogue with U.S. and other educators. Students graduating from the Bishkek Islamic Institute should have a better understanding of the relationships between religion, politics, and society in modern democracies and should be better prepared to apply this understanding in public service, education, and the private sector, and to contribute to building a democratic society.

The Bureau anticipates that the participating U.S. institution(s) and individuals will benefit by developing or strengthening regional expertise. Participating U.S. faculty may utilize

this experience to develop new courses or incorporate comparative content into existing courses. Students at participating U.S. institutions will gain a better understanding of Central Asia through interaction with visiting scholars and U.S. faculty that have incorporated international content into their courses.

Pending availability of funds, the grant should begin on or about June 15, 2003.

Participant Eligibility

All participants traveling to the Kyrgyz Republic funded under the grant must be U.S. citizens. Foreign participants must be both qualified to receive U.S. J–1 visas and willing to travel to the U.S. under the provisions of a J–1 visa during the exchange visits funded by this Program.

Programs must comply with J–1 visa regulations. Please refer to Solicitation Package for further information.

Budget Guidelines

The Bureau anticipates awarding one grant not to exceed $200,000. Applicants may submit a budget not to exceed this amount. Organizations with less than four years experience in conducting international exchanges are limited to $60,000, and are not encouraged to apply. The Bureau encourages applicants to provide maximum levels of cost-sharing and funding from private sources in support of its programs.

Applicants must submit a comprehensive budget for the entire program. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

Announcement Title and Number: All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/A/S/U–03–14.

FOR FURTHER INFORMATION CONTACT: To request a solicitation package, contact the Humphrey Fellowships and Institutional Linkages Branch; Office of Global Educational Programs; Bureau of Educational and Cultural Affairs; ECA/A/S/U, Room 349; U.S. Department of State; SA–44, 301 Fourth Street, SW., Washington, DC 20547; phone: (202) 619–5289, fax: (202) 401–1433. The Solicitation Package includes more detailed award criteria, all application forms, and guidelines for preparing proposals, including specific criteria for preparation of the proposal budget. Applicants desiring more information may contact Program Officer Jonathan Cebra at 202–205–8379 or *jcebra@pd.state.gov.*

Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

To Download a Solicitation Package Via Internet

The entire Solicitation Package may be downloaded from the Bureau's Web site at *http://exchanges.state.gov/education/RFGPs.* Please read all information before downloading.

Deadline for Proposals

All proposal copies must be received at the Bureau of Educational and Cultural Affairs by 5 p.m. Washington, DC time on Tuesday, April 1, 2003. Faxed documents will not be accepted at any time. Documents postmarked the due date but received on a later date will not be accepted. Each applicant must ensure that the proposals are received by the above deadline.

Applicants must follow all instructions in the Solicitation Package. The original and ten copies of the application should be sent to: U.S. Department of State, SA–44, Bureau of Educational and Cultural Affairs, Ref.: ECA/A/S/U–03–14, Program Management, ECA/EX/PM, Room 534, 301 4th Street, SW., Washington, DC 20547.

No later than one week after the competition deadline, applicants must also submit the Proposal Title Sheet, Executive Summary, and Proposal Narrative sections of the proposal as e-mail attachments in Microsoft Word (preferred), WordPerfect, or as ASCII text files to the following e-mail address: *partnerships@pd.state.gov.* In the e-mail message subject line, include the following: ECA/A/S/U–03–14. To reduce the time needed to obtain advisory comments from the Public Affairs Section of the U.S. Embassy in Bishkek, the Bureau will transmit these files electronically to this office.

Diversity, Freedom and Democracy Guidelines

Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. ''Diversity'' should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and physical challenges. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into the total proposal. Public Law 104–319 provides that ''in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy,'' the Bureau ''shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries.'' Public Law 106–113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

Adherence to All Regulations Governing the J Visa

The Bureau of Educational and Cultural Affairs is placing renewed emphasis on the secure and proper administration of Exchange Visitor (J visa) Programs and adherence by grantees and sponsors to all regulations governing the J visa. Therefore, proposals should demonstrate the applicant's capacity to meet all requirements governing the administration of Exchange Visitor Programs as set forth in 22 CFR 6Z, including the oversight of Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of forms, record-keeping, reporting and other requirements. The Grantee will be responsible for issuing DS–2019 forms to participants in this program.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at *http://exchanges.state.gov* or from: United States Department of State, Office of Exchange Coordination and Designation, ECA/EC/ECD—SA–44, Room 734, 301 4th Street, SW., Washington, DC 20547, Telephone: (202) 401–9810, FAX: (202) 401–9809.

Review Process

The Bureau will acknowledge receipt of all proposals and will review them for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by

the program office, as well as the Public Diplomacy section overseas, where appropriate. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other elements of the Department or the United States Government. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for grants resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

(1) *Broad and Enduring Significance of Institutional Objectives:* Program objectives should have significant and ongoing benefits for the participating institutions and for their surrounding societies or communities.

(2) *Creativity and Feasibility of Strategy to Achieve Objectives:* Strategies to achieve program objectives should be feasible and realistic within the budget and timeframe. These strategies should utilize and reinforce exchange activities creatively to ensure an efficient use of program resources.

(3) *Multiplier effect/impact:* Proposed programs should strengthen long-term mutual understanding, including maximum sharing of information and establishment of long-term institutional and individual linkages.

(4) *Support of Diversity:* Proposals should demonstrate substantive support of the Bureau's policy on diversity by explaining how issues of diversity are included in objectives for all institutional partners. Issues resulting from differences of race, ethnicity, gender, religion, geography, socio-economic status, or physical challenge should be addressed during program implementation. In addition, program participants and administrators should reflect the diversity within the societies which they represent (see the section of this document on ''Diversity, Freedom, and Democracy Guidelines''). Proposals should also discuss how the various institutional partners approach diversity issues in their respective communities or societies.

(5) *Institution's Capacity and Record/Ability:* Proposed personnel and institutional resources should be adequate and appropriate to achieve the program or project's goals. Proposals should demonstrate an institutional record of successful exchange programs, including responsible fiscal management and full compliance with all reporting requirements for past Bureau grants as determined by Bureau Grant Staff. The Bureau will consider the past performance of prior recipients and the demonstrated potential of new applicants.

(6) *Evaluation:* Proposals should outline a methodology for determining the degree to which the project meets its objectives, both while it is underway and at its conclusion. The final program evaluation should include an external component and should provide observations about the program's influence within the participating institutions as well as their surrounding communities or societies.

(7) *Cost-effectiveness:* Administrative and program costs should be reasonable and appropriate with cost-sharing provided by all participating institutions within the context of their respective capacities. Cost-sharing is viewed as a reflection of institutional commitment to the program.

(8) *Value to U.S.-Partner Country Relations:* Proposed projects should receive positive assessments by the U.S. Department of State's geographic area desk and overseas officers of program need, potential impact, and significance in the Kyrgyz Republic.

Authority

Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Pub. L. 87–256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is ''to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world.'' The funding authority for the program cited above is provided through the Freedom for Russia and Emerging Eurasian Democracies and Open Markets Support Act of 1992 (FREEDOM Support Act).

Notice

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements.

Notification

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures.

Dated: January 28, 2003.

C. Miller Crouch,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

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DEPARTMENT OF STATE

[Public Notice 4273]

Bureau of Educational and Cultural Affairs Request for Grant Proposals (RFGPs) for the Project ''Cultural and Religious Pluralism in Uzbekistan and the United States''

SUMMARY: The Europe/Eurasia Division of the Office of Citizen Exchanges of the Bureau of Educational and Cultural Affairs announces an open competition for the project, Cultural and Religious Pluralism in Uzbekistan and the United States. Public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3) may submit proposals to conduct a two-component exchange program with Uzbekistan. The first component of the program is for 60 community and religious leaders from Uzbekistan to travel to host communities in the United States for a program on cultural and religious pluralism. The second component is the recruitment of 16 experts on religion and the role of religion in American society who will travel to Uzbekistan to conduct lectures and training programs.

Program Information

Organizations must have four or more years of documented experience in conducting international exchange to be eligible to apply for a grant under this competition.

Overview: The Office of Citizen Exchanges consults with and supports American public and private nonprofit organizations in developing and implementing multi-phased, often multi-year, exchanges of professionals,

community leaders, scholars and academics, public policy advocates, non-governmental organization professionals, etc. These exchanges address issues crucial to both the United States and the foreign countries involved; they promote focused, substantive, and cooperative interaction among counterparts; and they entail both theoretical and experiential learning for all participants.

The initiative *Cultural and Religious Pluralism in Uzbekistan and the United States* will support an outreach program in a number of Uzbek communities to encourage an exchange of ideas about religious tolerance and diversity and the role of religion in a democratic society. The U.S. Embassy in Tashkent will select approximately twelve communities within Uzbekistan where the program will be conducted. The program will expose participants to freedom of religion and church-state issues in the United States, including the study and practice of religion (including Islam) in the United States, interfaith issues and associations, the role of religious organizations in the community, and the role of religion in a democratic political and social structure. ECA estimates that the project will run over a three-year period with the first part of the program commencing in the spring/summer of 2003. It is anticipated that one grant will be awarded under this competition. Requested ECA funding for the project should not exceed $1,305,000. Bureau guidelines state that organizations with less than four years of international exchange experience are limited to no more than $60,000 in ECA funding. Therefore, organizations that do not have more than four years of international exchange experience are not eligible under this competition. Project activities supported by the Department of State should be consistent with the principles of the non-establishment of religion and the separation of church and state. Activities that focus on theology or training in religious doctrine are not appropriate under this competition.

Guidelines: Strong proposals will have the following characteristics:

- A proven track record of working in Uzbekistan;
- Established offices in Uzbekistan and experienced staff with language facility and a commitment by the staff to monitor projects locally to ensure accountability;
- A clear, convincing plan showing how permanent results will be accomplished as a result of the activity funded by the grant.

Public Affairs Section Involvement: Though project administration and implementation are the responsibility of the grantee, the Public Affairs Section (PAS) of the U.S. Embassy in Tashkent will play a primary role in this project. The Public Affairs Section of the U.S. Embassy in Tashkent will evaluate project proposals, coordinate planning with the grantee organization, help coordinate in-country activities (including identification of participating communities), help nominate participants and review grantee nominations, observe in-country activities, debrief participants, work with grantee to solicit and approve follow-on projects, and evaluate project impact. The U.S. Embassy Public Affairs Section in Tashkent and the Bureau of Educational and Cultural Affairs must approve all participants.

Bureau Acknowledgement: Proposal narratives must confirm that all materials developed for the project with funds provided by the Bureau will acknowledge the Bureau of Educational and Cultural Affairs, U.S. Department of State funding for the program. Please note that this will be a formal requirement in all final grant awards.

Project Components: As envisioned by ECA and the Public Affairs Section of the U.S. Embassy in Tashkent, this project will be comprised of two program components that will run concurrently over the three years of the project. Proposals must address both components.

Uzbekistan Community Leaders Component: Proposals should describe a U.S. based program that involves substantive meetings with U.S. experts on the role of religion and religious and cultural pluralism in American life. Proposals should include activities that involve Islamic and other clerics and lay experts, faith-based organizations, and representatives of local government, and others involved in the interplay between church and state. The program should also include observation of classes on religion at religious and secular educational institutions. Groups from two Uzbek communities at a time should travel together to the U.S. for a two to three week program. The program should be based in one U.S. community (approximately two weeks) but include visits to other representative or relevant communities. There will be approximately five participants from each of the communities identified by the U.S. Embassy for a total of approximately 60 participants. Proposals should describe a transparent selection process that will be coordinated with the Public Affairs Section in Tashkent. Uzbek community leaders in the selected regions should include imams, clerics from other religions, government officials responsible for monitoring and regulating religion, people involved in formal and informal religious education (including women), as well as others involved in community religious affairs from the selected communities. The Public Affairs Section of the U.S. Embassy in Tashkent must approve all Uzbek participants in this program. Proposals should identify possible appropriate U.S. hosting communities. Host communities should be chosen based on their ability to accommodate visitors' dietary and worship needs, expose participants to the variety of religious practice in the U.S., offer appropriate academic programs in the vicinity, and demonstrate active faith-based and interfaith community organizations. Proposals should include a plan to address all logistics for the Uzbek participants including international and domestic travel, ground transportation, and lodging arrangements. Also, applicants should include detailed orientation programs for Uzbek participants. Proposals must include a plan for interpretation while in the United States. Interpretation for the participants must be in Uzbek (not Russian).

Follow On: Proposals should describe how applicants would encourage and organize the participants to undertake follow-on activities individually or in groups upon their return to Uzbekistan. These activities might include projects to describe participants' experiences in the U.S. to Uzbek audiences or other community-based projects that would build on the themes of this exchange. These themes include government/religious community relations, interfaith relations, the role of religion in a democratic society, and cultural heritage and its preservation. Proposals should describe how applicants would, in coordination with the U.S. Embassy in Tashkent, assist participants to develop concrete plans for activities such as community presentations and discussions, articles in/interviews with local media outlets, projects to advance interfaith dialogue in their communities, and local community-based projects to explore the diversity of Uzbek religious and cultural heritage.

U.S. Experts Component: This program component should build on the themes of this exchange, including government/religious community relations, interfaith relations, the role of religion in a democratic society, and cultural heritage preservation. This component involves the recruitment, selection, and programming of

approximately 16 U.S. experts on religion and the role of religion in American society to travel to Uzbekistan over a three-year period. Each expert should be in Uzbekistan for approximately two weeks. U.S. participants would be expected to prepare speeches and presentations, conduct workshops, and consult with Uzbek peers. For this component, proposals should focus on the same communities identified by the U.S. Embassy for the Uzbek leaders component.

Applicants should describe in detail how U.S. experts would interact with groups in the community including religious leaders, local government officials, students and educators, NGOs, and mahalla leadership. U.S. experts may be asked to address general issues related to religious practice in the United States and to speak on specific issues of interest to the Embassy or the community. U.S. experts may also be identified to participate in special events, conferences, or other relevant activities in connection with other parts of this initiative. Proposals should describe how logistical preparations would be made for the U.S. experts including transportation, lodging, interpretation (if necessary), insurance, visa processing, etc. Applicants should describe the content of orientation programs for U.S. experts before departure to Uzbekistan. Also, applicants should include a plan to follow up with the U.S. experts when they return from Uzbekistan.

Participants: Applicants should describe recruitment of U.S. participants, preferably from among specialists who have worked with Uzbek participants during the U.S.-based part of this program. Participants should be American experts on religion and religious pluralism, including religious scholars, religious organization leaders, clerics, and professionals active in community/religious relations. ECA and Public Affairs Section of the U.S. Embassy in Tashkent must approve final selections.

Media: For both components, the implementing organization will work with PAS Tashkent to coordinate media coverage in Uzbekistan with a USAID-funded grantee that will be responsible for working with local media outlets.

Note: In a separate solicitation, the Bureau anticipates announcing the Uzbekistan Educational Partnerships Program in Religious and Cultural Studies. That program will support academic linkages between scholars and institutions in the United States and selected counterparts in Uzbekistan. The Uzbek institutions identified for participation in the Uzbekistan Educational Partnerships Program in Religious and Cultural Studies may be appropriate venues for experts sponsored by the Cultural and Religious Pluralism in Uzbekistan and the United States Program. Therefore the grantees in the two programs for Uzbekistan will be expected to coordinate activities closely with one another to make sure that the activities of the two programs are complementary.

Evaluation: In general, evaluation should occur throughout the project. The evaluation should incorporate an assessment of the program from a variety of perspectives. Specifically, project assessment efforts will focus on: (a) Determining if objectives are being met or have been met, (b) identifying any unmet needs, and (c) assessing if the project has effectively discovered resources, advocates, and financial support for sustainability of future projects. Informal evaluation through discussions and other sources of feedback will be carried out throughout the duration of the project. Formal evaluation must be conducted at the end of each component, should measure the impact of the activities and should obtain participants' feedback on the program content and administration. A detailed evaluation should be conducted at the conclusion of the project and included in the final report submitted to the Department of State Bureau of Educational and Cultural Affairs. When possible, the evaluation should be conducted by an independent evaluator.

Program Data Requirements: Organizations that are awarded grants will be required to maintain specific data on program participants and activities in an electronically accessible database format that can be shared with the Bureau as required. As a minimum, the data must include the following:

(1) Name, address, contact information and biographic sketch of all persons who travel internationally on funds provided by the grant or who benefit from the grant funding but do not travel.

(2) Itineraries of international and domestic travel, providing dates of travel and cities in which any exchange experiences take place.

Budget Guidelines and Cost-Sharing Requirements: Applicants must submit a comprehensive budget for the entire program. Applicants must provide a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification. Please refer to the Proposal Submission Instructions (PSI) for complete budget guidelines and formatting instructions. Since Bureau grant assistance constitutes only a portion of total project funding, proposals should list and provide evidence of other anticipated sources of financial and in-kind support. Competitive proposals will provide cost sharing to the fullest extent possible beyond ECA's minimum cost-sharing requirements.

The following program costs are eligible for funding consideration:

1. *Travel Costs.* International and domestic airfares (per the Fly America Act), transit costs, ground transportation costs, and visas for U.S. participants (J–1 visas for Bureau-supported participants from Eurasia to travel to the U.S. are issued at no charge).

2. *Per Diem.* For U.S.-based programming, organizations should use the published Federal per diem rates for individual U.S. cities. For activities in Uzbekistan, ECA strongly encourages applicants to budget realistic costs that reflect the local economy. Domestic per diem rates may be accessed at: *http://www.policyworks.gov/* and foreign per diem rates can be accessed at: *http://www.state.gov/www/perdiems/index.html.*

3. *Interpreters.* Local interpreters with adequate skills and experience may be used for program activities. The Bureau strongly encourages applicants to use local interpreters, if possible. Salary costs for local interpreters must be included in the budget. Costs associated with using their services may not exceed rates for U.S. Department of State interpreters. Typically, one interpreter is provided for every four visitors who require interpreting, with a minimum of two interpreters. Bureau grants do not pay for foreign interpreters to accompany delegations from their home country. U.S. Department of State Interpreters may be used for highly technical programs with the approval of the Office of Citizen Exchanges. Proposal budgets should contain a flat $170/day per diem for each U.S. Department of State interpreter, as well as home-program-home air transportation of $400 per interpreter, reimbursements for taxi fares, plus any other transportation expenses during the program. Salary expenses for State Department interpreters are covered centrally and should not be part of an applicant's proposed budget.

4. *Book and cultural allowance.* Foreign participants are entitled to a one-time cultural allowance of $150 per person, plus a book allowance of $50. Interpreters should be reimbursed up to $150 for expenses when they escort participants to cultural events. U.S. program staff, trainers or participants are not eligible to receive these benefits.

5. *Consultants.* Consultants may be used to provide specialized expertise or to make presentations. Daily honoraria cannot exceed $250 per day. Subcontracting organizations may also be used, in which case the written agreement between the prospective grantee and subcontractor should be included in the proposal. Subcontracts should be itemized in the budget.

6. *Room rental.* Room rental may not exceed $250 per day.

7. *Materials development.* Proposals may contain costs to purchase, develop and translate materials for participants. The Bureau strongly discourages the use of automatic translation software for the preparation of training materials or any information distributed to the group of participants or network of organizations. Costs for high-quality translation of materials should be anticipated and included in the budget. Grantee organizations should expect to submit a copy of all program materials to the Bureau.

8. *Equipment.* Proposals may contain costs to purchase equipment for Eurasia-based programming such as computers, fax machines and copy machines. Costs for furniture are not allowed. Equipment costs must be kept to a minimum.

9. *Working meal.* Only one working meal may be provided during the program. Per capita costs may not exceed $5–8 for a lunch and $14–20 for a dinner, excluding room rental. The number of invited guests may not exceed participants by more than a factor of two-to-one. Interpreters must be included as participants.

10. *Return travel allowance.* A return travel allowance of $70 for each foreign participant may be included in the budget. The allowance may be used for incidental expenses incurred during international travel.

11. *Health Insurance.* Foreign participants will be covered under the terms of a Bureau-sponsored health insurance policy. The Bureau pays the premium directly to the insurance company. Applicants are permitted to include costs for travel insurance for U.S. participants in the budget.

12. *Wire transfer fees.* When necessary, applicants may include costs to transfer funds to partner organizations overseas.

13. *Administrative Costs.* Costs necessary for the effective administration of the program may include salaries for grantee organization employees, benefits, and other direct and indirect costs per detailed instructions in the Application Package. While there is no rigid ratio of administrative to program costs, priority will be given to proposals whose administrative costs are less than twenty-five (25) per cent of the total requested from the Bureau. Proposals should show strong administrative cost-sharing contributions from the applicant, the in-country partner and other sources.

Announcement Title and Number: All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/PE/C/EUR–03–23.

FOR FURTHER INFORMATION CONTACT: Brent Beemer, Program Officer, The Office of Citizen Exchanges Europe/Eurasia Division ECA/PE/C/EUR, Room 220, U.S. Department of State, 301 4th Street, SW., Washington, DC 20547, (202) 401–6887, fax: (202) 260–0440, *bbeemer@pd.state.gov*. The Solicitation Package contains detailed award criteria, required application forms, specific budget instructions, and standard guidelines for proposal preparation. Please specify Bureau Program Officer Brent Beemer on all other inquiries and correspondence.

Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

To Download a Solicitation Package Via Internet: The entire Solicitation Package may be downloaded from the Bureau's Web site at *http://exchanges.state.gov/education/RFGPs*. Please read all information before downloading.

Deadline for Proposals: All proposal copies must be received at the Bureau of Educational and Cultural Affairs by 5 p.m. Washington, DC time on Friday, April 11, 2003. Faxed documents will not be accepted at any time. Documents postmarked the due date but received on a later date will not be accepted. Each applicant must ensure that the proposals are received by the above deadline.

Applicants must follow all instructions in the Solicitation Package narrative. The original and eight copies of the application should be sent to: U.S. Department of State, SA–44, Bureau of Educational and Cultural Affairs, Ref.: ECA/PE/C/EUR–03–23, Program Management, ECA/EX/PM, Room 534, 301 4th Street, SW., Washington, DC 20547.

Applicants must also submit the ''Executive Summary'' and ''Proposal Narrative'' sections of the proposal on a 3.5″ diskette, formatted for DOS. These documents must be provided in ASCII text (DOS) format with a maximum line length of 65 characters. The Bureau will transmit these files electronically to the Public Affairs section at the US Embassy for its review, with the goal of reducing the time it takes to get embassy comments for the Bureau's grants review process.

Note: Proposal should not exceed a narrative of 20 pages double spaced in length.

Diversity, Freedom and Democracy Guidelines

Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. ''Diversity'' should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and physical challenges. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into the total proposal. Public Law 104–319 provides that ''in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy,'' the Bureau ''shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries.'' Public Law 106–113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

Adherence to All Regulations Governing the J Visa

The Office of Citizen Exchanges of the Bureau of Educational and Cultural Affairs is the official program sponsor of the exchange program covered by this RFGP, and an employee of the Bureau will be the ''Responsible Officer'' for the program under the terms of 22 CFR part 62, which covers the administration of the Exchange Visitor Program (J visa program). Under the terms of 22 CFR part 62, organizations receiving grants under this RFGP will be third parties ''cooperating with or assisting the sponsor in the conduct of the sponsor's program.'' The actions of grantee program organizations shall be ''imputed to the sponsor in evaluating

the sponsor's compliance with'' 22 CFR part 62. Therefore, the Bureau expects that any organization receiving a grant under this competition will render all assistance necessary to enable the Bureau to fully comply with 22 CFR part 62 *et seq.* The Bureau of Educational and Cultural Affairs places great emphasis on the secure and proper administration of Exchange Visitor (J visa) Programs and adherence by grantee program organizations and program participants to all regulations governing the J visa program status. Therefore, proposals should explicitly state in writing that the applicant is prepared to assist the Bureau in meeting all requirements governing the administration of Exchange Visitor Programs as set forth in 22 CFR part 62. If the applicant has experience as a designated Exchange Visitor Program Sponsor, the applicant should discuss their record of compliance with 22 CFR part 62 *et. seq.,* including the oversight of their Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of forms, record-keeping, reporting and other requirements.

The Office of Citizen Exchanges of ECA will be responsible for issuing DS–2019 forms to participants in this program.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at *http://exchanges.state.gov* or from: United States Department of State, Office of Exchange Coordination and Designation, ECA/EC/ECD–SA–44, Room 734, 301 4th Street, SW., Washington, DC 20547, Telephone: (202) 401–9810, Fax: (202) 401–9809.

Review Process

The Bureau will acknowledge receipt of all proposals and will review them for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Proposal Submission Instructions (PSI). The Program Office, the State Department Regional Office, as well as the Public Diplomacy section overseas will review all eligible proposals. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for assistance awards resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. *Program Planning and Ability to Achieve Program Objectives:* Program objectives should be stated clearly and should reflect the applicant's expertise in the subject area and region. Objectives should respond to the priority topics in this announcement and should relate to the current conditions in Uzbekistan. A detailed agenda and relevant work plan should explain how objectives will be achieved and should include a timetable for completion of major tasks. The substance of workshops, internships, seminars and/or consulting should be described in detail. Sample training schedules should be outlined.

2. *Institutional Capacity:* The proposal should include (1) The U.S. institution's mission and date of establishment (2) an outline of prior awards—U.S. government and private support received for the selected theme/region (3) descriptions of experienced staff members who will implement the program. Proposed personnel and institutional resources should be adequate and appropriate to achieve the program's goals. The proposal should reflect the institution's expertise in the subject area and knowledge of the conditions in the selected country. Proposals should demonstrate an institutional record of successful exchange programs, including responsible fiscal management and full compliance with all reporting requirements for past Bureau grants as determined by Bureau Grant Staff. The Bureau will consider the past performance of prior recipients and the demonstrated potential of new applicants.

3. *Cost Effectiveness and Cost Sharing:* Overhead and administrative costs for the proposal, including salaries, honoraria and subcontracts for services, should be kept to a minimum. Priority will be given to proposals whose administrative costs are less than twenty-five (25) per cent of the total funds requested from the Bureau. Applicants are encouraged to cost share a portion of overhead and administrative expenses. Cost-sharing, including contributions from the applicant, the in-country partner, and other sources should be included in the budget request.

4. *Multiplier Effect and Impact:* Proposed programs should strengthen long-term mutual understanding, should enhance information sharing and should establish long-term institutional and individual linkages. Applicants should describe how responsibility and ownership of the project will be transferred to the in-country partners and participants to ensure continued impact.

5. *Support of Diversity:* Proposals should demonstrate substantive support of the Bureau's policy on diversity. Achievable and relevant features should be cited in both program administration (selection of participants, program venues and program evaluation) and program content (orientation and wrap-up sessions, program meetings, resource materials and follow-up activities). Applicants should refer to the Bureau's Diversity, Freedom and Democracy Guidelines in the Proposal Submission Instructions (PSI).

6. *Follow-on Activities:* Proposals should provide a plan for continued follow-on activity ensuring that Bureau supported programs are not isolated events.

7. *Evaluation:* Proposals should include a detailed plan to monitor and evaluate the program. A draft survey questionnaire plus a description of a methodology to use to link outcomes to original project objectives should be included. Successful applicants will be expected to submit intermediate reports after each project component concludes or on a quarterly basis, whichever is less frequent.

Authority: Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87–256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is ''to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries* * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations* * *and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world.'' The funding authority for the program above is provided through the FREEDOM Support Act (FSA) legislation.

Notice

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information

provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements.

Notification

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures.

Dated: January 28, 2003.

C. Miller Crouch,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 03–2924 Filed 2–5–03; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 4229]

Notice of Meetings: United States International Telecommunication Advisory Committee, International Telecommunication Union Telecommunications Development Advisory Group Preparations

The Department of State announces meetings of the U.S. International Telecommunication Advisory Committee. The purpose of the Committee is to advise the Department on policy and technical issues with respect to the International Telecommunication Union (ITU). The purpose of these meetings is to prepare for the 2003 meeting of the Telecommunications Development Advisory Group (TDAG).

An ITAC meeting will be held on Thursday, February 20, 2003, at the State Department from 10 am to 12 pm to begin preparations for the meeting of the ITU Telecommunications Development Advisory Group, which will take place March 19–21, 2003 in Geneva, Switzerland. An additional meeting is scheduled concerning preparations for the TDAG on Thursday, March 6, 2003 from 10 am to 12 pm. All of these meetings will be at the Department of State in rooms yet to be determined.

Members of the public may attend these meetings and are welcome to participate in the discussions, subject to the discretion of the Chair. Directions to meeting location and room assignments may be determined by calling the ITAC Secretariat at 202–647–2592. Entrance to the State Department is controlled; in order to get precleared for each meeting, people planning to attend should send an e-mail to *worsleydm@state.gov* no later than 48 hours before the meeting. This e-mail should include the name of the meeting and date of meeting, your name, social security number, date of birth, and organizational affiliation. One of the following valid photo identifications will be required for admission to the State Department: U.S. driver's license, passport, U.S. Government identification card. Enter the Department of State from the C Street Lobby; in view of escorting requirements, non-Government attendees should plan to arrive not less than 15 minutes before the meeting begins.

Dated: January 30, 2003.

Anne D. Jillson,

Foreign Affairs Officer, Bureau of Economic and Business Affairs, Department of State.

[FR Doc. 03–2922 Filed 2–5–03; 8:45 am]

BILLING CODE 4710–45–P

DEPARTMENT OF STATE

[Public Notice 4228]

U.S. Advisory Commission on Public Diplomacy; Notice of Meeting

The Department of State announces the meeting of the U.S. Advisory Commission on Public Diplomacy on Wednesday, February 26 in Room 1408 of the U.S. Department of State at 2201 C Street, NW., Washington, DC. The meeting will take place from 1:30 p.m. to 2:45 p.m.

The Commission will hear from the State Department's Coordinator for International Information Programs (IIP). IIP is the State Department's information arm, providing the tools for the U.S. government to communicate effectively with foreign audiences. IIP provides communication strategy, products and programs that provide context for U.S. policy and American foreign policy overseas.

Stuart W. Holliday, IIP Coordinator, will be the speaker at the meeting. Previously, Mr. Holliday served as Principal Deputy Assistant Secretary for the Bureau of Public Affairs. Prior to this appointment, he served as Special Assistant to the President and Associate Director of Presidential Personnel at the White House, where he was responsible for the National Security Area. Mr. Holliday also served as policy advisor to Vice Presidential candidate Dick Cheney, and starting in 1998 he served as Deputy Policy Director in the Office of Governor W. Bush.

The U.S. Advisory Commission on Public Diplomacy is a bipartisan Presidentially appointed panel created by Congress in 1948 to provide oversight of U.S. Government activities intended to understand, inform and influence foreign publics. The Commission reports its findings and recommendations to the President, the Congress and the Secretary of State and the American people. Current commission members include Harold Pachios of Maine, who is the chairman; Charles Dolan of Virginia, who is the vice chairman; Penne Percy Korth of Texas; Lewis Manilow of Illinois; and Maria Elena Torano of Florida.

Members of the press and general public may attend the meeting, though attendance will be limited to the seating available. Access to the building is controlled, and individual building passes are required for all attendees.

To attend the meeting, please contact Matt Lauer at (202) 619–4457 and provide date of birth and Social Security number. For more information visit *http://www.state.gov/r/adcompd.*

Dated: January 31, 2003.

Matthew Lauer,

International Information Programs, U.S. Advisory Commission on Public Diplomacy, Department of State.

[FR Doc. 03–2923 Filed 2–5–03; 8:45 am]

BILLING CODE 4710–11–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Advisory Circular 25.775–1, Windows and Windshields

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of issuance of advisory circular.

SUMMARY: This notice announces the issuance of Advisory Circular (AC) 25.775–1, ''Windows and Windshields.'' This AC sets forth an acceptable means, but not the only means, of demonstrating compliance with the provisions of Title 14, Code of Federal Regulations (14 CFR), part 25, related to the certification requirements for windows, windshields, and mounting structures for transport category airplanes. Like all ACs, it is not regulatory but provides guidance for applicants in demonstrating compliance with the objective safety standards set forth in the rule.

DATES: Advisory Circular 25.775–1 was issued by the Manager, Transport

Airplane Directorate, Aircraft Certification Service, on January 17, 2003.

FOR FURTHER INFORMATION CONTACT: Rich Yarges, FAA, Airframe/Cabin Safety Branch, ANM–115, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA 98055–4056; telephone (425) 227–2143; facsimile (425) 227–1320, e-mail *rich.yarges@faa.gov.*

SUPPLEMENTARY INFORMATION:

How To Obtain a Copy of the AC

How To Obtain Copies: Copies of this AC can be found and downloaded from the Internet at *http://www.faa.gov/regulatoryAdvisory/ac_index.htm/*. You may also go to the Regulatory and Guidance Library Web site at *http://www.airweb.faa.gov/rgl,* at the link titled ''Advisory Circulars.'' Paper copies of the AC will be available in approximately 6–8 weeks from the U.S. Department of Transportation, Subsequent Distribution Office, SVC–121.23, Ardmore East Business Center, 3341 Q 75th Avenue, Landover, MD 20785.

Issued in Renton, Washington, on January 17, 2003.

Vi L. Lipski,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–2927 Filed 2–5–03; 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 Burbank-Glendale-Pasadena Airport, Burbank, California

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 Burbank-Glendale-Pasadena Airport under the provisions of the 49 United States Code (U.S.C.) section 40117 and part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before March 10, 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., Room 3012, Lawndale, CA 90261. In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Dan Feger, Deputy Executive Director at the following address: Burbank-Glendale-Pasadena Airport Authority, 2627 Hollywood Way, Burbank, CA 91505–9989.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Burbank-Glendale-Pasadena Airport Authority under section 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: Ruben Cabalbag, Airports Program Engineer, Airports Division, Federal Aviation Administration, 15000 Aviation Blvd., Room 3012, Lawndale, CA 90261, Telephone (310) 725–3630. 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 Burbank-Glendale-Pasadena Airport under the provisions of the 49 United States Code (U.S.C.) section 40117 and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On January 27, 2003, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Burbank-Glendale-Pasadena Airport Authority 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 30, 2003.

The following is a brief overview of the impose and use PFC application number 03–05–C–00–BUR.

Level of proposed PFC: $4.50.

Proposed charge effective date: January 1, 2008.

Proposed charge expiration date: November 1, 2009.

Total estimated PFC revenue approved in this application: $17,509,405.

Brief description of the proposed project: Terminal Security Enhancement Project.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: All air taxi/commercial operators (ATCO) filing or required to file FAA Form 1800–31.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**. In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Burbank-Glendale-Pasadena Airport Authority.

Issued in Hawthorne, California on January 27, 2003.

Herman C. Bliss,

Manager, Airports Division, Western-Pacific Region.

[FR Doc. 03–2928 Filed 2–5–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application 03–06–C–00–TPA To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Tampa International Airport, Tampa, Florida

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 the PFC at Tampa International Airport under the provisions of the 49 U.S.C. 40117 and part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before March 10, 2003.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Orlando Airports District Office, 5950 Hazeltine National Drive, Suite 400, Orlando, Florida 32822.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Louis E. Miller of the Hillsborough County Aviation Authority at the following address: Hillsborough County Aviation Authority, PO Box 22287, Tampa, Florida 33622–2287.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Hillsborough County Aviation Authority under § 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: Mr. Vernon P. Rupinta, Program Manager, 5950 Hazeltine National Drive, Suite 400, Orlando, Florida 32822, (407) 812–6331, Extension 24. 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 Tampa International Airport under the provisions of the 49 U.S.C. 40117 and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On January 30, 2003, in FAA determined that the application to impose and use the revenue from a PFC submitted by Hillsborough County Aviation Authority 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 16, 2003.

The following is a brief overview of the application.

Proposed charge effective date: August 1, 2006.

Proposed charge expiration date: September 1, 2003.

Level of the proposed PFC: $4.50.

Total estimated PFC revenue: $298,115,400.

Brief description of proposed project(s): Airside ''C'' Redevelopment Program; Airside ''B'' Demolition/Apron Reconstruction; Engine Run-up, Taxiway and Ramp; Outbound Baggage System & Security Enhancements.

Level of the proposed PFC: $4.50.

Total estimated PFC revenue: $298,115,400.

Class or classes or air carriers which the public agency has requested not be required to collect PFCs: On-Demand Air Taxi\Commercial Operators (ATCO).

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: Southern Region Headquarters, 1701 Columbia Avenue, College Park, Georgia 30337.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Hillsborough County Aviation Authority.

Issued in Orlando, Florida on January 30, 2003.

Miguel A. Martinez,

Acting DOD Manager, Southern Region.

[FR Doc. 03–2929 Filed 2–5–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Reports, Forms and Recordkeeping Requirements; Agency Information Collection Activity Under OMB Review

AGENCY: Maritime Administration, DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and approval. The nature of the information collection is described as well as its expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on November 20, 2002. No comments were received.

DATES: Comments must be submitted on or before March 10, 2003.

FOR FURTHER INFORMATION CONTACT: Lennis Fludd, Maritime Administration (MAR–560), 400 Seventh Street, SW., Washington, DC 20590. Telephone: (202) 366–2308; FAX: (202) 366–9580, or e-mail: *lennis.fludd@marad.dot.gov.*

Copies of this collection also can be obtained from that office.

SUPPLEMENTARY INFORMATION: Maritime Administration (MARAD).

Title: Records Retention Schedule.

OMB Control Number: 2133–0501.

Type of Request: Extension of currently approved collection.

Affected Public: U.S. Shipping Companies.

Form(s): None.

Abstract: Section 801, Merchant Marine Act, 1936, as amended, requires retention of financial records pertaining to financial assistance programs for ship construction and ship operations. These records are required to permit proper audit of pertinent records at the conclusion of a contract. The information will be used to audit pertinent records at the conclusion of a contract when the contractor was receiving financial assistance from the government.

Annual Estimated Burden Hours: 150 hours.

ADDRESSES: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention MARAD Desk Officer.

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 will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed 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 collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

Issued in Washington, DC on February 3, 2003.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 03–2931 Filed 2–5–03; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

January 24, 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, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before March 10, 2003 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–1812.

Regulation Project Number: REG–143321–02 (NPRM and Temporary).

Type of Review: Extension.

Title: Information Reporting Relating to Taxable Stock Transactions.

Description: The regulation prescribes procedures for reporting the acquisition of control of a corporation, substantial change in capital structure of a corporation, substantial change in capital structure of a corporation.

Respondents: Business or other for-profit.

Estimated Number of Respondents: 1.

Estimated Burden Hours Per Respondent: 1 hour.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 1 hour.

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. 03–2824 Filed 2–5–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

[TTB Notice No. 1; TTB O 1190.1]

Delegation Order—Deciding Requests Under the Freedom of Information Act and the Privacy Act; Authority To Decide Administrative Appeals Under the Freedom of Information Act and the Privacy Act

To: All Bureau Employees and All Interested Parties

1. *Purpose.* This order establishes responsibilities for making initial decisions on requests under the Freedom of Information Act (FOIA) and the Privacy Act (PA). It also delegates the authority to decide administrative appeals under the Freedom of Information Act, 5 U.S.C. 552, and the Privacy Act, 5 U.S.C. 552a.

2. *Background.* The Freedom of Information Act generally provides that any person has the right of access to Alcohol and Tobacco Tax and Trade Bureau (TTB) records, except to the extent that such records (or portions thereof) are protected from disclosure by a specific provision of the FOIA. The Privacy Act is both an access law and a non-disclosure law. Any individual (i.e. U.S. citizen or legal alien) who is the subject of a Privacy Act record or records maintained by the Bureau can request access to such records. The Privacy Act requires the Bureau to give access to their records unless the Bureau has exempted the entire system of records from the access provisions.

3. *Effective Date.* This order is effective January 24, 2003.

4. *Ratification.* In addition to section 1512(a) of the Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135 (2002), this order affirms and ratifies any action taken that is consistent with this order.

5. *Delegation.*

a. The Chief, Regulations and Procedures Division is hereby delegated responsibility for making initial decisions on requests under the FOIA or PA and processing such requests.

b. The Assistant Administrator, Headquarters Operations is hereby delegated authority to decide administrative appeals under the Freedom of Information Act, 5 U.S.C. 552, and the Privacy Act, 5 U.S.C. 552a.

6. *Coordination.* The Office of Chief Counsel is responsible for preparing proposed decisions on administrative appeals under the FOIA and PA for consideration of the Assistant Administrator, Headquarters Operations.

7. *Submission of FOIA Requests.* All FOIA requests for the Alcohol and Tobacco Tax and Trade Bureau should be sent to the following address: Chief, Regulations and Procedures Division, Alcohol and Tobacco Tax and Trade Bureau, 650 Massachusetts Avenue, NW., Room 5000, Washington, DC 20226.

8. *Redelegation.* The authorities delegated in this order may not be redelegated.

9. *Questions.* If you have a question about this order, contact the Chief, Regulations and Procedures Division (202–927–8210).

Arthur J. Libertucci,

Administrator.

[FR Doc. 03–2932 Filed 2–5–03; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

[TTB Notice No. 2; TTB O 1130.1]

Delegation Order—Delegation of the Administrator's Authorities in 27 CFR

To: All Bureau Employees and All Interested Parties

1. *Purpose.* This order delegates certain authorities of the Administrator, Alcohol and Tobacco Tax and Trade Bureau (TTB) to subordinate TTB officers and prescribes the subordinate TTB officers with whom persons file documents.

2. *Background.* a. On November 25, 2002, the President signed into law the Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135 (2002). The Homeland Security Act of 2002 divided the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, into two separate agencies, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) in the Department of Justice, and the Tax and Trade Bureau (TTB) in the Department of the Treasury. This division of the former agency and division of its responsibilities into two new agencies took place 60 days after enactment of the Act on January 24, 2003.

b. The Homeland Security Act of 2002 provides that the newly established Tax and Trade Bureau be headed by an Administrator. It also provides that the authorities, functions, personnel and assets of the Bureau of Alcohol, Tobacco and Firearms that are not transferred to the Department of Justice shall be retained within the Department of the Treasury and administered by the Tax and Trade Bureau.

c. Pursuant to the duties and powers established by the Homeland Security Act of 2002, the Administrator of TTB is authorized to administer and enforce Chapters 51 (relating to distilled spirits, wine and beer) and 52 (relating to tobacco products and cigarette papers and tubes) of title 26, U.S.C., the Internal Revenue Code of 1986, as amended, sections 4181 and 4182 (relating to the excise tax on firearms and ammunition) of the Internal Revenue Code of 1986, and title 27, United States Code (relating to alcohol).

d. In addition, Treasury Order No. 120–1 (Revised) dated January 24, 2003 established the Tax and Trade Bureau within the Department of the Treasury and designated it as the Alcohol and Tobacco Tax and Trade Bureau (TTB). It directed that the head of TTB is the Administrator who shall exercise the authorities, perform the functions, and carry out the duties of the Secretary in the administration and enforcement of the laws cited in paragraph 2 c above.

e. Treasury Order No. 120–1 also grants the Administrator of TTB all authorities delegated to the Director of the Bureau of Alcohol, Tobacco and Firearms in effect on January 23, 2003, that are related to the administration and enforcement of the laws specified in paragraph 2 c. In addition, it grants the Administrator full authority, powers, and duties to administer the affairs of and to perform the functions of TTB, including, without limitation, all management and administrative authorities and responsibilities similarly granted and assigned to Bureau Heads or Heads of Bureaus in Treasury Orders and Treasury Directives.

f. Treasury Order No. 120–1 provides that all regulations adopted on or before January 23, 2003 for the administration and enforcement of the laws cited in paragraph 2 c above shall continue in effect until superseded or revised.

g. Through this delegation order the Administrator of TTB intends to redelegate certain authorities of the Administrator in Title 27 of the Code of Federal Regulations (CFR) to subordinate TTB officers.

3. *Effective Date.* This order is effective January 24, 2003.

4. *Ratification.* In addition to section 1512(a) of the Homeland Security Act of 2002, this order affirms and ratifies any

action taken that is consistent with this order.

5. *Delegations.* a. Under the authority vested in the Administrator, Alcohol and Tobacco Tax and Trade Bureau, by the Homeland Security Act of 2002, Treasury Department Order No. 120–01 (Revised) dated January 24, 2003, and by 26 CFR 301.7701–9, this TTB order delegates certain authorities prescribed in 27 CFR to subordinate TTB officers. Also, this TTB order prescribes the subordinate officers with whom applications, notices, and reports required by 27 CFR are filed.

b. Accordingly, the following delegations of authority issued by the former Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury relative to authorities in 27 CFR are hereby adopted by the Administrator, Alcohol and Tobacco Tax and Trade Bureau, Department of the Treasury, subject to the amendments and exceptions listed in Paragraph 6 of this order.

27 CFR Part 1

ATF Order 1130.6—Delegation of the Director's Authorities in 27 CFR PART 1, Date of Order: 9/15/99 (64 FR 50135)

27 CFR Parts 4, 5, and 7

ATF Order 1130.2A—Delegation of the Director's Authorities in 27 CFR Parts 4, 5, and 7, Labeling and Advertising of Wine, Distilled Spirits and Malt Beverages, Date of Order: 2/22/00 (65 FR 12054)

27 CFR Parts 6, 8, 10, and 11

ATF Order 1130.7— Delegation of the Director's Authorities in 27 CFR Parts 6, 8, 10 and 11, Date of Order: 8/28/00 (65 FR 52159)

27 CFR Part 13

ATF Order 1130.21—Delegation of the Director's Authorities in 27 CFR Part 13, Labeling Proceedings, Date of Order: 5/17/01 (66 FR 29884)

27 CFR Parts 17 and 18

ATF Order 1130.13—Delegation of the Director's Authorities in 27 CFR Parts 17 and 18, Date of Order: 8/23/01 (66 FR 47933)

27 CFR Parts 20, 21, and 22

ATF Order 1130.9—Delegation of the Director's Authorities in 27 CFR Parts 20, 21, and 22, Date of Order: 6/21/01 (66 FR 35511)

27 CFR Part 24

ATF Order 1130.5—Delegation of the Director's Authorities in 27 CFR Part 24, Wine, Date of Order: 3/22/99 (64 FR 13846)

27 CFR Part 25

ATF Order 1130.10—Delegation of the Director's Authorities in 27 CFR Part 25, Beer, Date of Order: 6/21/01 (66 FR 35509)

27 CFR Part 26

ATF Order 1130.29—Delegation of the Director's Authorities in 27 CFR Part 26, Liquors and Articles from Puerto Rico and the Virgin Islands, Date of Order: 7/18/02 (67 FR 49388)

27 CFR Part 29

ATF Order 1130.25—Delegation of the Director's Authorities in 27 CFR Part 29, Stills and Miscellaneous Regulations, Date of Order: 2/6/02 (67 FR 7447)

27 CFR Part 30

ATF Order 1130.17—Delegation of the Director's Authorities in 27 CFR Part 30, Gauging Manual, Date of Order: 5/25/01 (66 FR 30989)

27 CFR Part 44

ATF Order 1130.31—Delegation of the Director's Authorities in 27 CFR Part 44, Exportation of Tobacco Products and Cigarette Papers and Tubes, Without Payment of Tax, or With Drawback of Tax, Date of Order: 4/26/02 (67 FR 30994)

27 CFR Parts 45 and 46

ATF Order 1130.28—Delegation of the Director's Authorities in 27 CFR Parts 45 and 46, Date of Order: 2/15/02 (67 FR 9043)

27 CFR Part 53

ATF Order 1130.18—Delegation of the Director's Authorities in 27 CFR Part 53, Manufacturer's Excise Taxes—Firearms and Ammunition, Date of Order: 7/18/01 (66 FR 39226)

27 CFR Part 70

ATF Order 1130.19—Delegation of the Director's Authorities in 27 CFR Part 70, Procedure and Administration, Other Than Certain Offers in Compromise, Date of Order: 2/1/02 (67 FR 7448)

ATF O 1100.63F—Delegation of Authority to Accept or Reject Offers in Compromise, Date of Order: 3/8/94 (59 FR 11826)

27 CFR Part 251—[Recodified as 27 CFR Part 27]

ATF Order 1130.12—Delegation of the Director's Authorities in 27 CFR Part 251, Importation of Distilled Spirits, Wines and Beer, Date of Order: 3/5/02 (67 FR 11371)

27 CFR Part 252

ATF Order 1130.27—Delegation of the Director's Authorities in 27 CFR Part 252, Exportation of Liquors, Date of Order: 3/29/02 (67 FR 18300)

27 CFR Parts 270, 275, and 296

Partially cancelled ATF Order 1130.15—Delegation of Certain of the Director's Authorities in 27 CFR Parts 270, 275 and 296, Date of Order: 12/22/99 (64 FR 71850)

27 CFR Part 275

ATF Order 1130.16—Delegation of Certain of the Director's Authorities in 27 CFR Part 275, Date of Order: 6/30/00 (65 FR 42764)

6. *Amendments and Exceptions.* Under the new organizational structure established for the Alcohol and Tobacco Tax and Trade Bureau, several offices and positions referenced in the above delegation orders have been amended, revised or deleted. Listed below are amendments to the above listed delegation orders which reflect the new organizational structure of the TTB and changes in titles or offices.

Any references in the above listed orders to authorities granted to—	Are hereby replaced with the term—
Headquarters	
Director, Bureau of Alcohol, Tobacco and Firearms	Administrator, Alcohol and Tobacco Tax and Trade Bureau.
Deputy Director	Deputy Administrator.
Assistant Director (Alcohol and Tobacco)	*For headquarters matters:* Assistant Administrator, Headquarters Operations. *For field matters:* Assistant Administrator, Field Operations.
Deputy Assistant Director (Alcohol and Tobacco)	*For headquarters matters:* Assistant Administrator, Headquarters Operations. *For field matters:* Assistant Administrator, Field Operations.

Any references in the above listed orders to authorities granted to—	Are hereby replaced with the term—
Assistant Director (Firearms, Explosives and Arson)	*For headquarters matters:* Assistant Administrator, Headquarters Operations. *For field matters:* Assistant Administrator, Field Operations.
Associate Director (Compliance Operations)	*For headquarters matters:* Assistant Administrator, Headquarters Operations. *For field matters:* Assistant Administrator, Field Operations.
Deputy Associate Director (Compliance Operations)	*For headquarters matters:* Assistant Administrator, Headquarters Operations. *For field matters:* Assistant Administrator, Field Operations.
Deputy Assistant Director (Field Operations)	Deputy Assistant Administrator, Field Operations.
Division Chief in the Office of Alcohol and Tobacco, or Division Chief (Alcohol and Tobacco).	Division Chief in Headquarters Operations.
Chief, Regulations Division	Chief, Regulations and Procedures Division.
Chief, Alcohol and Tobacco Programs Division	Chief, Trade Investigations Division.
Chief, Diversion Branch	Any Division Chief in Headquarters or Field Operations.
Chief, Alcohol Import/Export Branch	Chief, International Trade Division.
Chief, Market Compliance Branch	*With respect to advertising:* Specialist, Advertising, Labeling and Formulation Division. *With respect to interlocking directorates:* Chief, Trade Investigations Division.
Specialist, Market Compliance Branch	Specialist, Advertising, Labeling and Formulation Division.
Division Chief (Compliance)	Division Chief in Headquarters Operations.
Chief, Financial Management Division	CFO/Assistant Administrator, Management.
Chief, Acquisition and Property Management Division	Chief, Regulations and Procedures Division.
Chief, Document Services Branch	Assistant Chief, Regulations and Procedures Division (Knowledge Management).
Chief, Revenue Programs Division	Chief, Regulations and Procedures Division.
Chief, Revenue Division	Unit Supervisor (FAET), National Revenue Center.
Alcohol Labeling and Formulation Division and Predecessors	
Chief, Alcohol Labeling and Formulation Division (ALFD)	Chief, Advertising, Labeling and Formulation Division.
Assistant to the Chief, Alcohol Labeling and Formulation Division (ALFD).	Assistant Chief, Advertising, Labeling and Formulation Division.
Specialist, Alcohol Labeling and Formulation Division (ALFD)	Specialist, Advertising, Labeling and Formulation Division.
Alcohol Labeling Specialist	Specialist, Advertising, Labeling and Formulation Division.
Clerk, Alcohol Labeling and Formulation Division (ALFD)	Clerk, Advertising, Labeling and Formulation Division.
Chief, Product Compliance Branch	Assistant Chief, Advertising, Labeling and Formulation Division.
Specialist, Product Compliance Branch	Specialist, Advertising, Labeling and Formulation Division.
Chief, Formula and Processing Section	Assistant Chief, Advertising, Labeling and Formulation Division.
Specialist, Formula and Processing Section	Specialist, Advertising, Labeling and Formulation Division.
Field Offices	
Division Director/Special Agent in Charge	Chief, Trade Investigations Division or Chief, Tax Audit Division.
Resident Agent in Charge/Group Supervisor	Supervisor, Trade Investigations Group [1] or Supervisor, Tax Audit Group.[1]
Director, Industry Operations	Chief, National Revenue Center.
Area Supervisor	Unit Supervisor, National Revenue Center, or Supervisor, Trade Investigations Group [1] or Supervisor, Tax Audit Group.[1]
Inspector	Specialist, National Revenue Center or Investigator [1] or Auditor.[1]
Special Agent	Investigator [1] or Auditor.[1]
Regional Director	Chief, National Revenue Center.
Regional Director (Compliance)	Chief, National Revenue Center.
Audit Manager	Supervisor, Tax Audit Group.[1]
National Revenue Center and Technical Services	
Chief, Revenue Section, NRC	Chief, National Revenue Center.
Chief, Tax Processing Center	Chief, National Revenue Center.
Chief, Technical Services	Section Chief, National Revenue Center.
Technical Section Supervisor	Unit Supervisor, National Revenue Center.
Specialist	Specialist, National Revenue Center.
Laboratory	
Chief, Laboratory Services	Chief, Alcohol and Tobacco Laboratory.
Chemist, ATF Laboratory	Chemist, Alcohol and Tobacco Laboratory.
Other Titles	
An ATF supervisor in the Office of Alcohol and Tobacco or Firearms, Explosives and Arson.	Chief, Regulations and Procedures Division.

Any references in the above listed orders to authorities granted to—	Are hereby replaced with the term—
Clerk in the Office of Alcohol and Tobacco	Specialist, National Revenue Center.

[1] Field officials are not able to receive materials by mail—all mail should be sent to the National Revenue Center official until further notice.

7. *Redelegation.* The authorities delegated in this order may not be redelegated.

8. *Questions.* If you have a question about this order, contact the Regulations and Procedures Division (202–927–8210).

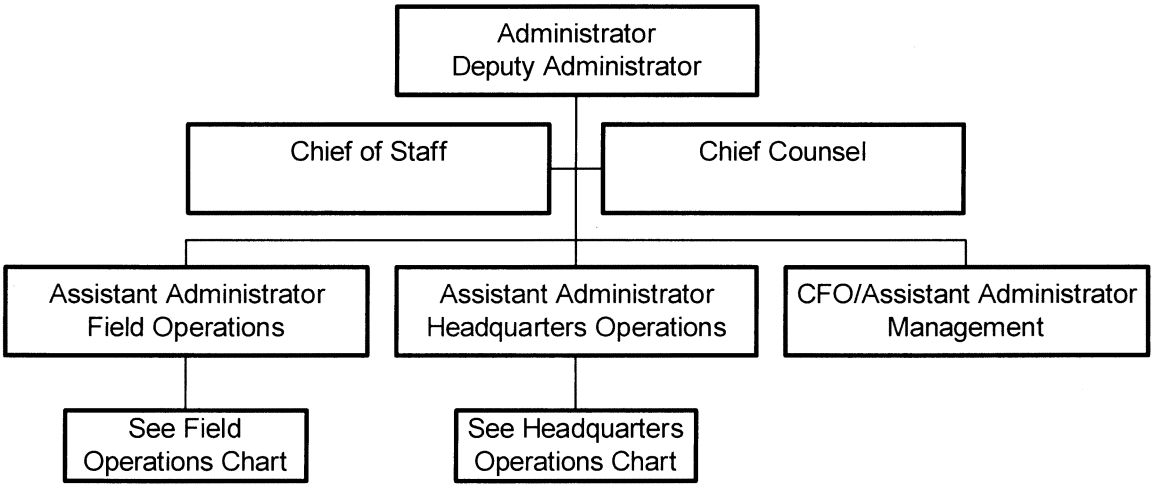
Arthur J. Libertucci,

Administrator.

BILLING CODE 4810–31–P

Department of the Treasury

Alcohol and Tobacco Tax and Trade Bureau



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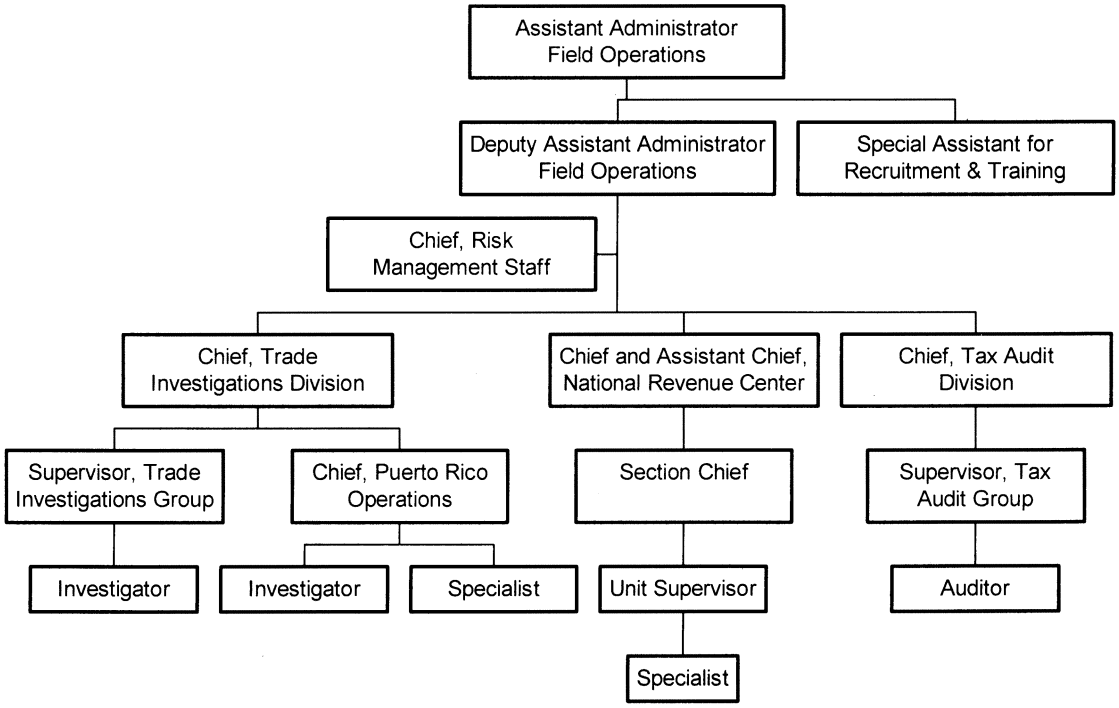
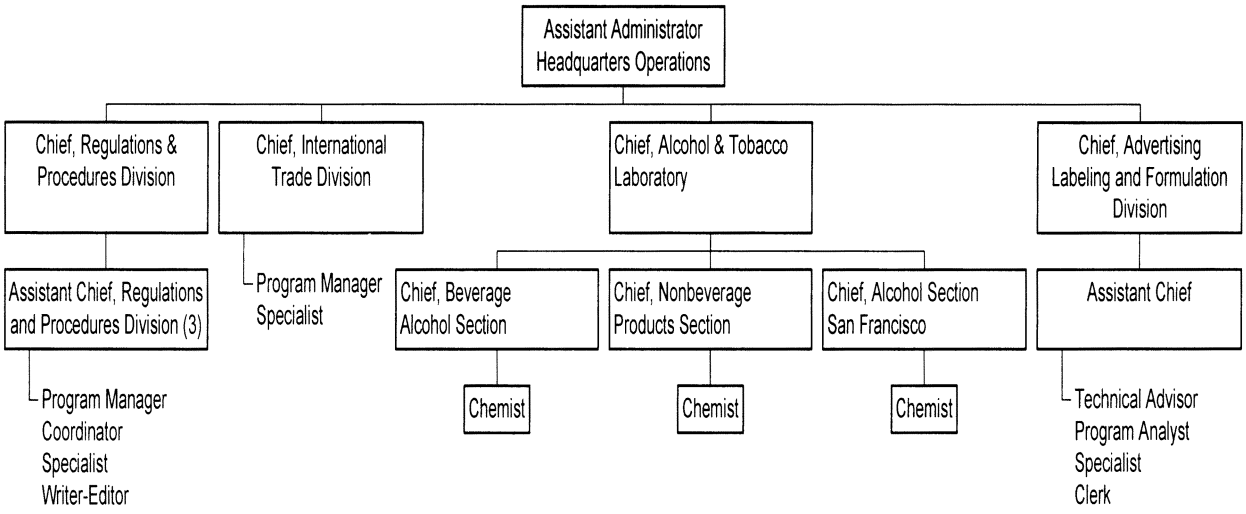


Headquarters Operations



Organizational charts as of 1/24/2003.

Charts are subject to change.

[FR Doc. 03–2933 Filed 2–5–03; 8:45 am]

BILLING CODE 4810–31–C

DEPARTMENT OF THE TREASURY

Customs Service

Notice of Cancellation of Customs Broker Permit

AGENCY: Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended (19 U.S.C. 1641), and the Customs Regulations (19 CFR 111.51), the following Customs broker local permits are canceled without prejudice.

Name	Permit number	Issuing port
Yamato Customs Brokers USA, Inc.	39–580	Chicago
Yamato Customs Brokers USA, Inc.	9198–P	San Francisco
Yamato Customs Brokers USA, Inc.	888	New York
Yamato Customs Brokers USA, Inc.	94–17–045	Savannah
Yamato Customs Brokers USA, Inc.	1270	Los Angeles
Yamato Customs Brokers USA, Inc.	097	Seattle
Yamato Customs Brokers USA, Inc.	(no number)	Detroit
All Nations Forwarding Import Co., Inc.	6532	Los Angeles
James W. Ghedi	53–87002	Houston

Dated: January 22, 2003.

Jayson P. Ahern,

Assistant Commissioner, Office of Field Operations.

[FR Doc. 03–2966 Filed 2–5–03; 8:45 am]

BILLING CODE 4820–02–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Financial Crimes Enforcement Network; Proposed Collection; Comment Request for Form 8300

AGENCY: Internal Revenue Service (IRS) and Financial Crimes Enforcement Network (FinCEN), 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 and the FinCEN are soliciting comments concerning Form 8300, Report of Cash Payments Over $10,000 Received in a Trade or Business.

DATES: Written comments should be received on or before April 7, 2003 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, Room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224; and/or Office of Chief Counsel, Financial Crimes Enforcement Network, Department of the Treasury, PO Box 39, Vienna, Virginia 22183. *Attention:* PRA Comments—Form 8300. Comments also may be submitted by electronic mail to the following Internet address: *regcomments@fincen.treas.gov* with the caption in the body of the text, ''Attention: PRA Comments—Form 8300.''

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Carol Savage, (202) 622–3945, *CAROL.A.SAVAGE@irs.gov,* or Internal Revenue Service, room 6407, 1111 Constitution Avenue, NW., Washington, DC 20224; Russell Stephenson, Senior Compliance Administration Specialist, FinCEN, (800) 949–2732, or Laurence Levine, Attorney-Advisor, FinCEN, (703) 905–3590. A copy of the form may be obtained through the Internet at *www.irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Report of Cash Payments Over $10,000 Received in a Trade or Business.

OMB Numbers: 1545–0892 (IRS) and 1506–0018 (FinCEN).

Form Number: 8300.

Abstract: Internal Revenue Code section 6050I requires any person in a trade or business who, in the course of the trade or business, receives more than $10,000 in cash or foreign currency in one or more related transactions to report it to the IRS and provide a statement to the payer. Form 8300 is used for this purpose.

Section 365 of the USA Patriot Act of 2001 (Pub. L. 107–56), adding new section 5331 to title 31 of the United States Code, authorized the Financial Crimes Enforcement Network to collect the information reported on Form 8300. In a joint effort to develop a dual use form, IRS and FinCEN worked together to ensure that the transmission of the data collected to FinCEN on Forms 8300 does not violate the provisions of section 6103. FinCEN makes the Forms 8300 available to law enforcement through its Bank Secrecy Act information sharing agreements.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, farms, and the Federal government.

Estimated Number of Respondents: 46,800.

Estimated Time Per Respondent: 1hr., 22 min.

Estimated Total Annual Burden Hours: 63,539.[1]

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.

[1] The burden for the information collection in 31 CFR 103.30 (also approved under control number 1506–0018) relating to the Form 8300, is reflected in the burden of the form.

Approved: January 15, 2003.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

William F. Baity,

Deputy Director Administration, Financial Crimes Enforcement Network.

[FR Doc. 03–2351 Filed 2–5–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Enhanced-Use Lease Development of Property at the Department of Veterans Affairs Medical Center, Butler, PA

AGENCY: Department of Veterans Affairs.

ACTION: Notice of intent to designate.

SUMMARY: The Secretary of the Department of Veterans Affairs (VA) is designating the Department of Veterans Affairs Medical Center, Butler, Pennsylvania, for an enhanced-use leasing development. The Department intends to enter into a 50-year lease of real property with a competitively selected lessee/developer who will finance, design, develop, maintain and manage a mental health facility, all at no cost to VA.

FOR FURTHER INFORMATION CONTACT: Vanessa Chambers, Capital Asset Management and Planning Service (182C), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 565–6554.

SUPPLEMENTARY INFORMATION: 38 U.S.C. section 8161 *et seq.* specifically provides that the Secretary may enter into an enhanced-use lease if he determines that at least part of the use of the property under the lease will be to provide appropriate space for an activity contributing to the mission of the Department; the lease will not be inconsistent with and will not adversely affect the mission of the Department; and the lease will enhance the property or result in improved services to veterans. This project meets these requirements.

Approved: January 31, 2003.

Anthony J. Principi,

Secretary of Veterans Affairs.

[FR Doc. 03–2967 Filed 2–5–03; 8:45 am]

BILLING CODE 8320–01–M

Federal Register

Thursday,
February 6, 2003

Part II

Department of Housing and Urban Development

24 CFR Part 902
Changes to the Public Housing Assessment System (PHAS); Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 902

[Docket No. FR–4707–P–01]

RIN 2577–AC32

Changes to the Public Housing Assessment System (PHAS)

AGENCY: Office of the Assistant Secretary for Public and Indian Housing.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the Public Housing Assessment System (PHAS) regulation at 24 CFR part 902 to provide additional information, revise certain procedures and establish others for the assessment of the physical condition, financial condition, management operations, and resident services and satisfaction with services provided to public housing residents. This proposed rule takes into consideration additional examination of the PHAS by HUD, as well as comments and suggestions on the PHAS provided through research conducted with representatives of public housing agencies (PHAs) and public housing residents.

The purpose of the PHAS is to function as a management tool that effectively and fairly measures a PHA's performance based on standards that are uniform and verifiable.

DATES: *Comment Due Date:* April 7, 2003.

ADDRESSES: Interested persons are invited to submit comments regarding this interim rule to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410–0500. Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 8 a.m. and 5 p.m. Eastern time weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: For further information contact the Office of Public and Indian Housing Real Estate Assessment Center (PIH–REAC), Attention: Wanda Funk, Department of Housing and Urban Development, 1280 Maryland Avenue, SW, Suite 800, Washington DC, 20024; telephone Technical Assistance Center at (888)–245–4860 (this is a toll-free number). Persons with hearing or speech impairments may access that number via TTY by calling the Federal Information Relay Service at (800) 877–8339 (this is a toll-free number). Additional information is available from the PIH–REAC Internet site, *http://www.hud.gov/reac.*

SUPPLEMENTARY INFORMATION:

I. Background

Regulatory Background

On September 1, 1998 (63 FR 46596), HUD published a final rule, codified at 24 CFR part 902, that established the PHAS, a new system for the assessment of America's public housing. Under the PHAS, HUD evaluates PHAs based on four key indicators: (1) The physical condition of the PHA's properties; (2) the PHA's financial condition; (3) the PHA's management operations; and (4) the residents' service and satisfaction assessment (through a resident survey). On the basis of these four indicators, PHAs receive a composite score that represents a single score for a PHA's entire operation and a corresponding performance designation. The PHAs that are designated high performers receive public recognition and relief from specific HUD requirements. The PHAs that are designated troubled or substandard receive remedial action.

The PHAS regulation became effective for all PHAs with fiscal years ending (FYE) on and after September 30, 1999.

To provide further information about the PHAS scoring process for each of the PHAS indicators, HUD published four scoring notices. The scoring notices which are periodically updated were first published on May 13, 1999: the Physical Condition Scoring at 64 FR 26166; the Financial Condition Scoring at 64 FR 26222; the Management Operations Scoring at 64 FR 26232; and the Resident Service and Satisfaction Scoring at 64 FR 26236.

On January 11, 2000 (65 FR 1712), HUD issued a final rule that made certain amendments to the PHAS regulation applicable to PHAs with FYE on or after June 30, 2000. In the January 11, 2000, amended rule, HUD deferred full implementation of the PHAS for PHAs with FYE on September 30, 1999, and December 31, 1999. These PHAs would receive an assessment score on the basis of HUD's assessment of the PHA's management operations in accordance with subpart D of part 902 and an overall PHAS advisory score.

On June 6, 2000 (65 FR 36042), HUD issued a technical correction to the January 11, 2000, final rule, and further deferred full implementation of the PHAS for PHAs with FYE through March 31, 2000. On May 30, 2001, HUD issued a notice (66 FR 29342) further deferring full implementation of the PHAS until after June 30, 2001.

On March 15, 2002 (67 FR 11844), HUD issued a notice advising that the PHAS became effective for PHAs with FYE on September 30, 2001. All PHAs now receive an overall PHAS score based on the four PHAS indicator scores and a corresponding designation based on the overall score. The notice advised that PHAs with FYE on September 30, 2001, through and including September 30, 2002, would be assessed in accordance with the interim scoring procedures described in the scoring notices published in the **Federal Register** on November 26, 2001, at 66 FR 59084 for the Physical Condition Indicator and at 66 FR 59126 for the Financial Condition Indicator.

Then on August 30, 2002 (67 FR 55860), HUD published a notice that extended the interim scoring methodology to all PHAs with FYE December 31, 2002, March 30, 2003, and June 30, 2003.

Recommendations for Changes to the PHAS

Since its inception in 1998, the PHAS has been the subject of discussion and further consideration both internally within HUD, and among the public and the public housing industry. A report by the National Academy of Public Administration (Evaluating Methods for Monitoring and Improving HUD-Assisted Housing Programs, 2001), issued at the request of Congress, found that ''the credibility of HUD's new system has been undermined by its adversarial relationship with many of the entities that implement HUD-assisted housing programs.'' They stated, ''The Academy panel believes that HUD cannot achieve an effective, well-run quality-assurance program for its assisted housing programs without a more effective working relationship with the assisted housing industry. Improved working relationships are needed to raise the credibility of the assessment tools being used, reduce the administrative burden, and better align the system's goals with the outcomes that well-run assisted housing providers are trying to achieve. Failing this, the industry and HUD will continue to have unproductive confrontations over the assessment scores from HUD's new quality-assurance system.'' The Academy recommended that, ''In consultation with all of the affected parties, HUD should proceed to refine and modify its current quality-assurance system * * *.''

In 2001, the Department followed this recommendation and met with public

housing stakeholders (including representatives of PHAs, residents, housing advocacy representatives, governmental representatives, and other groups) to discuss specific PHAS concerns and possible solutions.

In the November 26, 2001, **Federal Register** notice proposing the interim scoring changes to the PHAS, the Department stated it expects to give extensive consideration to potential improvements in the PHAS, and that this consideration might lead to further changes in the PHAS.

II. Compliance Monitoring and Quality Assurance Procedures

As a companion to implementation of the PHAS regulation that assesses a PHA's performance, HUD is expanding its programs for PHA compliance and quality assurance (QA) reviews. This places additional emphasis on the principle that with increased PHA flexibility comes additional accountability.

HUD is also expecting more from itself through this increased emphasis on compliance and QA reviews, and is committing resources to both areas.

The process to select PHAs for compliance and QA reviews will minimize duplication of resources and repetition of reviews for PHAs. Both review areas will share information obtained during PHA reviews, thus increasing efficiency and streamlining HUD's accountability efforts.

A. Compliance Monitoring

HUD is introducing a new compliance monitoring initiative which is a management tool designed to focus and enhance HUD's compliance monitoring of PHAs.

This new PHA compliance monitoring initiative will determine a PHA's compliance levels and direct the compliance monitoring resources accordingly. HUD will look at pre-selected business flags in the individual PHAS indicators that are most related to issues of compliance. When the indicator flags indicate that a PHA may have compliance issues, that PHA will be referred to the appropriate field office for further observation. HUD will use this information to identify the PHAs that will be scheduled for on-site compliance reviews conducted by field offices, thereby more accurately deploying the Department's compliance resources.

HUD anticipates that field offices will conduct a minimum of 350 annual, on-site compliance reviews nationwide. Approximately 150 of the PHAs that receive 80 percent of all funds will be reviewed annually and approximately 200 of the remaining PHAs will be reviewed annually.

B. Quality Assurance Procedures

The QA procedures are designed to ensure that (1) Overall PHAS grades, as well as the individual indicator grades, are based on standards that are uniform and verifiable; and (2) the PHA maintains proper and accurate records supporting PHAS and Section 8 Management Assessment Program (SEMAP) certifications.

Each of the PHAS subsystems undergoes rigorous quality assurance to ensure fair and accurate scores. For the Physical Assessment Subsystem, the QA plan is a multi-step procedure that employs both automated and manual reviews, the cornerstone of which is the QA inspection process.

In the QA inspection process, trained HUD inspectors go on-site to verify the results of the physical inspections performed by HUD contract inspectors. These quality assurance reviews may be conducted at any time, including during the course of a property inspection, following an inspection, or as a separate analysis. The reviews seek to verify that the contract inspector has followed HUD's procedures and correctly assessed the property. An inspector who is not performing within HUD's protocol is subject to administrative action in the form of performance deficiency letters that may lead to decertification. Other measures in the QA plan include ongoing training of inspectors in HUD's protocol, and the use of automated systems that flag anomalies in the inspections as they are processed.

Another QA procedure is the new PHAS Exigent Health and Safety (EHS) certification review. This certification review, performed by HUD staff, validates certain information that the PHA has provided to HUD. It is an on-site property review of the EHS deficiencies cited in the property inspection reports against the PHA's certification that these deficiencies have been corrected. Annually, HUD will conduct certification reviews for a minimum of 25 percent of the PHAs that were assessed under the PHAS and certified to the correction of EHS deficiencies.

Both the Financial Assessment Subsystem and the Management Assessment Subsystem conduct automated reviews of all of their respective submissions when they are transmitted to HUD. This automated review is followed by a manual review. If corrections, changes, or further information are necessary, HUD contacts the PHA.

There also is an independent audit review of the PHA's financial submission and management operations submission. The Independent Public Accountant (IPA) or Certified Public Accountant (CPA) performs the PHA's annual audit reviews and verifies the supporting documentation for these submissions. Then, in the audited submission, the IPA/CPA reports any findings to HUD. When the findings indicate inaccuracies or discrepancies, HUD adjusts the financial indicator, management indicator, and overall PHAS grade.

For the Financial Assessment Subsystem, the Quality Assurance Subsystem (QASS) addresses the reliability of financial data collected and assessed by the PIH–REAC. The QASS staff conducts Quality Assurance Reviews (QARs) of IPA and CPA firms that perform financial statement and compliance audits of PHAs. The CPA firms are selected based on three established risk factors. These factors are: The number of audit clients; the total dollar amount (revenue and assets audited); and referrals from field offices, HUD management, or the PIH–REAC subsystems. Annually, the QASS staff performs a minimum of 15 reviews of CPA firms that audit PHAs. Teams of QASS auditors visit the firms and review a sample of audits and the associated working papers for compliance with professional auditing standards promulgated by the General Accounting Office and the American Institute of Certified Public Accountants (AICPA), as well as the Office of Management and Budget and the HUD audit requirements.

When the QASS team identifies material departures from professional standards the team recommends administrative sanctions which may include referrals to one or more oversight bodies, such as state boards of accountancy, the AICPA Professional Ethics Division, state societies of CPAs, and HUD's enforcement office.

The QA for the Resident Service and Satisfaction Subsystem includes a manual review of the random sample of addresses to ensure that they are complete and that there are no duplications. When the grade for the survey is generated, HUD performs a QA review of all grades of D or F to assure that the survey process was successful.

The final PHAS QA procedure is the seven-day field office review of a PHA's overall PHAS grade. All PHAs' grades are transmitted to the field office for this review period prior to release of the grade to the PHA.

In addition to the QAR reviews, the QASS staff also will perform two other

types of reviews, both of which are new. The first additional review is the PHA monitoring review using the OMB A–133 Compliance Supplement. All major requirements associated with PIH programs are covered in the OMB A–133 Compliance Supplement and the monitoring review is to verify the PHA's adherence with statutes, regulations, and contract provisions; verify the documents supporting the PHAS (*e.g.*, Management Operations (MASS) Certification) and SEMAP certifications; and verify the results of the testing that the PHA's CPA is to perform during the annual financial statement audit. The PHAs who will be visited for a monitoring review will be selected both randomly and through a targeted risk-based approach. Each year the QASS team will conduct approximately 45 to 50 monitoring reviews nationwide. Once again, these reviews will be coordinated with field office staff to avoid repetitive reviews at the same PHA. Reported PHA findings, including false MASS certification, will result in appropriate follow-up action by the field office staff, such as referral for limited denial of participation (LDP), suspension, or debarment. The QASS staff will follow-up with CPAs who are not conducting the appropriate compliance testing. Follow-up actions include, but are not limited to, referring the CPA to one or more oversight bodies and HUD's enforcement office and/or including the CPA firm in the risk ranking process for QARs.

The second type of new review performed by QASS staff is an internal control review of PHA service providers (*e.g.*, fee accountants). The QASS staff will perform independent internal control reviews of the largest PHA service providers and determine whether follow-up action is required. Depending on the deficiencies identified, referrals will be made to HUD's enforcement office for action if the PHA service provider failed to comply with HUD requirements.

III. Proposed Amendments to the PHAS

Policy Considerations

After further research involving public housing stakeholders, as well as far-reaching internal review, HUD has developed proposed amendments to the PHAS. These proposed amendments to the PHAS make important improvements to the system, while retaining the core principle of ensuring housing is decent, safe, sanitary, and in good repair for public housing residents.

HUD received suggestions for changes to the PHAS from representatives of the public housing industry, public housing directors, HUD program experts, residents, and recommendations from the Millennial Housing Commission. HUD evaluated all of these suggestions in a deliberative process that led to this latest version of the PHAS. As a result, the Department has made numerous changes to the PHAS.

Above all, this proposed rule strives to be simpler to understand and utilize. It places more emphasis on assessing those items that directly affect day-to-day living conditions.

The proposed amendments to the PHAS retain the basic structure of the rule that they replace. A PHA will continue to be evaluated in four areas: physical condition, financial condition, management operations, and resident service and satisfaction. The PHAS continues to rely on information that is verifiable by a third party wherever possible, but with clearer QA standards.

Under current PHAS protocols, the evidence is clear there has been improvement generally in the management of the PHAs.

Recognizing this improvement, this proposed PHAS rule gives PHAs increased flexibility and regulatory relief without sacrificing accountability. Under the proposal, Grade A PHAs will be assessed less often. The physical inspection scoring process is revised and places a stronger emphasis on the concept of livability and the immediate correction of exigent health and safety deficiencies. In the financial assessment, four of the component thresholds have been lowered for Small and Very Small PHAs. In addition, the penalty for high liquidity and reserves is eliminated. Along with this additional flexibility and regulatory relief, the Department is placing increased accountability on PHAs for the information they supply. The Department expects the highest standards of integrity from providers of public housing. All information to which PHAs self-certify will be subject to audit and verification. When this information is false, fraudulent, or otherwise justifies enforcement, the Department will take aggressive action against those who would abuse the public trust. The Department has also increased the penalties for late submissions.

The proposed amendments to the PHAS are a collaborative effort between HUD and its partners. They have been developed out of mutual respect between HUD and the affected parties.

Highlights of Changes

Under the proposed rule, a PHA will receive letter grades of A, B, C, D, or F, and the frequency of assessments is based on the designation. Under the current PHAS rule, a PHA receives numeric scores and is assessed annually. Further, under the proposed rule, a PHA will no longer be designated high performer, standard performer, or troubled. A PHA's designation will be a letter grade based on the overall PHAS grade and indicator grades. In addition to publishing the proposed amendments to the PHAS rule, HUD is also publishing five proposed grading notices for comment. Four of the notices explain the grading process for each of the four PHAS indicators, and there is one overall notice explaining the grading process in general.

All observed deficiencies determine the physical condition score under the current rule. Under the proposed rule, only observed deficiencies that primarily impact ''livability'' determine the property grade.

In the proposed rule, the penalty points under Current Ratio (CR) and Months Expendable Fund Balance (MEFB) for high liquidity or reserves are eliminated.

In the proposed rule, the management operations self-sufficiency sub-indicator has four components rather than a stand-alone sub-indicator. Furthermore, self-sufficiency questions have been added to the resident survey. The proposed rule changes the standards for rating vacant unit turnaround time, work orders, and annual inspection of dwelling units and building systems. The maximum time periods have decreased, and the percentages of units, and buildings and systems required to be inspected for a given grade have increased.

Currently, the Resident Service and Satisfaction (RASS) indicator points are apportioned between the survey, and the implementation plan and follow-up plan certification. Under the proposed PHAS, the entire RASS assessment is based on survey results. If the survey process is not properly managed as directed by HUD, the PHA shall receive a zero and a grade of F under this indicator.

Under the current PHAS rule, a PHA may be designated ''troubled in one area'' based on the physical, financial, or management score. In this proposed rule, a PHA may be referred to the appropriate HUD office for remedial action if it receives a grade of F in any one of the four PHAS indicators.

The point deductions from the overall PHAS score for any late submission under the current rule are replaced with grade deductions from the affected indicators under the proposed rule. When a submission is late, the time period for a presumptive rating of

failure for that indicator is changed from 90 days to 49 days.

Overview of Changes

The following paragraphs describe the significant changes that will increase the fairness and accuracy of the assessments, and allow for more flexibility and regulatory relief for PHAs, while at the same time holding them increasingly accountable for performance.

• Under the proposed PHAS system, PHAs would receive an overall PHAS grade, four indicator grades, and sub-indicator/component grades. This grading system would replace the scoring system of the current regulation. The grades would be A, B, C, D, and F. The sub-indicator/component grades would determine the indicator grade. The four indicator grades would determine the overall PHAS grade. The weight of each of the four indicators would remain the same, *i.e.*, 30 percent for the physical condition indicator, 30 percent for the financial condition indicator, 30 percent for the management operations indicator, and 10 percent for the resident service and satisfaction indicator. To implement the new grading approach for assessing PHAs, HUD will publish five proposed grading notices for comment in the **Federal Register**.

• A new assessment schedule is being proposed which recognizes and rewards superior performance. The frequency of a PHA's assessments would be based on its PHAS designation. All PHAs would be assessed under the four PHAS indicators in the first year after implementation of the revised PHAS rule. Each PHA's designation from that year would serve as its baseline. That baseline designation would determine the PHA's next PHAS assessments. When a PHA is designated Grade A, under this proposal the PHA will next be assessed in three years. When a PHA is designated Grade B, under this proposal the PHA will next be assessed in two years. When a PHA is designated Grade C, D, or F, under this proposal the PHA will be assessed the next year. Thereafter, the PHA's most recent designation would determine the intervals between PHAS assessments. These assessment intervals and the grading bands are modeled after those HUD uses for physical inspections of multifamily housing.

• The designations ''high performer, standard performer, and troubled performer,'' would be replaced with grade designations. The grades proposed are A, B, C, D, and F, with A being the highest, similar to a ''high performer'' under the current system, and F being the lowest.

• For a PHA that receives an overall PHAS grade of A, B or C, and that does not receive a grade of less than C in any of the indicators, the PHA's overall grade would serve as its designation. However, a PHA that receives a grade D in one or more indicators would be designated Grade D, regardless of the overall grade. Similarly, a PHA that receives a grade F in any of the indicators would be designated Grade F, regardless of the overall grade. Finally, a PHA that receives a grade F in the Capital Fund management operations sub-indicator would be designated Capital Fund Grade F. This proposed grading system reflects the principle that designations signify the level of risk HUD assigns to PHAs, rather than a subjective categorization of their overall performance. A PHA that is under-performing in one or more indicators is assumed to be at higher risk than a PHA that is performing at a level of least C across the indicators. The designations of Grade D or Grade F for PHAs that under-perform in one or more indicators will reflect that heightened level of risk and will serve to increase the level of attention these PHAs receive from HUD field offices and other interested parties.

• HUD would continue to assess the physical condition of properties in compliance with HUD's housing standard of decent, safe, sanitary, and in good repair. The characterization and reporting of the results, however, would be changed. The proposed approach would continue to use the existing inspection methodology but would place a stronger emphasis on the concept of livability and the correction of EHS deficiencies. Specific deficiencies that have a direct impact on residents would be identified and categorized in the new deficiency class ''livability.'' All EHS deficiencies would remain the same and require immediate correction or remedy. Deficiencies not classified as directly affecting livability or EHS concerns would be recorded and reported to the PHA, but will not impact a property's assessment grade.

• Under the proposed livability concept, the existing property level numeric scoring approach would be changed to a letter-based grading system of A, B, C, D, and F. PHAS Indicator #1 grades would then be derived from the property grades. As in the current regulation, PHAS Indicator #1 grades for PHAs with more than one property would be calculated as a weighted average of the individual property results using the number of dwelling units in each property as weights.

• The grading scale for the six Financial Condition Indicator components would be redistributed to allow equal weight for the financial condition and the financial management of a PHA.

• In the financial condition assessment, the penalty points for PHAs with high liquidity or reserves under CR and MEFB would be eliminated. This will prevent PHAs with high liquidity or reserves from being unfairly penalized.

• The proposed rule would reinstitute the peer group and threshold assessment methodologies for the CR and MEFB components of the Financial Condition Indicator. A PHA will receive a letter grade of A, B, C, D, or F for each component.

• The proposed rule would establish an additional size category in the financial condition peer groupings. The Large size-based category (*i.e.*, those PHAs administering 1,250 to 9,999 units) will be divided into two large peer groups: Large (1,250–4,999 units) and Very Large (5,000–9,999 units). Further analysis demonstrates there is a statistically significant difference in distribution of component values between the Large and Very Large size categories, and that this will lead to a more accurate assessment.

• The assessment thresholds for four of the financial condition components would be less stringent for small PHAs (less than 250 units).

• The number of components in MASS sub-indicator #2, Capital Fund, is proposed to be reduced from five to two. The two components that assess a PHA's compliance with statutory requirements for expending (component #1) and obligating (component #2) capital funds would be retained. Grade A would be available to PHAs whose time for obligation and expenditure is extended because of those exemptions for obligation of funds that are provided in the statute, including an exemption that the Secretary may establish by notice. The Grade F standard would apply if there are unexpended or unobligated funds for any other reason.

• Recognizing the importance of self-sufficiency to improving the lives of residents of public housing, the proposed PHAS amendment places greater emphasis on assessing a PHA's performance under HUD's various self-sufficiency programs. The management operations self-sufficiency sub-indicator would be amended to better capture the PHA's performance in administering the various self-sufficiency programs. Questions regarding self-sufficiency would also be added to the resident survey, as residents' awareness of these

programs is key to their potential for success.

• The standards for rating vacant unit turnaround time, work orders, and the annual inspection of dwelling units and systems are proposed to be changed. The maximum time permitted before a PHA will receive a grade of F for vacant unit turnaround time and completion of work orders would be decreased, as would the maximum time permitted in order to receive the highest grade. The grades between these two extremes would be distributed accordingly. Similarly, the percent of dwelling units and systems that are required to be inspected before the PHA will receive a grade of F would be increased. These proposed standards more closely reflect the standards in the private rental market.

• Under the previous version of the PHAS, five of the available ten points in the RASS assessment went to the PHA for the follow-up plan and the implementation plan. To obtain a more accurate accounting of resident satisfaction, this assessment and the PHA's RASS grade would be based entirely on the responses to the resident survey, although, as a threshold matter, a PHA would receive a zero and a grade of F if it fails to implement the survey as HUD directs.

• As in the three other PHAS indicators, a PHA that receives a grade of F under the RASS indicator would be designated a Grade F PHA. All Grade F PHAs are referred to the appropriate HUD office for remedial action, including execution of a Memorandum of Agreement.

• The penalties for late submissions would be changed from point reductions to grade reductions. The time period before a PHA will receive a presumptive rating of zero for failing to make a submission would be reduced. In addition, the late penalties would apply to late submissions under each indicator. Accordingly, when a PHA submits its unaudited financial information or management certification more than 7 days after the submission due date, but no more than 21 days after that date, the PHA's grade for each indicator submitted late would be lowered one letter grade. When a PHA submits its unaudited financial information or management certification more than 21 days, but no more than 35 days after the submission due date, the PHA's grade for each indicator submitted late would be lowered two letter grades. When a PHA submits its unaudited financial information or management certification more than 35 days, but no more than 49 days after the submission due date, the PHA's grade for each indicator submitted late would be lowered three letter grades. After 49 days, the PHA would receive a late presumptive rating of zero and a grade of F for each indicator submitted late.

IV. Section-by-Section Overview of the PHAS Amendments

To assist the reader in identifying those sections of the existing PHAS regulation that are proposed to be revised and the new sections that would be added, the following provides a section-by-section overview of the amendments being proposed by this rule.

Subpart A—General Provisions

Section 902.1 (Purpose and general description). Paragraph (a) would be amended to remove superfluous editorial comments pertaining to the purpose of the PHAS. Paragraph (b) would be removed because the Real Estate Assessment Center (REAC) is no longer independent of the Office of Public and Indian Housing (PIH). Following the administrative reorganization of HUD, REAC was incorporated into PIH. Paragraph (c), which briefly describes the PHAS Indicators, would be redesignated paragraph (b) and amended to add information pertaining to the objectives of each of the PHAS Indicators in former paragraphs §§ 902.20(a), 902.30(a), 902.40(a) and 902.50(a). Paragraph (d) would be redesignated paragraph (c) and amended to reflect the proposal that PHAs be graded and not numerically scored. The proposed rule would remove paragraph (e) pertaining to changes in a PHA's fiscal year end because it is no longer applicable.

Section 902.3 (Scope). This section proposes minor editorial changes.

Section 902.5 (Applicability). This section would be amended to clarify the applicability of the PHAS to resident management corporations (RMCs), direct-funded resident management corporations (DF-RMCs) and alternate management entities (AMEs). Paragraph (a) would be divided into new paragraphs (a) and (b). The information in paragraph (b) pertaining to implementation of the PHAS is proposed to be placed in paragraph (d). The information in paragraph (b) pertaining to the issuance of PHAS advisory scores is removed because it is no longer applicable.

Section 902.7 (Definitions). The proposed rule would delete the following definitions that are no longer applicable or are not used in the regulation: Occupancy loss; reduced actual vacancy rate within the previous three years; and tenant receivable outstanding. The following definitions are proposed to be added: Annual contributions contract (ACC); Assistant Secretary; certification review; decent, safe, sanitary, and in good repair; entity-wide; family self-sufficiency; Grade A PHA; Grade B, C, or D PHA; Grade F PHA; Memorandum of Agreement (MOA); the acronym PIH-REAC; and self-sufficiency. The following definitions would be clarified and rewritten in plain language: adjustment for physical condition and neighborhood environment; deficiency; reduced average number of days non-emergency work orders were active during the previous three years; and work order deferred to the Capital Fund Program. Section 902.9 (PHAS grading). This proposed new section would explain the letter-based grading system and organize PHAS scoring information in a more logical fashion. Additionally, this section would consolidate general grading information in one location, rather than placing it at the end of the subpart for each Indicator. Proposed paragraph (a) briefly describes the grading process. Proposed paragraphs (b) and (c) include information about the distribution of PHAS indicator grades among the four indicators, and availability of grading notices that is in current §§ 902.25(a), 902.27, 902.35(a)(1), 902.37, 902.45(a), 902.47, 902.53(a)(2) and 902.55.

Section 902.10 (PHAS designation). This proposed new section presents the PHAS designation information in the first part of the regulation. The performance designations high performer, standard performer, and troubled, would be replaced by a grading system of the following letter grades: A, B, C, D, and F. Paragraphs (a) through (e) of this proposed section would contain amended information about the performance requirements for the PHAS designations that is in § 902.67(a), (b) and (c) of the current rule. Under this proposal, a PHA's designation would be A, B, or C, when its overall grade is an A, B, or C, and there are no indicator grades of D or F. A PHA would be designated a Grade D PHA if any of the indicator grades are a grade of D. A PHA would be designated a Grade F PHA if any of the indicator grades are a grade of F. If a PHA has a grade of F under the Capital Fund component of the management operations indicator, the PHA would be designated a Capital Fund Grade F PHA.

Section 902.13 (Frequency of PHAS assessments). This proposed new section would describe the revised frequency of PHAS assessments. Under the new PHAS, the frequency of

assessment would be based on the performance of the PHA.

Section 902.15 (Posting and publication of PHAS grades and designations). This proposed new section would include information about the provisions for posting and publication of PHAS grades that is in § 902.63(e) of the current rule. This section proposes that HUD will continue to post final PHAS grades on the Internet, but removes the existing provision that HUD will publish final overall PHAS grades in the **Federal Register**.

Subpart B—PHAS Indicator #1: Physical Condition

Section 902.20 (Physical condition assessment). This proposed rule would reorganize this section. Paragraph (a) pertaining to the objective of the physical condition assessment would be moved to new § 902.1(b)(2). Paragraph (b)(1) and § 902.24(a), which briefly describe the method of assessment, would be incorporated into new paragraph (a). Paragraph (b)(2) describing the assessments is proposed to be moved to § 902.24(a). New paragraph (b) would include the information about transmission of inspection results included in § 902.24(a)(3). New paragraph (c) would include information pertaining to the frequency of physical inspections. Paragraph (c) pertaining to physical inspection requirements would be redesignated paragraph (d). New paragraph (e) pertaining to HUD access to PHA properties would contain the information in § 902.24(d).

Section 902.23 (Physical condition standards for public housing—decent, safe, and sanitary housing in good repair (DSS/GR)). The title for this section is proposed to be changed to ''Inspectable areas.'' Paragraph (a) would be revised because information regarding DSS/GR has been moved to § 902.7, ''Definitions.'' There would be minor editorial changes to paragraphs (b)(4) and (c), such as substituting the word ''housing'' with the term ''PHA properties.''

Section 902.24 (Physical inspection of PHA properties). The information in current§ 902.24(a) pertaining to inspection of PHA properties would be moved to § 902.20(a). The information in current § 902.23(a)(1) pertaining to PHA compliance with DSS/GR standards would be moved to proposed § 902.24(a). Proposed § 902.24(a) would also clarify that a random sample of dwelling units is to be inspected. Proposed §§ 902.24 (a)(1) and (2) pertaining to inspection of occupied units contain the information in current § 902.20(b)(2). The paragraph on off-line units currently in § 902.20(b)(2)(iii) would be revised to be more specific and would be located in § 902.24(a)(2)(iii) of the proposed rule. The information in current § 902.24 (a)(1) pertaining to inspector actions during a property inspection would be moved to new § 902.24(b). The information in current § 902.24(a)(2) pertaining to PHA notification of health and safety deficiencies would be moved to new § 902.24(c). Paragraph (c)(1) would state the requirement that PHAs correct all health and safety deficiencies. Paragraph (c)(2) would address procedures for EHS deficiencies. Each PHA must correct all EHS deficiencies within 24 hours and must certify to HUD that the corrections have been made. HUD will provide additional guidance on the certification requirements. Section 902.24(a)(3) pertaining to inspectors transmitting inspection results to HUD would be moved to new § 902.20(b). Section 902.24(b), entitled ''definitions,'' would be redesignated new § 902.24(d). This paragraph would be amended to remove the reference to the publishing for comment of significant amendments in the definition for ''Dictionary of Deficiency Definitions.'' The references to publishing proposed amendments to the Dictionary of Deficiency Definitions for comment would be moved to new § 902.24(e). The definitions for criticality, Item Weights and Criticality Levels Document, normalized weights, score, and sub-area are removed because they are no longer applicable. The definitions for base grade, deficiency classification, Deficiency Classification Summary Document, grading class, livability, property grade, property livability points, and PHAS Indicator #1 grade are added. Section 902.24(c) pertaining to civil rights and nondiscrimination compliance would have minor editorial changes and would be redesignated § 902.24(f). Section 902.24(d) regarding access to properties would be moved to new § 902.20(f).

Section 902.25 (Physical condition scoring and thresholds). The title for this section would be changed to ''Adjustments to physical condition property grade.'' Paragraph (a) pertaining to the Federal Register Scoring Notice (now Grading Notice) for the physical condition indicator would be moved to the new § 902.9(c). As proposed, § 902.25(a) would only address the adjustments for physical condition and neighborhood environment currently in § 902.25(b). The portion of paragraph (b) describing adjustments would be moved to paragraph (a), with editorial changes. The content of current paragraph (b)(1) would be removed. The definitions currently in paragraph (b)(2) would be moved to paragraphs (c)(1) and (2), with changes. Specifically, property age and percentage of families with incomes below the poverty rate would no longer be used as factors for the physical condition adjustment. Instead, the physical condition adjustment would apply to properties with documented design or structural defects that a PHA cannot correct, and the neighborhood environment adjustment would apply to documented conditions existing in the immediate surrounding neighborhood such as a landfill, floodplain, or other environmentally hazardous area. Current paragraph (b)(3) would become paragraph (b), rephrased in terms of a one-letter grade adjustment, and revised to remove the reference to property age and to add the concept that the adjustment would be determined by HUD on a case by case basis. Material on scattered-site properties, currently in paragraph (b)(4), would be deleted. Paragraph (b)(5), on supporting documentation, would be redesignated paragraph (e), with editorial changes. Proposed new paragraph (d) would clarify that a PHA would certify to the adjustment for physical condition and/or neighborhood environment as part of the management operations submission. Paragraph (c) regarding database adjustments would be redesignated as § 902.26. Current § 902.25(d) regarding overall physical inspection score would be moved to new § 902.28(d). The provision in current § 902.25(e)(1) establishing the number of points (now percentage of grade) for this indicator would be moved, with changes, to new § 902.9(b)(1). Paragraph (e)(2) pertaining to score (now grade) thresholds would be moved, with changes, to proposed § 902.29.

Section 902.26 (Physical inspection report). The title for this section would be changed to ''Database adjustments to physical condition assessments'' to reflect that this section now only addresses database adjustments. The information in paragraph (a) that describes the physical inspection report would be moved to proposed new § 902.27. Paragraphs (a)(1) through (a)(5) pertaining to reinspections when EHS deficiencies are corrected are proposed to be removed. The provisions in paragraphs (a)(1) through (5) have not been used by PHAs, and therefore are proposed to be replaced by provisions elsewhere in the proposed rule that are more beneficial to PHAs. Section 902.25(c) describing database

adjustments to physical inspection scores (as proposed, ''grades'') would be reorganized and redesignated as § 902.26 (a) through (d). The language would be amended to clarify the circumstances in which a PHA may request a database adjustment.

Section 902.27 (Physical condition portion of total PHAS points). The title for this section would be changed to ''Physical inspection report.'' The material in § 902.26(a) that describes the physical inspection report would be moved to proposed § 902.27(a). The section would reflect the proposed new scoring based on grade and livability and the changes to the inspection report.

Section 902.28 (Overall Physical Condition Indicator grade). This is proposed as a new section. Paragraph (a) would describe the new system of property grades. Paragraph (b) would describe the impact of EHS deficiencies on property grades. Paragraph (c) would describe the requirements and consequences of PHA certification to EHS corrections, and to adjustments to physical condition and neighborhood environment. Paragraph (d) pertaining to the overall Physical Condition Indicator grade would contain the information in current § 902.25(d), with revisions reflecting the new grading system for PHA properties.

Section 902.29 (Threshold). This proposed new section would contain information pertaining to the performance threshold, currently found in § 902.25(e), revised to reflect the proposed grading system.

Subpart C—PHAS Indicator #2: Financial Condition

Most of the changes proposed to Subpart C are to provide clarification to the current regulation. Three of the changes would amend the financial condition grading. First, the reference in § 902.35(a)(3) to penalty points for PHAs with high liquidity or reserves under CR component and MEFB component would be eliminated. Second, the proposed § 902.35(d) amends the Occupancy Loss (OL) component to clarify that the calculation for OL would not include Section 8 assistance. Third, the grading thresholds for four of the components would be made less stringent for small PHAs (less than 250 units). Further changes to the financial condition grading will be provided in a separate PHAS Notice on the Financial Condition Grading Process.

Section 902.30 (Financial condition assessment). Paragraph (a) pertaining to the objective of the financial condition assessment would be moved to proposed § 902.1(b)(2). Proposed § 902.30(a) would state the annual financial filing requirement for both the unaudited and audited financial information, currently found in § 902.33(b) and (c). Proposed paragraph (b) contains the requirement for an IPA or CPA to certify to audited financial submissions. Proposed paragraph (c) contains the requirements and format of the financial information. Proposed paragraph (d) would list the components of the financial condition indicator. Proposed paragraph (e) would describe the annual electronic submission requirement for financial information.

Section 902.33 (Financial reporting requirements). The title for this section is proposed to be changed to ''Financial condition grading.'' Sections 902.33(a), (b), and (c) of the current rule would be moved to § 902.30 of this proposed rule. Proposed §§ 902.33(a) and (b) pertain to grading. The information in those sections is analogous to current § 902.35(a) on scoring, amended to clarify the role of peer groups in financial grading. Proposed paragraph (c) pertains to grade adjustments after submission of audited financial information, similar to § 902.63(b) of the current rule.

Section 902.35 (Financial condition scoring and thresholds). The title for this section is proposed to be changed to ''Financial condition components.'' Section 902.35(a) would be removed and replaced by proposed §§ 902.33(a) and (b). Section 902.35(a)(1) would be removed. Similar content would be reflected in the proposed rule § 902.9(c) on grading procedures, and § 902.33 on financial condition grading. Paragraph (a)(2), regarding PHAS advisory scores, is proposed to be removed because it is no longer applicable. Paragraph (a)(3) regarding penalty points for PHAs with high liquidity or reserves under CR component and MEFB component is proposed to be removed. HUD will no longer penalize a PHA for having high liquidity or reserves under either the CR component or MEFB component.

Section 902.35, as proposed, would only describe the six components of PHAS Indicator #2. The six components would remain the same as in current § 902.35(b) except for revisions to the Occupancy Loss component in proposed § 902.35(d) (currently in § 902.35(b)(4)).

Section 902.37 (Financial condition portion of total PHAS points). The title for this section would be changed to ''Threshold.'' This section is analogous to current § 902.35(c), revised to reflect the grading system.

Subpart D—PHAS Indicator #3: Management Operations

The Management Operations Indicator would be significantly changed, with new sections describing the general requirements for management operations assessments and grading. Two new components would be added, evaluating a PHA's performance in the areas of income verification (#7) and tenant rent calculation (#8), in compliance with the President's management agenda goal of reducing overpayments of rent subsidies. Each of the eight sub-indicators, including their components, specific exemptions, and grades are described in a separate section in this proposed rule. Each sub-indicator would be of equal weight. More detailed information is provided in the PHAS Notice on the Management Operations Grading Process.

Section 902.40 (Management operations assessment and performance standards). Paragraph (a) pertaining to objectives of the management operations assessment would be incorporated into proposed § 902.1(b)(3). Proposed § 902.40(c) lists the management operations sub-indicators, as well as the specific exemptions for two of the sub-indicators, the components and the ratings, of each sub-indicator and/or component. The grading for management operations would be a scale of grades A, B, C, D, and F. All of the sub-indicators would be graded either under the A, B, C, D, F scale, the A, C, F scale, or, in the case of the Capital Fund sub-indicator, the new rent and income verification sub-indicators, and two components of the security sub-indicator, on an A and F scale. Proposed paragraph (d) states that in the case of PHAs reviewed less often than annually under proposed § 902.13(a), the management operations certification shall include only information for the assessed fiscal year. Proposed paragraph (e) states the HUD existing requirement that the management operations submission is subject to the PHA's annual audit. It would provide for HUD on-site review of the submission and supporting documentation. Paragraph (e) also proposes consequences for failure to maintain supporting documentation.

Section 902.41 (Management operations sub-indicator #1—vacant unit turnaround time). This proposed new section would state the specific exemptions for the vacant unit turnaround time sub-indicator, as well as guidance for maintaining documentation to support such exemptions (see proposed § 902.41(a)).

This section would make one important change to current practice. Where it is currently HUD's practice to exempt employee occupied units from the unit turnaround time calculation, as provided at 24 CFR § 901.10, proposed § 902.41(a) would not retain that exemption. Proposed § 902.41(e) would state the standards for grades A, B, C, D, and F.

Section 902.42 (Management operations sub-indicator #2—Capital Fund). This sub-indicator would be changed from five components to two components in accordance with § 9(j) of the 1937 Act as amended by § 519 of the Quality Housing and Work Responsibility Act of 1998, Pub. L. 105–276 (approved Oct. 21, 1998) (QHWRA). Section 9(j) specifically states the time limits for expenditure and obligation of funds to be four years and two years, respectively, except for extensions or waivers as approved by the Secretary. Section 9(j) also provides that the Secretary shall enforce the expenditure and obligation requirements. Therefore, the proposed rule would follow closely the requirements of section 9(j). The three components that would be eliminated are budget controls, quality of the physical work, and contract administration. The two components that would be measured are timeliness of expenditure of funds and timeliness of obligation of funds. This sub-indicator, and its components, would be graded on an A and F scale. This sub-indicator would be automatically excluded if a PHA chooses not to receive capital funding under § 9(d).

Section 902.43 (Management operations performance standards). The title for this section would be changed to ''Management operations sub-indicator #3—work orders.'' This proposed rule would redesignate §§ 902.43(a)(1) through 902.43(a)(5), which describe the management operations sub-indicators, as §§ 902.41 through 902.46, respectively, and would move § 902.43(b)(2) pertaining to requests for manual rather than electronic submissions to § 902.60(a).

As proposed, § 902.43 describes work orders, and states the standards for grades A, B, C, D, and F. The standards for component #1, emergency work orders, would remain the same as the current standard, which is similar to the standard for indicator number four in the Public Housing Management Assessment Program (PHMAP) regulation, 24 CFR 901.25(a). The Grade F standard would apply when less than 96 percent of emergency work orders were completed or the emergency was abated within 24 hours or less. The standards for non-emergency work orders (component #2) would be shortened. The standard for a Grade A for this component would be shortened to seven days, and, for a Grade F, the standard would be shortened to greater than 30 calendar days rather than greater than 60 calendar days. These new standards more realistically reflect the standards in the private market.

Section 902.44 (Management operations sub-indicator #4—annual inspection of dwelling units and systems). This section would incorporate the information in § 902.43(a)(4) of the current rule. This section would state the specific exemptions for this sub-indicator, as well as provide guidance for maintaining documentation to support such exemptions. It would state the standards for grades A, B, C, D, and F. The standards for a Grade F for component #1, annual inspection of dwelling units, and component #2, annual inspection of systems, would be less than 96 percent of inspected component #1, annual inspection of dwelling units, and to less than 85 percent for component #2, annual inspection of systems, to more closely reflect the standards in the private market.

Section 902.45 (Management operations scoring and thresholds). The title for this section would be changed to ''Management operations sub-indicator #5—security.'' The information in paragraph (a) pertaining to the Federal Register Scoring Notice (as proposed, the ''grading notice'') for the management operations indicator is moved to the new § 902.9(c). Paragraph (b) pertaining to scoring thresholds would be moved to new § 902.49 and rewritten to reflect the proposed new grading system.

Proposed § 902.45 incorporates the information in § 902.43(a)(5) regarding the security sub-indicator, and lists the standards for grades A, B, C, D, and F for component 1, tracking and reporting crime and crime-related problems by category of crime and date, time, and place of incident, and the standards for A and F for components #2 and #3, screening of applicants and lease enforcement, respectively. Component #4, grant program goals, would be removed from this sub-indicator. The standards for components #1, tracking and reporting crime-related problems by category and date, time, and place of incident, would be stated as grades A, B, C, D, and F, and would require tracking of crimes by category as well as tracking of actions taken by the PHA to address the crime-related issue. The standards for components #2 and #3, screening of applicants and lease enforcement, respectively, would be stated as A and F, revising the approach taken in 24 CFR 901.45(b) and (c) of PHMAP.

Section 902.46 (Management operations sub-indicator #6—self-sufficiency). This proposed new section would incorporate the information in § 902.43(a)(6) on the self-sufficiency sub-indicator. This sub-indicator would be changed in its entirety. There would be four new components: component #1, economic self-sufficiency; component #2, Family Self-Sufficiency (FSS); component #3, resident job training and employment; and component #4, resident participation in management, business development, and public housing administration. Each of these components would be graded A, C, or F. The FSS component is proposed to be analogous to the FSS component under SEMAP, 24 CFR § 985.3(o), and would be based on percentage of participation and percentage of participating families who have escrow accounts greater than zero.

Section 902.47 (Management operations sub-indicator # 7—income verification). This sub-indicator would be new, and would evaluate the PHA's performance in properly verifying all residents' income, including such matters as exclusions from income and utility allowances. The grades would be either A or F. The information in current § 902.47 would be moved to proposed § 902.9(b).

Section 902.48 (Management operations sub-indicator # 8—rent calculation). This new sub-indicator would evaluate a PHA's performance in correctly calculating tenant rent for all tenants. The possible grades would be A or F.

Section 902.49 (Threshold). This proposed new section describes the grading threshold for the Management Operations Indicator. It contains information pertaining to the scoring threshold currently in § 902.45(b), revised to reflect the proposed grading system.

Subpart E—PHAS Indicator #4: Resident Service and Satisfaction

This subpart would be substantially revised to present the information in a clearer manner and to reflect that the grade is based primarily on the survey results, although a PHA will receive an F if it fails to implement the survey according to HUD's instructions. Under this proposed rule, a PHA would continue to receive the media package from HUD and is required to certify to the implementation of the survey in the RASS. However, a PHA would not be graded for the performance of the

implementation plan, other than to receive an F if it fails to properly implement it according to HUD's instructions. A PHA would be required to update unit addresses in the Public and Indian Housing Information Center (PIC) database and certify to updating unit addresses in RASS. The follow-up plan would no longer be required and would not be graded. The survey would include new questions on family self-sufficiency. More detailed information on the grading of this indicator would be provided in the PHAS Notice on the Resident Service and Satisfaction Grading Process.

Section 902.50 (Resident service and satisfaction assessment). Paragraph (a) of current § 902.50, pertaining to the objectives of the resident service and satisfaction assessment, would be incorporated into new § 902.1(b)(4). Current § 902.50(b) would be redesignated paragraph (a), and would briefly describe the method of assessment. Current § 902.50(c), describing the survey process, would be redesignated paragraph (b). Proposed paragraph (c) parallels proposed § 902.40(e) regarding HUD on-site review of the required certifications and activities. The paragraph also describes the consequences for failure to maintain supporting documentation.

Section 902.51 (Updating of public housing unit address information). The title for this section would be changed to ''Certifications and updating of unit address information.'' This section would be amended and would clarify the responsibilities of a PHA regarding the survey process. The information in paragraph (c) pertaining to requests for manual rather than electronic submissions is moved to proposed § 902.60(b).

Section 902.52 (Distribution of survey to residents). The title for this section would be changed to ''Resident survey sampling.'' Current § 902.52(a), pertaining to resident survey sampling, would comprise the entire proposed § 902.52. The most significant change is that the proposed section would require the sample of units to be random. Current § 902.52(b), pertaining to a third party survey administrator, is moved to § 902.53.

Section 902.53 (Resident service and satisfaction scoring and thresholds). The title for this section would be changed to ''Third party administrator.'' Paragraph (a)(1) pertaining to scoring (now grading) would be moved to new § 902.54. Paragraph (a)(2) pertaining to **Federal Register** Scoring Notice (as proposed, the ''grading notice'') for the resident service and satisfaction indicator would be moved to new § 902.9(c). Section 902.53(b) pertaining to performance threshold would be moved to § 902.55. The information in § 902.52(b) pertaining to the third party survey administrator would comprise this proposed section.

Section 902.54 (Resident service and satisfaction grading and survey contents). This proposed section would explain the grading and contents of the resident survey. This section would reflect that the grade for this indicator is proposed to be based on survey results only. This section also would reflect that the content of the survey is proposed to be changed to include questions regarding self-sufficiency. The survey questions regarding services would be moved to the category of maintenance and repair in order to consolidate questions in these categories.

Section 902.55 (Resident service and satisfaction portion of total PHAS points). The title for this section would be changed to ''Threshold.'' The information in this section pertaining to scoring (''grading'' in this proposed rule) would be moved to new § 902.9(b). This section would contain the information pertaining to performance thresholds in § 902.53(b), revised to reflect the proposed grading system.

Subpart F—PHAS submissions and grading adjustments

Section 902.60 (Data collection). This section would be completely redrafted and renamed ''Requests for manual and late submissions.'' The information currently in paragraph (a) pertaining to fiscal year reporting periods would be removed because the information is no longer applicable. The information currently in paragraph (b) pertaining to collection of physical inspection data would be moved to proposed § 902.9(b)(1). The information currently in paragraph (c) pertaining to the submissions of financial information would be moved to the new § 902.9(b)(2). The information currently in paragraph (d) pertaining to management operations submissions would be moved to new § 902.9(b)(3). The information currently in paragraph (d)(2) pertaining to the retention of documentation that supports the submissions and calculations is moved to new § 902.63(c). Proposed § 902.60(a), pertaining to the request to manually submit information for Indicators #2 and #3, contains the information currently in § 902.43(b)(2). Proposed § 902.60(b) pertaining to the request to manually submit information for Indicator #4 contains the information currently in § 902.51(c). Proposed § 902.60(c) would pertain to the request for extension of time to make submissions. Proposed § 902.60(d) would provide for a request for extension of time to submit audited financial information. The information currently in §§ 902.60(f)(1) and (2) pertaining to circumstances in which HUD may make adjustments to a PHA's score would be moved to proposed §§ 902.63(c)(2) and (3), respectively. The information currently in § 902.60(g) regarding RMCs and DF–RMCs would be in proposed § 902.5(a).

Section 902.61 (Failure to submit data). This proposed new section would state the *information* currently in § 902.60(e). The penalties for late submissions would be increased, and the time period before a PHA will receive a presumptive rating of zero would be reduced. Proposed § 902.61(b) would provide for presumptive ratings of zero in the case of late submissions, similar to current § 902.60(e)(2). The penalties and late presumptive rating provisions also would be presented in table format for clarity.

Section 902.63 (PHAS grading adjustments). Paragraph (a) pertaining to the computation method of a PHAS score (now grade) would be moved to proposed § 902.9(a). Paragraph (b) would be amended to reflect the proposed grading system and to organize the information in a more logical fashion. Paragraph (c) pertaining to issuance of a PHAS score by HUD would be redesignated new paragraph (a) and revised to reflect the proposed grading system. This proposed paragraph expressly states when a PHAS grade is final, and this meaning is used throughout the proposed rule to prevent misunderstanding. Paragraph (d) would contain minor editorial changes. Paragraph (e) pertaining to posting and publication of PHAS grades would be moved to proposed § 902.15.

Section 902.67 (Score and designation status). The title for this section would be changed to ''Withholding, denying, and rescinding grades'' because it would, as proposed, only address situations when a grade may be withheld, denied, or rescinded. Paragraphs (a), (b), and (c) pertaining to performer designation status would be moved to proposed §§ 902.10(a), (b), and (c) and amended to reflect the new grading system. The amendments describe the proposed terms for PHAS designation, which would be Grade A PHA, Grade B PHA, Grade C PHA, Grade C PHA, and Grade F PHA. Section 902.67(d) pertaining to withholding, denying, and rescinding designations would comprise proposed §§ 902.67(a) through (c), which clarify

when HUD may withhold or rescind a PHA's PHAS designation.

Section 902.68 (Technical review of results of PHAS Indicators #1 or #4). This section would be rewritten, in part, for the purposes of providing clarity. A new paragraph (d) would be added, providing that the Assistant Secretary reviews all technical reviews that are denied.

Section 902.69 (PHA right of petition and appeal). This section would be rewritten to provide more clarity and consistency in terminology. Throughout this section, reference is made to Grade A PHA, Grade B PHA, Grade C PHA, Grade D PHA, Grade F PHA, and Capital Fund Grade F PHA. Two situations in which a PHA has a right to appeal would be added. As proposed, a PHA may appeal its final overall PHAS grade if the change would result in a higher grade. In addition, a PHA that is under the jurisdiction of the HUD office with jurisdiction over Grade F PHAs would have the right to appeal after one year if granting the appeal would result in meeting the requirements to substantially improve its performance under PHAS pursuant to § 902.75(f).

Subpart G—PHAS Incentives and Remedies

Section 902.71 (Incentives for high performers). The title for this section would be changed to ''Incentives for Grade A PHAs.'' This proposed section contains editorial changes and would be amended to reflect that the highest designation would be ''Grade A PHA.'' Although exempt from annual assessments, Grade A PHAs would be required to submit financial information annually.

Section 902.73 (Referral to an area Hub/Program Center). The title for this section would be changed to ''Referral of Grade B, C, and D PHAs.'' This section is proposed to be rewritten to more clearly present the process and content of the Improvement Plan. Information currently in this section regarding RMCs and DF–RMCs would be moved to § 902.5.

Section 902.75 (Referral to a Troubled Agency Recovery Center (TARC)). The title for this section would be changed to ''Referral of Grade F PHAs.'' All of the paragraphs in this section would be rewritten to streamline and clarify the information pertaining to the performance requirements of PHAs that have been referred to the HUD office with jurisdiction over Grade F PHAs. The information in paragraph (b) pertaining to MOAs would be reorganized for clarity into paragraphs (b) and (c). Paragraph (c), discussing a PHA's review of the MOA, would be deleted. Paragraph (d) addressing the statutorily prescribed maximum time a PHA may remain under the jurisdiction of the HUD office responsible for Grade F PHAs would be redesignated paragraph (f). Paragraph (f) regarding resident participation would be deleted. The involvement of resident leadership in the MOA would be described in paragraph (c)(7). Because the time periods that a Grade F PHA can remain under the jurisdiction of the remedial HUD office would be explained in subparagraphs (f)(1) and (f)(2), the example that is in current paragraph (g)(3) is deleted. Paragraph (h) providing for HUD audit reviews of Grade F PHAs would be redesignated paragraph (g). Paragraph (i) providing for continuation of service to residents would be redesignated paragraph (h).

Section 902.77 (Referral to the Departmental Enforcement Center (DEC)). The name of this section would be changed to ''Actions and sanctions.'' All references to the DEC would be changed to reflect a reorganization within the Department. This section would be rewritten to streamline and clarify the information pertaining to PHA nonperformance and the actions that HUD may take against a PHA.

Section 902.79 (Substantial default). Proposed § 902.79(a)(1), like the current section, describes the events or conditions that constitute a substantial default. Paragraph (a)(5) of this section would be redesignated paragraph (b) of this proposed section. Paragraph (b) of this section would be redesignated paragraph (c) of this proposed section. This section also proposes minor editorial changes.

Section 902.83 (Interventions). This section would be rewritten to clarify the information pertaining to interventions HUD may initiate if HUD determines that a PHA is in substantial default.

Section 902.85 (Resident petitions for remedial action). This section would be rewritten to more clearly present the information pertaining to the percentage of residents required to participate in a petition for remedial action.

V. Findings and Certifications

Paperwork Reduction Act Statement

The revised information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). Under this Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

The public reporting burden for this new collection of information is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided in the following table.

Information collection	Under OMB control No.	Number of respondents	Total annual responses	Hours per response	Total hours
Financial Management Template	2535–0107	5,964	5,964	5	29,850
Management Operations Certification	2535–0106	3,169	3,169	2	6,274.5
Assessment of Resident Satisfaction:	2507–0001	637,629	267,382	0.25 —Res. 4.8—PHA	78,104
Residents		631,283	262,398	.25	65,600
PHAs-Unit Addresses		3,173	2,394	2.24	5,371
PHAs-Implementation Plan		3,173	2,590	2.75	7,133
RASS Totals		637,629	267,382	.....	78,104

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to:

(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;

(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 collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this proposal. Comments must be received by April 7, 2003. Comments must refer to the proposal by name and docket number (FR–4707–P–01) and must be sent to:

Lauren Wittenberg, OMB Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Fax number (202) 395–6947, E-mail *Lauren_Wittenberg@omb.eop.gov.*

and

Rules Docket Clerk, Office of the General Counsel, Room 10276, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410.

Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, *Regulatory Planning and Review.* OMB determined that this rule is a ''significant regulatory action'' as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). Any changes made to this rule as a result of that review are identified in the docket file, which is available for public inspection in the office of the Department's Rules Docket Clerk, Room 10276, 451 Seventh Street, SW, Washington, DC 20410–0500.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and the private sector. This rule will not impose any federal mandates on any state, local, or tribal governments or the private sector within the meaning of the Unfunded Mandates Reform Act of 1995.

Environmental Review

A Finding of No Significant Impact with respect to the environment was made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The Finding remains available for public inspection during regular business hours in the Office of the Rules Docket Clerk, Office of General Counsel, Department of Housing and Urban Development, Room 10276, 451 Seventh Street, SW., Washington, DC 20410.

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this rule, and in so doing certifies that this rule is not anticipated to have a significant economic impact on a substantial number of small entities. This rule revises HUD's existing regulations for the assessment of public housing at 24 CFR part 902, PHAS, to revise certain procedures to clarify the regulation and to simplify the PHAS process. The additional information and the revision of certain procedures impose no significant economic impact on a substantial number of small entities.

Notwithstanding HUD's determination that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Federalism

The General Counsel, as the Designated Official under Executive Order 12612, Federalism, has determined that the policies contained in this rule will not have substantial direct effects on states or their political subdivisions, on the relationship between the federal government and the states, or on the distribution of power and responsibilities among the various levels of government. This rule is intended to promote good management practices by including, in HUD's relationship with PHAs, continuing review of PHAs' compliance with already existing requirements. This rule will not create any new significant requirements. As a result, the rule is not subject to review under the Order.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers for Public Housing is 14.850.

List of Subjects in 24 CFR part 902

Administrative practice and procedure, Public Housing, Reporting and recordkeeping requirements.

Accordingly, HUD proposes to revise 24 CFR part 902 to read as follows:

PART 902—PUBLIC HOUSING ASSESSMENT SYSTEM

Subpart A—General Provisions

Sec.
902.1 Purpose and general description.
902.3 Scope.
902.5 Applicability.
902.7 Definitions.
902.9 PHAS grading.
902.10 PHAS designation.
902.13 Frequency of PHAS assessments.
902.15 Posting and publication of PHAS grades and designations.

Subpart B—PHAS Indicator #1: Physical Condition

902.20 Physical condition assessment.
902.23 Inspectable areas.
902.24 Physical inspection of PHA properties.
902.25 Adjustments to physical condition property grade.
902.26 Database adjustments to physical condition assessments.
902.27 Physical inspection report.
902.28 Overall physical condition indicator grade.
902.29 Threshold.

Subpart C—PHAS Indicator #2: Financial Condition

902.30 Financial condition assessment.
902.33 Financial condition grading.
902.35 Financial condition components.
902.37 Threshold.

Subpart D—PHAS Indicator #3: Management Operations

902.40 Management operations assessment and performance standards.
902.41 Management operations sub-indicator #1—vacant unit turnaround time.
902.42 Management operations sub-indicator #2—Capital Fund.
902.43 Management operations sub-indicator #3—work orders.
902.44 Management operations sub-indicator #4—annual inspection of dwelling units and systems.
902.45 Management operations sub-indicator #5—security.
902.46 Management operations sub-indicator #6—self-sufficiency.
902.47 Management operations sub-indicator #7—income verification.
902.48 Management operations sub-indicator #8—rent calculation.
902.49 Threshold.

Subpart E—PHAS Indicator #4: Resident Service and Satisfaction

902.50 Resident service and satisfaction assessment.
902.51 Certification and updating of unit address information.
902.52 Resident survey sampling.
902.53 Third party administrator.
902.54 Resident service and satisfaction grading and survey contents.
902.55 Threshold.

Subpart F—PHAS Submission Requests and Grade Adjustments

902.60 Requests for manual and late submissions.

902.61 Failure to submit data.
902.63 PHAS grade adjustments.
902.67 Withholding, denying, and rescinding grades.
902.68 Technical review of results of PHAS Indicators #1 or #4.
902.69 PHA right of petition and appeal.

Subpart G—PHAS Incentives and Remedies

902.71 Incentives for Grade A PHAs.
902.73 Referral of Grade B, C, and D PHAs.
902.75 Referral of Grade F PHAs.
902.77 Actions and sanctions.
902.79 Substantial default.
902.83 Interventions.
902.85 Resident petitions for remedial action.

Authority: 42 U.S.C. 1437d(j) and 3535(d).

Subpart A—General Provisions

§ 902.1 Purpose and general description.

(a) *Purpose.* The Public Housing Assessment System (PHAS) provides a management tool for effectively and fairly measuring the performance of a public housing agency (PHA) in essential housing operations, including rewards for strong performers and consequences for poor performers.

(b) *PHAS Indicators.* PHAS assesses and grades a PHA's performance based on four indicators.

(1) PHAS Indicator #1 assesses the physical condition of a PHA's properties (see subpart B of this part). The objective of the Physical Condition Indicator is to determine whether a PHA is meeting HUD's standard for acceptable basic housing conditions—decent, safe, sanitary and in good repair (DSS/GR)—and the level to which the PHA is maintaining its public housing in accordance with this standard.

(2) PHAS Indicator #2 assesses the financial condition of a PHA (see subpart C of this part). The objective of the Financial Condition Indicator is to measure the financial condition of a PHA to evaluate whether it has sufficient financial resources and is capable of managing those financial resources effectively to provide housing that is DSS/GR.

(3) PHAS Indicator #3 assesses the management operations of a PHA (see subpart D of this part). The objective of the Management Operations Indicator is to measure certain key management operations and responsibilities of a PHA for the purpose of assessing the PHA's management operations performance.

(4) PHAS Indicator #4 assesses the resident service and satisfaction feedback on a PHA's operations (see subpart E of this part). The objective of the Resident Service and Satisfaction Indicator is to measure the level of resident satisfaction with living conditions at the PHA.

(c) *Assessment tools.* HUD shall use uniform and objective protocols for the physical inspection of properties and the financial assessment of the PHA, and shall gather relevant data from the PHA and the PHA's public housing residents to assess management operations and resident service and satisfaction, respectively. On the basis of this data, HUD shall assess and grade the results, advise PHAs of their grade and identify low graded PHAs so that these PHAs shall receive the appropriate guidance to improve performance and provision of services to residents.

§ 902.3 Scope.

(a) The PHAS measures a PHA's essential housing operations. All PHAs remain responsible for complying with requirements such as fair housing and equal opportunity requirements, requirements under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and requirements of programs under which the PHA is receiving assistance even though these other requirements are not specifically referenced in this part. A PHA's adherence to all requirements will be monitored in accordance with the applicable program regulations, HUD compliance and review policies, and the PHA's Annual Contributions Contract (ACC).

(b) All PHA certifications, year-end financial information, and supporting documentation are subject to HUD verification at any time, including an independent auditor review. Failure to maintain and provide supporting documentation for any indicator(s), sub-indicator(s) and/or component(s) shall result in a zero and grade of F for the indicator(s), sub-indicator(s) and/or component(s), and a lower overall PHAS grade. Appropriate sanctions for false certifications shall be imposed, including civil penalties, limited denial of participation, suspension or debarment of the signatories, the loss of Grade A PHA designation, pursuant to § 902.67, and a lower grade under the PHAS indicators. See § 902.63.

§ 902.5 Applicability.

(a) *PHAs, RMCs, DF–RMCs, and AMEs.* This part applies to PHAs (as described in §§ 902.1 and 902.3) and to Resident Management Corporations (RMCs), RMCs that receive direct funding from HUD in accordance with § 20 of the Act (DF–RMCs) (42 U.S.C. 1437r) and alternate management entities (AMEs). When management operations of a PHA's properties have been assumed by an RMC, the PHA's certification shall identify the property and the management functions assumed by the RMC.

(b) *Assessments of RMCs, DF–RMCs and AMEs.* (1) RMCs and DF–RMCs will be assessed and issued grades under PHAS based on the public housing properties or portions of public housing properties that they manage and the responsibilities they assume that can be graded under PHAS. All RMCs and DF–RMCs are subject to the requirements of this part.

(2) AMEs are not issued PHAS grades. The performance of the AME contributes to the PHAS grade of the PHA or PHAs for which the AME assumed management responsibilities. The PHA shall obtain a certification from the AME of the management functions undertaken by the AME. The PHA shall include the information regarding the management functions undertaken by the AME as part of its own management operations certification under subpart D.

(3) For an RMC, the PHA shall obtain a certified questionnaire from the RMC as to the management functions undertaken by the RMC. Following verification of the RMC's certification, the PHA shall submit the RMC's certified questionnaire along with its own. The RMC's Executive Director, Chief Executive Officer, or other responsible party must approve its certification.

(4) A DF–RMC shall submit directly to HUD its certified statement concerning the management functions that it has undertaken. The DF–RMC's Executive Director, Chief Executive Officer, or other responsible party must approve the certification prior to submission to HUD.

(c) *PHA responsible entity under ACC, except where DF–RMC assumes management operations.* (1) Because the PHA and not the RMC or AME is responsible to HUD under the ACC, the PHAS grade of a PHA shall be based on all of the properties covered by the ACC, including those with management operations assumed by an RMC or AME (including a court ordered receivership agreement, if applicable).

(2) A PHA's overall PHAS grade will not be based on properties managed by a DF–RMC.

(d) *Implementation of PHAS.* The regulations in this part are applicable to PHAs with fiscal years ending on and after September 30, 2003.

§ 902.7 Definitions.

As used in this part:

Act means the U.S. Housing Act of 1937 (42 U.S.C. 1437 *et seq.*)

Adjustment for physical condition and neighborhood environment is one

letter grade increase in the property grade. The letter grade increase, however, shall not result in a property grade of more than an A.

Alternative management entity (AME) is a receiver, private contractor, private manager, or any other entity that is under contract with a PHA, under a Regulatory or Operating Agreement with a PHA, or that is otherwise duly appointed or contracted (for example, by court order or agency action) to manage all or part of a PHA's operations.

Annual Contributions Contract (ACC) means the written contract between HUD and a PHA under which HUD agrees to provide funding for a program under the Act and the PHA agrees to comply with HUD requirements for the program.

Assessed fiscal year is the PHA fiscal year that is being assessed under the PHAS.

Assistant Secretary means the Assistant Secretary for Public and Indian Housing.

Average number of days non-emergency work orders were active is calculated:

(1) By dividing the total of—

(i) The number of days in the assessed fiscal year it takes to close active non-emergency work orders that were carried over from the previous fiscal year;

(ii) The number of days it takes to complete non-emergency work orders issued and closed during the assessed fiscal year; and

(iii) The number of days all active non-emergency work orders were open in the assessed fiscal year, but not completed;

(2) By the total number of non-emergency work orders that were used in the calculation of paragraphs (1)(i), (ii) and (iii) of this definition.

Certification review means the HUD on-site property review of the exigent health and safety deficiencies observed in the property inspection against the PHA's certification that these deficiencies have been corrected.

Days means calendar days unless otherwise specified.

Decent, safe, sanitary and in good repair (DSS/GR) is HUD's standard for acceptable basic housing conditions and the level to which a PHA is to maintain its public housing.

Deficiency means any PHAS indicator, sub-indicator, or component for which the PHA has received a PHAS grade of F. In the context of PHAS Indicator #1, deficiency is an observed physical condition of an inspectable item that is recorded during a physical condition inspection. Examples of deficiencies are a hole in the wall or a damaged refrigerator in the kitchen (see § 902.24).

Entity-wide means all programs and activities regardless of funding source (federal and non-federal) of a PHA. The determination of entity-wide shall be made in accordance with generally accepted accounting principles (GAAP) authoritative literature.

Family self-sufficiency (FSS) program means the program established by a PHA within its jurisdiction to promote self-sufficiency among participating families, including the provision of supportive services to these families, as authorized by section 23 of the Act.

Improvement Plan is a document developed by a PHA that sets forth the required actions to be taken, including timetables, to correct deficiencies in any of the PHAS indicators, sub-indicators and components identified during the PHAS assessment. An Improvement Plan may be required when a Memorandum of Agreement (MOA) is not required.

Memorandum of Agreement is a binding contractual agreement between a PHA and HUD that is required for each Grade F PHA as described in this subpart. The MOA sets forth target dates, strategies, and incentives for improving management performance, and provides sanctions if improved performance does not result.

Memorandum of Understanding (MOU) is a binding agreement by and among a PHA and other parties outlining activities, responsibilities, and timelines for social services and property management and maintenance services.

PIH–REAC means HUD's Office of Public and Indian Housing Real Estate Assessment Center.

Property is a project or development with a separate identifying project number.

Reduced average number of days non-emergency work orders were active during the previous three years is a comparison of the average time non-emergency work orders were active in the assessed fiscal year to the average number of days non-emergency work orders were active in the fiscal year two years prior to the assessed fiscal year. It is calculated by subtracting the average number of days non-emergency work orders were active in the assessed fiscal year from the average number of days non-emergency work orders were active in the earlier year. If a PHA elects to certify to the reduction of the average time non-emergency work orders were active during the previous three years, the PHA shall retain justifying documentation to support its certification for HUD review as described in subpart F.

Self-sufficiency means that an FSS family is no longer receiving Section 8, public or Indian housing assistance, or any federal, state, or local rent or homeownership subsidies or welfare assistance. Achievement of self-sufficiency, although an FSS program objective, is not a condition for receipt of the FSS account funds.

Unit months available is the total number of units managed by a PHA multiplied by 12 (adjusted by new units entering a PHA's public housing stock during the assessed fiscal year) exclusive of units months vacant due to demolition, conversion, ongoing modernization, and units approved for non-dwelling purposes.

Unit months leased is the actual number of months each unit was rented during the fiscal year based on the PHA's tenant rent rolls or Housing Assistant Payment (HAP) records.

Work order deferred to the Capital Fund Program is any work order that is combined with similar work items under the PHA's Capital Fund Program or other PHA capital improvements program and is completed within the assessed fiscal year, or shall be completed in the following fiscal year when there are fewer than three months remaining before the end of the assessed fiscal year from the time the work order was generated.

§ 902.9 PHAS grading.

(a) *Overall PHAS grade.* Each PHA will receive an overall PHAS grade of A, B, C, D, or F. Sub-indicators and components within each of the four PHAS indicators are graded individually, and the grades for the sub-indicators and components are used to determine a single grade for each of the four PHAS indicators. Then, the four indicator grades are combined to determine a PHA's final overall PHAS grade.

(b) *Indicator grades.* The overall PHAS grade is derived from a weighted average of grade values for the four indicators as follows:

(1) Physical Condition Indicator #1—Weighted 30 percent of the overall PHAS grade. The PHA's grade is based on the results of the physical inspections of PHA properties performed by contract inspectors using HUD's Uniform Physical Condition Standards (UPCS) inspection protocol. The results of the inspections are electronically submitted to HUD.

(2) Financial Condition Indicator #2—Weighted 30 percent of the overall PHAS grade. The PHA's grade is based on year-end financial information,

prepared in accordance with GAAP, which is electronically submitted to HUD. All PHAs that meet the federal assistance threshold set forth in the Single Audit Act and the Office of Management and Budget (0MB) Circular A–133 (see 24 CFR 84.26) also submit year-end audited financial information. The audited information is transmitted to HUD electronically after the independent public accountant (IPA) or certified public accountant (CPA) certifies or attests to the accuracy of the financial information.

(3) Management Operations Indicator #3—Weighted 30 percent of the overall PHAS grade. The PHA's grade is based on the management certification that is electronically submitted to HUD. The certification is approved by PHA Board resolution and signed and attested to by the Executive Director. In accordance with § 902.63, appropriate sanctions for false certification shall be imposed, including civil penalties, limited denial of participation, suspension, or debarment of the signatories.

(4) Resident Service and Satisfaction Indicator #4—Weighted 10 percent of the overall PHAS grade. The PHA's grade is based on the responses to the resident survey that is conducted by a third party administrator.

(c) *Grading procedures.* (1) The grades for each PHAS indicator are calculated in accordance with the grading procedures described in the grading notices published separately in the **Federal Register**. The PHAS grading notices, with their respective appendices, are:

(i) Public Housing Assessment System (PHAS); Changes to the PHAS; Introduction to PHAS Grading;

(ii) Physical Condition Grading Process;

(iii) Financial Condition Grading Process;

(iv) Management Operations Grading Process; and

(v) Resident Service and Satisfaction Grading Process.

(2) HUD will publish for comment any significant proposed amendments to the notices. After comments have been considered, HUD will publish a notice adopting a final notice or amendment. The PHAS grading notices currently in effect are posted on the PIH–REAC Internet site at *http://www.hud.gov/reac* or may be obtained from the PIH–REAC Technical Assistance Center at 888–245–4860 (this is a toll-free number).

§ 902.10 PHAS designation.

All PHAs shall receive a designation. The designation is based on the overall PHAS grade and the four indicator grades as set forth below.

(a) *Grade A PHA, Grade B PHA, and Grade C PHA.* A PHA's overall PHAS grade is its designation if none of its indicator grades are less than a grade of C.

(1) Grade A PHAs are eligible for incentives that include relief from reporting and other requirements, as described in §§ 902.13 and 902.71.

(2) Grade B PHAs are eligible for relief as described in § 902.13.

(3) Grade B and C PHAs shall be referred to the Hub Office/Program Center pursuant to § 902.73 and shall correct all deficiencies.

(b) *Grade D PHAs.* A PHA shall be designated a Grade D PHA if at least one of the four indicator grades is a grade of D and none of the indicator grades is a grade of F.

(1) Grade D PHAs shall be referred to the Hub Office/Program Center pursuant to § 902.73 and shall correct all deficiencies.

(2) A PHA that is designated a Grade D PHA is at risk of being designated a Grade F PHA.

(c) *Grade F PHAs.* A PHA shall be designated a Grade F PHA if at least one of the four indicator grades is a grade of F.

(d) *Capital Fund Grade F PHA.* A PHA that receives a grade of F for the Capital Fund sub-indicator under Management Operations Sub-Indicator #2 (see § 902.42) shall be a Capital Fund Grade F PHA. In accordance with section 6(j)(2) of the Act (42 U.S.C. 1437d(j)(2)), a Capital Fund Grade F PHA is subject to the sanctions in section 6(j)(4) of the Act (42 U.S.C. 1437(d)(j)(4)), as appropriate.

(e) *Referral of Grade F PHAs.* A Grade F PHA and Capital Fund Grade F PHAs shall be referred to the appropriate HUD office for remedial action pursuant to § 902.75.

§ 902.13 Frequency of PHAS assessments.

(a) *Frequency.* The PHA's PHAS designation determines the frequency of the PHAS assessments.

(1) When a PHA is designated a Grade A PHA, the PHA's next assessment shall be in three years.

(2) When a PHA is designated a Grade B PHA, the PHA's next assessment shall be in two years.

(3) When a PHA is designated a Grade C, D, or F PHA, the PHA's next assessment shall be the following year.

(b) *Baseline.* In the first calendar year after implementation of this regulation, all PHAs shall be assessed in accordance with the requirements of this part and graded in accordance with the most recent grading notices. For PHA's with fiscal years ending September 30, 2003, December 31, 2003, March 31, 2004, and June 30, 2004, this PHAS assessment shall be the baseline assessment. The baseline assessment will determine each PHA's next PHAS assessment. Thereafter, the PHA's most recent final overall PHAS grade will determine the intervals between PHAS assessments.

(c) *Financial submissions.* Notwithstanding the foregoing, a PHA shall electronically submit the unaudited and audited financial information to HUD every year pursuant to subpart C of this part. HUD shall not issue a grade for the unaudited and audited financial information in the years that a PHA is not being assessed under PHAS.

§ 902.15 Posting and publication of PHAS grades and designations.

Each PHA and DF–RMC shall post its overall PHAS grade, each of the four indicator grades and its designation in appropriate conspicuous and accessible locations in its offices within two weeks of receipt of the overall grade. In addition, HUD shall post every PHA's and DF–RMC's overall PHAS grade, indicator grades, and designation on the PIH–REAC Internet site.

Subpart B—PHAS Indicator #1: Physical Condition

§ 902.20 Physical condition assessment.

(a) *Method of assessment, generally.* The physical condition assessment is based on an independent physical inspection of a PHA's properties provided by HUD and conducted using HUD's UPCS inspection protocol. This assessment determines the extent of a PHA's compliance with the DSS/GR standards.

(b) *Method of transmission.* After the inspection is completed, the inspector transmits the results to HUD where the results are verified for accuracy and then graded in accordance with the procedures in this subpart. The PHA's property inspection reports for the assessed fiscal year are used to determine the PHA's physical condition grade under this subpart.

(c) *Frequency of inspections.* HUD will conduct a physical inspection of PHA properties only for the fiscal years for which the PHA is assessed under this part.

(d) *PHA physical inspection requirements.* The HUD-conducted physical inspections required by this part do not relieve the PHA of the responsibility to inspect public housing units as provided in section 6(f)(3) of the Act (42 U.S.C. 1437d(f)(3)) and § 902.44.

(e) *Compliance with State and local codes.* The physical condition standards

in this subpart do not supersede or preempt state and local building and maintenance codes with which the PHA's public housing must comply. PHAs must continue to adhere to these codes.

(f) *HUD access to PHA properties.* All PHAs are required by the ACC to provide the Government with full and free access to all facilities in its property(ies). All PHAs are required to provide HUD or its representative with access to its property(ies), and all units and appurtenances in order to permit physical inspections, certification reviews, and quality assurance reviews under this part. Access to the units shall be provided whether or not the resident is home or has installed additional locks for which the PHA did not obtain keys. In the event that the PHA fails to provide access as required by HUD or its representative, the PHA shall be given a zero and grade of F for the property or properties involved which shall be reflected in the PHAS Indicator #1 grade and the overall PHAS grade.

§ 902.23 Inspectable areas.

(a) *General.* The physical inspections address five major physical areas of public housing: site, building exteriors, building systems, dwelling units, and common areas. The physical inspections also identify health and safety considerations (including exigent health and safety (EHS) considerations). The inspections focus on acceptable basic housing conditions, not the adornment, decor, or other cosmetic appearance of the properties.

(b) *Major inspectable areas.* The five major inspectable areas of public housing are the following:

(1) Site. The site includes components such as fencing and retaining walls, grounds, lighting, mailboxes, signs (such as those identifying the property or areas of the property), parking lots/driveways, play areas and equipment, refuse disposal, roads, storm drainage, and walkways. The site must be free of health and safety hazards and be in good repair. The site must not be subject to material adverse conditions, such as abandoned vehicles, dangerous walks or steps, poor drainage, septic tank back-ups, sewer hazards, excess accumulations of trash, vermin or rodent infestation, or fire hazards.

(2) Building exterior. Each building on the site must be structurally sound, secure, habitable, and in good repair. The building's exterior components such as doors, fire escapes, foundations, lighting, roofs, walls and windows, where applicable, must be free of health and safety hazards, operable, and in good repair.

(3) Building systems. The building's systems include components such as domestic water, electrical system, elevators, emergency power, fire protection, HVAC, and sanitary system. Each building's systems must be free of health and safety hazards, functionally adequate, operable, and in good repair.

(4) Dwelling units. (i) Each dwelling unit within a building must be structurally sound, habitable, and in good repair. All areas and aspects of the dwelling unit (for example, the unit's bathroom, call-for-aid, ceiling, doors electrical systems, floors, hot water heater, HVAC (where individual units are provided), kitchen, lighting, outlets/switches, patio/porch/balcony, smoke detectors, stairs, walls, and windows) must be free of health and safety hazards, functionally adequate, operable, and in good repair.

(ii) Where applicable, the dwelling unit must have hot and cold running water, including an adequate source of potable water.

(iii) If the dwelling unit includes its own sanitary facility, it must be in proper operating condition, usable in private, and adequate for personal hygiene and the disposal of human waste.

(iv) The dwelling unit must include at least one battery-operated or hard-wired smoke detector in proper working condition on each level of the unit.

(5) Common areas. The common areas must be structurally sound, secure, and functionally adequate for the purposes intended. The common areas include components such as basement/garage/carport, restrooms, closets, utility, mechanical, community rooms, day care, halls/corridors, stairs, kitchens, laundry rooms, office, porch, patio, balcony, and trash collection areas, if applicable. The common areas must be free of health and safety hazards, operable, and in good repair. All common area ceilings, doors, floors, HVAC, lighting, outlets/switches, smoke detectors, stairs, walls, and windows, to the extent applicable, must be free of health and safety hazards, operable, and in good repair.

(c) *Health and safety concerns.* All areas and components of PHA properties must be free of health and safety hazards. Health and safety hazards include, but are not limited to, air quality, electrical hazards, elevators, emergency/fire exits, flammable materials, garbage and debris, handrail hazards, infestation, and lead-based paint. For example, the buildings must have fire exits that are not blocked, and have handrails that are undamaged and have no other observable deficiencies. PHA properties must have no evidence of infestation by rats, mice, or other vermin, or of garbage and debris. PHA properties must have no evidence of electrical hazards, natural hazards, or fire hazards. The dwelling units and common areas must have proper ventilation and be free of mold, odor (*e.g.*, propane, natural gas, methane gas), or other observable deficiencies. The PHA must comply with all regulations and requirements related to the ownership of pets, and the evaluation and reduction of lead-based paint hazards, and must have all appropriate certifications available for review (see 24 CFR part 35).

§ 902.24 Physical inspection of PHA properties.

(a) *The inspection, generally.* During the physical inspection of a property, an inspector inspects a random sample of dwelling units and buildings in the PHA's public housing portfolio to determine the extent of compliance with HUD's DSS/GR standards. The dwelling units inspected in a property are a randomly selected sample of the units in the properties. The buildings inspected include all buildings with sampled units plus additional buildings, including all common (non-residential) buildings.

(1) Only occupied units shall be inspected as dwelling units. Units approved by HUD for non-dwelling purposes, such as daycare or meetings, are inspected as common areas. Certain categories of vacant units that are not under lease at the time of the physical inspection (*e.g.*, units undergoing rehabilitation or extensive repair, vacant units during the turnaround period prior to lease-up) shall not be inspected, but shall be assessed under the Financial Condition Indicator #2 (subpart C).

(2) The categories of vacant units that are not under lease that are not inspected are as follows:

(i) Units undergoing vacant unit turnaround—vacant units that are in the routine process of turnover; *i.e.*, the period between which one resident vacates a unit and a new lease takes effect;

(ii) Units undergoing rehabilitation—vacant units that have substantial rehabilitation needs already identified, and for which there is an approved implementation plan to address the identified rehabilitation needs and the plan is fully funded; and

(iii) Off-line units—vacant units that have significant unanticipated repair requirements, such as fire damage, that prevent the units from being occupied after a normal period of time (considered to be between 5 and 7 days)

and which are not included in an approved rehabilitation plan.

(b) *Observed deficiencies.* During the inspection of a property, the inspector looks for deficiencies in each inspectable item within the inspectable areas. For example, the inspector looks for holes (deficiencies) in the walls (item) of a dwelling unit (area).

(c) *Health and safety deficiencies and EHS deficiencies.*

(1) *Health and safety deficiencies.* The PHA is required to promptly correct all health and safety deficiencies.

(2) *EHS deficiencies.* Before leaving the site, the inspector gives the property representative the list of every observed EHS deficiency (*i.e.*, every life-threatening health and safety deficiency). The property representative acknowledges receipt of the list of the observed deficiencies by signature. The PHA must immediately correct or remedy all EHS deficiencies cited in the deficiency report and the property inspection report within 24 hours. In addition, the PHA must certify, as directed by HUD, that all EHS deficiencies were corrected or remedied within 24 hours.

(d) *Definitions for grading.* The following definitions apply to the physical condition grading process in this subpart:

Base grade means the initial property grade derived from the number of livability deficiencies.

Deficiencies means the specific problems, such as a hole in a wall or a damaged refrigerator in the kitchen, that can be recorded for the inspectable items.

Deficiency Classification Summary Document refers to the Deficiency Classification Summary Document that is included as Appendix 2 to the PHAS notice on the Interim Physical Condition Scoring Process published in the **Federal Register** on November 26, 2001.

This document is also available from the Real Estate Assessment Center, 1280 Maryland Ave., SW., Suite 800, Washington, DC 20410. This document shows the grading class for each severity level of each deficiency listed in the Dictionary of Deficiency Definitions.

Dictionary of Deficiency Definitions (''Dictionary'') refers to the Dictionary of Deficiency Definitions document that is included as Appendix 2 to the PHAS Notice on the Physical Condition Grading Process. The Dictionary lists each deficiency that may be observed, defines each deficiency, and sets forth the severity levels for each deficiency under this subpart.

Grading class is a group of deficiencies that are treated alike. Each deficiency within a grading class has the same type of impact on a property grade. There are three grading classes:

(1) *Livability:* deficiencies that have a major impact on livability for residents (*e.g.*, toilet not working);

(2) *EHS:* deficiencies that are life-threatening and require immediate attention or remedy. This category includes all of the deficiencies for which the PHA receives a notice at the end of the physical inspection (*e.g.*, exposed wires); and

(3) *Other:* deficiencies that have little or no impact on livability for residents (*e.g.*, small hole in an interior door) but are a valuable management tool because they provide information on the condition of the property.

Inspectable areas (or area) means any of the five major components of the property that are inspected. They are: site; building exteriors; building systems; dwelling units; and common areas.

Inspectable item means the individual parts, such as walls, kitchens, bathrooms, and other things, to be inspected in an inspectable area. The number of inspectable items varies for each inspectable area.

Livability is the concept of grading the physical condition of PHA properties that focuses on the impact of the deficiencies on the residents. The severity levels of each deficiency in the Dictionary have been classified into one of three grading classes: livability, EHS or other.

PHAS Indicator #1 grade is a letter grade (A, B, C, D, or F) that corresponds to the weighted average of all of the property grades, reflecting the physical condition of all of a PHA's properties.

Property grade is a letter (A, B, C, D, or F), based on counts of deficiencies in grading classes, that reflects the physical condition of a property.

Property livability points mean a value derived from the number of deficiencies in the livability grading class that is used to assign a base grade to a PHA property.

Reported grade means the grade reported to a PHA, including any change in the base grade due to observed EHS deficiencies. Deficiencies in grading class ''other'' are recorded, but do not affect the base grade or the reported grade.

Severity means one of three levels (*i.e.*, level 1, level 2, and level 3) that reflects the extent of the damage or problem associated with each deficiency. The severity levels for each deficiency are set forth in the Dictionary. The Dictionary also sets forth the specific definitions for each severity level.

(e) *Dictionary and Deficiency Classification.* HUD shall publish for comment any significant proposed amendments to the Dictionary and the Deficiency Classification Summary Document. After comments have been considered, HUD shall publish a notice adopting the final Dictionary and Document or the amendments. The Dictionary and the Deficiency Classification Summary Document that are currently in effect can be found at HUD's Internet site at *http://www.hud.gov/reac* or obtained from the PIH–REAC Technical Assistance Center at 888–245–4860 (this is a toll free number).

(f) *Compliance with civil rights/nondiscrimination requirements.* HUD reviews certain elements during the physical inspection to determine possible indications of noncompliance with the Fair Housing Act (42 U.S.C. 3601–19) and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). All Fair Housing Act and Rehabilitation Act observations recorded by an inspector are classified as ''other'' deficiencies under livability and are not included in the property grade. All information is provided to HUD's Office of Fair Housing and Equal Opportunity for further review.

§ 902.25 Adjustments to physical condition property grade.

(a) *Adjustment for physical condition and neighborhood environment.* In accordance with section 6(j)(1)(I)(2) of the Act (42 U.S.C. 1437d(j)(1)(I)(2)), the overall physical condition grade for a property shall be adjusted upward to the extent that negative conditions are caused by situations outside the control of the PHA. The intent of this adjustment is to avoid penalizing the PHA through appropriate application of the adjustment.

(b) *One-letter grade adjustment.* A PHA shall receive a one-letter grade adjustment (*i.e.*, increase) in the property grade if the property satisfies the criteria for either physical condition or neighborhood environment or for both. To be eligible for this adjustment, the PHA must certify that the property meets the definitions of physical condition and/or neighborhood environment. An adjustment made under this section will be an adjustment to an individual property grade determined by HUD on a case by case basis.

(c) *Definitions.* Definitions and application of physical condition and neighborhood environment factors are:

(1) Physical condition applies to documented structural or design defects in a property that a PHA cannot correct.

(2) Neighborhood environment applies to documented conditions within the immediate surrounding neighborhood that adversely impact a property's physical condition such as:

(A) A landfill;

(B) Flood plain; or

(C) Other environmentally hazardous areas.

(d) *Certification to an adjustment for physical condition and/or neighborhood environment.* The PHA certifies to the adjustment for physical condition and/or neighborhood environment as part of its management operations submission.

(e) *Maintenance of supporting documentation.* A PHA shall maintain supporting documentation (pursuant to § 902.63(c)) to show how it determined that the property's grade is subject to adjustment under this section.

(1) If the basis for adjustment was neighborhood environment, the PHA shall have on file the appropriate documentation supporting the adjustment. Properties that fall into this category but which have already been removed from consideration for other reasons (permitted exemptions and modifications and/or exclusions) shall not be counted in this calculation.

(2) For the physical condition adjustment, a PHA must maintain documentation showing the structural or design defects. A PHA shall also maintain documentation showing that any property exempted for other reasons was not included in the calculation.

§ 902.26 Database adjustments to physical condition assessments.

(a) *Generally.* HUD may review the results of a PHA's physical inspection and make adjustments to the property grade based on certain circumstances such as:

(1) Factors not reflected or inappropriately reflected in the physical property grade;

(2) Adverse conditions beyond the PHA's control; and

(3) Modernization work in progress.

(b) *Adjustments for factors not reflected or inappropriately reflected in the property grade.* (1) Factors not reflected or inappropriately reflected in the property grade include inconsistencies between local code requirements and the HUD UPCS physical inspection protocol (24 CFR part 5, subpart G); conditions which are permitted by local variance or license or which are preexisting physical features that do not conform to, or are inconsistent with, HUD's UPCS physical inspection protocol; or the inspector grading the PHA for elements (*e.g.*, roads, sidewalks, mail boxes, resident-owned appliances, etc.) that the PHA does not own and is not responsible for maintaining, and for which it has notified the proper authorities regarding the deficient structure.

(2) The PHA may request an adjustment due to these circumstances through the applicable Hub Office/Program Center. The request shall be in writing and include appropriate proof of the reasons for the unusual or incorrect result. A PHA may submit the request for this adjustment either prior to or after the physical inspection has been concluded. If the request is made after the conclusion of the physical inspection, the request shall be made within 15 days of issuance of the Physical Inspection Report and grade for the property. Based on the recommendation of the applicable HUD Hub Office/Program Center following its review of the PHA's documentation, HUD may determine that a reinspection and/or re-grading of the PHA's property is necessary.

(c) *Adjustments for adverse conditions beyond the PHA's control.* Under certain circumstances, HUD may determine that certain deficiencies that adversely and significantly affect the property grades of the PHA were caused by circumstances beyond the control of the PHA. The correction of these conditions, however, remains the responsibility of the PHA.

(1) Adverse conditions beyond the PHA's control may include, but are not limited to, damage caused by third parties (such as a private entity or public entity undertaking work near a public housing property that results in damage to the property) or natural disasters.

(2) A PHA may request an adjustment due to these circumstances through the applicable HUD Hub Office/Program Center. The request shall be submitted within 15 days of the issuance of the Physical Inspection Report and grade for the property to the PHA and shall be accompanied by a certification that all deficiencies identified in the original report have been corrected. Based on the recommendation of the applicable HUD Hub Office/Program Center after its review of the PHA's evidence or documentation, HUD may determine that a reinspection and/or re-grading of the PHA's property is necessary.

(d) *Adjustments for modernization work in progress.* HUD may determine that an occupied dwelling unit or other areas of a PHA property, subject to physical inspection under this subpart, which are undergoing modernization work in progress require an adjustment to the physical condition grade.

(1) Occupied dwelling units or other areas of a PHA property undergoing modernization are not exempt from physical inspection. All elements of the dwelling units or of the other areas of the PHA property that are subject to inspection and are not undergoing modernization at the time of the inspection (even if modernization is planned) shall be subject to HUD's physical inspection protocol without adjustment. For those elements of the dwelling units or of the property that are undergoing modernization, deficiencies shall be noted in accordance with HUD's physical inspection protocol, but the PHA may request adjustment of the physical condition grade as a result of modernization work in progress.

(2) The PHA may request an adjustment due to modernization work in progress through the applicable HUD Hub Office/Program Center. The request shall be in writing and include supporting documentation of the modernization work underway at the time of the physical inspection. A PHA may submit the request for this adjustment either prior to or after the physical inspection has been concluded. If the request is made after the conclusion of the physical inspection, the request shall be made within 15 days of issuance of the Physical Inspection Report and grade for the property. Based on the recommendation of the applicable HUD Hub Office/Program Center, HUD may determine that a reinspection and/or re-grading of the PHA's property is necessary.

§ 902.27 Physical inspection report.

(a) *Report generally.* Following the physical inspection of each property and the determination of the property grade under this subpart, the PHA shall receive an Inspection Summary Report. The Inspection Summary Report allows the PHA to see all observed deficiencies by inspectable area, and the impact of livability and EHS deficiencies on the property grade.

(b) *Report contents.* The Inspection Summary Report includes the following items:

(1) A list of the livability, EHS, and other deficiencies observed;

(2) The health and safety deficiencies for each of the five inspectable areas; a listing of all observed smoke detector deficiencies; and a projection of the total number of health and safety deficiencies that the inspector potentially would see in an inspection of all buildings and all units;

(3) The overall property grade;

(4) The values of the livability points; and

(5) The reported property grade.

§ 902.28 Overall physical condition indicator grade.

(a) *Property grade.* To determine a property's base grade, all livability deficiencies reported for dwelling units, buildings (which combines the inspectable areas of building exterior, building systems and common areas), and site are counted. To quantify the impact of the cited deficiencies on the inspectable areas, values called ''livability points'' are calculated separately for dwelling units, buildings (adjusted for the number of units in each building and to account for any sampling of the buildings), and site. The livability points are then combined into overall livability points for the property, with dwelling units, buildings, and site each contributing 60 percent, 30 percent, and 10 percent, respectively. Property livability points are translated into the base grade as specified in the Physical Condition Grading Process notice. When there are no EHS deficiencies cited, the base grade is the property's reported grade.

(b) *Impact of EHS deficiencies on a property grade.* If at least one EHS deficiency is cited, other than for smoke detectors, then the reported grade will be one grade lower than the base grade (*i.e.*, A becomes B, B becomes C, C becomes D, D becomes F, and F remains as F).

(c) *Correction of EHS deficiencies.* When a PHA corrects all of the EHS deficiencies on a property inspection report and certifies to HUD that they have been corrected pursuant to section § 902.24 (c), the property grade will revert to the base grade. If an EHS certification review later shows that all of the EHS deficiencies to which the PHA certified were not corrected, then the PHA's property grade will be reduced one-letter grade below the reported property grade and the PHA's overall physical inspection grade also may be reduced, with F being the lowest possible grade.

(d) *PHAS Indicator #1 grade.* The PHAS Indicator #1 grade for a PHA is based on the grades for all the properties in a PHA's portfolio. To determine the PHAS Indicator #1 grade, each property grade is assigned a numerical value. Then a weighted average of property grade values is calculated with weights equal to the number of units in the property divided by the total number of units in the PHA. This PHAS Indicator #1 grade is the letter grade corresponding to the weighted average of property grade values.

§ 902.29 Threshold.

When a PHA receives a grade of F under this indicator, the PHA shall be designated a Grade F PHA. When a PHA receives a grade of D under this indicator, the PHA shall be designated a Grade D PHA.

Subpart C—PHAS Indicator #2: Financial Condition

§ 902.30 Financial condition assessment.

(a) *Annual financial filing dates.* Under this indicator, PHAs shall submit unaudited and audited financial information to HUD on an annual basis.

(1) Unaudited financial information filing date. The unaudited financial information shall be submitted to HUD annually, no later than two months after the end of the PHA's fiscal year in accordance with Uniform Financial Reporting Standards (see 24 CFR part 5, subpart H).

(2) Audited financial information filing date. The audited financial information shall be submitted no later than nine months after the end of the PHA's fiscal year, in accordance with the Single Audit Act and OMB Circular A–133 (see 24 CFR 84.26). A PHA that has an audit conducted, but is not subject to the Single Audit Act, shall also submit audited information no later than nine months after the end of the PHA's fiscal year.

(b) *Certification or attestation.* Prior to the electronic submission of the PHA's audited statement, the PHA's IPA or CPA shall certify or attest that the financial information being submitted electronically accurately reflects the audited ''hard copy'' financial information.

(c) *Annual financial information.* The financial information shall be:

(1) Submitted on an entity-wide basis;

(2) Prepared in accordance with GAAP; and

(3) Submitted electronically in the format prescribed by HUD.

(d) *Components of Financial Condition Indicator.* A PHA's financial condition shall be assessed on the basis of six components described in § 902.35. The six components are:

(1) Current Ratio;

(2) Number of Months Expendable Fund Balance;

(3) Tenant Receivables Outstanding;

(4) Occupancy Loss;

(5) Expense Management/Utility Consumption; and

(6) Net Income or Loss Divided by the Expendable Fund Balance.

(e) *Annual submission requirement.* A PHA shall electronically submit its unaudited and audited financial information to HUD every year. In accordance with § 902.13, HUD will not grade the unaudited and audited financial information in the years that a PHA is not being assessed under PHAS.

§ 902.33 Financial condition grading.

(a) Under PHAS Indicator #2, HUD will determine a grade based on the calculated values of the six financial condition components, and the results of the audit.

(b) Each financial condition component value will be converted to a grade. The grade from each financial condition component will then be combined to create the overall financial condition assessment grade. A PHA's grade for a financial condition component depends upon both the calculated value of the financial condition components and the PHA's peer group. A PHA's peer group will be determined based on a PHA's size and regional location. HUD will use a region as part of the peer group only if a peer group based solely on size would not allow an equitable assessment. A PHA's size will be based on the number of public housing, Section 8, and other units the PHA operates.

(c) HUD may adjust a PHA's Financial Conditioner Indicator grade after receipt of the PHA's audited submission for the assessed fiscal year. Any adjustment to the Financial Conditioner Indicator grade (*i.e.*, increase or decrease) shall result in a corresponding adjustment to the PHA's final overall PHAS grade. In addition, if there is a significant difference between the unaudited and audited submissions, a PHA's financial condition grade and final overall PHAS grade shall be adjusted (*i.e.*, a letter grade reduction) as described in the PHAS notice on the Financial Condition Grading Process. Findings, qualifications, or other conditions reported as the result of an audit may also reduce the Financial Condition grade by one or more letter grades. The letter grade reductions are based on the severity of the finding, qualifications, or reported condition, as described in the PHAS notice on the Financial Condition Grading Process.

§ 902.35 Financial condition components.

The six Financial Condition Indicator components are:

(a) *Current Ratio.* This component is calculated by dividing the current assets by current liabilities. This component measures a PHA's liquidity position. This component is calculated on an entity-wide basis.

(b) *Number of Months Expendable Fund Balance.* This component is calculated by dividing the expendable fund balance by the monthly operating expenses. This component measures the adequacy of the PHA's reserves. This component is calculated on an entity-wide basis.

(c) *Tenant Receivables Outstanding.* This component is calculated by dividing the gross tenant receivables by the amount of tenant rents collected during the assessed fiscal year. This component measures a PHA's ability to collect rent. This component is calculated on an entity-wide basis.

(d) *Occupancy Loss.* This component is calculated by dividing the unit months leased by the unit months available, and then subtracting that number from one. This component measures the ability of a PHA to maximize rental income. This component is calculated on all programs, excluding any units associated with the Section 8 Housing Choice Vouchers, Section 8 Rental Vouchers and Section 8 Certificates programs.

(e) *Expense Management/Utility Consumption.* This component is calculated by dividing key expenses, including the expense for utility consumption, by months leased. This component measures the ability of a PHA to maintain utility expenses at a reasonable level relative to its peers. This component is calculated only on the low rent program.

(f) *Net Income or loss divided by the Expendable Fund Balance.* This component is calculated by dividing net income or loss by the expendable fund balance. This component measures how the results of the PHA's operations for the assessed fiscal year affect the PHA's viability. This component is calculated on an entity-wide basis.

§ 902.37 Threshold.

When a PHA receives a grade of F under this indicator, the PHA shall be designated a Grade F PHA. When a PHA receives a grade of D under this indicator, the PHA shall be designated a Grade D PHA.

Subpart D—PHAS Indicator #3: Management Operations

§ 902.40 Management operations assessment and performance standards.

(a) *Management certification filing date.* Under this indicator, a PHA shall electronically submit to HUD its annual management operations information no later than two months after the end of the assessed fiscal year.

(b) *Board resolution and attestation.* The management operations certification shall be approved by a resolution of the PHA Board and signed and attested to by the Executive Director. In accordance with § 902.63, appropriate sanctions for false certification shall be imposed, including civil penalties, limited denial of participation, suspension, or debarment of the signatories.

(c) *Sub-indicators of Management Operations Indicator.* The PHA's management operations shall be assessed on the basis of eight sub-indicators described in the sections below. Five sub-indicators have two or more components. Two sub-indicators have specific exemptions. The eight sub-indicators are:

(1) Vacant unit turnaround time. This sub-indicator has a single component and has specific exemptions.

(2) Capital Fund. This sub-indicator has two components.

(3) Work orders. This sub-indicator has two components.

(4) Annual inspection of dwelling units and systems. This sub-indicator has two components and has specific exemptions.

(5) Security. This sub-indicator has three components.

(6) Self-sufficiency. This sub-indicator has four components.

(7) Income verification. This sub-indicator has a single component.

(8) Rent calculation. This sub-indicator has a single component.

(d) *Assessed period.* The Management Operations certification shall include only information for the assessed fiscal year. No information is required for and no certification is required during the years a PHA is not assessed under this part in accordance with § 902.13(a).

(e) *Audit and HUD review.* A PHA's management operations submission is subject to the annual IPA or CPA audit required by the Single Audit Act and OMB Circular A–133. A PHA's management operations submission also is subject to HUD on-site review at any time in accordance with § 902.63. A PHA that is unable to provide supporting documentation for the information under any of the sub-indicators or components to which it certified will receive a zero and a grade of F for the sub-indicator or component, and its management operations grade and final overall PHAS grade will be lowered.

§ 902.41 Management operations sub-indicator #1—vacant unit turnaround time.

This sub-indicator measures a PHA's efforts during the assessed fiscal year to reduce unit turnaround time, and assesses the adequacy of a PHA's system to track unit downtime, make ready time, and lease up time.

(a) *Units Exempted.* The following two categories of units that are not considered available for occupancy are exempted from the computation of vacant unit turnaround time.

(1) Units approved for non-dwelling use. Units approved for non-dwelling use that are exempt during the assessed fiscal year are HUD-approved units used to promote self-sufficiency and anti-drug activities or for non-dwelling purposes, such as police substations, day care centers, public safety activities, or resident job training.

(2) Vacant units approved for deprogramming. Vacant units approved for deprogramming that are exempt during the assessed fiscal year are HUD-approved units for demolition and/or disposition, or units that have been combined.

(b) *Vacancy days exempted.* The vacancy days for units in the following two categories shall be exempted from the calculation of vacant unit turnaround time in the assessed fiscal year. The two categories are:

(1) Vacancy days associated with vacant units receiving section 9(d) Capital Funds during the assessed fiscal year. Vacancy days associated with a vacant unit prior to the time the unit meets the conditions of being a unit receiving section 9(d) Capital Funds, and vacancy days associated with a vacant unit after construction work has been completed or after the time period for placing the vacant unit under construction has expired, shall not be exempted.

(2) Vacancy days associated with units vacant during the assessed fiscal year due to circumstances and actions beyond a PHA's control. Circumstances and actions beyond a PHA's control may include:

(i) A legally enforceable court order or settlement agreement resulting from litigation during the assessed fiscal year;

(ii) Federal law or state law, not preempted by federal law, or the implementing regulations;

(iii) Natural disasters during the assessed fiscal year; or

(iv) Vacant units during the assessed fiscal year that have sustained casualty damage and are pending resolution of insurance claims or settlements, but only until the insurance claims are settled.

(c) *Supporting documents for section 9(d) Capital Fund units.* A PHA shall maintain information to support its determination of vacancy days associated with a vacant unit that meets the conditions of being a unit receiving section 9(d) Capital Funds under paragraph (b)(1) of this section. The PHA shall maintain:

(1) The date on which the unit met the conditions of being a vacant unit receiving section 9(d) Capital Funds; and

(2) The date on which construction work was completed or the time period

for placing the vacant unit under construction expired.

(d) *Supporting documents for vacancies beyond PHA's control.* A PHA shall maintain information to support its determination of vacancy days associated with units vacant due to circumstances and actions beyond the PHA's control under paragraph (b)(2) of this section. This supporting information is subject to review and may be requested for verification purposes at any time by HUD. The PHA shall, at a minimum, maintain:

(1) The date on which the unit met the conditions of being a unit vacant due to circumstances and actions beyond a PHA's control;

(2) Documentation identifying the specific conditions that distinguish the unit as a unit vacant due to circumstances and actions beyond a PHA's control;

(3) A description or list of the actions taken by a PHA to eliminate or mitigate these conditions; and

(4) The date on which the unit ceased to meet such conditions and became an available unit.

(e) *Ratings for vacant unit turnaround time.*

(1) Grade A: When the average number of days during the assessed fiscal year between the time a unit is vacated and a new lease takes effect for units reoccupied is less than or equal to 5 days.

(2) Grade B: When the average number of days during the assessed fiscal year between the time a unit is vacated and a new lease takes effect for units reoccupied is greater than 5 days and less than or equal to 10 days.

(3) Grade C: When the average number of days during the assessed fiscal year between the time a unit is vacated and a new lease takes effect for units reoccupied is greater than 10 days and less than or equal to 20 days.

(4) Grade D: When the average number of days during the assessed fiscal year between the time a unit is vacated and a new lease takes effect for units reoccupied is greater than 20 days and less than or equal to 30 days.

(5) Grade F: When the average number of days during the assessed fiscal year between the time a unit is vacated and a new lease takes effect for units reoccupied is greater than 30 days.

§ 902.42 Management operations sub-indicator #2—Capital Fund.

This sub-indicator grades the funds provided to a PHA from the Capital Fund under section 9(d) of the Act (42 U.S.C. 1437g(9)(d)) that during the assessed fiscal year remain unobligated by a PHA after two years beyond the date on which the funds became available to a PHA for obligation in the case of modernization, or the date on which the agency accumulates adequate funds to undertake modernization, substantial rehabilitation, or new construction of units, and/or remain unexpended by a PHA after four years beyond the date on which the funds became available to a PHA for obligation. Funds from the Capital Fund under section 9(d) of the Act (42 U.S.C. 1437g(d)(2)) do not include HOPE VI program funds and Vacancy Reduction program funds.

(a) *Applicability.* This sub-indicator is not applicable for PHAs that choose not to receive Capital Funds under section 9(d) of the Act.

(b) *Components of Capital Fund sub-indicator.* The two components of the Capital Fund sub-indicator are:

(1) Unexpended funds over four years old; and

(2) Timeliness of fund obligation.

(c) *Grades for Capital Fund sub-indicator.*

(1) Component #1. Unexpended funds over four years old.

(i) Grade A: When a PHA has no unexpended funds during the assessed fiscal year that are over four years old beyond the date on which the funds became available to a PHA for expenditure, or when the Secretary has approved a time extension because of litigation, obtaining approvals of the federal, state, or local government, complying with environmental assessment or abatement requirements, relocating residents, or any other reason established by the Secretary by notice published in the **Federal Register**.

(ii) Grade F: When a PHA has unexpended funds during the assessed fiscal year over four years old beyond the date on which the funds became available to a PHA for expenditure and is unable to demonstrate any of the above conditions.

(2) Component #2. Timeliness of fund obligation.

(i) Grade A: When a PHA has no unobligated funds during the assessed fiscal year over two years old beyond the date on which the funds became available to a PHA for obligation, or the Secretary has approved a time extension because of litigation, obtaining approvals of the federal, state, or local government, complying with environmental assessment or abatement requirements, relocating residents or any other reason established by the Secretary by notice published in the **Federal Register**.

(ii) Grade F: When a PHA has unobligated funds during the assessed fiscal year over two years old beyond the fiscal year in which funds were obligated by HUD to the PHA and is unable to demonstrate any of the above conditions.

§ 902.43 Management operations sub-indicator #3—work orders.

This sub-indicator examines the time it takes to complete or abate emergency work orders; the average number of days non-emergency work orders were active during the assessed fiscal year; and any progress a PHA has made during the preceding three fiscal years to reduce the period of time non-emergency work orders were active.

(a) *Adequacy of work order system.* It is implicit in this sub-indicator that the PHA have an adequate work order system in terms of how a PHA accounts for and controls its work orders, and its timeliness in preparing/issuing work orders.

(b) *Grades for work orders.*

(1) Component #1. Emergency work orders.

(i) Grade A: When at least 99 percent of emergency work orders during a PHA's assessed fiscal year were completed or the emergency was abated within 24 hours or less.

(ii) Grade B: When at least 98 percent of emergency work orders during a PHA's assessed fiscal year were completed or the emergency was abated within 24 hours or less.

(iii) Grade C: When at least 97 percent of emergency work orders during a PHA's assessed fiscal year were completed or the emergency was abated within 24 hours or less.

(iv) Grade D: When at least 96 percent of emergency work orders during a PHA's assessed fiscal year were completed or the emergency was abated within 24 hours or less.

(v) Grade F: When less than 96 percent of emergency work orders during a PHA's assessed fiscal year were completed or the emergency was abated within 24 hours or less.

(2) Component #2. Non-emergency work orders. The PHA shall track all non-emergency work orders that were active during the assessed fiscal year (including preventive maintenance work orders). A PHA is not required to track non-emergency work orders from the date they are deferred for the Capital Fund Program, issued to prepare a vacant unit for re-rental, or issued for the performance of cyclical maintenance.

(i) Grade A: When the average number of days non-emergency work orders were active during the assessed fiscal year is 7 days or less.

(ii) Grade B: When the average number of days non-emergency work

orders were active during the assessed fiscal year is more than 7 days and less than or equal to 15 days.

(iii) Grade C: When a PHA is in one of the following categories:

(A) The average number of days non-emergency work orders were active during the assessed fiscal year is more than 15 days and less than or equal to 22 days; or

(B) The PHA has reduced the average number of days non-emergency work orders were active during the assessed fiscal year by at least 15 days during the past three fiscal years.

(iv) Grade D: When a PHA is in one of the following categories:

(A) The average number of days non-emergency work orders were active during the assessed fiscal year is more than 22 days and less than or equal to 30 days; or

(B) The PHA has reduced the average number of days non-emergency work orders were active during the assessed fiscal year by at least 10 days during the past three fiscal years.

(v) Grade F: When the average number of days non-emergency work orders were active during the assessed fiscal year is more than 30 days.

§ 902.44 Management operations sub-indicator #4—annual inspection of dwelling units and systems.

This sub-indicator examines the percentage of dwelling units and systems that a PHA inspects on an annual basis in order to determine short-term maintenance needs and long-term modernization needs. The PHA is required to conduct dwelling unit and systems inspections using the HUD Uniform Physical Condition Standards (UPCS) set forth in 24 CFR part 5, subpart G.

(a) *Adequacy of inspection program.* It is implicit in this sub-indicator that the PHA have an adequate inspection program in terms of tracking inspections, ensuring the thoroughness/quality of the PHA's inspections, and tracking needed repairs.

(b) *Units to be inspected.* All occupied units and/or units available for occupancy are required to be inspected. This includes units used for non-dwelling purposes, those occupied by an employee, and those used for resident services.

(c) *Units exempted.* Units in the following categories are exempted and not included in the calculation of the total number of units, and the number and percentage of units inspected for the assessed fiscal year.

(1) Occupied units for which a PHA has documented two attempts to inspect the unit during the assessed fiscal year, but only if the PHA can document that it has initiated eviction proceedings, and is in the process of evicting the legal or illegal occupant(s) as provided under the lease to ensure that the unit can be subsequently inspected.

(2) Units vacant during the assessed fiscal year for the following reasons:

(i) Vacant units that are receiving section 9(d) Capital Funds; or

(ii) Vacant units that are documented to be uninhabitable for reasons beyond a PHA's control due to:

(A) High/unsafe levels of hazardous/toxic materials;

(B) An order of the local health department or state agency or a directive of the Environmental Protection Agency;

(C) Natural disasters; or

(D) Units that are kept vacant because they are structurally unsound and documented action has been initiated to rehabilitate or demolish the units.

(d) *Systems exempted.* Systems that are a part of individual dwelling units that are exempted, or a part of a building where all of the dwelling units in the building are exempted, are also exempted from the calculation of this sub-indicator.

(e) *Grades for annual inspection of dwelling units and systems.*

(1) Component #1. Annual inspection of dwelling units.

(i) Grade A: When a PHA inspected 100 percent of its units during the assessed fiscal year and, if repairs were necessary for compliance with 24 CFR part 5, subpart G:

(A) Completed the repairs during the inspection;

(B) Issued work orders for the repairs; or

(C) Referred similar work items to the current year's section 9(d) Capital Fund program, or to next year's section 9(d) Capital Fund program if there are fewer than three months remaining before the end of a PHA's assessed fiscal year from the time the inspection was completed.

(ii) Grade B: When a PHA inspected less than 100 percent but at least 98 percent of the units during the assessed fiscal year and, if repairs were necessary for compliance with 24 CFR part 5, subpart G:

(A) Completed the repairs during the inspection;

(B) Issued work orders for the repairs; or

(C) Referred similar work items to the current year's section 9(d) Capital Fund program, or to next year's section 9(d) Capital Fund program if there are fewer than three months remaining before the end of a PHA's assessed fiscal year from the time the inspection was completed.

(iii) Grade C: When a PHA inspected less than 98 percent but at least 97 percent of its units during the assessed fiscal year and, if repairs were necessary for compliance with 24 CFR part 5, subpart G:

(A) Completed the repairs during the inspection;

(B) Issued work orders for the repairs; or

(C) Referred similar work items to the current year's section 9(d) Capital Fund program, or to next year's section 9(d) Capital Fund program if there are fewer than three months remaining before the end of a PHA's assessed fiscal year from the time the inspection was completed.

(iv) Grade D: When a PHA inspected less than 97 percent but at least 96 percent of its units during the assessed fiscal year and, if repairs were necessary for compliance with 24 CFR part 5, subpart G:

(A) Completed the repairs during the inspection;

(B) Issued work orders for the repairs; or

(C) Referred similar work items to the current year's section 9(d) Capital Fund program, or to next year's section 9(d) Capital Fund program if there are fewer than three months remaining before the end of a PHA's assessed fiscal year from the time the inspection was completed.

(v) Grade F: When a PHA has failed to:

(A) Inspect at least 96 percent of its units during the assessed fiscal year for compliance with 24 CFR part 5, subpart G;

(B) Correct deficiencies during the inspection or issue work orders for the repairs; or

(C) Refer similar work items to the current year's section 9(d) Capital Fund program, or to next year's section 9(d) Capital Fund program if there are fewer than three months remaining before the end of a PHA's assessed fiscal year from the time the inspection was completed.

(2) Component #2. Annual inspection of systems (including common areas and non-dwelling space).

(i) Grade A: When a PHA inspected all major systems during the assessed fiscal year at 100 percent of its buildings and sites, according to its maintenance plan. The inspection must include:

(A) Performing the required maintenance on structures and systems in accordance with 24 CFR part 5, subpart G, and manufacturers' specifications;

(B) Issuing work orders for maintenance/repairs; or

(C) Including identified deficiencies in the current year's section 9(d) Capital Fund program, or in next year's section 9(d) Capital Fund program if there are fewer than three months remaining before the end of the PHA's assessed

fiscal year at the time the inspection was performed.

(ii) Grade B: When a PHA inspected all major systems for less than 100 percent but at least 95 percent of its buildings and sites during the assessed fiscal year, according to its maintenance plan. The inspection must include:

(A) Performing the required maintenance on structures and systems in accordance with 24 CFR part 5, subpart G, and manufacturers' specifications;

(B) Issuing work orders for maintenance/repairs; or

(C) Including identified deficiencies in the current year's section 9(d) Capital Fund program, or in next year's section 9(d) Capital Fund program if there are fewer than three months remaining before the end of the PHA's assessed fiscal year at the time the inspection was performed.

(iii) Grade C: When a PHA inspected all major systems for less than 95 percent but at least 90 percent of its buildings and sites during the assessed fiscal year, according to its maintenance plan. The inspection must include:

(A) Performing the required maintenance on structures and systems in accordance with 24 CFR part 5, subpart G, and manufacturers' specifications;

(B) Issuing work orders for maintenance/repairs; or

(C) Including identified deficiencies in the current year's section 9(d) Capital Fund program, or in next year's section 9(d) Capital Fund program if there are fewer than three months remaining before the end of the PHA's assessed fiscal year at the time the inspection was performed.

(iv) Grade D: When a PHA inspected all major systems for less than 90 percent but at least 85 percent of its buildings and sites during the assessed fiscal year, according to its maintenance plan. The inspection must include:

(A) Performing the required maintenance on structures and systems in accordance with 24 CFR part 5, subpart G, and manufacturers' specifications;

(B) Issuing work orders for maintenance/repairs; or

(C) Including identified deficiencies in the current year's section 9(d) Capital Fund program, or in next year's section 9(d) Capital Fund program if there are fewer than three months remaining before the end of the PHA's assessed fiscal year at the time the inspection was performed.

(v) Grade F: When a PHA failed to:

(A) Inspect all major systems for at least 85 percent of its buildings and sites during the assessed fiscal year and perform the required maintenance on these systems in accordance with 24 CFR part 5, subpart G, and manufacturers' specifications;

(B) Issue work orders for maintenance/repairs; or

(C) Include identified deficiencies in the current year's section 9(d) Capital Fund program, or in next year's section 9(d) Capital Fund program if there are fewer than three months remaining before the end of the PHA's assessed fiscal year at the time the inspection was performed.

§ 902.45 Management operations sub-indicator #5—security.

This sub-indicator evaluates a PHA's performance in tracking all types of crime-related problems by category of crime and date, time and place of incident in its properties; reporting incidents of crime to local law enforcement agencies; adopting and implementing applicant screening and resident eviction policies and procedures, and other anticrime strategies; coordinating with local government officials and residents in the properties on the implementation of such strategies. There are three components.

(a) *Policies.* The applicant screening and resident eviction policies and procedures adopted by the Board and implemented by the PHA should be consistent with section 6(j)(1)(I) of the 1937 Act (42 U.S.C. 1437d(j)(1)(I)).

(b) *Grades for the components of resident and applicant information.*

(1) Component #1. Tracking and reporting crime-related problems.

(i) Grade A: When a PHA's Board, by resolution, adopted policies and a PHA implemented procedures and can document that it:

(A) Tracked all types of crime and crime-related problems by category, date, time, and place in at least 95 percent of its property during the assessed fiscal year, and the action taken, as appropriate;

(B) Had a cooperative system for tracking and reporting incidents of crime during the assessed fiscal year to local police authorities to improve law enforcement and crime prevention; and

(C) Coordinated with local government officials and its residents during the assessed fiscal year on the implementation of anticrime strategies.

(ii) Grade B: When a PHA's Board, by resolution, adopted policies and a PHA implemented procedures and can document that it:

(A) Tracked all types of crime and crime-related problems by category, date, time, and place in at least 85 percent of its property during the assessed fiscal year, and the action taken, as appropriate; and

(B) Reported incidents of crime during the assessed fiscal year to local police authorities to improve law enforcement and crime prevention.

(iii) Grade C: When a PHA's Board, by resolution, adopted policies and a PHA implemented procedures and can document that it:

(A) Tracked all types of crime and crime-related problems by category, date, time, and place in at least 75 percent of its property during the assessed fiscal year, and the action taken, as appropriate; and

(B) Reported incidents of crime during the assessed fiscal year to local police authorities to improve law enforcement and crime prevention.

(iv) Grade D: When a PHA's Board, by resolution, adopted policies and a PHA implemented procedures and can document that it:

(A) Tracked all types of crime and crime-related problems by category, date, time, and place in at least 65 percent of its property during the assessed fiscal year, and the action taken, as appropriate; and

(B) Reported incidents of crime during the assessed fiscal year to local police authorities to improve law enforcement and crime prevention.

(v) Grade F: When a PHA's Board, by resolution, did not adopt policies or a PHA did not implement procedures, did not track any crime, or cannot document that it:

(A) Tracked all types of crime and crime-related problems by category, date, time, and place in at least 65 percent of its property during the assessed fiscal year, and the action taken, as appropriate; or

(B) Reported incidents of crime during the assessed fiscal year to local police authorities to improve law enforcement and crime prevention.

(2) Component #2. Screening of Applicants.

(i) Grade A: When a PHA's Board, by resolution, adopted policies and a PHA implemented procedures and can document that it successfully screened out and denied admission to public housing applicants during the assessed fiscal year who:

(A) Had a recent history of criminal activity involving crimes to persons or property and/or other criminal acts that would adversely affect the health, safety or welfare of other residents or PHA personnel;

(B) Were evicted, because of drug-related criminal activity, from housing assisted under the Act, for a minimum of a three year period beginning on the date of such eviction, unless the

applicant successfully completed, since the eviction, a rehabilitation program approved by a PHA;

(C) A PHA had reasonable cause to believe are illegally using a controlled substance; or

(D) A PHA had reasonable cause to believe abuses alcohol in a way that causes behavior that may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA personnel.

(ii) Grade F: When a PHA's Board has not adopted policies or has not implemented procedures that result in screening out and denying admission during the assessed fiscal year to a public housing applicant who meets the criteria as described in paragraph (b)(2)(i) of this section, or the screening procedures do not result in the denial of admission to a public housing applicant who meets the criteria as described in paragraph (b)(2)(i) of this section.

(3) Component #3. Lease enforcement.

(i) Grade A: When a PHA's Board, by resolution, adopted policies and a PHA implemented procedures and can document that it appropriately evicted during the assessed fiscal year any public housing resident who:

(A) A PHA had reasonable cause to believe engages in any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA personnel;

(B) A PHA had reasonable cause to believe engages in any drug-related criminal activity (as defined at section 3(b) of the Act (42 U.S.C. 1437a(b)(9)) on or off a PHA's property; or

(C) A PHA had reasonable cause to believe abuses alcohol in such a way that causes behavior that may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA personnel.

(ii) Grade F: When a PHA's Board has not adopted policies or has not implemented procedures that document results in the eviction during the assessed fiscal year of any public housing resident who meets the criteria as described in paragraph (b)(3)(i) of this section, or the eviction procedures do not result in the eviction of public housing residents who meet the criteria as described in paragraph (b)(3)(i) of this section.

§ 902.46 Management operations sub-indicator #6—self-sufficiency.

This sub-indicator measures a PHA's efforts to coordinate, promote or provide effective programs and activities to promote the self-sufficiency of residents and resident participation in the administration of public housing.

(a) *General applicability.* A PHA that does not have a mandatory FSS program shall not be assessed under the applicable component of this sub-indicator. The weight for that component shall be redistributed among the remaining components of this sub-indicator.

(b) *Grades for self-sufficiency.*

(1) Component #1. Economic self-sufficiency. A PHA shall use its best efforts to enter into cooperative agreements with state, local and other agencies providing welfare or public assistance that may provide information to facilitate a PHA in targeting assistance and services supporting economic self-sufficiency.

(i) Grade A: When a PHA entered into an agreement with a public assistance provider and can document that information is being provided to facilitate assistance to the PHA in targeting assistance and services supporting economic self-sufficiency.

(ii) Grade C: When a PHA entered into an agreement with a public assistance provider, but cannot document that information is being provided to facilitate assistance to the PHA in targeting assistance and services supporting economic self-sufficiency.

(iii) Grade F: When a PHA has not entered into an agreement with a public assistance provider and has not documented that information is being provided to facilitate assistance to the PHA in targeting assistance and services supporting economic self-sufficiency.

(2) Component #2. FSS. After assessing the needs of families and the training and employment resources in the community, a PHA and other local partners, such as public assistance providers, work together to develop a comprehensive program that can provide each family with appropriate education, job training and other services to enable them to obtain employment.

(i) Grade A: When a PHA documents that it has a mandatory FSS program and documents that it:

(A) Met or exceeded at least 80 percent of the total proposed participation; and

(B) At least 30 percent of the FSS families have escrow accounts greater than zero.

(ii) Grade C: When a PHA documents that it has a mandatory FSS program and documents that it:

(A) Met at least 60 percent of the total proposed participation; and

(B) At least 30 percent of the FSS families have escrow accounts greater than zero.

(iii) Grade F: When a PHA documents that it has a mandatory FSS program and cannot document its performance or documents that it:

(A) Met less than 60 percent of the total proposed participation; or

(B) Less than 30 percent of the FSS families have escrow accounts greater than zero.

(3) Component #3. Resident job training and employment. A PHA has executed a Memorandum of Understanding for partnering locally with a social service, labor, Temporary Assistance for Needy Families (TANF) or similar type agency or non-profit to supply employment and/or job training and placement for residents. A PHA has hired residents under in-house apprenticeship programs or through force account employment to perform maintenance and repairs, or Section 3 compliance requirements incorporated into agency procurement and contracting solicitations and awards. A PHA has provided space and/or transportation for residents to access literacy, job training, and supportive services in connection with residents obtaining and maintaining employment.

(i) Grade A: When a PHA executed a Memorandum of Understanding for partnering locally with a social service, labor, TANF, or similar type agency or non-profit to supply employment and/or job training and placement for residents and can document that it has hired residents under in-house apprenticeship programs or through force account employment to perform maintenance and repairs, or under Section 3 compliance requirements. The PHA documents that it has incorporated Section 3 requirements in the agency's procurements and contracting solicitation and awards and provides space and/or transportation for residents to access literacy, job training, and supportive services in connection with residents obtaining and maintaining employment.

(ii) Grade C: When a PHA executed a Memorandum of Understanding for partnering locally with a social service, labor, TANF, or similar type agency or non-profit to supply employment and/or job training and placement for residents, but cannot document that it has hired residents under in-house apprenticeship programs, or through force account employment to perform maintenance and repairs and Section 3 compliance requirements. The PHA cannot document that it has incorporated Section 3 requirements in the agency's procurements and contracting solicitation and awards and does not provide space and/or transportation for residents to access literacy, job training, and supportive services in connection

with residents obtaining and maintaining employment.

(iii) Grade F: When a PHA has not executed a Memorandum of Understanding for partnering locally with a social service, labor, TANF, or similar type agency or non-profit to supply employment and/or job training and placement for residents, and has not hired residents under in-house apprenticeship programs, through force account employment to perform maintenance and repairs and or Section 3 compliance requirements. The PHA has not incorporated Section 3 requirements in the agency's procurements and contracting solicitation and awards and does not provide space and/or transportation for residents to access literacy, job training, and supportive services in connection with residents obtaining and maintaining employment.

(4) Component #4. Resident participation in management, business property, and public housing administration. A PHA has executed a Memorandum of Understanding that provides for at least quarterly meetings with a Resident Advisory Board and/or duly elected resident organizations to assure quality service in the delivery of property management and maintenance services. For public housing administration, a PHA has entered into written agreements with RMCs and/or resident-owned businesses to provide full or partial property management and maintenance services, or supportive services to residents.

(i) Grade A: When a PHA executed a Memorandum of Understanding with a Resident Advisory Board and/or duly elected resident organizations and documents that quarterly meetings were held to assure quality service in the deliverance of property management and maintenance services. The PHA entered into written agreements with RMCs and/or resident-owned businesses and can document that it provided full or partial property management and maintenance services.

(ii) Grade C: When a PHA executed a Memorandum of Understanding with a Resident Advisory Board and/or duly elected resident organizations, but cannot document that quarterly meetings were held to assure quality service in the deliverance of property management and maintenance services. The PHA has entered into written agreements with RMCs and/or resident-owned businesses, but cannot document that it provided full or partial property management and maintenance services.

(iii) Grade F: When a PHA has not executed a Memorandum of Understanding with a Resident Advisory Board and/or duly elected resident organizations, and cannot document that quarterly meetings were held to assure quality service in the deliverance of property management and maintenance services. The PHA has not entered into written agreements with RMCs and/or resident-owned businesses, and cannot document that it provided full or partial property management and maintenance services.

§ 902.47 Management operations sub-indicator # 7—income verification.

This sub-indicator evaluates a PHA's performance in and ability to properly verify applicant/resident income.

(a) *Grade A:* When a PHA, at the time of admission and annual reexamination, correctly verifies and determines adjusted annual income for 100 percent of assisted families.

(b) *Grade F:* When a PHA, at the time of admission and annual reexamination, does not correctly verify and determine adjusted annual income for 100 percent of assisted families.

§ 902.48 Management operations sub-indicator #8—rent calculation.

This sub-indicator evaluates a PHAs performance in and ability to correctly calculate resident rents.

(a) *Grade A:* When a PHA correctly calculates the rent of 100 percent of its residents by applying the appropriate deductions, exclusions and allowances; and when the family is responsible for utilities under the lease, the PHA uses the appropriate utility allowance for the unit leased in determining gross rent.

(b) *Grade F:* When a PHA does not correctly calculate the rent of 100 percent of its residents by applying the appropriate deductions, exclusions and allowances; or when the family is responsible for utilities under the lease, the PHA did not use the appropriate utility allowance for the unit leased in determining gross rent.

§ 902.49 Threshold.

When a PHA receives a grade of F under this indicator, the PHA shall be designated a Grade F PHA. When a PHA receives a grade of D under this indicator, the PHA shall be designated a Grade D PHA.

Subpart E—PHAS Indicator #4: Resident Service and Satisfaction

§ 902.50 Resident service and satisfaction assessment.

(a) *Method of assessment, generally.* The resident service and satisfaction assessment, which measures the level of resident satisfaction with living conditions, is performed through a survey. A third party organization administers the survey to the PHA residents.

(b) *Survey process.* The PHA shall manage the survey process in accordance with a methodology prescribed by HUD. In addition, PHAs must address any issues identified in the survey. As part of the survey process, the PHA is responsible for:

(1) Updating the unit addresses;

(2) Certifying to the update of the unit addresses; and

(3) Completing implementation plan activities and certifying to their completion.

(c) *HUD review.* The completion of the required actions and the corresponding certifications are subject to HUD on-site review at any time. A PHA that is unable to provide supporting documentation to HUD will receive a zero and a grade of F for this indicator and its final overall PHAS grade will be lowered.

(d) *Frequency of assessment.* In accordance with § 902.13(a), HUD will conduct a resident service and satisfaction survey for an assessed fiscal year only. For fiscal years when a PHA is not assessed under this part, the PHA may undertake a resident service and satisfaction survey on its own.

§ 902.51 Certifications and updating of unit address information.

(a) *Electronic unit address update and verification.* At the beginning of the annual survey process the PHA is required to ensure that its public housing unit addresses are accurate.

(1) All PHAs are required to electronically update unit address information in the Public and Indian Housing Information Center (PIC) database. All PHAs are required to make any additions, deletions and corrections to their respective unit addresses in PIC.

(2) After updating the unit address information electronically, the PHA will certify electronically in the resident assessment sub-system (RASS) database that the list of unit addresses for their property residents is correct.

(3) A PHA is required to both update and certify its unit address information to ensure that HUD has complete and accurate information, and to ensure that the surveys reach the residents. If a random sample of residents cannot be selected to participate in the survey because the unit addresses are incorrect or obsolete, HUD is not able to conduct the survey at that PHA. In that case, the PHA shall receive a zero and a grade of F for the Resident Service and Satisfaction Indicator.

(b) *Implementation plan certification.* All PHAs are required to certify to their implementation plans electronically in

the RASS database in accordance with HUD guidance.

§ 902.52 Resident survey sampling.

A random sample of units shall be chosen to receive the Customer Service and Satisfaction Survey at each PHA. The units shall be randomly selected based on the total number of occupied and vacant units at the PHA. The unit sampling for each PHA is based on the unit representation of each property in relation to the size of the entire PHA.

§ 902.53 Third party administrator.

The third party administrator designated by HUD is responsible for performing the following functions as part of the survey process.

(a) Distributing the survey to a randomly selected sample of units at each PHA;

(b) Receiving the completed surveys;

(c) Collecting, scanning, and aggregating results of the survey;

(d) Transmitting the survey results to HUD for analysis and grading; and

(e) Maintaining the individual surveys and ensuring that the responses to the surveys are kept confidential.

§ 902.54 Resident service and satisfaction grading and survey contents.

(a) *Grading.* A PHA shall be graded A, B, C, D or F on the Resident Service and Satisfaction Indicator survey results. The overall resident service and satisfaction grade for a PHA is based on the numeric value for each property within the PHA. It is a weighted average of the numeric value of each property-level grade. The final grades are based on the percentage of points out of the total number of possible points that the PHA receives on the survey, converted to a 0.0 to 4.0 scale. The methods for obtaining the weighted average and the final resident service and satisfaction grades are more fully explained in the resident service and satisfaction grading process notice.

(b) *Survey contents.* The survey content focuses on resident evaluation of the overall living conditions. Residents are asked questions about:

(1) Maintenance, repair, and services (*e.g.*, work order response);

(2) Communications (*e.g.*, perceived effectiveness);

(3) Safety (*e.g.*, perception of personal security);

(4) Property appearance; and

(5) Self-Sufficiency.

§ 902.55 Threshold.

A PHA shall receive a zero and a grade of F under this indicator if the survey process is not managed as directed by HUD, it is determined that the survey results have been altered, or it is determined that the surveys were completed by someone other than the designated residents. When a PHA receives a grade of F under this indicator, the PHA shall be designated a Grade F PHA. When a PHA receives a grade of D under this indicator, the PHA shall be designated a Grade D PHA.

Subpart F—PHAS Submission Requests and Grade Adjustments

§ 902.60 Requests for manual and late submissions.

(a) *Request to manually submit PHAS Indicators #2 and #3.* If the electronic submission requirement poses an administrative or cost burden, a PHA may request approval to submit the unaudited year-end financial information and management operations certification manually. The request must include the reasons why the PHA is unable to submit the data electronically. The PIH–REAC must receive the request for manual submission 60 days prior to the submission due date for each PHAS indicator. A PHA shall forward its request for manual submission in writing to the Director of PIH–REAC, 1280 Maryland Avenue, SW., Suite 800, Washington, DC 20024–2135 or submit its request to *phas@hud.gov* by e-mail. HUD shall respond to the PHA's request and forward its determination in writing or by e-mail to the PHA. Approvals are for the PHA's assessed fiscal year only.

(b) *Request to manually submit PHAS Indicator #4.* If the electronic updating and certification requirements pose an administrative or cost burden, a PHA may request approval to manually update resident unit addresses, certify to updated addresses and certify to the survey implementation plan. The request must include the reason why the PHA is unable to update and certify electronically. The PIH–REAC must receive the request 30 days prior to the due dates for the resident unit address update and certification and for the certification to the survey implementation plan. A PHA shall forward its request in writing to the Director of PIH–REAC, 1280 Maryland Avenue, SW., Washington, DC 20024–2135 or submit its request to *phas@hud.gov* by e-mail. HUD shall respond to the PHA's request and forward its determination in writing to the PHA. Approvals shall be only for the PHA's current survey cycle.

(c) *Request for extension of time to make submissions.* In the event of extenuating circumstances, a PHA may request an extension of time to submit its unaudited financial information, management operations certification, and resident service and satisfaction certifications. To receive an extension, a PHA must ensure that the PIH–REAC receives the PHA's extension request (electronic or written) 15 days before the submission due date. The PHA's extension request (electronic or written) must include a justification as to why the PHA cannot submit the information by the submission due date. A PHA shall submit its request for an extension of time to the Director of PIH–REAC, 1280 Maryland Avenue, SW., Suite 800, Washington, DC 20024–2135, or submit its request to *phas@hud.gov* by email. HUD shall forward its determination (electronic or written) to the PHA.

(d) *Request for extension of time to submit audited financial information.* In accordance with OMB Circular A–133, HUD, for good cause, may grant PHAs an extension of time to submit audited financial information. HUD shall consider PHA requests for extensions of the report submission due date (established by OMB as no later than nine months after the end of the fiscal year). The PHA's extension request (electronic or written) must include a justification as to why the PHA cannot submit the information by the submission due date. The OMB requires that the request be submitted prior to the submission due date. A PHA shall submit its request for an extension of time to the Director of PIH–REAC, 1280 Maryland Avenue, SW., Suite 800, Washington, DC 20024–2135, or submit its request to *phas@hud.gov* by email. HUD shall forward its determination (electronic or written) to the PHA.

§ 902.61 Failure to submit data.

(a) *Failure to submit data by due date.* (1) HUD shall impose letter grade deductions if a PHA, without a finding of good cause by HUD, submits its year-end unaudited financial information or management operations certification, required by this part, past the due dates. The letter grade deductions will be imposed on each indicator beginning on the eighth day after the submission due date.

(2) A PHA shall receive a presumption rating of zero and a grade of F for each PHAS indicator for which the certification or year-end unaudited financial information is not received within 49 days after the due date.

(i) TABLE 1.—LATE SUBMISSION FOR EITHER UNAUDITED FINANCIAL INFORMATION OR MANAGEMENT OPERATIONS CERTIFICATION

If a PHA submits either its unaudited financial information or management operations certification * * *	Then * * *
(A) more than 7 days, but no more than 21 days after the submission due date.	the PHA's grade will be lowered one letter grade for the indicator submitted late.
(B) more than 21 days, but no more than 35 days, after the submission due date.	the PHA's grade will be lowered two letter grades for the indicator submitted late.
(C) more than 35 days, but no more than 49 days, after the submission due date.	the PHA's grade will be lowered three letter grades for the indicator submitted late.
(D) more than 49 days after the submission due date	the PHA will receive a late presumptive rating of zero and its grade for the indicator submitted late will be an F.

(ii) TABLE 2.—LATE SUBMISSION FOR BOTH UNAUDITED FINANCIAL INFORMATION AND MANAGEMENT OPERATIONS CERTIFICATION

If a PHA submits both its unaudited financial information and management operations certification * * *	Then * * *
(A) more than 7 days, but no more than 21 days after the submission due date.	one letter grade will be deducted from each indicator submitted during this time period.
(B) more than 21 days, but no more than 35 days after the submission due date.	two letter grades will be deducted from each indicator submitted during this time period.
(C) more than 35 days, but no more than 49 days, after the submission due date.	three letter grades will be deducted from each indicator submitted during this time period.
(D) more than 49 days after the submission due date	the PHA will receive a late presumptive rating of zero and its grade for both indicators will be an F.

(3) The PHA shall receive a presumptive rating of zero and a grade of F for the Financial Condition Indicator, if a PHA, without a finding of good cause, submits its audited financial information after the due date.

(i) TABLE 3.—LATE SUBMISSION FOR AUDITED FINANCIAL INFORMATION

If a PHA submits its audited financial information * * *	Then * * *
(A) more than 9 months after the PHA's fiscal year end	the PHA will receive a late presumptive rating of zero and its financial condition indicator grade will be an F.
(B) [Reserved].	

(b) *Presumptive rating of zero and grade of F.* If the PHA receives a presumptive rating of zero and grade of F for any PHAS indicator due to failure to submit a certification, year-end financial information, or audited financial information by the due date, including any applicable extension of the due date, the PHA shall be designated a Grade F PHA or Capital Fund Grade F PHA pursuant to § 902.10.

(c) *Rejected submissions.* When HUD rejects a PHA's year-end unaudited financial information or management operations certifications after the due date, a PHA shall have 15 days from the date of the rejection to resubmit the information without a penalty being applied.

§ 902.63 PHAS grade adjustments.

(a) *Issuance of grade by HUD.* HUD will issue an overall PHAS grade for each PHA after the later of one month after the submission due date for financial information and the other required certifications, or one month after submission by the PHA of its financial information and the other required information certifications. The overall PHAS grade becomes the PHA's final grade upon issuance by HUD.

(b) *Adjustments to the PHAS grade.* Adjustments may be made to a PHA's final overall PHAS grade as a result of:

(1) The IPA or CPA audit, as provided in subpart C;

(2) Property reinspections;

(3) The appeal process provided in § 902.69;

(4) Determinations as a result of HUD's Office of Inspector General (OIG) investigation and/or audit;

(5) Investigations by HUD's Office of Fair Housing and Equal Opportunity;

(6) A HUD conducted compliance review or quality assurance review;

(7) A HUD conducted certification review;

(8) A Field Office on-site review; and/or

(9) An investigation by any appropriate legal authority.

(c) *Record retention and verification of information submitted.* (1) A PHA shall maintain documentation for three years verifying information on all indicators, sub-indicators, and components for HUD on-site review.

(2) A PHA's certifications, year-end financial information, and all supporting documentation are subject to verification by HUD at any time, including review by an independent auditor as authorized by section 6(j)(6) of the Act (42 U.S.C. 1437d(j)(6)). Appropriate sanctions for false certification shall be imposed, including civil penalties, limited denial of participation, suspension, or debarment of the signatories, the loss of Grade A PHA designation pursuant to § 902.67, and a lower grade under the PHAS indicators that shall result in a lower overall PHAS grade.

(3) A PHA that cannot provide supporting documentation to HUD, or to the PHA's IPA or CPA for the assessment under any indicator(s), sub-indicator(s), and/or component(s) shall receive a zero and a grade of F for that indicator(s), sub-indicator(s), and/or component(s), and its overall PHAS grade shall be lowered.

(d) *Review of a PHA's audited financial information.* As part of HUD's ongoing quality assurance process, HUD may conduct a quality assurance review of a PHA's IPA or CPA statement and work papers. If a PHA's audit is determined to be deficient as a result of a quality assurance review, HUD may, at its discretion, select the audit firm that will perform a new audit of the PHA and may serve as the audit committee for the audit in question. This quality assurance review is important to determine the accuracy of the grading under Financial Condition Indicator #2.

§ 902.67 Withholding, denying, and rescinding grades.

(a) *Withholding, denying, and rescinding grade/designation.* (1) In exceptional circumstances, HUD may conduct any review as it may determine necessary, and may deny or rescind incentives for Grade A, B, C, or D PHA designations even though a PHA has satisfied all of the PHAS indicators for Grade A, B, C, or D PHA designation. HUD may do so only in the case of a PHA that:

(i) Is operating under a special agreement with HUD;

(ii) Is involved in litigation that bears directly upon the physical, financial, or management performance of a PHA;

(iii) Is operating under a court order;

(iv) Demonstrates substantial evidence of fraud or misconduct, including evidence that the PHA's certifications submitted under this part, are not supported by the facts as evidenced by sources such as a HUD monitoring and/or compliance review, routine reports, a HUD (OIG) investigation and/or audit, an IPA's or CPA's audit, or an investigation by any appropriate legal authority; or

(v) Demonstrates substantial noncompliance in one or more areas of a PHA's required compliance with applicable laws and regulations, including areas not assessed under the PHAS. Areas of substantial noncompliance include, but are not limited to, noncompliance with civil rights, procurements, nondiscrimination and fair housing laws and regulations, or the ACC. Substantial noncompliance casts doubt on the capacity of a PHA to preserve and protect its public housing properties and operate them consistent with Federal laws and regulations.

(2) If a Grade A, B, C, or D PHA designation is denied or rescinded, the PHA shall be a Grade F PHA.

(b) *Effect of denial or rescission.* The denial or rescission of a designation of a Grade A, B, C, or D PHA will result in an overall final PHAS grade of zero.

(c) *Procedures for request for reinstatement of grade/designation.* A PHA that disagrees with the denial or rescission of its grade/designation may request reinstatement of the grade/designation. The request, which must be in writing and include reasons for the reinstatement, must be directed to the Assistant Secretary. Requests must be sent to: Assistant Secretary for Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4100, Washington, DC 20410.

§ 902.68 Technical review of results of PHAS Indicators #1 or #4.

(a) *Request for technical reviews.* A PHA may request a technical review of physical inspection results and resident survey results.

(1) For all technical reviews, the burden of proof is on the PHA to show that an error occurred.

(2) A PHA's request for technical review must be submitted in writing to the Director of PIH–REAC, 1280 Maryland Avenue, SW., Suite 800, Washington, DC 20024–2135. PIH–REAC must receive the written request no later than 15 days following the issuance of the physical inspection results or the resident survey results to the PHA. The request must include the PHA's reasonable evidence that an error occurred.

(b) *Technical review of physical inspection results.* (1) If after review of the results of the physical inspection and grade for a property, the PHA believes that an objectively verifiable and material error (or errors) occurred in the inspection of that property, the PHA may request a technical review of the inspection results for that property.

(2) The PHA's request must include the PHA's evidence that an objectively verifiable and material error occurred. A PHA must submit documentation such as photographic evidence, written material from an objective source such as a local fire marshal or building code official, or other similar evidence. The evidence must have a factual basis other than a disagreement with the inspector's observations or the inspector's finding regarding the severity of the deficiency.

(3) A technical review of a property's physical inspection will not be conducted based on conditions, other than EHS deficiencies, that were corrected subsequent to the inspection, or based on a challenge to the grading class.

(4) After receipt of a PHA's request for technical review of a property's inspection results, PIH–REAC shall review the PHA's file and any objectively verifiable evidence submitted by the PHA. If PIH–REAC's review determines that an objectively verifiable and material error (or errors) has been documented, then PIH–REAC may take one or a combination of the following actions:

(i) Undertake a new inspection;

(ii) Correct the physical inspection report;

(iii) Issue a corrected physical condition grade; or

(iv) Issue a corrected PHAS grade.

(5) In determining whether a new inspection of the property is warranted, PIH–REAC shall review the PHA's file and evidence submitted. PIH–REAC shall then determine whether the evidence supports that there may have been a significant contractor error in the inspection which, if a new inspection were conducted, would result in a significant change from the property's original physical condition grade, overall PHAS grade, and corresponding PHAS designation (*i.e.*, Grade A PHA, Grade B PHA, Grade C PHA, and Grade D PHA). If the new inspection results in a significant change in the PHA's original physical condition grade, PHAS grade and corresponding designation, PIH–REAC shall issue a new PHAS grade and corresponding designation to the PHA.

(6) Material errors are the only grounds for technical review of physical inspection results. There are three types of material errors.

(i) Building data error. A building data error occurs if the inspection includes the wrong building, a building that was not owned by the PHA, or a common area or site areas that are not a part of the property. Incorrect building data that does not affect the grade, such as the address, the building name, the year built, etc., are not considered material. However, HUD requests notification of these errors so they may be corrected in the database.

(ii) Unit count error. A unit count error occurs if the total number of public housing units used in the grading is incorrect. Because the grading uses total public housing units, PIH–REAC shall review instances when the participant can provide evidence that the total units used is incorrect.

(iii) Non-existent deficiency error. A non-existent deficiency error occurs if the inspection cites a deficiency that does not exist.

(c) *Technical review of resident survey results.* If after review of the results of the resident service and satisfaction survey, the PHA believes that the contracted third party administrator can be shown to be in error, the PHA may request a technical review of a PHA's resident survey results.

(1) The PHA's request must include objectively verifiable evidence that a technical error occurred. Examples of technical errors include, but are not limited to, incorrect material being mailed to residents, or incorrect PHA unit addresses due to the third party administrator's error, such as unit numbers being omitted from the addresses. A PHA that does not update its unit address list pursuant to § 902.51 may not request a technical review based on incorrect addresses.

(2) After receipt of a PHA's request for technical review of resident survey results, PIH–REAC shall review the PHA's file and any evidence submitted by the PHA. If PIH–REAC's review determines that an error has been documented, then PIH–REAC may take one or a combination of the following actions:

(i) Undertake a new survey;

(ii) Correct the resident survey results report;

(iii) Issue a corrected resident services and satisfaction grade; or

(iv) Issue a corrected PHAS grade.

(d) *Review of technical review decisions.* The Assistant Secretary will review all technical reviews that are denied by PIH–REAC.

§ 902.69 PHA right of petition and appeal.

(a) *Appeals and petitions.* A PHA may:

(1) Appeal its Grade F PHA designation (including Grade F PHA and Capital Fund Grade F PHA as provided in § 902.10(c));

(2) Appeal its final overall PHAS grade;

(3) Petition for removal of Grade F PHA designation; and

(4) Appeal any refusal of a petition to remove its Grade F PHA designation.

(b) *Appeal of final overall PHAS grade.* (1) If a PHA believes that an objectively verifiable and material error (or errors) exists in any of its final PHAS indicator grades, which, if corrected, will result in a significant change in the PHA's final overall PHAS grade and its designation, the PHA may appeal its final overall PHAS grade in accordance with the procedures of this section. A significant change in a final overall PHAS grade is a change that would cause the PHA's final overall PHAS grade to increase, resulting in a higher PHAS designation for the PHA (*i.e.*, from Grade F PHA to Grade D PHA, Grade D PHA to Grade C PHA, Grade C PHA to Grade B PHA, Grade B PHA to Grade A PHA).

(2) A PHA that is under the jurisdiction of the appropriate HUD office having jurisdiction over Grade F PHAs may appeal its overall final PHAS grade after one year even if granting the appeal does not change its grade of F. This right to appeal provides the PHA with the opportunity to meet the requirements to substantially improve its performance under PHAS pursuant to § 902.75(f).

(c) *Appeal and petition procedures.* (1) To appeal its Grade F PHA designation or its final overall PHAS grade, a PHA shall submit a request in writing to the Director of PIH–REAC at 1280 Maryland Avenue, SW., Suite 800, Washington, DC 20024. PIH–REAC must receive the written request no later than 30 days following the issuance of the designation and the final overall PHAS grade to the PHA.

(2) To petition removal of Grade F PHA designation, a PHA shall submit its request in writing to the Director of PIH–REAC at 1280 Maryland Avenue, SW., Suite 800, Washington, DC 20024.

(3) An appeal of a Grade F designation or petition for removal of Grade F designation must include the PHA's supporting documentation and reasons for the appeal. An appeal of a final overall PHAS grade must include the PHA's reasonable evidence that an objectively verifiable and material error occurred. Any appeal or petition submitted to PIH–REAC without appropriate documentation shall not be considered and shall be returned to the PHA.

(d) *Consideration of petitions and appeals.* (1) *Consideration of appeal of final overall PHAS grade.* After receipt of an appeal of a final overall PHAS grade from a PHA, PIH–REAC shall review the PHA's file and the evidence submitted by the PHA supporting that an objectively verifiable and material error occurred. If PIH–REAC determines that the PHA has documented an objectively verifiable and material error, PIH–REAC shall convene a Board of Review (the Board), in accordance with the procedures of this section, to evaluate the appeal and its merits. If the Board determines that an objectively verifiable and material error existed for any of the PHAS indicators based on the evidence, the Board may determine either that a reassessment of the PHA is warranted or that the PHA's PHAS indicator grade(s) and final overall PHAS grade are changed, resulting in a change of designation. If the Board determines that a reassessment of the PHA is warranted, PIH–REAC shall schedule a reinspection or undertake a new assessment of the financial condition, management operations, or resident service and satisfaction, or any combination thereof. If the Board determines that a grade should be changed, that change shall be made by PIH–REAC.

(2) *Consideration of appeal of Grade F PHA designation or petition to remove Grade F PHA designation.* After receipt of an appeal of a Grade F PHA designation or petition to remove a Grade F PHA designation, PIH–REAC shall convene a Board to evaluate the appeal or petition and its merits. The Board may determine that a reassessment is necessary or may determine that other actions such as changing the PHA's designation, or removing the PHA's Grade F PHA designation are appropriate. If the Board determines that a reassessment is warranted, PIH–REAC shall schedule a reinspection or undertake a new assessment of the financial condition, management operations or resident service and satisfaction, or any combination thereof. If the Board determines that the designation should be changed, that change shall be made by PIH–REAC.

(3) *Board Membership.* The Board membership shall be comprised of a representative from PIH–REAC, from the Office of Public and Indian Housing, and from such other office or other representatives as the Secretary may designate.

(e) *Appeal and petition decisions.* HUD shall make final decisions of appeals and petitions under this section, within 30 days of receipt of the appeal or petition, and may extend this period for an additional 30 days if necessary. A PHA's failure to submit supporting documentation with its request for appeal or petition, or within any additional period granted by HUD is grounds for denial of the appeal or petition. The Assistant Secretary shall report all final appeal decisions to PHAs.

Subpart G—PHAS Incentives and Remedies

§ 902.71 Incentives for Grade A PHAs.

(a) *Incentives for Grade A PHAs.* A PHA that is a Grade A PHA shall be eligible for the following incentives, and any other incentives that HUD may determine appropriate and permissible under program statutes or regulations.

(1) Relief from specific HUD requirements. (i) A Grade A PHA shall be relieved of specific HUD requirements (for example, fewer reviews and less monitoring), effective upon notification of Grade A PHA designation.

(ii) As provided in §§ 902.13 and 902.30, a PHA that is a Grade A PHA shall be next assessed under PHAS in three years. Notwithstanding the PHA's

PHAS assessment schedule, a Grade A PHA is required to submit annual unaudited and audited financial information. However, HUD shall not issue a grade for the unaudited and audited financial information in the years that a PHA is not being assessed under PHAS.

(2) Public recognition. Grade A PHAs will receive a Certificate of Commendation from HUD. These PHAs also will receive special public recognition from the Hub Office/Program Centers.

(3) Bonus points in funding competitions. A Grade A PHA shall be eligible for bonus points in HUD's funding competitions, and formula-based programs when bonus points are not restricted by statute or regulation governing the funding program. Eligibility for Grade A PHAs to receive these bonus points will be stated in HUD's notices of funding availability or other funding documents.

(b) *Compliance with applicable Federal laws and regulations.* Relief from any standard procedural requirement provided under this section does not relieve a PHA from the requirements of the provisions of other federal and state laws and regulations or other HUD handbook requirements. For example, although a Grade A PHA or a Grade B, C or D PHA may be relieved of requirements for prior HUD approval for certain types of contracts for services, the PHA must still comply with all other Federal and State requirements that remain in effect, such as those for competitive bidding or competitive negotiation (see 24 CFR 85.36).

(c) *Audits and reviews not relieved by designation.* A Grade A PHA or a Grade B, C or D PHA remains subject to:

(1) Regular IPA or CPA audits.

(2) OIG audits or investigations, which shall continue to be conducted as circumstances may warrant.

§ 902.73 Referral of Grade B, C, and D PHAs.

(a) *General.* (1) Referral. Grade B, C, and D PHAs shall be referred to the Hub Office/Program Center for appropriate action.

(2) Improvement Plan. (i) A PHA that is designated a Grade D PHA shall be required to submit an Improvement Plan to address deficiencies in the PHA's performance.

(ii) A PHA that is designated a Grade B or C PHA may be required, at the discretion of the appropriate area Hub Office/Program Center, to submit an Improvement Plan to address specific deficiencies.

(b) *Submission of an Improvement Plan.* A PHA is required to submit its Improvement Plan to the Hub Office/Program Center for approval within 30 days after the PHA's final overall PHAS grade is issued. All Improvement Plans must meet the requirements of paragraphs (d), (e) and (f) of this section.

(c) *Correction of deficiencies.* (1) Time period for correction. After a PHA receives its overall PHAS grade and designation of Grade B, C, or D PHA, the PHA must correct any deficiency indicated in the assessment within 90 days, or, if an Improvement Plan is required, within such period as provided in the Improvement Plan.

(2) Notification and report to Hub Office/Program Center. A PHA shall notify the Hub Office/Program Center of its action to correct each deficiency.

(d) *Improvement Plan.* An Improvement Plan shall:

(1) List each PHAS indicator, sub-indicator and/or component, together with the grade, that was identified as a deficiency and identify other baseline data, including all relevant raw data;

(2) Describe any other problems with performance and/or compliance that were identified during an on-site review of the PHA's operations;

(3) Describe the procedures that shall be followed to correct each deficiency;

(4) Provide a timetable for the correction of each deficiency; and

(5) Provide for or facilitate technical assistance to the PHA.

(e) *Determination of acceptability of Improvement Plan* (1) The Hub Office/Program Center shall approve or deny an Improvement Plan and notify the PHA of its decision.

(2) An Improvement Plan that is not approved shall be returned to the PHA with recommendations from the Hub Office/Program Center for revising the Improvement Plan to obtain approval.

(f) *Submission of revised Improvement Plan.* The PHA shall submit a revised Improvement Plan within 30 days of its receipt of the Hub Office/Program Center recommendations.

(g) *Failure to submit acceptable Improvement Plan or correct deficiencies.* (1) The Hub Office/Program Center shall notify a PHA if a PHA fails to submit an acceptable Improvement Plan or fails to correct deficiencies within the time specified in an Improvement Plan or such extensions that may be granted by HUD.

(2) The PHA shall respond to the Hub Office/Program Center's notification within 30 days and provide the Hub Office/Program Center with the reasons for its lack of progress in submitting or carrying out the Improvement Plan.

(3) The Hub Office/Program Center shall advise the PHA whether its reasons for lack of progress are acceptable. If the Hub Office/Program Center determines that the PHA's reasons for lack of progress are unacceptable, HUD shall notify the PHA that it shall be referred to the HUD office with jurisdiction over Grade B, C, or D PHAs for remedial actions, or such actions as that office may determine appropriate in accordance with the provisions of the ACC, this part and other HUD regulations, including the remedies available for substantial default.

(4) If the HUD office with jurisdiction over Grade B, C, or D PHAs determines that a PHA failed to correct deficiencies within the time specified in an Improvement Plan or such extensions as may be granted by HUD, HUD may take further action to sanction the PHA, but only after the PHA has had one year since the PHA was notified it was a Grade B, C, or D PHA to correct its deficiencies.

§ 902.75 Referral of Grade F PHAs.

(a) *General.* After a PHA has received notification it is a Grade F PHA (*i.e.*, Grade F PHA or Capital Fund Grade F PHA), in accordance with the requirements of section 6(j)(2)(B) of the Act (42 U.S.C. 1437d(j)(2)(B)) and in accordance with this part, HUD shall refer the PHA to the appropriate HUD office for remedial action. The remedial actions taken by HUD and the PHA will include actions statutorily required, and such other actions that HUD determines to be appropriate.

(b) *Memorandum of Agreement (MOA).* HUD shall initiate the development of an MOA, within 30 days of notifying a PHA that it is a Grade F PHA. The PHA must execute the MOA as drafted by HUD within 10 days after issuance. The final MOA is a binding contractual agreement between HUD and a PHA.

(c) *Scope of the MOA.* The scope of the MOA may vary depending upon the extent of the deficiencies identified in the PHAS assessment. All MOAs will include:

(1) Each PHAS indicator, sub-indicator or component, together with the grade, that was identified as a deficiency and other baseline data, including all relevant raw data;

(2) Performance targets for the periods specified by HUD;

(3) Strategies for the PHA to use to achieve the performance targets within the time period of the MOA;

(4) Technical assistance that will be provided to the PHA or facilitated by HUD;

(5) Incentives for meeting the targets, such as the removal of Grade F PHA designation;

(6) The consequences for failing to meet the targets including, but not limited to, the sanctions that may be imposed. Sanctions include the imposition of budget and management controls by HUD, declaration of substantial default, and subsequent actions. Subsequent actions include judicial appointment of a receiver, limited denial of participation, suspension, debarment, or other actions HUD deems appropriate; and

(7) A description of the involvement of local public and private entities, including PHA resident leaders, in carrying out the MOA and rectifying the PHA's deficiencies.

(d) *Parties to the MOA.* An MOA will be executed by:

(1) The PHA Board Chairperson (supported by a Board resolution) or a receiver (pursuant to a court ordered receivership agreement, if applicable);

(2) The PHA Executive Director, or a designated receiver (pursuant to a court ordered receivership agreement, if applicable) or other designated Chief Executive Officer;

(3) The Director of the HUD office with jurisdiction over the PHA while the PHA is a Grade F PHA; and

(4) The appointing authorities of the Board of Commissioners, unless exempted by the HUD office with jurisdiction over the PHA while the PHA is a Grade F PHA.

(e) *Failure to execute MOA or improve performance under MOA.* HUD will take further action if the PHA fails or refuses to execute an MOA within the period provided in paragraph (b) of this section, or the PHA operating under an executed MOA does not improve its performance as provided in paragraph (f) of this section. HUD shall take the actions required by § 902.77(a).

(f) *Recovery.* (1) Two year maximum recovery period. After referral to the appropriate HUD office for remedial action, the PHA has two years to improve its performance as measured by the PHAS indicators. The PHA must improve its performance in each year of the two-year period as required by the Act or HUD will take further action as set forth in § 902.77.

(2) Benchmarks. (i) By the end of the first year, the PHA must make the following improvements. For a Grade F PHA, for each indicator with a grade of F, the PHA must improve that indicator's grade value by at least 50 percent of the difference between its value and the minimum grade value for a grade of D. For a Capital Fund Grade F PHA, the PHA must obligate 50 percent of the unobligated funds and/or expend 50 percent of the unexpended funds.

(ii) By the end of the second year, the PHA must make the following improvements. For a Grade F PHA, the PHA must achieve an overall PHAS grade of D and a grade of D for each of the four indicators. For a Capital Fund Grade F PHA, the PHA must obligate 100 percent of the unobligated funds and/or expend 100 percent of the unexpended funds.

(iii) The end of the first year is one year from the date the PHA receives the initial notice of its final overall PHAS grade and Grade F PHA designation. The end of the second year is two years from the date the PHA receives the initial notice of its final overall PHAS grade and Grade F PHA designation.

(g) *Audit review.* HUD shall perform an audit review and may, at its discretion, select the audit firm to perform the audit of the PHA that is a Grade F PHA. Further, HUD may, at its discretion, serve as the audit committee for the audit in question.

(h) *Continuation of services to residents.* To the extent feasible, all services to residents will continue uninterrupted during the time a PHA is a Grade F PHA and under jurisdiction of the appropriate HUD office.

§ 902.77 Actions and sanctions.

(a) *Actions against Grade F PHAs.* (1) Failure to execute or meet the MOA *requirements.* The failure of a Grade F PHA to execute or meet the requirements of an MOA in accordance with § 902.75 constitutes a substantial default under § 902.79. The HUD office with jurisdiction over the PHA while the PHA is a Grade F PHA will recommend to the Assistant Secretary that the PHA be declared in substantial default. In accordance with § 902.79, the Assistant Secretary shall notify the PHA of the default and allow the PHA an opportunity to cure the default. If the PHA fails to cure the default within a period not to exceed 30 days unless the Assistant Secretary determines that a longer period is appropriate, HUD shall take further action.

(2) Actions. (i) For PHAs with fewer than 1250 units, HUD shall initiate either the judicial appointment of a receiver or an administrative receivership.

(ii) For PHAs with 1250 or more units, HUD shall initiate the judicial appointment of a receiver or an administrative receivership, but may only initiate an administrative receivership while HUD's petition for judicial receivership is pending.

(iii) For all PHAs, following the recommendation of the Assistant Secretary, HUD shall initiate the interventions provided in § 902.83, and may initiate such other sanctions available to HUD, including limited denial of participation, suspension, debarment, and referral to the appropriate federal government agencies or offices for the imposition of civil or criminal sanctions.

(b) *Actions against other PHAs in substantial default.* A PHA that is not a Grade F PHA, but that has been found to be in substantial default under the provisions of § 902.79 also is subject to further action. The Assistant Secretary makes the determination that a PHA is in substantial default. In accordance with § 902.79, the Assistant Secretary shall notify the PHA of the default and allow the PHA an opportunity to cure the default. If the PHA fails to cure the default within the specified period of time, HUD shall initiate the judicial appointment of a receiver or the interventions provided in § 902.83, as recommended by the Assistant Secretary. HUD also may initiate such other available sanctions, including limited denial of participation, suspension, debarment, and referral to the appropriate federal government agencies or offices for the imposition of civil or criminal sanctions.

(c) *Receivership/Possession of PHA by HUD.* (1) The appointments of receivers, the actions of receivers, and HUD's responsibilities toward the receivers are governed by the provisions of section 6(j)(3) of the Act (42 U.S.C. 1437d(j)(3)).

(2) If a judicial receiver is appointed, the receiver, in addition to the powers provided by the court, shall have available the powers provided by section 6(j)(3)(C) of the Act (42 U.S.C. 1437d(j)(3)(C)).

(3) If HUD assumes responsibility for all or part of the PHA, the Secretary of HUD shall have available the powers provided by section 6(j)(3)(D) of the Act (42 U.S.C. 1437d(j)(3)(D)).

(4) If an administrative receiver is appointed, the Secretary may delegate to the administrative receiver any of the powers provided to the Secretary as described in paragraph (c)(3) of this section, in accordance with section 6(j)(3)(D) of the Act.

(d) *Continuation of services to residents.* To the extent feasible, all services to residents shall continue uninterrupted, during the time a PHA is under referral to HUD.

§ 902.79 Substantial default.

(a) *Events or conditions that constitute substantial default.* The

following events or conditions shall constitute substantial default.

(1) HUD may determine that events have occurred or that conditions exist that constitute a substantial default if a PHA is determined to be in violation of federal statutes, including but not limited to the Act, or in violation of regulations implementing such statutory requirements, whether or not such violations would constitute a substantial breach or default under provisions of the PHA's ACC.

(2) HUD may determine that a PHA's failure to execute an MOA or satisfy the terms of an MOA entered into pursuant to § 902.75, or to make reasonable progress to execute or meet requirements included in an MOA, are events or conditions that constitute a substantial default.

(3) HUD shall determine that a Grade F PHA that does not show substantial improvement, as described in § 902.75(f), is in substantial default.

(4) HUD may determine that a substantial breach or default in the terms and conditions of the PHA's ACC constitutes a substantial default.

(b) *Scope of substantial default.* HUD may determine that the events or conditions constituting a substantial default are limited to a portion of a PHA's public housing operations, designated either by program, by operational area, or by property(ies).

(c) *Notification of substantial default and response.* In the event of substantial default described in paragraph (a) of this section or if information from an annual assessment, audit, or any other credible source (including, but not limited to, the Office of Fair Housing Enforcement, the OIG, a court order, or a referral from a mayor or other official) indicates that events or conditions may exist that constitute a substantial default or breach, HUD shall perform an independent investigation. Upon a determination or finding, HUD shall advise a PHA of such substantial default or of such information. HUD is authorized to protect the confidentiality of the source(s) of such information in appropriate cases.

(1) Form of notification. Except in the case of apparent fraud or criminality, and/or in the case of an emergency condition that poses an imminent threat to the life, health, or safety of residents, the Assistant Secretary shall provide written notification to the PHA of the determination or finding that events have occurred or that conditions exist that constitute substantial default. Before taking further action, HUD shall provide the PHA an opportunity to take corrective action, including the remedies and procedures available to PHAs designated Grade F. The written notification shall be transmitted to the Executive Director, the Chairperson of the Board, and the appointing authority(ies) of the Board. The written notification shall include, but is not limited to:

(i) Identification of the specific covenants, conditions, and/or agreements under which the PHA is determined to be in noncompliance;

(ii) Identification of the specific events, occurrences, or conditions that constitute the determined noncompliance;

(iii) Identification of the information, referrals, and opportunities to initiate corrective action;

(iv) Identification of a specific time period of not less than 10 days (except in cases of apparent fraud or other criminal behavior, and/or under emergency conditions) nor more than 30 days, during which the PHA shall be required to demonstrate that the determination or finding is not substantively accurate; and

(v) A statement indicating that, absent a satisfactory response in accordance with paragraph (c)(2) of this section, HUD will take action, using any or all of the interventions specified in § 902.83 and determined to be appropriate to remedy the noncompliance, citing § 902.83, and any additional authority.

(2) Receipt of notification. Upon receipt of the notification, the PHA must demonstrate, within the time period permitted in the notification, factual error(s) in HUD's description of events, occurrences, or conditions, or show that the events, occurrences, or conditions do not constitute noncompliance with the statute, regulation, covenants, or conditions.

(3) Waiver of notification. A PHA may waive, in writing, receipt of written notice from HUD of a finding of substantial default, and voluntarily consent to a determination of substantial default. The PHA shall concur on the existence of substantial default conditions that can be remedied by technical assistance, and the PHA shall provide HUD with written assurance that the PHA shall address all deficiencies. HUD shall then immediately proceed with interventions as provided in § 902.83.

(d) *Emergency situations.* In any situation determined to be an emergency, or in any case when the events or conditions precipitating the intervention are determined to be the result of criminal or fraudulent activity, the Secretary or the Secretary's designee is authorized to intercede to protect the residents' and HUD's interests by causing the proposed interventions to be implemented without appeals or delays.

§ 902.83 Interventions.

(a) If HUD determines that a substantial default exists under this part, HUD may initiate any interventions deemed necessary to maintain dwellings that are decent, safe, sanitary and in good repair for the residents. Interventions under this part (including an assumption of operating responsibilities) may be limited to one or more of a PHA's operational areas (*e.g.*, maintenance, modernization, occupancy, or financial management) or to a single public housing property or a group of properties. Under this limited intervention procedure, HUD may select, or participate in the selection of, an AME to assume management responsibility for a specific property, a group of properties in a geographical area, or a specific operational area. During the limited intervention procedure, the PHA retains responsibility for all programs, operational areas, and properties not subject to the intervention.

(b) Interventions may include:

(1) Providing technical assistance for existing PHA management staff;

(2) Selecting or participating in the selection of an AME to provide technical assistance or other services up to and including contract management of all or any part of the public housing properties administered by a PHA;

(3) Assuming possession and operational responsibility for all or any part of the public housing administered by a PHA;

(4) Entering into agreements, arrangements, and/or contracts for or on behalf of a PHA, or acting as the PHA, and expending or authorizing the expenditure of PHA funds, irrespective of the source of such funds, to remedy the events or conditions constituting the substantial default;

(5) Providing intervention and assistance necessary to remedy emergency conditions;

(6) Selecting an administrative receiver to manage and operate all or part of the PHA's housing after soliciting competitive proposals; and

(7) Petitioning for the appointment of a receiver to any District Court of the United States or any court of the state in which real property of the PHA is located.

(c) The receiver is to conduct the affairs of the PHA:

(1) In a manner consistent with statutory, regulatory, and contractual obligations of the PHA;

(2) In accordance with additional terms and conditions that the court may provide; and

(3) In accordance with section 6(j)(3)(C) of the Act (42 U.S.C. 1437d(j)(3)(C)).

(d) Any party may petition for termination of a receiver appointed pursuant to this section. The receiver may be terminated when the court determines that all defaults have been cured or the PHA is capable again of discharging its duties.

(e) HUD may take the actions described in this section sequentially or simultaneously in any combination.

§ 902.85 Resident petitions for remedial action.

Residents may petition HUD to take remedial action pursuant to sections 6(j)(3)(A)(i) through (iv) of the Act (42 U.S.C. 1437d(j)(3)(A)(i) through (iv)) if:

(a) the resident petitioners equal at least 20 percent of the PHA's residents; or

(b) the petitioning organization or organizations' membership equals at least 20 percent of the PHA's residents.

Dated: January 9, 2003.

Michael Liu,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 03–2608 Filed 1–31–03; 4:06 pm]

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Part III

Securities and Exchange Commission

17 CFR Parts 205, 240, and 249
Implementation of Standards of Professional Conduct for Attorneys; Final Rule and Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 205

[Release Nos. 33–8185; 34–47276; IC–25919; File No. S7–45–02]

RIN 3235–AI72

Implementation of Standards of Professional Conduct for Attorneys

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting a final rule establishing standards of professional conduct for attorneys who appear and practice before the Commission on behalf of issuers. Section 307 of the Sarbanes-Oxley Act of 2002 requires the Commission to prescribe minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers. The standards must include a rule requiring an attorney to report evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the issuer up-the-ladder within the company to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and, if they do not respond appropriately to the evidence, requiring the attorney to report the evidence to the audit committee, another committee of independent directors, or the full board of directors. Proposed Part 205 responds to this directive and is intended to protect investors and increase their confidence in public companies by ensuring that attorneys who work for those companies respond appropriately to evidence of material misconduct. We are still considering the ''noisy withdrawal'' provisions of our original proposal under section 307; in a related proposing release we discuss this part of the original proposal and seek comment on additional alternatives.

EFFECTIVE DATE: August 5, 2003.

FOR FURTHER INFORMATION CONTACT: Timothy N. McGarey or Edward C. Schweitzer at 202–942–0835.

I. Executive Summary

Section 307 of the Sarbanes-Oxley Act of 2002 (the ''Act'') (15 U.S.C. 7245)[1] mandates that the Commission issue rules prescribing minimum standards of professional conduct for attorneys appearing and practicing before it in any way in the representation of issuers, including at a minimum a rule requiring an attorney to report evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the issuer or any agent thereof to appropriate officers within the issuer and, thereafter, to the highest authority within the issuer, if the initial report does not result in an appropriate response. The Act directs the Commission to issue these rules within 180 days.[2]

On November 21, 2002, in response to this directive, we published for comment proposed Part 205, entitled ''Standards of Professional Conduct for Attorneys Appearing and Practicing before the Commission in the Representation of an Issuer.'' The proposed rule prescribed minimum standards of professional conduct for attorneys appearing and practicing before us in any way in the representation of an issuer. The proposed rule took a broad view of who could be found to be appearing and practicing before us. It covered lawyers licensed in foreign jurisdictions, whether or not they were also admitted in the United States. In addition to a rigorous up-the-ladder reporting requirement, the proposed rule incorporated several corollary provisions. Under certain circumstances, these provisions permitted or required attorneys to effect a so-called ''noisy withdrawal'' by notifying the Commission that they have withdrawn from the representation of the issuer, and permitted attorneys to report evidence of material violations to the Commission.

Our proposing release [3] generated significant comment and extensive debate. We received a total of 167 timely comment letters: 123 from domestic parties and 44 from foreign parties. In addition to soliciting comments, on December 17, 2002 the Commission hosted a Roundtable discussion concerning the impact of the rules upon foreign attorneys. Many of these comments focused on the following issues: The scope of the proposed rule (including, particularly, its application to attorneys who either are not admitted to practice in the United States, or are admitted in the United States but who do not practice in the field of securities law); the proposed rule's ''noisy withdrawal'' provision (including the Commission's authority to promulgate this portion of the rule and the provision's impact upon the attorney-client relationship); and the triggering standard for an attorney's duty to report evidence of wrongdoing. In light of the compressed time period resulting from the 180-day implementation deadline prescribed in the Act, a number of commenters requested that the Commission allow additional time for consideration of several aspects of the proposed rule, including the application of the rule to non-United States lawyers and the impact of the ''noisy withdrawal'' and related provisions.

The thoughtful and constructive suggestions we have received from a broad spectrum of commenters have enabled us better to understand interested parties' views concerning the operation and impact of the proposed rule. As more specifically discussed below, the final rule we adopt today has been significantly modified in light of these comments and suggestions. Thus, the triggering standard for reporting evidence of a material violation has been modified to clarify and confirm that an attorney's actions will be evaluated against an objective standard. The documentation requirements imposed upon attorneys and issuers under the proposed rule have been eliminated, and a ''safe harbor'' provision has been added to protect attorneys, law firms, issuers and officers and directors of issuers. In response to the large number of comments requesting that we defer the immediate implementation of a final rule to accord affected persons adequate time to assess the duties imposed thereunder, we have deferred the effective date of the rule until 180 days after publication in the **Federal Register**.

We believe that the final rule responds fully to the mandate of Section 307 to require reporting of evidence of material violations up-the-ladder within an issuer, thereby allowing issuers to take necessary remedial action expeditiously and reduce any adverse

[1] Section 307 of the Sarbanes-Oxley Act of 2002 (the ''Act'') (15 U.S.C. 7245) mandates that the Commission: Shall issue rights, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

(1) Requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) If the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

[2] President Bush signed the Act on July 30, 2002.

[3] *See* Release 33–8150 (Nov. 21, 2002), 67 FR 71669 (Dec. 2, 2002).

impact upon investors. The final rule strikes an appropriate balance between our initial rule proposal on up-the-ladder reporting and the various views expressed by commenters while still achieving this important goal.

At the same time, the Commission considers it important to move forward in its assessment of rules under Section 307 requiring attorney withdrawal and notice to the Commission in cases where an issuer's officers and directors fail to respond appropriately to violations that threaten substantial injury to the issuer or investors. Accordingly, we are extending the comment period on the ''noisy withdrawal'' and related provisions of the proposed rule and are issuing a separate release soliciting comment on this issue. In that release, we are also proposing and soliciting comment on an alternative procedure to the ''noisy withdrawal'' provisions. Under this proposed alternative, in the event that an attorney withdraws from representation of an issuer after failing to receive an appropriate response to reported evidence of a material violation, the issuer would be required to disclose its counsel's withdrawal to the Commission as a material event. In the same release, we are soliciting additional comment on the final rules we are adopting, particularly insofar as adoption of the ''noisy withdrawal'' provisions of the proposed alternative might require conforming changes to the final rule.

Interested parties should submit comments within 60 days of the date of publication of the proposing release in the **Federal Register**. This will provide additional time for interested parties to comment on the impact of these provisions while still allowing for their implementation as of the effective date of the final rule.

II. Section-by-Section Discussion of the Final Rule

Section 205.1—Purpose and Scope

This part sets forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of an issuer. These standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part. Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.

Proposed Section 205.1 stated that this part will govern ''[w]here the standards of a state where an attorney is admitted or practices conflict with this part.'' In the proposing release, we specifically raised the question whether this part should ''preempt conflicting state ethical rules which impose a lower obligation'' upon attorneys.[4]

A number of commenters questioned the Commission's authority to preempt state ethics rules, at least without being explicitly authorized and directed to do so by Congress.[5] Another comment letter noted that the Constitution's Commerce Clause grants the federal government the power to regulate the securities industry, that the Sarbanes-Oxley Act requires the Commission to establish rules setting forth minimum standards of conduct for attorneys appearing and practicing before it, and that, under the Supremacy Clause, duly adopted Commission rules will preempt conflicting state rules.[6] Finally, several commenters questioned why the Commission would seek to supplant state ethical rules which impose a higher obligation upon attorneys.[7]

The language which we adopt today clarifies that this part does not preempt ethical rules in United States jurisdictions that establish more rigorous obligations than imposed by this part. At the same time, the Commission reaffirms that its rules shall prevail over any conflicting or inconsistent laws of a state or other United States jurisdiction in which an attorney is admitted or practices.

Section 205.2—Definitions

For purposes of this part, the following definitions apply:

(a) *Appearing and practicing* before the Commission:

(1) Means:

(i) Transacting any business with the Commission, including communications in any form;

(ii) Representing an issuer in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request, or subpoena;

(iii) Providing advice in respect of the United States securities laws or the Commission's rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document; or

(iv) Advising an issuer as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission's rules or regulations thereunder to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission; but

(2) Does not include an attorney who:

(i) Conducts the activities in paragraphs (a)(1)(i) through (a)(1)(iv) of this section other than in the context of providing legal services to an issuer with whom the attorney has an attorney-client relationship; or

(ii) Is a non-appearing foreign attorney.

The definition of the term ''appearing and practicing'' included in the proposed rule was based upon Rule 102(f) of our Rules of Practice, and covered, *inter alia*, an attorney's advising a client (1) that a statement, opinion, or other writing does not need to be filed with or incorporated into any type of submission to the Commission or its staff, or (2) that the issuer is not required to submit or file any registration statement, notification, application, report, communication or other document with the Commission or its staff. This broad definition was intended to reflect the reality that materials filed with the Commission frequently contain information contributed, edited or prepared by individuals who are not necessarily responsible for the actual filing of the materials, and was consistent with the position the Commission has taken as *amicus curiae* in cases involving liability under Section 10(b) of the Exchange Act (15 U.S.C. 78j(b)).

A number of commenters argued that the proposed definition of ''appearing and practicing'' was overly broad. The American Bar Association (''ABA'') stated that the definition in the proposed rule would unfairly:

> subject to the rules attorneys who do not practice securities law and may have only limited or tangential involvement with particular SEC filings and documents. For example, it could inappropriately encompass non-securities specialists who do no more than prepare or review limited portions of a filing, lawyers who respond to auditors' letters or prepare work product in the ordinary course unrelated to securities matters that may be used for that purpose,

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[4] 67 FR 71670, 71697 (Dec. 2, 2002).

[5] See Comments of the Association of the Bar of the City of New York, at 28 (''There is nothing in Section 307 to suggest that Congress authorized the Commission to preempt state law and rules governing attorney conduct.''); *see also* Comments of the American Bar Association, at 32; Comments of 77 law firms, at 2. While questioning the Commission's authority in this area, the American Bar Association (''ABA'') nevertheless recognized that ''the federal system of the United States may provide an arguable basis for the pre-emption of attorney-client and confidentiality obligations applicable to United States attorneys.'' *See* Comments of the American Bar Association, at 37.

[6] *See* Comments of Susan P. Koniak *et al.*, at 28–29.

[7] *See*, *e.g.*, Comments of Susan P. Koniak *et al.*, at 32; Comments of Richard W. Painter, at 8; Comments of Nancy J. Moore, at 3.

and lawyers preparing documents that eventually may be filed as exhibits. * * * We also believe it is inappropriate for the Commission to include lawyers who simply advise on the availability of exemptions from registration.[8]

The ABA recommended that the definition be modified to apply ''only to those lawyers with significant responsibility for the company's compliance with United States securities law, including satisfaction of registration, filing and disclosure obligations, or with overall responsibility for advising on legal compliance and corporate governance matters under United States law.''[9]

On the other hand, several commenters supported the more expansive definition set forth in the proposed rule. A comment letter submitted by a group of 50 academics specifically affirmed their:

> support [for] the Commission's inclusion of lawyers who advise and/or draft, but do not sign, documents filed with the Commission, as well as lawyers who advise that documents need not be filed with the Commission. Any other rule would facilitate circumvention of these rules by encouraging corporate managers and corporate counsel to confine lawyer signatures on Commission documents or filings to a bare minimum to ensure no up-the-ladder reporting of wrongdoing. That would risk gutting these rules and § 307.[10]

The definition contained in the final rule addresses several of the concerns raised by commenters. Attorneys who advise that, under the federal securities laws, a particular document need not be incorporated into a filing, registration statement or other submission to the Commission will be covered by the revised definition. In addition, an attorney must have notice that a document he or she is preparing or assisting in preparing will be submitted to the Commission to be deemed to be ''appearing and practicing'' under the revised definition. The definition in the final rule thereby also clarifies that an attorney's preparation of a document (such as a contract) which he or she never intended or had notice would be submitted to the Commission, or incorporated into a document submitted to the Commission, but which subsequently is submitted to the Commission as an exhibit to or in connection with a filing, does not constitute ''appearing and practicing'' before the Commission.

As discussed below, commenters also raised concerns regarding the potential application of the rule to attorneys who, while admitted to practice in a state or other United States jurisdiction, were not providing legal services to an issuer. Under the final rule, attorneys need not serve in the legal department of an issuer to be covered by the final rule, but they must be providing legal services to an issuer within the context of an attorney-client relationship. An attorney-client relationship may exist even in the absence of a formal retainer or other agreement. Moreover, in some cases, an attorney and an issuer may have an attorney-client relationship within the meaning of the rule even though the attorney-client privilege would not be available with respect to communications between the attorney and the issuer.

The Commission intends that the issue whether an attorney-client relationship exists for purposes of this part will be a federal question and, in general, will turn on the expectations and understandings between the attorney and the issuer. Thus, whether the provision of legal services under particular circumstances would or would not establish an attorney-client relationship under the state laws or ethics codes of the state where the attorney practices or is admitted may be relevant to, but will not be controlling on, the issue under this part. This portion of the definition will also have the effect of excluding from coverage attorneys at public broker-dealers and other issuers who are licensed to practice law and who may transact business with the Commission, but who are not in the legal department and do not provide legal services within the context of an attorney-client relationship. Non-appearing foreign attorneys, as defined below, also are not covered by this definition.

205.2(b) provides:

> (b) *Appropriate response* means a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes:
>
> (1) That no material violation, as defined in paragraph (i) of this section, has occurred, is ongoing, or is about to occur;
>
> (2) That the issuer has, as necessary, adopted appropriate remedial measures, including appropriate steps or sanctions to stop any material violations that are ongoing, to prevent any material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence; or
>
> (3) That the issuer, with the consent of the issuer's board of directors, a committee thereof to whom a report could be made pursuant to § 205.3(b)(3), or a qualified legal compliance committee, has retained or directed an attorney to review the reported evidence of a material violation and either:
>
> (i) Has substantially implemented any remedial recommendations made by such attorney after a reasonable investigation and evaluation of the reported evidence; or
>
> (ii) Has been advised that such attorney may, consistent with his or her professional obligations, assert a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to the reported evidence of a material violation.

The definition of ''appropriate response'' emphasizes that an attorney's evaluation of, and the appropriateness of an issuer's response to, evidence of material violations will be measured against a reasonableness standard. The Commission's intent is to permit attorneys to exercise their judgment as to whether a response to a report is appropriate, so long as their determination of what is an ''appropriate response'' is reasonable.

Many of the comments on this paragraph focused on the proposal's standard that an attorney has received an appropriate response when the attorney ''reasonably believes,'' based on the issuer's response, that there either is or was no material violation, or that the issuer has adopted appropriate remedial measures. They suggested, among other things, that the paragraph be amended to state that the attorney could rely upon the factual representations and legal determinations that a reasonable attorney would rely upon,[11] or that the Commission adopt the ABA's Model Rules' definition of ''reasonably believes.''[12] Others opined that the

[8] *See* Comments of the American Bar Association, at 12.

[9] *Id.; see also* Comments of Sullivan & Cromwell, at 12–14; Comments of 77 law firms, at 7 (arguing that the scope of the definition of the term may incite efforts by attorneys to limit their involvement in certain matters in an effort to avoid coming within the purview of the rule).

[10] *See* Comments on Susan P., Koniak *et al.,* at 33.

[11] Comments of Thomas D. Morgan, at 5–6; Comments of Morrison & Foerster and eight other law firms, at 14 (paragraph 205.2(b) should be revised to read that in all situations it would be an appropriate response for an issuer to assert a colorable defense to any claim of material violation).

[12] Comments of Palmer & Dodge, Attachment at 2 (''The Model Rules state that 'reasonable belief' or 'reasonably believes' when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.'' Model Rule 1.0(i)). ''Reasonable'' and ''reasonably,'' in turn, are defined as ''denot[ing] the conduct of a reasonably prudent and competent lawyer.'' Model Rule 1.0(h). Along similar lines, one group of commenters suggested that the paragraph include language paralleling the Model Rule definition, setting as the standard the conclusion of ''a prudent and competent attorney, acting reasonably under the same circumstances'' that a response was appropriate. Comments of Susan P. Koniak *et al.,* at 12–13, 15; *see also* Comments of the SIA/TBMA, at 18 (urging that the Commission modify this paragraph to protect an attorney whose judgment that an issuer's response was appropriate was ''reasonable under the circumstances'').

''reasonably believes'' standard was inappropriate because it would impose on lawyers who are not expert in the securities laws a standard based on the ''reasonable'' securities law expert.[13] Others opined that the standard should be modified to require the lawyer's ''actual understanding,'' rather than reasonable belief, regarding a ''clear'' material violation,[14] while others urged that the standard must be objective.[15]

Other commenters felt that the paragraph did not properly address situations, which the commenters felt would be frequent, where an issuer's inquiry into the report of a possible material violation would be ''inconclusive.''[16] Others expressed the belief that the rule did not give a reporting lawyer sufficient guidance ''such that a reporting attorney can with confidence, and without speculation, determine whether he or she has received an appropriate response.''[17] Some comments questioned whether reporting attorneys would be able to judge whether discipline or corrective measures were sufficient to constitute an appropriate response.[18] One suggested that the paragraph be modified to provide that an attorney has received an appropriate response when the chief legal officer (''CLO'') states that he or she has fulfilled the obligations set forth in Section 205.3(b)(3), unless the attorney is reasonably certain that the representations are untrue.[19] Some commenters found the term ''and/or'' in subparagraph (b)(2) of the proposed paragraph confusing.[20] Others questioned whether the provision that the issuer ''rectify'' the material violation should be read to contemplate restitution to injured parties, with one stating that it did not believe Congress intended to impose upon attorneys an obligation to require issuers to make restitution,[21] while others read the proposed rule as ''impl[ying] that the appropriateness of a response need not include compensation of injured parties,'' and accordingly supported this standard.[22] A few commenters noted that under subparagraph (b)(2) a response is appropriate only if the issuer has already ''adopted remedial measures,'' and thus apparently does not apply if the issuer is in the process of adopting them. They urged that the Commission provide that an appropriate response includes ongoing remedial measures.[23]

A few comments were directed at the discussion accompanying the proposed rule. One suggestion was that the Commission make clear that the factors it will consider in determining whether an outside law firm's response that no violation has occurred constitutes an appropriate response include a description of the scope of the investigation undertaken by the law firm and the relationship between the issuer and the firm. They also urged the Commission to expressly state that the greater or more credible the evidence that triggered the report, the more detailed an investigation into the matter must be.[24] One commenter also suggested that the Commission withdraw the statement in the release of the proposed rule that Section 205.2(b) ''permits'' attorneys ''to exercise their judgment,'' finding that language both superfluous and conveying a signal that the Commission will be loathe to second-guess a lawyer's judgment that a response is ''appropriate.'' [25]

Several commenters suggested that the proposed rule should exempt internal investigations of reported evidence of a material violation.[26] Commenters were concerned that the reporting and disclosure requirements in the proposed rules might discourage issuers from obtaining legal advice and undertaking internal investigations and that, as a result, some violations might not be discovered or resolved.[27] Thus, some commenters urged that an issuer must be permitted ''to retain counsel to investigate the claim and respond to it, including defense in litigation, without being at risk of violating the rule.''[28] Some commenters stated that ''counsel conducting an internal investigation'' should not be subject to the rule's reporting and disclosure requirements.[29]

The proposing release stated that ''[i]t would not be an inappropriate response to reported evidence of a material violation for an issuer's CLO to direct defense counsel to assert either a colorable defense or a colorable basis for contending that the staff should not prevail. Such directions from the CLO, therefore, would not require defense counsel to report any evidence of a material violation to the issuer's directors.''[30] Several commenters were concerned over a possible chilling effect on an attorney's representation of an issuer in a Commission investigation or administrative proceeding if the attorney were subject to reporting and disclosure requirements.[31] Some noted

[13] Comments of the American Corporate Counsel Association, at 10. This concern was also expressed by commenters who asserted that foreign lawyers, in particular, would not have sufficient practical knowledge of United States laws to determine what constitutes an appropriate response. See, *e.g.*, Comments of Nagashima Ohno & Tsunematsu, at 7; Comments of the SIA/TBMA, at 13 (reporting attorney's judgment should be evaluated in light of that attorney's training, experience and position).

[14] Comments of Covington & Burling, at 3.

[15] Comments of Susan P. Koniak *et al.*, at 12–13.

[16] Comments of Covington & Burling, at 3.

[17] Comments of Richard Hall, Cravath Swaine & Moore, at 6–7; Comments of the Association of the Bar of the City of New York, at 12; Comments of Carter, Ledyard & Milburn, at 3 (stating that requiring an attorney, in deciding whether an issuer has made an appropriate response, to determine whether a material violation is about to occur, is an ''impossibly predictive standard''); Comments of the Japan Federation of Bar Associations, at 3 (opining that the term ''appropriate response'' cannot be easily construed on its face).

[18] Comments of the SIA/TBMA, at 18; Comments of the Association of the Bar of the City of New York, at 12 (''[o]nce an attorney has reported and documented a possible violation, the attorney should be assured that good faith reliance upon the response protects the attorney).

[19] Comments of the Corporation, Finance and Securities Law Section of the District of Columbia Bar, at 14; Comments of the American Bar Association, at 22 (''[w]e believe it is important that the Commission recognize that a reporting attorney may rely on the considered judgment of the CLO so long as that judgment is in the range of reasonableness even though the attorney would not necessarily come out that way''); Comments of Skadden, Arps, Slate, Meagher & Flom, at 9–10 (reporting attorney should be able to rely upon the stated belief of the officer to whom he has reported the evidence of material violation that no material violation has occurred).

[20] Comments of JP Morgan & Chase, at 10–11; Comments of Debevoise & Plimpton, at 5.

[21] Comments of JP Morgan & Chase, at 11; Comments of Debevoise & Plimpton, at 5–6.

[22] Comments of the Corporation, Finance and Securities Law Section of the District of Columbia Bar, at 14.

[23] Comments of Carter, Ledyard & Milburn, at 3; Comments of Skadden, Arps, Slate, Meagher & Flom, at 9–10 (appropriate response should include a timely response that adequate measures are being taken).

[24] Comments of Susan P. Koniak *et al.*, at 13; Comments of Schiff Hardin & Waite, at 4–5 (criticizing the examples in the release of the proposed rule as undercutting the proposition that attorneys will be permitted to exercise their reasonable judgment, and stating that the Commission should clarify that the reasonableness of an issuer's response will vary depending on the circumstances and will not necessarily depend on the existence of a written legal opinion from outside counsel to the issuer); Comments of the SIA/TBMA, at 18 (suggesting revisions to Section 205.2(b) that would state that an appropriate response should be reasonable under the circumstances, measured by the magnitude and quality of the evidence of the violation, the severity of the violation, and whether there is a potential for ongoing or recurring violation).

[25] Comments of Susan P. Koniak *et al.*, at 12.

[26] Comments of the SIA/TBMA, at 11 (stating that the Rules ''should exempt outside counsel whom securities firms retain to conduct internal investigations'').

[27] Comments of Carter, Ledyard & Milburn, at 6 (noting risk that proposed rules ''might discourage persons from seeking legal representation''); Comments of the SIA/TBMA, at 11.

[28] Comments of Weil Gotshal & Manges, at 7.

[29] Comments of the Corporation, Finance and Securities Law Section of the District of Columbia Bar, at 4; Comments of the American Bar Association, at 30.

[30] 67 FR 71683.

[31] Comments of Akin Gump Strauss Hauer & Feld, at 7–8; Comments of Cleary, Gottlieb, Steen &

Continued

that an issuer's disagreement in good faith with the Commission over a matter in litigation should not raise a reporting obligation under the rules.[32] Others suggested that the definition of ''appropriate response'' include the assertion of ''a colorable defense or the obligation of the Commission staff to bear the burden of proving its case.'' [33] Some commenters stressed that an attorney representing an issuer should be able to take any position for which there is an evidentiary foundation and a nonfrivolous legal basis.[34] The commenters did not want the final rules to impair an advocate's ability to present non-frivolous arguments. Some commenters noted that an issuer has no right to use an attorney to conceal ongoing violations or plan further violations of the law.[35]

The standard set forth in the final version of Section 205.2(b) requires the attorney to ''reasonably believe'' either that there is no material violation or that the issuer has taken proper remedial steps. The term ''reasonably believes'' is defined in Section 205.2(m). In providing that the attorney's belief that a response was appropriate be reasonable, the Commission is allowing the attorney to take into account, and the Commission to weigh, all attendant circumstances. The circumstances a reporting attorney might weigh in assessing whether he or she could reasonably believe that an issuer's response was appropriate would include the amount and weight of the evidence of a material violation, the severity of the apparent material violation and the scope of the investigation into the report. While some commenters suggested that a reporting attorney should be able to rely completely on the assurance of an issuer's CLO that there was no material violation or that the issuer was undertaking an appropriate response, the Commission believes that this information, while certainly relevant to the determination whether an attorney could reasonably believe that a response was appropriate, cannot be dispositive of the issue. Otherwise, an issuer could simply have its CLO reply to the reporting attorney that ''there is no material violation,'' without taking any steps to investigate and/or remedy material violations. Such a result would clearly be contrary to Congress' intent in enacting Section 307. On the other hand, it is anticipated that an attorney, in determining whether a response is appropriate, may rely on reasonable and appropriate factual representations and legal determinations of persons on whom a reasonable attorney would rely.

Some commenters expressed confusion over the ''and/or'' connectors in the proposed subparagraph (b)(2), and they have been eliminated in the final rule. The Commission believes that the revisions to this subparagraph make clear that the issuer must adopt appropriate remedial measures or sanctions to prevent future violations, redress past violations, and stop ongoing violations and consider the feasibility of restitution. The concern that under subparagraph (b)(2) any issuer's response to a reporting attorney that remedial measures are ongoing but not completed must be deemed to be inappropriate, thereby requiring reporting up-the-ladder, appears to be overstated. Many remedial measures, such as disclosures and the cessation of ongoing material violations, will occur in short order once the decision has been made to pursue them. Beyond this, the reasonable time period after which a reporting attorney is obligated to report further up-the-ladder would include a reasonable period of time for the issuer to complete its ongoing remediation.

By broadening the definition of ''appropriate response,'' subparagraph (b)(3) responds to a variety of concerns raised by commenters. Subparagraph (b)(3) permits an issuer to assert as an appropriate response that it has directed its attorney, whether employed or retained by it, to undertake an internal review of reported evidence of a material violation and has substantially implemented the recommendations made by an attorney after reasonable investigation and evaluation of the reported evidence. However, the attorney retained or directed to conduct the evaluation must have been retained or directed with the consent of the issuer's board of directors, a committee thereof to whom a report could be made pursuant to 205.3(b)(3), or a qualified legal compliance committee.

Subparagraph (b)(3) also explicitly incorporates into the final rule our view, expressed in the proposing release, that ''[i]t would not be an inappropriate response to reported evidence of a material violation for an issuer's CLO to direct defense counsel to assert either a colorable defense or a colorable basis for contending that the staff should not prevail.''[36] Subparagraph (b)(3) incorporates this standard into the definition of ''appropriate response'' by permitting an issuer to respond to a report that it has been advised by its attorney that he or she may assert a colorable defense on behalf of the issuer in response to the reported evidence ''in any investigation or judicial or administrative proceeding,'' including by asserting a colorable basis that the Commission or other charging party should not prevail.[37] The provision would apply only where the defense could be asserted consistent with an attorney's professional obligation. Once again, the attorney opining that he or she may assert a colorable defense must have been retained or directed to evaluate the matter with the consent of the issuer's board of directors, a committee thereunder to whom a report could be made pursuant to Section 205(b)(3), or a qualified legal compliance committee.

We noted in our proposing release our intention that the rule not ''impair zealous advocacy, which is essential to the Commission's processes.''[38] The attorney conducting an internal investigation that is contemplated under subparagraph (b)(3) may engage in full and frank exchanges of information with the issuer he or she represents.

Hamilton, at 9 (''There would be an unavoidable chilling effect on the advocacy of lawyers who represent clients before the Commission in investigations and administrative proceedings if Rule 205 applies to them.''); Comments of the Association of the Bar of the City of New York, at 19–20 (stating that it would be ''unfair[] to include attorneys who are adverse parties in enforcement or administrative proceedings within the reporting and withdrawal requirements of the proposed rules''); Comments of Susan P. Koniak *et al.*, at 36 (final rules should ''avoid chilling legitimate and vigorous advocacy'').

[32] Comments of Richard Hall, Cravath, Swaine & Moore, at 3.

[33] Comments of Morrison & Foerster and eight other law firms, at 14.

[34] Comments of Securities Regulation Committee, Business Law Section, New York State Bar Association, at 6 (stating that ''a lawyer need not subjectively believe that he or she has the 'better side of the argument' or that it is a position likely to prevail. The attorney is permitted to undertake the representation if he or she, after a reasonable investigation, believes that there is (or will be) evidentiary support for the position and that the assertions of law are nonfrivolous. See, *e.g.*, Rule 11, Fed. R. Civ. P.''). *See also* Comments of Cleary, Gottlieb, Steen & Hamilton, at 9 (''Lawyers representing clients before the Commission must be free to make all non-frivolous arguments to the staff.'').

[35] Comments of Susan P. Koniak, *et al.*, at 37.

[36] The text of the final rule does not specifically include a reference to a ''colorable basis for contending that the staff [or other litigant] should not prevail,'' nor does it specifically refer to requiring the Commission staff or other litigant to bear the burden of its case. The Commission, however, considers these and related actions permitted to an attorney, consistent with his or her professional obligations, to be included within the reference to asserting a ''colorable defense.''

[37] Subparagraph (b)(3) thereby also addresses the concern of some commenters that an attorney representing an issuer in connection with a Commission investigation or administrative proceeding not be required to report the information. Under subparagraph (b)(3), asserting a colorable defense on an issuer's behalf in an investigation or administrative proceeding may constitute an appropriate response, and no further reporting would be required.

[38] 67 FR 71673.

Moreover, as noted above, subparagraph (b)(3) expressly provides that the assertion of colorable defenses in an investigation or judicial or administrative proceeding is an appropriate response to reported evidence of a material violation. Concerns over a chilling effect on advocacy should thus be allayed. At the same time, by including a requirement that this response be undertaken with the consent of the issuer's board of directors, or an appropriate committee thereof, the revised definition is intended to protect against the possibility that a chief legal officer would avoid further reporting ''up-the-ladder'' by merely retaining a new attorney to investigate so as to assert a colorable, but perhaps weak, defense.

The term ''colorable defense'' does not encompass all defenses, but rather is intended to incorporate standards governing the positions that an attorney appropriately may take before the tribunal before whom he or she is practicing. For example, in Commission administrative proceedings, existing Rule of Practice 153(b)(1)(ii), 17 CFR 201.153(b)(1)(ii), provides that by signing a filing with the Commission, the attorney certifies that ''to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, the filing is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.'' An issuer's right to counsel is thus not impaired where the attorney is restricted to presenting colorable defenses, including by requiring the Commission staff to bear the burden of proving its case. Of course, as some commenters noted, an issuer has no right to use an attorney to conceal ongoing violations or plan further violations of the law.

205.2(c) provides:

(c) *Attorney* means any person who is admitted, licensed, or otherwise qualified to practice law in any jurisdiction, domestic or foreign, or who holds himself or herself out as admitted, licensed, or otherwise qualified to practice law.

Commenters suggested that the proposed rule's definition of the term ''attorney'' was unnecessarily broad. A number of commenters suggested that it was inappropriate to apply the rule to foreign attorneys, arguing that foreign attorneys, and attorneys representing or employed by multijurisdictional firms, are subject to statutes, rules, and ethical standards in those foreign jurisdictions that are different from, and potentially incompatible with, the requirements of this rule.[39] These points were amplified by foreign attorneys who attended a December 17, 2002 Roundtable discussion hosted by the Commission to address the issues raised by the application of the rule to foreign attorneys.

As noted above, and as set forth more fully below, the rule we adopt today adds a new defined term, ''non-appearing foreign attorney,'' which addresses many of the concerns expressed regarding the application of the rule to foreign attorneys. In addition, other commenters argued that the proposed rule's definition of ''attorney'' applied to a large number of individuals employed by issuers who are admitted to practice, but who do not serve in a legal capacity. By significantly narrowing the definition of the term ''appearing and practicing'' as set forth above, we have addressed many of the concerns expressed by commenters concerning the application of the rule to individuals admitted to practice who are employed in non-legal positions and do not provide legal services.

205.2(d) provides:

(d) *Breach of fiduciary duty* refers to any breach of fiduciary or similar duty to the issuer recognized under an applicable federal or state statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions.

The definition we adopt today has been slightly modified from the definition included in the proposing release. Several commenters suggested that the definition in the proposing release should be amended to include breaches of fiduciary duty arising under federal or state statutes.[40] The phrase ''under an applicable federal or state statute'' has been added to clarify that breaches of fiduciary duties imposed by federal and state statutes are covered by the rule.

205.2(e) provides:

(e) *Evidence of a material violation* means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.

This revised definition of ''evidence of a material violation'' clarifies aspects of the objective standard that the Commission sought to achieve in the definition originally proposed.[41] The definition of ''evidence of a material violation'' originally proposed prompted extensive comment because (read together with the rule's other definitions) it defines the trigger for an attorney's obligation under the rule to report up-the-ladder to an issuer's CLO or qualified legal compliance committee (''QLCC'') (in section 205.3(b)). Some commenters, including some practicing attorneys, found the proposed reporting trigger too high.[42] Many legal scholars endorsed the framework of increasingly higher triggers for reporting proposed by the Commission at successive stages in the reporting process but considered the Commission's attempt at articulating an objective standard unworkable and suggested changes to the language in the proposed rule.[43] Nearly all practicing lawyers who commented found the reporting trigger in the rule too low and called instead for a subjective standard, requiring ''actual belief'' that a material violation has occurred, is ongoing, or is about to occur before the attorney would be obligated to make an initial report within the client issuer.[44] The revised

[39] See, *e.g.*, Comments of Skadden, Arps, Slate, Meagher and Flom, at 16 (noting that foreign private issuers usually consult with United States counsel on securities matters, and suggesting that limiting the definition of ''attorney'' to lawyers licensed in United States jurisdictions ''will avoid the unfairness of subjecting foreign lawyers to the Proposed Rules without compromising the effectiveness of the rules.'').

[40] *See* Comments of Richard W. Painter, at 10–11 (''Breaches of fiduciary duty to pension funds under federal law such as ERISA, and other similar violations would thus clearly be covered, whereas arguably they are not under the current definition in the Proposed Rules.'').

[41] The proposed rule defines *evidence of a material violation* as ''information that would lead an attorney reasonably to believe that a material violation has occurred, is occurring, or is about to occur'' and *reasonable belief* as what ''an attorney, acting reasonably, would believe.''

[42] *E.g.,* Comments of John Bullock, at 1 (''the threshold for mandatory reporting by an attorney should be the level of evidence that a responsible corporate officer should want to know, so that the client can pursue an investigation and take appropriate action. The standard should therefore be 'some credible information that a material violation may have occurred, may be occurring, or may be about to occur.'''').

[43] Comments of Richard W. Painter, at 6 (suggesting that ''evidence that a violation is 'possible' could trigger the duty to report to the Chief Legal Officer, whereas evidence that a violation is ''likely'' could trigger the duty to report to the full board or to the QLCC. Evidence that a violation was 'highly likely' or a 'near certainty' could trigger the requirement of a noisy withdrawal.''); Comments of Susan P. Koniak *et al.*, at 9–11, 15–17 (emphasizing the importance of distinguishing between a violation and evidence of one and suggesting the use of the phrase ''credible evidence'').

[44] Comments of Skadden Arps, Slate, Meagher & Flom, at 10 (proposing to define ''*evidence of a material violation*'' as ''facts and circumstances known to an attorney which have caused the attorney to believe that a material violation has occurred, is occurring or is about to occur''); Comments of Chadbourne & Parke, at 7 (proposing ''a subjective standard that an attorney 'knows' that a material violation has occurred, is occurring or is about to occur''); Comments of Sullivan & Cromwell, at 11 (''Evidence of a material violation

Continued

definition incorporates suggested changes into an objective standard that is designed to facilitate the effective operation of the rule and to encourage the reporting of evidence of material violations.

Evidence of a material violation must first be credible evidence.[45] An attorney is obligated to report when, based upon that credible evidence, ''it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.'' This formulation, while intended to adopt an objective standard, also recognizes that there is a range of conduct in which an attorney may engage without being unreasonable.[46] The ''circumstances'' are the circumstances at the time the attorney decides whether he or she is obligated to report the information. These circumstances may include, among others, the attorney's professional skills, background and experience, the time constraints under which the attorney is acting, the attorney's previous experience and familiarity with the client, and the availability of other lawyers with whom the lawyer may consult. Under the revised definition, an attorney is not required (or expected) to report ''gossip, hearsay, [or] innuendo.'' [47] Nor is the rule's reporting obligation triggered by ''a combination of circumstances from which the attorney, in retrospect, should have drawn an inference,'' as one commenter feared.

On the other hand, the rule's definition of ''evidence of a material violation'' makes clear that the initial duty to report up-the-ladder is not triggered only when the attorney ''knows'' that a material violation has occurred [48] or when the attorney ''conclude[s] there has been a violation, and no reasonable fact finder could conclude otherwise.''[49] That threshold for initial reporting within the issuer is too high. Under the Commission's rule, evidence of a material violation must be reported in all circumstances in which it would be unreasonable for a prudent and competent attorney not to conclude that it is ''reasonably likely'' that a material violation has occurred, is ongoing, or is about to occur. To be ''reasonably likely'' a material violation must be more than a mere possibility, but it need not be ''more likely than not.''[50] If a material violation is reasonably likely, an attorney must report evidence of this violation. The term ''reasonably likely'' qualifies each of the three instances when a report must be made. Thus, a report is required when it is reasonably likely a violation has occurred, when it is reasonably likely a violation is ongoing or when reasonably likely a violation is about to occur.

205.2(f) provides:

(f) *Foreign government issuer* means a foreign issuer as defined in 17 CFR 230.405 eligible to register securities on Schedule B of the Securities Act of 1933 (15 U.S.C. 77a *et seq.*, Schedule B).

We adopt the definition for this new term prescribed under Rule 405.

205.2(g) provides:

(g) *In the representation of an issuer* means providing legal services as an attorney for an issuer, regardless of whether the attorney is employed or retained by the issuer.

The definition we adopt today has been modified from the definition included in the proposing release. The phrase ''providing legal services'' has been substituted for the term ''acting.'' Some commenters objected that the term ''acting'' was both imprecise and overly broad, and that the concept of ''representation of an issuer'' should ''apply only to attorneys who are rendering legal advice to the organizational client. * * * and therefore have the professional obligations of an attorney.''[51] The substitution of the term ''providing legal services'' responds to these concerns. We believe that this change, combined with the narrowing of the definition of the term ''appearing and practicing'' as set forth above, addresses the concerns expressed by the ABA and others.[52]

For the reasons explained in the proposing release,[53] an attorney employed by an investment adviser who prepares, or assists in preparing, materials for a registered investment company that the attorney has reason to believe will be submitted to or filed with the Commission by or on behalf of a registered investment company is appearing and practicing before the Commission under this definition.

Although some commenters objected to this construction of the definition of ''in the representation of an issuer,''[54] those commenters did not contest either the fact that such an attorney, though employed by the investment adviser rather than the investment company, is providing legal services for the investment company or the logical implication of that fact: that the attorney employed by the investment adviser is accordingly representing the investment company before the Commission.[55] Indeed, the Investment Company Institute (''ICI'') opposes the Commission's construction of its rule because, the ICI asserts, the Commission's construction might make investment advisers limit the participation of attorneys employed or retained by the investment adviser in preparing filings for investment companies, thereby forcing the investment companies ''to retain their own counsel'' to do exactly the same work now performed by attorneys for the investment adviser.[56]

means information of which the attorney is consciously aware that would, in the attorney's judgment, constitute a material violation that has occurred, is occurring, or is about to occur.''); Comments of the American Bar Association, at 17 (recommending use of ''the knowledge standard'').

[45] *See* Comments of Susan P. Koniak *et al.*, at 18.

[46] Comments of Richard W. Painter, at 5–6.

[47] Comments of the Association of the Bar of the City of New York, at 10.

[48] The standard was suggested, *e.g.*, in Comments of the American Bar Association, at 5, 16–17.

[49] Comments of Cleary, Gottlieb, Steen & Hamilton, at 5–6 (any lower trigger for reporting would be equivocal, would lead to disparate application of the rule, and would ''chill'' the attorney-client relationship).

[50] The Commission intends the definition of the term ''reasonably likely'' to be consistent with the discussion of the term included in the adopting release for the recently adopted final rule governing disclosure of off-balance sheet arrangements, enacted pursuant to § 401(a) of the Sarbanes-Oxley Act.

[51] Comments of the American Bar Association, at 14 (''It is not uncommon for persons who were attorneys and may still retain their license to move into other non-legal capacities in the organization. * * * These persons should be subject to no greater obligations to the organization than someone who is not an attorney.''). However, the ABA stated that it believed that the rule ''appropriately applied to any attorney for the issuer'' who renders legal advice to the issuer. *Id.*

[52] We also note that the change should address concerns expressed that counsel to underwriters or similar persons might be covered by the rule.

[53] 67 FR 71678–79.

[54] *See, e.g.*, Comments of the Investment Company Institute at 1–5 (asserting that the Commission's construction of its rule may cause investment advisers to ''limit or even eliminate the participation of their internal and outside lawyers in the preparation of fund filings and materials, and in providing day-to-day advice to advisory personnel responsible for managing funds, in order to ensure that such lawyers are not 'involved in the representation of an issuer' or 'practicing before the Commission' within the meaning of the proposed rule.'').

[55] On the correctness of this inference, *see, e.g.*, Comments of Thomas D. Morgan at 3–4 (pointing out that ''current law'' makes an attorney employed by an investment adviser the ''legal representative'' of an investment company under these circumstances, although one has to take ''a logical step'' to reach that conclusion) (citing *Restatement (Third) of the Law Governing Lawyers* section 51(4)(2000)). An attorney-client relationship does not depend on payment for legal services performed. However, the legal services provided by an investment adviser to an investment company are usually performed pursuant to an advisory contract along with other services (such as investment advice) and are covered by the overall investment advisory fee.

[56] Comments of the Investment Company Institute, at 4. As noted in the proposing release, 67

205.2(h) provides:

(h) *Issuer* means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of that Act (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), and that it has not withdrawn, but does not include a foreign government issuer. For purposes of paragraphs (a) and (g) of this section, the term ''issuer'' includes any person controlled by an issuer, where an attorney provides legal services to such person on behalf of, or at the behest, or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer.

The definition for the term ''issuer'' we adopt today incorporates the definition set forth in Section 2(a)(7) of the Act, which in turn incorporates the definition contained in the Exchange Act. The definition has been modified to specifically exclude foreign government issuers, defined above.[57]

The definition also has been modified to make clear that, for purposes of the terms ''appearing and practicing'' before the Commission and ''in the representation of an issuer,'' the term ''issuer'' includes any person controlled by an issuer (*e.g.*, a wholly-owned subsidiary), where the attorney provides legal services to that person for the benefit of or on behalf of an issuer. We consider the change important to achieving the objectives of Section 307 in light of the statutory reference to appearing and practicing ''in any way'' in the representation of an issuer. Under the revised definition, an attorney employed or retained by a non-public subsidiary of a public parent issuer will be viewed as ''appearing and practicing'' before the Commission ''in the representation of an issuer'' whenever acting ''on behalf of, or at the behest, or for the benefit of'' the parent. This language, consistent with the Commission's comment in the proposing release (although now limited to persons controlled by an issuer) would encompass any subsidiary covered by an umbrella representation agreement or understanding, whether explicit or implicit, under which the attorney represents the parent company and its subsidiaries, and can invoke privilege claims with respect to all communications involving the parent and its subsidiaries. Similarly, an attorney at a non-public subsidiary appears and practices before the Commission in the representation of an issuer when he or she is assigned work by the parent (*e.g.*, preparation of a portion of a disclosure document) which will be consolidated into material submitted to the Commission by the parent, or if he or she is performing work at the direction of the parent and discovers evidence of misconduct which is material to the parent. The definition of the term is also intended to reflect the duty of an attorney retained by an issuer to report to the issuer evidence of misconduct by an agent of the issuer (*e.g.*, an underwriter) if the misconduct would have a material impact upon the issuer.[58]

205.2(i) provides:

(i) *Material violation* means a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law.

The definition we adopt today modifies the definition set forth in the proposed rule by adding the phrases ''United States federal or state'' and ''arising under United States federal or state law.'' This modification clarifies that material violations must arise under United States law (federal or state), and do not include violations of foreign laws. The final rule does not define the word ''material,'' because that term has a well-established meaning under the federal securities laws [59] and the Commission intends for that same meaning to apply here.

205.2(j) provides:

(j) *Non-appearing foreign attorney* means an attorney:

(1) Who is admitted to practice law in a jurisdiction outside the United States;

(2) Who does not hold himself or herself out as practicing, and does not give legal advice regarding, United States federal or state securities or other laws (except as provided in paragraph (j)(3)(ii) of this section); and

(3) Who:

(i) Conducts activities that would constitute appearing and practicing before the Commission only incidentally to, and in the ordinary course of, the practice of law in a jurisdiction outside the United States; or

(ii) Is appearing and practicing before the Commission only in consultation with counsel, other than a non-appearing foreign attorney, admitted or licensed to practice in a state or other United States jurisdiction.

The final rule provides that a ''non-appearing foreign attorney'' does not ''appear and practice before the Commission'' for purposes of the rule. In brief, the definition excludes from the rule those attorneys who: (1) Are admitted to practice law in a jurisdiction outside the United States; (2) do not hold themselves out as practicing, or giving legal advice regarding, United States law; and (3) conduct activities that would constitute appearing and practicing before the Commission only (i) incidentally to a foreign law practice, or (ii) in consultation with United States counsel. A non-United States attorney must satisfy all three criteria of the definition to be excluded from the rule.

The effect of this definition will be to exclude many, but not all, foreign attorneys from the rule's coverage. Foreign attorneys who provide legal advice regarding United States securities law, other than in consultation with United States counsel, are subject to the rule if they conduct activities that constitute appearing and practicing before the Commission. For example, an attorney licensed in Canada who independently advises an issuer regarding the application of Commission regulations to a periodic filing with the Commission is subject to the rule. Non-United States attorneys who do not hold themselves out as practicing United States law, but who engage in activities that constitute appearing and practicing before the Commission, are subject to the rule unless they appear and practice before the Commission only incidentally to a foreign law practice or in consultation with United States counsel.

Proposed Part 205 drew no distinction between the obligations of United States and foreign attorneys. The proposing release requested comment on the effects of the proposed rule on attorneys who are licensed in foreign jurisdictions or otherwise subject to foreign statutes, rules and ethical standards. The Commission recognized that the proposed rule could raise difficult issues for foreign lawyers and

FR 71678–79, and below in the discussion of Section 205.3(b), an attorney employed by an investment adviser who becomes aware of evidence of a material violation that is material to an investment company while thus representing that investment company before the Commission has a duty to report such evidence up-the-ladder within the investment company. For the reasons explained in the proposing release and noted below, however, such reporting does no violence to the attorney-client privilege. *See Restatement (Third) of the Law Governing Lawyers,* section 75 and cmt. d (explaining that in a subsequent proceeding in which the co-client's interests are adverse there is normally no attorney-client privilege regarding either co-client's communications with their attorney during the co-client relationship).

[57] We also note that the changes should address concerns expressed that counsel to underwriters or similar persons might be covered by the rule.

[58] An attorney who represents a subsidiary or other person controlled by an issuer at the behest, for the benefit, or on behalf of a parent issuer who becomes aware of evidence of a material violation that is material to the issuer should report the evidence up-the-ladder through the issuer, as set forth in Section 205.3(b) of the rule.

[59] *See Basic, Inc.* v. *Levinson*, 485 U.S. 224, 231–36 (1988); *TSC Indus.* v. *Northway, Inc*, 426 U.S. 438 (1976).

international law firms because applicable foreign standards might be incompatible with the proposed rule. The Commission also recognized that non-United States lawyers play significant roles in connection with Commission filings by both foreign and United States issuers.

On December 17, 2002, the Commission hosted a Roundtable on the International Impact of the Proposed Rules Regarding Attorney Conduct. The Roundtable offered foreign participants the opportunity to share their views on the application of the proposed rule outside of the United States. The participants consisted of international regulators, professional associations, and law firms, among others. Participants at the Roundtable expressed concern about many aspects of the proposed rule. Some objected to the scope of the proposed definition of ''appearing and practicing before the Commission,'' noting that a foreign attorney who prepares a contract or other document that subsequently is filed as an exhibit to a Commission filing might be covered by the rule. In addition, some of the participants stated that foreign attorneys with little or no experience or training in United States securities law may not be competent to determine whether a material violation has occurred that would trigger reporting requirements. Others stated that the ''noisy withdrawal'' and disaffirmation requirements of the proposed rule would conflict with the laws and principles of confidentiality and the attorney-client privilege recognized in certain foreign jurisdictions.

The Commission received more than 40 comment letters that addressed the international aspects of the proposed attorney conduct rule. Many suggested that non-United States attorneys should be exempt from the rule entirely, arguing that the Commission would violate principles of international comity by exercising jurisdiction over the legal profession outside of the United States. Others recommended that the Commission take additional time to consider these conflict issues, and provide a temporary exemption from the rule for non-United States attorneys. The majority of commenters asserted that the proposed rule's ''noisy withdrawal'' and disaffirmation requirements would conflict with their obligations under the laws of their home jurisdictions.

Section 205.2(j) and the final definition of ''appearing and practicing before the Commission'' under § 205.2(a) together address many of the concerns expressed by foreign lawyers. Foreign lawyers who are concerned that they may not have the expertise to identify material violations of United States law may avoid being subject to the rule by declining to advise their clients on United States law or by seeking the assistance of United States counsel when undertaking any activity that could constitute appearing and practicing before the Commission. Mere preparation of a document that may be included as an exhibit to a filing with the Commission does not constitute ''appearing and practicing before the Commission'' under the final rule, unless the attorney has notice that the document will be filed with or submitted to the Commission and he or she provides advice on United States securities law in preparing the document.

The Commission respects the views of the many commenters who expressed concerns about the extraterritorial effects of a rule regulating the conduct of attorneys licensed in foreign jurisdictions. The Commission considers it appropriate, however, to prescribe standards of conduct for an attorney who, although licensed to practice law in a foreign jurisdiction, appears and practices on behalf of his clients before the Commission in a manner that goes beyond the activities permitted to a non-appearing foreign attorney. Non-United States attorneys who believe that the requirements of the rule conflict with law or professional standards in their home jurisdiction may avoid being subject to the rule by consulting with United States counsel whenever they engage in any activity that constitutes appearing and practicing before the Commission. In addition, as discussed in Section 205.6(d) below, the Commission is also adopting a provision to protect a lawyer practicing outside the United States in circumstances where foreign law prohibits compliance with the Commission's rule.

205.2(k) provides:

(k) *Qualified legal compliance committee* means a committee of an issuer (which also may be an audit or other committee of the issuer) that:

(1) Consists of at least one member of the issuer's audit committee (or, if the issuer has no audit committee, one member from an equivalent committee of independent directors) and two or more members of the issuer's board of directors who are not employed, directly or indirectly, by the issuer and who are not, in the case of a registered investment company, ''interested persons'' as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19));

(2) Has adopted written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation under § 205.3;

(3) Has been duly established by the issuer's board of directors, with the authority and responsibility:

(i) To inform the issuer's chief legal officer and chief executive officer (or the equivalents thereof) of any report of evidence of a material violation (except in the circumstances described in § 205.3(b)(4));

(ii) To determine whether an investigation is necessary regarding any report of evidence of a material violation by the issuer, its officers, directors, employees or agents and, if it determines an investigation is necessary or appropriate, to:

(A) Notify the audit committee or the full board of directors;

(B) Initiate an investigation, which may be conducted either by the chief legal officer (or the equivalent thereof) or by outside attorneys; and

(C) Retain such additional expert personnel as the committee deems necessary; and

(iii) At the conclusion of any such investigation, to:

(A) Recommend, by majority vote, that the issuer implement an appropriate response to evidence of a material violation; and

(B) Inform the chief legal officer and the chief executive officer (or the equivalents thereof) and the board of directors of the results of any such investigation under this section and the appropriate remedial measures to be adopted; and

(4) Has the authority and responsibility, acting by majority vote, to take all other appropriate action, including the authority to notify the Commission in the event that the issuer fails in any material respect to implement an appropriate response that the qualified legal compliance committee has recommended the issuer to take.

A QLCC, as here defined, is part of an alternative procedure for reporting evidence of a material violation. That alternative procedure is set out in § 205.3(c) of the rule.

The definition of a QLCC in § 205.2(k) of the final rule contains a few modifications from the definition in the proposed rule. In the first clause of the definition, the final rule provides that an audit or other committee of the issuer may serve as the QLCC. As a result, the issuer is not required to form a QLCC as a new corporate structure, unless it wishes to, so long as another committee of the issuer meets all of the requisite criteria for a QLCC and agrees to function as a QLCC in addition to its separate duties and responsibilities. This change responds to comments that issuers should not be required to create a new committee to serve as a QLCC, so long as an existing committee contains the required number of independent directors.[60]

[60] Comments of the American Corporate Counsel Association, at 9–10; Comments of Association of the Bar of the City of New York, at 42; Comments of Corporations Committee, Business Law Section,

Subsection 205.2(k)(1) of the final rule, which addresses the composition of the QLCC, provides that if an issuer has no audit committee, the requirement to appoint at least one member of the audit committee to the QLCC may be met by appointing instead a member from an equivalent committee of independent directors. The Commission does not intend to limit use of the QLCC mechanism only to those issuers that have an audit committee. However, the Commission believes that the requirement that the QLCC be comprised of members who are not employed directly or indirectly by the issuer is warranted and appropriate, and thus disagrees with a commenter's suggestion to permit non-independent board members to be on the QLCC.[61]

Subsection 205.2(k)(3)(iii)(A) has been modified to clarify that the QLCC shall have the authority and responsibility to recommend that an issuer implement an appropriate response to evidence of a material violation, but not to require the committee to direct the issuer to take action. This modification responds to comments that the proposed rule would be in conflict with established corporate governance models insofar as the QLCC would have the explicit authority to compel a board of directors to take certain remedial actions.[62]

The proposed rule did not specify whether the QLCC could act if its members did not all agree. In response to comments expressing concern over this point,[63] language has been included in subsections 205.2(k)(3) and (4) of the final rule to clarify that decisions and actions of the QLCC must be made and taken based upon majority vote. Unanimity is not required for a QLCC to operate; nor should an individual member of a QLCC act contrary to the collective decision of the QLCC. Accordingly, the final rule specifies that a QLCC may make its recommendations and take other actions by majority vote.

Commenters suggested both that issuers would have great difficulty finding qualified persons to serve on a QLCC because of the burdens and risks of such service,[64] and that many companies will utilize a QLCC because reporting evidence of a material violation to a QLCC relieves an attorney of responsibility to assess the issuer's response.[65] The Commission does not know how widespread adoption of the QLCC alternative will be, but encourages issuers to do so as a means of effective corporate governance. In any event, the Commission does not intend service on a QLCC to increase the liability of any member of a board of directors under state law and, indeed, expressly finds that it would be inconsistent with the public interest for a court to so conclude.

As in the proposed rule, the final rule provides that members of the QLCC may not be ''employed, directly or indirectly, by the issuer.'' This language, which is also included in Section 205.3(b)(3), is drawn directly from Section 307 of the Sarbanes-Oxley Act. The Commission considers it appropriate and consistent with the mandate of the Act to ensure a high degree of independence in QLCC members and members of committees to whom reports are made under Section 205.3(b)(3). Accordingly, the Commission anticipates that these provisions will be amended to conform to final rules defining who is an ''independent'' director under Section 301 of the Act, upon adoption of those rules.

205.2(l) provides:

(l) *Reasonable* or *reasonably* denotes, with respect to the actions of an attorney, conduct that would not be unreasonable for a prudent and competent attorney.

The definition of ''reasonable'' or ''reasonably'' is based on Rule 1.0(h) of the ABA's Model Rules of Professional Conduct, modified to emphasize that a range of conduct may be reasonable.

205.2(m) provides:

(m) *Reasonably believes* means that an attorney believes the matter in question and that the circumstances are such that the belief is not unreasonable.

This definition is based on the definition of ''reasonable belief'' or ''reasonably believes'' in Rule 1.0(i) of the ABA's Model Rules of Professional Conduct, modified to emphasize that the range of possible reasonable beliefs regarding a matter may be broad—limited for the purposes of this rule by beliefs that are unreasonable. Because the definition no longer is used in connection with the definition of ''evidence of a material violation,'' the proposed rule's attempt to exclude the subjective element in ''reasonable belief'' has been abandoned.

205.2(n) provides:

(n) *Report* means to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing.

The definition for this term has not been changed from the one included in the proposed rule.

Section 205.3—Issuer as Client

205.3(a) provides:

(a) *Representing an Issuer.* An attorney appearing and practicing before the Commission in the representation of an issuer owes his or her professional and ethical duties to the issuer as an organization. That the attorney may work with and advise the issuer's officers, directors, or employees in the course of representing the issuer does not make such individuals the attorney's clients.

This section makes explicit that the client of an attorney representing an issuer before the Commission is the issuer as an entity and not the issuer's individual officers or employees that the attorney regularly interacts with and advises on the issuer's behalf. Most commenters supported the second sentence of the subsection as it is consistent with a lawyer's recognized obligations under accepted notions of professional responsibility.[66] Thus, this sentence remains unchanged in the final rule.

The proposed rule provided that an attorney ''shall act in the best interest of the issuer and its shareholders.'' Commenters raised three principal concerns regarding that provision: It misstates an attorney's duty under traditional ethical standards in charging an attorney with acting in the ''best interest'' of the issuer; it suggests attorneys have a duty to shareholders creating a risk that the failure to observe that duty could form the basis for a private action against the attorney by any of these shareholders;[67] and it appears to contradict the view expressed by the Commission in the proposing release that ''nothing in Section 307 creates a private right of action against an attorney.'' [68] As the Commission agrees, in part, with these comments, it has modified language in the final rule.

As to the first concern, the Commission recognizes that it is the client issuer, acting through its management, who chooses the

State Bar of California, at 12; Comments of Skadden, Arps, Slate, Meagher & Flom, at 12, 20, 25.

[61] *See* Comments of America's Community Bankers, at 5–6.

[62] Comments of Business Law Section, New York State Bar Association, at 14–15; Comments of the Business Roundtable, at 2–3.

[63] Comments of the American Bar Association, at 27; Comments of Business Law Section, New York State Bar Association, at 15.

[64] Comments of Clifford Chance, at 4–5; Comments of Emerson Electric Co., at 5.

[65] Comments of Susan P. Koniak *et al.*, at 11; Comments of Richard W. Painter, at 5; Comments of Thomas D. Morgan, at 12.

[66] *See* ABA Model Rule 1.13, ''Organization as Client,'' at 1:139.

[67] *See, e.g.*, Comments of Cleary, Gottlieb, Steen & Hamilton, at 3–4; Comments of Corporations Committee, Business Law Section, The State Bar of California, at 7; Comments of the American Corporate Counsel Association, at 11; Comments of Task Force on Corporate Responsibility of the County of New York Lawyers' Association, at 2–3.

[68] *See* Comments of the Association of the Bar of the City of New York, at 47–50.

objectives the lawyer must pursue, even when unwise, so long as they are not illegal or unethical. However, we disagree with the comment to the extent it suggests counsel is never charged with acting in the best interests of the issuer. ABA Model Rule 1.13 provides that an attorney is obligated to act in the ''best interests'' of an issuer in circumstances contemplated by this rule: that is, when an individual associated with the organization is violating a legal duty, and the behavior ''is likely to result in substantial injury'' to the organization. In those situations, it is indeed appropriate for counsel to act in the best interests of the issuer by reporting up-the-ladder.[69] However, the Commission appreciates that, with respect to corporate decisions traditionally reserved for management, counsel is not obligated to act in the ''best interests'' of the issuer. Thus, the reference in the proposed rule to the attorney having a duty to act in the best interests of the issuer has been deleted from the final rule. The sentence has also been modified to make it clear the lawyer ''owes his or her professional and ethical duties to the issuer as an organization.''

As to the second concern, the courts have recognized that counsel to an issuer does not generally owe a legal obligation to the constituents of an issuer—including shareholders.[70] The Commission does not want the final rule to suggest it is creating a fiduciary duty to shareholders that does not currently exist. Accordingly, we have deleted from the final rule the reference to the attorney being obligated to act in the best interest of shareholders. This modification should also address the third concern as the Commission does not intend to create a private right of action against attorneys or any other person under any provision of this part. Indeed, the final rule contains a new provision, 205.7, that expressly provides that nothing in this part is intended to or does create a private right of action.

205.3(b) provides:

(b) *Duty to report evidence of a material violation.* (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith. By communicating such information to the issuer's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer.

Section 205.3(b) clarifies an attorney's duty to protect the interests of the issuer the attorney represents by reporting within the issuer evidence of a material violation by any officer, director, employee, or agent of the issuer. The section was broadly approved by commenters. Paragraph (b)(1) describes the first step that an attorney representing an issuer is required to take after he or she becomes aware of evidence of a material violation, now defined in § 205.2. The definition of ''evidence of a material violation'' originally proposed was controversial and has been modified (as discussed above). Paragraph (b)(1), however, was otherwise generally approved.[71]

Section 205.3(b)(2) in Proposed Rule: Withdrawn

(2) The attorney reporting evidence of a material violation shall take steps reasonable under the circumstances to document the report and the response thereto and shall retain such documentation for a reasonable time.

The language set forth from proposed subsection 205.3(b)(2) of the proposed rule has been withdrawn.

In the final rules we have eliminated all requirements that reports and responses be documented and maintained for a reasonable period. Under the proposed rule, a lawyer would have been required to document his or her report of evidence of a material violation (205.3(b)(2)); the CLO would have been required to document any inquiry in response to a report (205.3(b)(3)); a reporting attorney would have been required to document when he or she received an appropriate response to a report (205.3(b)(2)); and an attorney who believed he or she did not receive an appropriate response to a report would have been required to document that response (205.3(b)(8)(ii)).

The Commission proposed the documentation requirements because it believed that up-the-ladder reporting would be handled more thoughtfully if those involved memorialized their decisions. It was also the Commission's view that documentation would benefit reporting attorneys as it would provide them with a contemporaneous written record of their actions that they could use in their defense if their up-the-ladder reporting subsequently became the subject of litigation. To that end, the Commission proposed 205.3(e)(1) (which is codified in the final rule as § 205.3(d)(1)) that specifically authorizes an attorney to use ''[a]ny report under this section * * * or any response thereto * * * in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue.'' Moreover, the Commission noted (*see* note 52 to the proposing release) that in at least one reported judicial decision, an associate at a law firm who had memorialized his reasons for resigning from the firm over a dispute regarding the adequacy of disclosures in a registration statement, was dismissed as a defendant in subsequent litigation over the appropriateness of those disclosures because his contemporaneous record demonstrated he had not participated in the fraud.

Nevertheless, the comments that the Commission received to the proposed documentation requirements were almost unanimously in opposition to its inclusion in the final rule. A number of commenters expressed concern that the documentation requirement could be an impediment to open and candid discussions between attorneys and their issuer clients. Those commenters were of the view it would stultify the consultation process because if the client knows the lawyer is documenting discussions regarding a potential material violation, managers are less likely to be honest and forthcoming.[72]

Other commenters expressed concern that the documentation requirement has the potential to create a conflict of interest between the lawyer and his or her client. For example, one commenter

[69] *See* ABA Model Rule 1.13, at 1:139.

[70] Decisions in a number of states recognize that, under state law, an attorney for an issuer does not owe a fiduciary duty to shareholders. *See Pelletier* v. *Zweifel,* 921 F.2d 1465, 1491–92 n.60 (11th Cir.) *cert. denied,* 502 U.S. 955 (1991) (Under Georgia law ''[I]t is a black letter principle of corporation law that a corporation's counsel does not owe * * * [a] fiduciary duty to the corporation's shareholders''). *See also Skarbrevik* v. *Cohen, England & Whitfield,* 231 Cal. App. 3d 692, 703 (1991) (Under California law, ''[a]n attorney representing a corporation does not become the representative of its stockholders merely because the attorney's actions on behalf of the corporation also benefit the stockholders; as attorney for the corporation, counsel's first duty is to the corporation.''); *Egan* v. *McNamara,* 467 A.2d 733, 738 (DC 1983) (''According to the District of Columbia Code of Professional Responsibility (Code), an attorney represents, and therefore owes a duty to, the entity that retains him. * * * When retained to represent a corporation, he represents the entity, not its individual shareholders, officers, or directors.'').

[71] The Comment of Federal Bar Counsel, at 12–13, for example, objected to ''becomes aware'' in (b)(1) but appears to have done so in connection with the proposed definition of ''evidence of a material violation.'' The revisions made to that definition appear to address those objections.

[72] *See, e.g.*, Comments of the American Bar Association, at 22; Comments of the American Corporate Counsel Association, at 5; Comments of the Association of the Bar of the City of New York, at 16; Comments of Cleary, Gottlieb, Steen & Hamilton, at 6.

stated that it ''places counsel to the issuer in the untenable position of having to protect himself or herself while trying to advise his or her client.'' [73] Similarly, another commenter pointed out that documentation would ''occur at exactly the time when there was disagreement between an attorney and the client. At the very least, requiring the attorney to produce such product by virtue of his or her separate obligation to the Commission is bound to present potential for conflict of interest.'' [74] Indeed, it was pointed out, there may be occasions where the preparation of documentation is not in the best interests of the client.[75]

Additionally, commenters opined that the documentation requirement might increase the issuer's vulnerability in litigation. They noted that a report will be a ''treasure trove of selectively damning evidence'' [76] and, while the Commission may be of the view that such documentation should be protected by the attorney-client privilege, the applicability of the privilege will be decided by the courts. Thus, there is considerable uncertainty as to whether it will be protected. At a minimum, it was contended, assertions of privilege will be met with significant and prolonged legal challenges.[77]

At least at the present time, the potential harms from mandating documentation may not justify the potential benefits. In all likelihood, in the absence of an affirmative documentation requirement, prudent counsel will consider whether to advise a client in writing that it may be violating the law.[78] In other situations, responsible corporate officials may direct that such matters be documented. In those situations, the Commission's goal will be met, but not in an atmosphere where the issuer and the attorney may perceive that their interests are in conflict.

205.3(b)(2) provides:

(2) The chief legal officer (or the equivalent thereof) shall cause such inquiry into the evidence of a material violation as he or she reasonably believes is appropriate to determine whether the material violation described in the report has occurred, is ongoing, or is about to occur. If the chief legal officer (or the equivalent thereof) determines no material violation has occurred, is ongoing, or is about to occur, he or she shall notify the reporting attorney and advise the reporting attorney of the basis for such determination. Unless the chief legal officer (or the equivalent thereof) reasonably believes that no material violation has occurred, is ongoing, or is about to occur, he or she shall take all reasonable steps to cause the issuer to adopt an appropriate response, and shall advise the reporting attorney thereof. In lieu of causing an inquiry under this paragraph (b), a chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a qualified legal compliance committee under paragraph (c)(2) of this section if the issuer has duly established a qualified legal compliance committee prior to the report of evidence of a material violation.

Paragraph (b)(2) (corresponding to paragraph (b)(3) of the proposed rule, as revised) describes the responsibilities of the issuer's CLO (or the equivalent thereof) in handling reported evidence of a material violation. The final rule adds a provision expressly allowing the CLO to make use of an issuer's QLCC. The revision eliminates the CLO's documentation requirement and, for the time being, the CLO's obligation, as part of the QLCC process, to notify the Commission in the unlikely event that the issuer fails to take appropriate remedial actions recommended by the QLCC after a determination by the QLCC that there has been or is about to be a material violation. It also changes language that would have required a CLO who reasonably believed that a material violation had occurred, was ongoing, or was about to occur to ''take any necessary steps to ensure that the issuer adopts an appropriate response'' to language that would, under the same circumstances, require the CLO to ''take all reasonable steps to cause the issuer to adopt an appropriate response.'' These are the points on which the corresponding paragraph in the proposed rule was criticized.[79] Reporting up-the-ladder was otherwise consistently supported. The CLO is responsible for investigating the reported evidence of a material violation for the reasons set out in the proposing release.[80] The second sentence of this paragraph has been modified to clarify the circumstances under which the CLO must advise a reporting attorney that no violation has been found. Thus, the term ''determines'' has been substituted for ''reasonably believes'' in the second sentence. This change makes the second sentence consistent with the first sentence which requires the CLO to cause an inquiry to be conducted ''to determine'' whether a violation has occurred, is ongoing, or is about to occur. Other minor textual changes have been made to the paragraph that do not alter its substantive requirements.

205.3(b)(3) provides:

(3) Unless an attorney who has made a report under paragraph (b)(1) of this section reasonably believes that the chief legal officer or the chief executive officer of the issuer (or the equivalent thereof) has provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to:

(i) The audit committee of the issuer's board of directors;

(ii) Another committee of the issuer's board of directors consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, ''interested persons'' as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19)) (if the issuer's board of directors has no audit committee); or

(iii) The issuer's board of directors (if the issuer's board of directors has no committee consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, ''interested persons'' as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19))).

This paragraph describes the circumstances under which an attorney who has reported evidence of a material violation to the issuer's CLO and/or CEO is obliged to report that evidence further up-the-ladder within the client issuer. The paragraph tracks the statutory language in Section 307 of the Act, is not controversial, and is adopted without change from the corresponding paragraph in the proposed rule—(b)(4)—for the reasons set out in the proposing release.[81]

205.3(b)(4) provides:

(4) If an attorney reasonably believes that it would be futile to report evidence of a material violation to the issuer's chief legal officer and chief executive officer (or the equivalents thereof) under paragraph (b)(1) of this section, the attorney may report such

[73] Comments of Skadden, Arps, Slater, Meagher & Flom, at 23.

[74] Comments of Corporations Committee, Business Law Section, the State Bar of California, at 10.

[75] *Id.*

[76] Comments of the American Corporate Counsel Association, at 5.

[77] *See* Comments of Corporations Committee, Business Law Section, the State Bar of California, at 10.

[78] *See* Comments of Cleary, Gottlieb, Steen & Hamilton, at 6.

[79] *E.g.,* Comments of the SIA/TBMA, at 16 (CLO should be able to make use of the QLCC); Comments of J.P. Morgan Chase & Co., at 3 (CLO should not be required to notify the Commission that a material violation has occurred and disaffirm documents that the issuer has submitted to or filed with the Commission that the CLO believes are false or materially misleading); Comments of Compass Bancshares, at 2–3 (requiring CLO ''to issue a response in writing to the attorney creates an undue burden on the CLO [in] responding to an issue which the CLO may not feel is warranted''); Comments of Charles Schwab & Co., at 1–2 (CLO ''typically does not have authority to sanction employees outside of his or her chain of command, to require the business units to adopt new procedures, or even to make disclosure on behalf of the company without the concurrence of other executives'').

[80] 67 FR 71685–86.

[81] 67 FR 71686.

evidence as provided under paragraph (b)(3) of this section.

The basis for paragraph (b)(4) is implicit in Section 307 of the Act. This bypass provision, however, is not controversial, was not the subject of comment, and is adopted without any substantive change from the corresponding paragraph—(b)(5)—of the proposed rule for the reasons set out in the proposing release.[82]

205.3(b)(5) provides:

(5) An attorney retained or directed by an issuer to investigate evidence of a material violation reported under paragraph (b)(1), (b)(3), or (b)(4) of this section shall be deemed to be appearing and practicing before the Commission. Directing or retaining an attorney to investigate reported evidence of a material violation does not relieve an officer or director of the issuer to whom such evidence has been reported under paragraph (b)(1), (b)(3), or (b)(4) of this section from a duty to respond to the reporting attorney.

Paragraph (b)(5) addresses circumstances in which those to whom evidence of a material violation is reported direct others, either in-house attorneys or outside attorneys retained for that purpose, to investigate the possible violation. It elicited only a few comments, all of them negative.[83] The thrust of these comments was that issuers would be reluctant to retain counsel to investigate reports if those attorneys might trigger up-the-ladder reporting that could result in reporting out to the Commission. The definition of ''appropriate response'' in section 205.2(b) of the final rule has been modified to address these comments. Further, the modifications to the proposed rule reflected in final rule §§ 205.3(b)(6) and (b)(7) below, will relieve attorneys retained or directed to investigate or litigate reports of violations from reporting up-the-ladder in a number of instances.

Paragraph (b)(5) is adopted essentially as proposed. This paragraph—numbered (b)(6) in the proposed rule '' makes two points: first, that the investigating attorneys are themselves appearing and practicing before the Commission and are accordingly bound by the requirements of the proposed rule; and, second, that the officers or directors who caused them to investigate remain obligated to respond to the attorney who initially reported the evidence of a material violation that other attorneys have been directed to investigate.

205.3(b)(6) and (b)(7) provide:

(6) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if:

(i) The attorney was retained or directed by the issuer's chief legal officer (or the equivalent thereof) to investigate such evidence of a material violation and:

(A) The attorney reports the results of such investigation to the chief legal officer (or the equivalent thereof); and

(B) Except where the attorney and the chief legal officer (or the equivalent thereof) each reasonably believes that no material violation has occurred, is ongoing, or is about to occur, the chief legal officer (or the equivalent thereof) reports the results of the investigation to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee; or

(ii) The attorney was retained or directed by the chief legal officer (or the equivalent thereof) to assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation, and the chief legal officer (or the equivalent thereof) provides reasonable and timely reports on the progress and outcome of such proceeding to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee.

(7) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if such attorney was retained or directed by a qualified legal compliance committee:

(i) To investigate such evidence of a material violation; or

(ii) To assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation.

As noted above in our discussion of paragraph (b)(5) of the final rule, a number of commenters expressed the view that the final rule should eliminate any requirement that attorneys report up-the-ladder when they are retained or directed to investigate a report of a material violation or to litigate whether a violation has occurred. New paragraphs (b)(6) and (b)(7) respond to these legitimate comments, and narrow considerably the instances when it is likely to be necessary for such an attorney to report up-the-ladder. Paragraph (b)(6) addresses the responsibilities of attorneys retained or directed to investigate or litigate reported violations by the chief legal officer (or the equivalent thereof); paragraph (b)(7) addresses circumstances where attorneys are retained or directed to investigate or litigate reported violations by a qualified legal compliance committee. Where an attorney is retained to investigate by the chief legal officer, the attorney has no obligation to report where the results of the investigation are provided to the chief legal officer and the attorney and the chief legal officer agree no violation has occurred and report the results of the inquiry to the issuer's board of directors or to an independent committee of the board. An attorney retained or directed by the chief legal officer to litigate a reported violation does not have a reporting obligation so long as he or she is able to assert a colorable defense on behalf of the issuer and the chief legal officer provides reports on the progress and outcome of the litigation to the issuer's board of directors. An attorney retained or directed by a qualified legal compliance committee to investigate a reported violation has no reporting obligations. Similarly, an attorney retained or directed by a qualified legal compliance committee to litigate a reported violation has no reporting obligation provided he or she may assert a colorable defense on behalf of the issuer.

205.3(b)(8) and (b)(9) provide:

(8) An attorney who receives what he or she reasonably believes is an appropriate and timely response to a report he or she has made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section need do nothing more under this section with respect to his or her report.

(9) An attorney who does not reasonably believe that the issuer has made an appropriate response within a reasonable time to the report or reports made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section shall explain his or her reasons therefor to the chief legal officer (or the equivalent thereof), the chief executive officer (or the equivalent thereof), and directors to whom the attorney reported the evidence of a material violation pursuant to

[82] 67 FR 71686.

[83] *See* Comments of Schiff Hardin & Waite, at 4 (paragraph (b)(5) as proposed goes ''too far'' in deeming a lawyer engaged by an issuer to conduct an internal investigation of a possible material violation of the securities laws to be appearing and practicing before the Commission and that issuers will be reluctant to retain independent counsel to investigate if the independent counsel have ''an obligation to effect a noisy withdrawal if they disagree with the client's response to the finding or recommendation resulting from the investigation''); Comments of the Chicago Bar Association, at 3 (paragraph as proposed is overbroad in requiring an outside lawyer engaged to investigate whether a violation has occurred to withdraw and notify the Commission if it disagrees with the issuer); Comments of the Corporation, Finance and Securities Law Section of the District of Columbia Bar, at 4–5 (''attorneys conducting an internal investigation, and not otherwise interacting with the Commission or even known to the Commission at that point, do not have a sufficient nexus with the Commission's processes'' to be covered by the Commission's rules; making them subject to the Commission's rules will ''make issuers less willing to retain, and attorneys less willing to conduct, such investigations''; and is unnecessary because section 205.3(b)(2) requires an issuer's CLO ''to assess the timeliness and appropriateness of the issuer's response'').

paragraph (b)(1), (b)(3), or (b)(4) of this section.

As proposed, paragraphs (b)(8) and (b)(9)—numbered (b)(7) and (b)(8) in the proposed rule—elicited no comment (apart from negative comments on documentation provisions that have been eliminated in the final rule). They are adopted without any other substantive change for reasons explained in the proposing release.[84]

205.3(b)(10) provides:

(10) An attorney formerly employed or retained by an issuer who has reported evidence of a material violation under this part and reasonably believes that he or she has been discharged for so doing may notify the issuer's board of directors or any committee thereof that he or she believes that he or she has been discharged for reporting evidence of a material violation under this section.

Paragraph (b)(10) authorizes an attorney to notify an issuer's board of directors or any committee thereof if the attorney reasonably believes that he or she has been discharged for reporting evidence of a material violation under this section. This provision, an important corollary to the up-the-ladder reporting requirement, is designed to ensure that a chief legal officer (or the equivalent thereof) is not permitted to block a report to the issuer's board or other committee by discharging a reporting attorney.

This provision is similar in concept to paragraph (d)(4) of the proposed rule (as to which, as noted above, the Commission is seeking further comment), although it does not provide for reporting outside the issuer.

205.3(c) provides:

(c) *Alternative reporting procedures for attorneys retained or employed by an issuer that has established a qualified legal compliance committee.* (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney may, as an alternative to the reporting requirements of paragraph (b) of this section, report such evidence to a qualified legal compliance committee, if the issuer has previously formed such a committee. An attorney who reports evidence of a material violation to such a qualified legal compliance committee has satisfied his or her obligation to report such evidence and is not required to assess the issuer's response to the reported evidence of a material violation.

(2) A chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a previously established qualified legal compliance committee in lieu of causing an inquiry to be conducted under paragraph (b)(2) of this section. The chief legal officer (or the equivalent thereof) shall inform the reporting attorney that the report has been referred to a qualified legal compliance committee. Thereafter, pursuant to the requirements under § 205.2(k), the qualified legal compliance committee shall be responsible for responding to the evidence of a material violation reported to it under this paragraph (c).

This alternative to the reporting requirements of § 205.3(b) would allow, though not require, an attorney to report evidence of a material violation directly to a committee of the board of directors that meets the definitional requirements for a QLCC. It would also relieve the reporting attorney of any further obligation once he or she had reported such evidence to an issuer's QLCC.

Under this alternative, the QLCC—itself a committee of the issuer's board of directors with special authority and special responsibility—would be responsible for carrying out the steps required by Section 307 of the Act: notifying the CLO of the report of evidence of a material violation (except where such notification would have been excused as futile under § 205.3(b)(4)); causing an investigation where appropriate; determining what remedial measures are appropriate where a material violation has occurred, is ongoing, or is about to occur; reporting the results of the investigation to the CLO, the CEO, and the full board of directors; and notifying the Commission if the issuer fails in any material respect to take any of those appropriate remedial measures.

More generally, the QLCC institutionalizes the process of reviewing reported evidence of a possible material violation. That would be a welcome development in itself. It may also produce broader synergistic benefits, such as heightening awareness of the importance of early reporting of possible material violations so that they can be prevented or stopped.

Probably the most important respect in which § 205.3(c) differs from § 205.3(b) is, as noted, that Section 205.3(c) relieves an attorney who has reported evidence of a material violation to a QLCC from any obligation ''to assess the issuer's response to the reported evidence of a material violation.'' If the issuer fails, in any material respect to take any remedial action that the QLCC has recommended, then the QLCC, as well as the CLO and the CEO, all have the authority to take appropriate action, including notifying the Commission if the issuer fails to implement an appropriate response recommended by the QLCC.

Commenters generally approved of the QLCC in concept, although several proposed changes in how it would work. The American Bar Association agreed with the need for corporate governance mechanisms to ensure legal compliance once a material violation is reported to an issuer's board, but suggested that existing corporate governance reforms should be given time before new reforms are added.[85] Another commenter suggested that the QLCC should be only one of a number of acceptable governance models, with issuers having freedom to craft techniques suitable to their own circumstances.[86] The Commission recognizes these concerns, but believes the benefits of the QLCC model, as described above, and the absence of any requirement that an issuer form or utilize a QLCC, justify inclusion of this alternative in the final rule.

One commenter suggested that the Commission's final rules should make clear that, for a matter to be referred to a QLCC, the issuer must have a QLCC in place and is not permitted simply to establish a QLCC to respond to a specific incident.[87] This comment has been addressed in § 205.3(c), which authorizes referral only to a QLCC that has been previously formed.

Commenters made a number of other suggestions regarding the QLCC provisions in the proposed rule. One commenter proposed that the Commission consider making creation of a QLCC mandatory for each issuer.[88] The Commission believes that keeping the QLCC as an alternative reporting mechanism is preferable, and that attorneys should be permitted to report up-the-ladder through their chief legal officers. Another commenter suggested that the QLCC proposal be modified to remove the ''noisy withdrawal'' provision.[89] The Commission has concluded that, in the extraordinary circumstance in which an appropriate response does not follow a QLCC's recommendation in response to evidence of a material violation, the QLCC should have the authority to take all appropriate action, including notifying the Commission, although it is not required to do so in every case. Another suggestion from a commentator was that the Commission offer a ''safe harbor'' for a chief legal officer who

[84] 67 FR 71687.

[85] Comments of the American Bar Association, at 27–28.

[86] Comments of the American Corporate Counsel Association, at 9–10.

[87] Comments of Richard W. Painter, at 5.

[88] Comments of Edward C. Brewer III, at 4.

[89] Comments of the Association of the Bar of the City of New York, at 41–42.

reports to a QLCC.[90] The Commission has provided a form of ''safe harbor'' against any inconsistent standard of a state or other United States jurisdiction in Section 205.6(c), and against a private action in Section 205.7.

Section 205.3(d) Issuer Confidences

205.3(d)(1) provides:

(1) Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue.

Paragraph (d)(1) makes clear that an attorney may use any records the attorney may have made in the course of fulfilling his or her reporting obligations under this part to defend himself or herself against charges of misconduct. It is effectively equivalent to the ABA's present Model Rule 1.6(b)(3) and corresponding ''self-defense'' exceptions to client-confidentiality rules in every state. The Commission believes that it is important to make clear in the rule that attorneys can use any records they may have prepared in complying with the rule to protect themselves.

One comment expressed concern that this provision would empower the Commission to use such records against the attorney. That concern misreads this paragraph, which expressly refers to the use of these records ''by an attorney'' in a proceeding where the attorney's compliance with this part is in issue.

205.3(d)(2) provides:

(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

This paragraph thus permits, but does not require, an attorney to disclose, under specified circumstances, confidential information related to his appearing and practicing before the Commission in the representation of an issuer. It corresponds to the ABA's Model Rule 1.6 as proposed by the ABA's Kutak Commission in 1981–1982 and by the ABA's Commission of Evaluation of the Rules of Professional Conduct (''Ethics 2000 Commission'') in 2000,[91] and as adopted in the vast majority of states.[92] It provides additional protection for investors by allowing, though not requiring, an attorney to disclose confidential information relating to his appearing and practicing before the Commission in the representation of an issuer to the extent the attorney reasonably believes necessary (1) to prevent the issuer from committing a material violation that the lawyer reasonably believes is likely to result in substantial injury to the financial interest or property of the issuer or investors; (2) to prevent the issuer from perpetrating a fraud upon the Commission; or (3) to rectify the consequences of an issuer's material violations that caused or may cause substantial injury to the issuer's financial interest or property in the furtherance of which the attorney's services were used.

The proposed version of this rule provided that the attorney appearing or practicing before the Commission could disclose information to the Commission:

(i) To prevent the issuer from committing an illegal act that the attorney reasonably believes is likely to result in substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer from committing an illegal act that the attorney reasonably believes is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of the issuer's illegal act in the furtherance of which the attorney's services had been used.

Several comments stated that permitting attorneys to disclose illegal acts to the Commission, in the situations delineated by the proposed rule, would undermine the relationship of trust and confidence between lawyer and client, and may impede the ability of lawyers to steer their clients away from unlawful acts.[93] Other comments expressed concern that this provision conflicts with, and would (in their eyes impermissibly) preempt, the rules of professional conduct of certain jurisdictions (such as the District of Columbia) which bar the disclosure of information which an attorney is permitted to disclose under this paragraph, particularly where it permits the disclosure of past client misconduct.[94] Some aver that ''it is not a lawyer's job'' in representing an issuer before the Commission ''to correct or rectify the consequences of [the issuer's] illegal actions, or even to prevent wrong-doing.'' [95]

Other commenters noted that these disclosure provisions should be limited to illegal acts that are likely to have a material impact on the market for the issuer's securities,[96] or to ongoing criminal or fraudulent conduct by the issuer,[97] while others suggest that attorneys should only be permitted to disclose information where there is a risk of death or bodily harm, and not where only ''monetary interests'' are

[90] *Id.,* at 42–43.

[91] ABA, *Report of the Commission on Evaluation of the Rules of Professional Conduct* (November 2000), recommended permitting a lawyer to disclose confidential ''information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.''

[92] Thirty-seven states permit an attorney to reveal confidential client information in order to prevent the client from committing criminal fraud. *See Restatement (Third) of the Law Governing Lawyers* (2000) section 67, Cmt. f, and Thomas D. Morgan & Ronald D. Rotunda, *Model Code of Professional Responsibility, Model Rules of Professional Conduct, and Other Selected Standards,* at 146 (reproducing the table prepared by the Attorneys' Liability Assurance Society (''ALAS'') cited in the Restatement). The ABA's Model Rule 1.6, which prohibits disclosure of confidential client information even to prevent a criminal fraud, is a minority rule. In its *Carter and Johnson* decision (1981 WL 384414, at n.78), the Commission expressly did not address an attorney's obligation to disclose a client's intention to commit fraud or an illegal act.

[93] See comments of Joseph T. McLaughlin, Heller Ehrman, at 2; Comments of the Los Angeles County Bar Association, at 2.

[94] Comments of Eleven Persons or Law Firms, at 8–9; Comments of the American Bar Association, at 33 (urging the Commission to refrain from considering the proposed disclosure provisions unless and until it receives express Congressional authority to preempt state privilege rules); Comments of 77 law firms, at 2; Comments of Latham & Watkins, at 5–6; Comments of Theodore Sonde, at 2; Comments of Schiff Hardin & Waite, at 7–8; Comments of Sheldon M. Jaffe, at 7–9; Comments of Emerson Electric, at 2; Comments of the Federal Bar Council, at 9–10 & n.9; Comments of JP Morgan & Chase, at 11 & n.3 (citing treatise for proposition that only six states permit disclosure to rectify past fraud).

[95] Comments of the Law Society of England and Wales, at 12.

[96] Comments of the Los Angeles County Bar Association, at 2; Comments of Edward C. Brewer, III at 8; see also Comments of the Association of the Bar of the City of New York at 5 (supporting attorney disclosure of materials facts to avoid assisting a criminal or fraudulent act by the client, or to correct prior representations made by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud).

[97] Comments of Theodore Sonde, at 2.

involved.[98] Many of the commenters voicing objections to this paragraph suggested that the Commission defer its promulgation until after further developments by state supreme courts[99] or further discussion.[100] Others, while criticizing the rule, noted that an attorney practicing before the Commission could comply with this permissive disclosure provision, but would have a duty to explain to the client at the outset this limitation on the ''normal'' duty of confidentiality.[101]

Commenters supporting the paragraph, however, noted that at least four-fifths of the states now permit or require such disclosures as pertain to ongoing conduct,[102] and that those states that follow the minority rule ''narrow[] the lawyer's options for responding to client conduct that could defraud investors and expose the lawyer to liability for legal work that the lawyer has already done.''[103] Several of these comments noted that the Commission could or should have required that lawyers make these disclosures to it when the client insists on continuing fraud or pursuing future illegal conduct,[104] and urged the Commission to make clear that this paragraph does not override state ethics rules that make such disclosures mandatory.[105] Many commenters also stated that it was proper for this paragraph to preempt any state ethics rule that does not permit disclosure.[106] They also noted that the confidentiality interests of a corporate client are not infringed by lawyer disclosure under the circumstances required by the paragraph, as the paragraph addresses a situation where the lawyer reasonably believes that agents of an issuer are engaged in serious illegality that the issuer has failed to remedy; in that situation, an instruction by an officer or even the board of the issuer to remain silent cannot be regarded as authorized.[107] Others generally supported the provision as injecting vitality into existing ethics rules, and stated that the Commission should not delay action on this provision.[108] One commenter emphasized the need to protect from retaliation attorneys who engage in the reporting mandated by Part 205.[109]

The final version of this paragraph contains modifications or clarifications of the paragraph as proposed. In paragraph (2), the description of when an attorney may disclose client confidences is limited ''to the extent the attorney reasonably believes necessary'' to accomplish one of the objectives in the rule. In subparagraph (i), the term ''material violation'' has been substituted for ''illegal act'' to conform to the statutory language in Section 307. In subparagraph (ii), the final version identifies the illegal acts that might perpetrate a fraud upon the Commission in an investigation or administrative proceeding; each of the statutes now referenced in subparagraph (ii) were referenced in the release accompanying the proposed rule.[110] The term ''perpetrate a fraud'' in this paragraph covers conduct involving the knowing misrepresentation of a material fact to, or the concealment of a material fact from, the Commission with the intent to induce the Commission to take, or to refrain from taking, a particular action. Subparagraph (iii) has been modified to cover only material violations by the issuer, and now this material violation must be one that has ''caused, or may cause, substantial injury to the financial interest or property of the issuer or investors'' before the provision may be invoked.

With regard to the issues raised by the comments on this paragraph, as explained below, the Commission either has addressed the concerns voiced by the commenters, believes that the concerns are adequately addressed by the paragraph, or has found the concerns to be insufficient to warrant further modification. Although commenters raised a concern that permitting attorneys to disclose information to the Commission without a client's consent would undermine the issuers' trust in their attorneys, the vast majority of states already permit (and some even require) disclosure of information in the limited situations covered by this paragraph,[111] and the Commission has seen no evidence that those already-existing disclosure obligations have undermined the attorney-client relationship. In addition, the existing state law ethics rules support the proposition that generalized concerns about impacting the attorney-client relationship must yield to the public interest where an issuer seeks to commit a material violation that will materially damage investors, seek to perpetrate a fraud upon the Commission in enforcement proceedings, or has used the attorney's services to commit a material violation.

With regard to the comments that this paragraph would preempt state law ethics rules that do not permit disclosure of information concerning such acts, or the concerns expressed by commenters at the other end of the spectrum that this paragraph could be misread to supplant state ethics rules that require rather than permit disclosure,[112] the Commission refers to Section 205.1 and the related discussion above. Section 205.1 makes clear that Part 205 supplements state ethics rules and is not intended to limit the ability of any jurisdiction to impose higher obligations upon an attorney not inconsistent with Part 205. A mandatory disclosure requirement imposed by a state would be an additional requirement consistent with the Commission's permissive disclosure rule. The Commission also notes that, as this paragraph in most situations follows the permissive disclosure rules already in place in most jurisdictions, the conflict raised by these commenters is unlikely to arise in practice.

As for the comments suggesting that attorneys be permitted to disclose only information that would appear to have a material impact on the value of the issuer's securities, the Commission has,

[98] Comments of the American College of Trial Lawyers, at 6.

[99] Comments of Conference of Chief Justices, at 4.

[100] Comments of the Federal Bar Council, at 14.

[101] Comments of the Law Society of England and Wales, at 12.

[102] Comments of Morrison & Foerster and eight other law firms, Exhibit B (listing jurisdictions whose ethics rules permit or require attorneys to disclose clients' past and/or require attorneys to disclose clients' past and/or ongoing fraud); Comments of Edward C. Brewer, III, at 8 (the proposed rule for permissive disclosure of an issuer's ''illegal act'' is essentially no different than the existing Model Code provision).

[103] Comments of Richard W. Painter, at 6.

[104] Comment of Edward C. Brewer, at 8.

[105] Comments of Susan P. Koniak *et al.*, at 26–27; Comments of Nancy J. Moore, at 2–3.

[106] Comments of Susan P. Koniak *et al.*, 27, 31–32.

[107] Comments of William H. Simon, at 3.

[108] See, *e.g.*, Comments of Manning G. Warren III, at 1; Comments of Douglas A. Schafer, Comment of Elaine J. Mittleman at 2; Comments of Thomas Ross *et al.*, at 6–8.

[109] Comment of Elaine J. Mittleman at 2.

[110] See 67 FR at 71693.

[111] Comment of the American Corporate Counsel Association, at 7 (noting that permissive disclosure standards are ''more in line with a majority of state professional rules of conduct'').

[112] Specifically, New Jersey requires an attorney to reveal confidential ''information relating to the representation of a client to the proper authorities * * * to the extent the lawyer reasonably believes necessary to prevent the client: (1) [f]rom committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in * * * substantial injury to the financial interest or property of another'' or (2) such an act that ''the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.'' New Jersey Rule of Professional Conduct 1.6(b). Wisconsin's corresponding rule is virtually identical to New Jersey's, except that it makes no reference to ''proper authorities.'' Wisconsin Supreme Court Rule 20:1.6. Florida requires a lawyer to reveal confidential information ''to the extent the lawyer reasonably believes necessary * * * to prevent a client from committing a crime.'' Florida Rule of Professional Conduct 4–1.6.

where appropriate, modified the paragraph in a manner that responds to that concern. Subparagraph (iii) has been limited to material violations, and subparagraph (i) limits its application to material violations that are likely to cause substantial injury to the financial interest or property of the issuer or investors.

Finally, the Commission concludes that it is not appropriate for it to wait for further developments. The Commission believes there has been ample discussion of this paragraph in the comments received, and that the major issues concerning this paragraph have been well identified. In addition, delay pending further developments does not promise to be fruitful: most state supreme courts already have rules in place that are consistent with this paragraph, and there is no evidence when, if ever, state supreme courts (or legislative bodies) will revisit these issues, and the public interest in allowing lawyers appearing and practicing before the Commission to disclose the acts covered by this paragraph counsels against waiting indefinitely for further refinement of state ethics rules.

Subsection 205.3(e)(3) in Proposed Rule: Withdrawn

The proposed paragraph read:

Where an issuer, through its attorney, shares with the Commission information related to a material violation, pursuant to a confidentiality agreement, such sharing of information shall not constitute a waiver of any otherwise applicable privilege or protection as to other persons.

Several commenters stated that it was uncertain if the Sarbanes-Oxley Act granted the Commission the authority to promulgate a rule that would control determinations by state and federal courts whether a disclosure to the Commission, even if conditioned on a confidentiality agreement, waives the attorney-client privilege or work product protection,[113] and a few suggested that the proposed paragraph would conflict with Federal Rule of Evidence 501.[114] They noted that this is an unsettled issue in the courts, or suggested that the Commission's proposed rule runs contrary to the bulk of decisional authority on this issue.[115] A few also noted that proposed legislation before Congress in 1974, supported by the Commission, that would have enacted a provision permitting issuers to selectively waive privileges in disclosures to the Commission was ultimately not passed by Congress.[116] The concern was expressed that attorneys might disclose information to the Commission in the belief that the evidentiary privileges for that information were preserved, only to have a court subsequently rule that the privilege was waived.[117]

The Commission has determined not to adopt the proposed rule on this ''selective waiver'' provision. The Commission is mindful of the concern that some courts might not adopt the Commission's analysis of this issue, and that this could lead to adverse consequences for the attorneys and issuers who disclose information to the Commission pursuant to a confidentiality agreement, believing that the evidentiary protections accorded that information remain preserved.

Nonetheless, the Commission finds that allowing issuers to produce internal reports to the Commission—including those prepared in response to reports under 205.3(b)—without waiving otherwise applicable privileges serves the public interest because it significantly enhances the Commission's ability to conduct expeditious investigations and obtain prompt relief, where appropriate, for defrauded investors. The Commission further finds that obtaining such otherwise protected reports advances the public interest, as the Commission only enters into confidentiality agreements when it has reason to believe that obtaining the reports will allow the Commission to save substantial time and resources in conducting investigations and/or provide more prompt monetary relief to investors. Although the Commission must verify that internal reports are accurate and complete and must conduct its own investigation, doing so is far less time consuming and less difficult than starting and conducting investigations without the internal reports. When the Commission can conduct expeditious and efficient investigations, it can then obtain appropriate remedies for investors more quickly. The public interest is thus clearly served when the Commission can promptly identify illegal conduct and provide compensation to victims of securities fraud.

The Commission also finds that preserving the privilege or protection for internal reports shared with the Commission does not harm private litigants or put them at any kind of strategic disadvantage. At worst, private litigants would be in exactly the same position that they would have been in if the Commission had not obtained the privileged or protected materials. Private litigants may even benefit from the Commission's ability to conduct more expeditious and thorough investigations. Indeed, many private securities actions follow the successful completion of a Commission investigation and enforcement action. Consequently, allowing the Commission access to otherwise privileged and inaccessible internal reports but denying access to others would not be unfair to private litigants but is appropriate in the public interest and for the protection of investors.

For these reasons, the Commission will continue to follow its policy of

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[113] Comments of Richard W. Painter, at 9 (''the only effective method'' of assuring lawyers that the attorney-client privilege is not waived by disclosure to the Commission ''is to seek an act of Congress establishing selective waiver and preempting inconsistent state law''); Comments of the American Bar Association, at 32; Comments of Susan P. Koniak *et al.*, at 44.

[114] Comments of Sheldon Jaffe, at 10. Fed. R. Evid. 501 provides that ''[e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.''

[115] Comments of the American Bar Association, at 32 n. 21; Comments of Sheldon M. Jaffe, at 9–11; Comments of Edward C. Brewer, III, at 11; Comments of Latham & Watkins, at 5; Comments of Morrison & Foerster and eight other law firms, at 19.

[116] Comments of the American Bar Association, at 32 n. 22; Comments of Morrison & Foerster and eight other law firms, at 19. The Commission notes that the proposal in Congress to which these commenters refer would have applied the selective waiver doctrine to all documents produced to the Commission, and was not limited to productions conditioned upon an express confidentiality agreement. *See Westinghouse Elec. Corp.* v. *Republic of the Philippines,* 951 F.2d 1414, 1425 (3d Cir. 1991). Also, Congress did not reject the Commission's proposal; rather, the House Committee to which the proposal was submitted took no action. *See* SEC Oversight and Technical Amendments: Hearing Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 98th Cong., 2d Sess 341 at 34, 51 (1984). Therefore, that the proposal before that House Committee in 1984 was not ultimately enacted carries no significance. *NAACP* v. *American Family Mut. Ins. Co.,* 978 F.2d 287, 299 (7th Cir. 1992) (''unsuccessful proposals to amend a law, in the years following passage, carry no significance'').

[117] Comments of Richard W. Painter, at 9; Comments of Susan P. Koniak *et al.*, at 6; Comments of Latham & Watkins, at 5 (''[g]iven the high stakes associated with waiver of privilege, uncertainty as to interpretation of [Paragraph 205.3(e)(3)'s] requirements in this regard is troubling''); Comments of the SIA/TBMA at 15 (''[a]lthough we welcome this positive statement of Commission policy, given sharp disagreements among courts on the question of selective waiver, issuers and attorneys cannot be secure in their disclosures absent a statutory statement of express preemption'').

entering into confidentiality agreements where it determines that its receipt of information pursuant to those agreements will ultimately further the public interest, and will vigorously argue in defense of those confidentiality agreements where litigants argue that the disclosure of information pursuant to such agreements waives any privilege or protection.

Section 205.4—Responsibilities of Supervisory Attorneys

(a) An attorney supervising or directing another attorney who is appearing and practicing before the Commission in the representation of an issuer is a supervisory attorney. An issuer's chief legal officer (or the equivalent thereof) is a supervisory attorney under this section.

(b) A supervisory attorney shall make reasonable efforts to ensure that a subordinate attorney, as defined in § 205.5(a), that he or she supervises or directs conforms to this part. To the extent a subordinate attorney appears and practices before the Commission in the representation of an issuer, that subordinate attorney's supervisory attorneys also appear and practice before the Commission.

(c) A supervisory attorney is responsible for complying with the reporting requirements in § 205.3 when a subordinate attorney has reported to the supervisory attorney evidence of a material violation.

(d) A supervisory attorney who has received a report of evidence of a material violation from a subordinate attorney under § 205.3 may report such evidence to the issuer's qualified legal compliance committee if the issuer has duly formed such a committee.

Section 205.4 prescribes the responsibilities of a supervisory attorney, and is based in part upon Rule 5.1 of the ABA's Model Rules, which (1) mandates that supervisory attorneys (including partners at law firms and attorneys exercising similar management responsibilities at law firms) must make reasonable efforts to ensure that attorneys at the firm conform to the Rules of Professional Conduct; and (2) provides that a supervisory attorney may be held liable for violative conduct by another attorney which he or she knowingly ratifies or which he or she fails to prevent when able to do so.

Several commenters objected that the articulation of the responsibilities of supervisory attorneys included in the proposed rule rendered senior attorneys responsible for the actions of more junior attorneys whose activities they might not actually supervise or direct. For example, the ABA argued that defining a supervisory attorney to include individuals ''who have supervisory authority over another attorney'' would unfairly cover ''all partners in a law firm and even senior associates,'' many of whom might not exercise actual supervisory authority regarding, or have any involvement with, the matter in question.[118] On the other hand, comments submitted by a distinguished group of academics stated that the sections of the proposed rule prescribing the responsibilities of supervisor and subordinate attorneys were ''necessary'' and appropriate.[119]

The language we adopt today confirms that a supervisory attorney to whom a subordinate attorney reports evidence of a material violation is responsible for complying with the reporting requirements prescribed under the rule. This language modifies the proposed rule by clarifying that only a senior attorney who actually directs or supervises the actions of a subordinate attorney appearing and practicing before the Commission is a supervisory attorney under the rule. A senior attorney who supervises or directs a subordinate on other matters unrelated to the subordinate's appearing and practicing before the Commission would not be a supervisory attorney under the final rule. Conversely, an attorney who typically does not exercise authority over a subordinate attorney but who does direct the subordinate attorney in the specific matter involving the subordinate's appearance and practice before the Commission is a supervisory attorney under the final rule. The final rule eliminates the proposed requirement that a supervisory attorney who believes that evidence of a material violation presented by a subordinate attorney need not be reported ''up-the-ladder'' document the basis for that conclusion. The final rule also eliminates the requirement that a supervisory attorney ensure a subordinate's compliance with the federal securities laws.

Section 205.5—Responsibilities of a Subordinate Attorney

(a) An attorney who appears and practices before the Commission in the representation of an issuer on a matter under the supervision or direction of another attorney (other than under the direct supervision or direction of the issuer's chief legal officer (or the equivalent thereof)) is a subordinate attorney.

(b) A subordinate attorney shall comply with this part notwithstanding that the subordinate attorney acted at the direction of or under the supervision of another person.

(c) A subordinate attorney complies with § 205.3 if the subordinate attorney reports to his or her supervising attorney under § 205.3(b) evidence of a material violation of which the subordinate attorney has become aware in appearing and practicing before the Commission.

(d) A subordinate attorney may take the steps permitted or required by § 205.3(b) or (c) if the subordinate attorney reasonably believes that a supervisory attorney to whom he or she has reported evidence of a material violation under § 205.3(b) has failed to comply with § 205.3.

Section 205.5 is based, in part, on Rule 5.2 of the ABA's Model Rules (which provides that subordinate attorneys remain bound by the Model Rules notwithstanding the fact that they acted at the direction of another person). This section confirms that a subordinate attorney is responsible for complying with the rule. We do not believe that a subordinate attorney should be exempted from the application of the rule merely because he or she operates under the supervision or at the direction of another person. We believe that creation of such an exemption would seriously undermine Congress' intent to provide for the reporting of evidence of material violations to issuers. Indeed, because subordinate attorneys frequently perform a significant amount of work on behalf of issuers, we believe that subordinate attorneys are at least as likely (indeed, potentially more likely) to learn about evidence of material violations as supervisory attorneys.

This section attracted far less comment than section 205.4, and those comments which were received typically supported the concept of allowing a subordinate attorney to satisfy his or her obligations under the rule by reporting evidence of a material violation to a supervisory attorney.[120] The language we adopt today clarifies that a subordinate attorney must be appearing and practicing before the Commission to come under the rule, and conforms this section to the language in section 205.4 by providing that a senior attorney must actually direct or supervise the actions of a subordinate attorney (rather than have

[118] *See* Comments of the American Bar Association, at 22–23. *See also* Comments of Skadden, Arps, Slate, Meagher & Flom, at 27 (arguing that the section should be eliminated entirely, or, alternatively, ''narrowed to apply only to the supervisory attorney within a law firm or a law department who is directly responsible for the supervision of a subordinate attorney in connection with the representation of the issuer in the specific matter, regardless of whether the attorney supervises such subordinate attorney in other unrelated matters.'').

[119] *See* Comments of Susan P. Koniak *et al.*, at 42.

[120] *See* Comments of the American Bar Association, at 22 (''We believe the Commission correctly approaches in Rule 205.5 the treatment of subordinate lawyers who report to a supervisory attorney and in Rule 205.4(c) the shifting of responsibility for compliance to the supervisory attorney to which the matter was reported'').

supervisory authority) to be a supervisory attorney under the rule.

New language has been added to this section to provide that an attorney who appears and practices before the Commission on a matter in the representation of an issuer under the supervision or direction of the issuer's CLO (or the equivalent thereto) is not a subordinate attorney. Accordingly, that person is required to comply with the reporting requirements of Section 205.3. For example, an issuer's Deputy General Counsel, who reports directly to the issuer's General Counsel (CLO) on a matter before the Commission, is not a subordinate attorney. Thus, the Deputy General Counsel is not relieved of any further reporting obligations by advising the CLO of evidence of a material violation. Further, in the event the Deputy General Counsel does not receive an appropriate response from the CLO, he or she is obligated to report further up-the-ladder within the issuer.

Section 205.6—Sanctions and Discipline

(a) A violation of this part by any attorney appearing and practicing before the Commission in the representation of an issuer shall subject such attorney to the civil penalties and remedies for a violation of the federal securities laws available to the Commission in an action brought by the Commission thereunder.

(b) An attorney appearing and practicing before the Commission who violates any provision of this part is subject to the disciplinary authority of the Commission, regardless of whether the attorney may also be subject to discipline for the same conduct in a jurisdiction where the attorney is admitted or practices. An administrative disciplinary proceeding initiated by the Commission for violation of this part may result in an attorney being censured, or being temporarily or permanently denied the privilege of appearing or practicing before the Commission.

(c) An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.

(d) An attorney practicing outside the United States shall not be required to comply with the requirements of this part to the extent that such compliance is prohibited by applicable foreign law.

Paragraph 205.6(a) of the proposed rule tracked the language of Section 3(b) of the Act (which expressly states that a violation of the Act and rules promulgated thereunder shall be treated as a violation of the Exchange Act, subjecting any person committing such a violation to the same penalties as are prescribed for violations of the Exchange Act). Similarly, paragraph 205.6(b) of the proposed rule was based on Section 602 of the Act (adding Section 4C(a) to the Exchange Act, which incorporates that portion of Rule 102(e) of the Commission's Rules of Practice prescribing the state-of-mind requirements for Commission disciplinary actions against accountants who engage in improper professional conduct). Finally, paragraph 205.6(c) of the proposed rule stated that the Commission may discipline attorneys who violate the rule, regardless of whether the attorney is subject to prosecution or discipline for violation of a state ethical rule that applies to the same conduct.

Collectively, proposed section 205.6 (originally entitled ''Sanctions'') generated a number of comments. One commenter complained that sections 3(b) and 307 of the Act did not authorize Commission enforcement action against violators of the rule, and that violations should be handled in Commission disciplinary proceedings.[121] Several other commenters argued that paragraph 205.6(a) should specifically state that the Commission will not seek criminal penalties for violations of the rule.[122] Commenters also suggested that the juxtaposition of paragraphs 205.6(a) and (b) created confusion as to whether the Commission would treat violations of the rule as an Exchange Act violation or a violation of Rule 102(e). A number of commenters also suggested that the Commission should create a safe harbor, protecting attorneys who make a good faith attempt to comply with the rule and explicitly stating that the rule is only enforceable by the Commission and does not create a private right of action.[123]

The language we today adopt in § 205.6 has been extensively modified in light of these comments. The amended section is now titled ''Sanctions and Discipline,'' emphasizing that the Commission intends to proceed against individuals violating Part 205 as it would against other violators of the federal securities laws and, when appropriate, to initiate proceedings under this rule seeking an appropriate disciplinary sanction. Paragraph 205.6(a) has been amended to clarify that only the Commission may bring an action for violation of the part. Paragraph 205.6(b) incorporates the language of paragraph 205.6(c) of the proposed rule, and adds new language specifying the sanctions available to the Commission in administrative disciplinary proceedings against attorneys who violate the part.

New paragraph 205.6(c), consistent with § 205.1, provides that attorneys who comply in good faith with this part shall not be subject to discipline for violations of inconsistent standards imposed by a state or other United States jurisdiction. Paragraph 205.6(c) has been drafted to apply only to an attorney's liability for violating inconsistent standards of a state or other U.S. jurisdiction. Thus, it is not available where the state or other jurisdiction imposes additional requirements on the attorney that are consistent with the Commission's rules. Moreover, this paragraph has no application in actions or proceedings brought by the Commission relating to violations of the federal securities laws or the Commission's rules or regulations thereunder. Further, the fact that an attorney may assert or establish in a state professional disciplinary proceeding, or in a private action, that he or she complied with this part, and complied in good faith, does not affect the Commission's ability or authority to bring an enforcement action or disciplinary proceeding against an attorney for a violation of this part. Indeed, even if a state ethics board or a court were to determine in an action not brought by the Commission that an attorney complied with this part or complied in good faith with this part, that determination would not preclude the Commission from bringing either an enforcement action or a disciplinary proceeding against that attorney for a violation of this part based on the same conduct.

New paragraph 205.6(d) addresses the conduct of non-U.S. attorneys who are subject to this part, because they do not meet the definition of non-appearing foreign attorney. As noted above, the new definition of non-appearing foreign attorney in paragraph 205.2(j) responds to the large number of comments received from lawyers practicing in other jurisdictions stating that attorneys practicing in many foreign countries are subject to rules and regulations that render compliance with the part impossible. This point was also made at the December 17 Roundtable discussion. Several commenters also stated that attorneys who are admitted in United States jurisdictions but who practice in foreign countries are subject to similar restrictions. New paragraph 205.6(d) provides that attorneys in that situation must comply with the part to the

[121] *See* Comments of the Association of the Bar of the City of New York, at 43–44.

[122] *Id.* at 46–47. *See also* Comments of Morrison & Foerster and eight other law firms, at 21.

[123] *See* Comments of Skadden, Arps, Slate, Meagher and Flom, at 29; Comments of the SIA/TBMA, at 16; Comments of the American Bar Association, at 33; Comments of Sullivan & Cromwell, at 16–17.

maximum extent allowed by the regulations and laws to which they are subject.

Section 205.7—No Private Right of Action

(a) Nothing in this part is intended to, or does, create a private right of action against any attorney, law firm, or issuer based upon compliance or noncompliance with its provisions.

(b) Authority to enforce compliance with this part is vested exclusively in the Commission.

In the proposing release, the Commission expressed its view that: ''nothing in Section 307 creates a private right of action against an attorney. * * * Similarly, the Commission does not intend that the provisions of Part 205 create any private right of action against an attorney based on his or her compliance or non-compliance with its provisions.''[124] Nevertheless, the Commission requested comments on whether it should provide in the final rule ''a 'safe harbor' from civil suits'' for attorneys who comply with the rule.[125] Numerous commenters agreed that the final rule should contain such a provision.

Several commenters suggested that the final rule contain a safe harbor similar to that provided for auditors in Section 10A(c) of the Exchange Act, 15 U.S.C. 78j–1(c), which provides that ''[n]o independent public accountant shall be liable in a private action for any finding, conclusion, or statement expressed in a report'' to the Commission made by an issuer whose auditor has reported to its board a failure to take remedial action.[126] Other commenters recommended that the Commission adopt language similar to that in the Restatement (Third) of Law Governing Lawyers, Standards of Care section 52, which provides that ''[p]roof of a violation of a rule or statute regulating the conduct of lawyers * * * does not give rise to an implied cause of action for professional negligence or breach of fiduciary duty * * *.''[127] And others noted that the ABA Model Rules, Scope, ¶ 20, provides that ''[v]iolation of Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.''[128] Finally, numerous other commenters were of the view that a safe harbor should be created to protect lawyers from liability where they have attempted in good faith to comply with this part.[129]

The Commission is persuaded that it is appropriate to include an express safe harbor provision in the rule, which is set forth in new Section 205.7, No Private Right of Action. Paragraph (a) makes it clear that Part 205 does not create a private cause of action against an attorney, a law firm or an issuer, based upon their compliance or non-compliance with the part. The Commission is of the view that the protection of this provision should extend to any entity that might be compelled to take action under this part; thus it extends to law firms and issuers. The Commission is also of the opinion that, for the safe harbor to be truly effective, it must extend to both compliance and non-compliance under this part.

Paragraph (b) provides that only the Commission may enforce the requirements of this part. The provision is intended to preclude, among other things, private injunctive actions seeking to compel persons to take actions under this part and private damages actions against such persons. Once again, the protection extends to all entities that have obligations under this part.

III. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (''PRA'')[130] requires the agency to obtain approval from the Office of Management and Budget (''OMB'') if an agency's rule would require a ''collection of information,'' as defined by the PRA. As set forth in the proposing release, certain provisions of the rule, such as the requirement of written procedures for QLCCs, meet the ''collection of information'' requirement of the PRA. The information collection is necessary to implement the Standards of Professional Conduct for Attorneys prescribed by the proposed rule and required by Section 307 of the Sarbanes-Oxley Act of 2002. Specifically, the collection of information is intended to ensure that evidence of violations is communicated to appropriate officers and/or directors of issuers, so that they can adopt appropriate remedies and/or impose appropriate sanctions. In the rare cases in which a majority of a QLCC has concluded that an issuer did not act appropriately, the information may be communicated to the Commission. The collection of information is, therefore, an important component of the Commission's program to discourage violations of the federal securities laws and promote ethical behavior of attorneys appearing and practicing before the Commission.

The final rule would impose an up-the-ladder reporting requirement when attorneys appearing and practicing before the Commission become aware of evidence of a material violation by the issuer or any officer, director, employee, or agent of the issuer. An attorney must report such evidence to the issuer's CLO or to both the CLO and CEO. A subordinate attorney complies with the rule if he or she reports evidence of a material violation to his or her supervisory attorney (who is then responsible for complying with the rule's requirements). A subordinate attorney may also take the other steps described in the rule if the supervisor fails to comply.

If the CLO, after investigation, determines that there is no violation, he or she must so advise the reporting attorney. Unless the CLO reasonably believes that there is no violation, he or she must take reasonable steps to cause the issuer to adopt an appropriate response to stop, prevent or rectify any violation. The CLO must also report on the remedial measures or sanctions to the reporting attorney.

The rule also requires attorneys to take certain steps if the CLO or CEO does not provide an appropriate response to a report of evidence of a violation. These steps include reporting the evidence up-the-ladder to the audit committee, another committee consisting solely of independent directors if there is no audit committee, or to the board of directors if there is no such committee. If the attorney believes that the issuer has not made an appropriate response to the report, the attorney must explain the reasons for his or her belief to the CEO, CLO or directors to whom the report was made.

Alternatively, if an attorney other than a CLO reports the evidence to a QLCC, he or she need take no further action under the rule. The QLCC must have written procedures for the receipt, retention and consideration of reports of material violations, and must be authorized and responsible to notify the CLO and CEO of the report, determine whether an investigation is necessary and, if so, to notify the audit committee or the board of directors. The QLCC may also initiate an investigation to be

[124] 67 FR 71697.

[125] 67 FR 71691.

[126] *See* Comments of Attorney's Liability Assurance Society, Inc., at 20; Comments of the Association of the Bar of the City of New York, at 5.

[127] *See* Comments of the American Bar Association, at 33–34; Comments of Morrison & Foerster and eight other law firms, at 21.

[128] *Id.* Comments of the American Bar Association, at 33–34.

[129] *See, e.g.*, Comments of Skadden Arps Slate Meagher & Flom, at 29; Comments of the SIA/TBMA, at 21; Comments of the Investment Company Institute, at 7.

[130] 44 U.S.C. 3501 *et seq.*

conducted by the CLO or outside attorneys, and retain any necessary expert personnel. At the conclusion of the investigation, the QLCC may recommend that the issuer adopt appropriate remedial measures and/or impose sanctions, and notify the CLO, CEO, and board of directors of the results of the inquiry and appropriate remedial measures to be adopted. Where the QLCC decides, by a majority vote, that the issuer has failed to take any remedial measure that the QLCC has directed the issuer to take, the QLCC has the authority to notify the Commission. A CLO may also refer a report of evidence of a material violation to a QLCC, which then would have responsibility for taking the steps required by the rule.

The respondents to this collection of information would be attorneys who appear and practice before the Commission and, in certain cases, the issuer, and/or officers, directors and committees of the issuer. We proposed to require attorneys to document communications contemplated by the proposed rule. In response to commenters concerns, we are not specifying that the communications must be documented. We continue to believe that, in providing quality representation to issuers, attorneys report evidence of violations to others within the issuer, including the CLO, the CEO, and, where necessary, the directors. In addition, officers and directors already investigate evidence of violations and report within the issuer the results of the investigation and the remedial steps they have taken or sanctions they have imposed. Attorneys who believe that they were discharged for making a report under the proposed rule might notify the issuer of that fact. Except as discussed below, we therefore believe that the reporting requirements imposed by the rule are ''usual and customary'' activities that do not add to the burden that would be imposed by the collection of information.[131]

Certain aspects of the collection of information, however, impose a new burden. For an issuer to choose to establish a QLCC, the QLCC must adopt written procedures for the confidential receipt, retention and consideration of any report of evidence of a material violation. We are adopting this requirement and its collection of information requirement largely as proposed.

We estimate for purposes of the PRA that there are approximately 18,200 issuers that would be subject to the proposed rule.[132] We are unable to estimate precisely how many issuers will choose to form a QLCC. For these purposes, we estimate that approximately 20%, or 3,640, will choose to establish a QLCC. Establishing the written procedures required by the proposed rule should not impose a significant burden. We assume that an issuer would incur a greater burden in the year that it first establishes the procedures than in subsequent years, in which the burden would be incurred in updating, reviewing, or modifying the procedures. For purposes of the PRA, we assume that an issuer would spend six hours every three-year period on the procedures. This would result in an average burden of two hours per year. Thus, we estimate for purposes of the PRA that the total annual burden imposed by this collection of information would be 7,280 hours. We assume that half of those hours will be incurred by outside counsel at a rate of $300 per hour. Using these assumptions, we estimate the collection of information would result in a cost of $1,092,000.

We are not adopting at this time a requirement that attorneys make a ''noisy withdrawal.'' We have amended the PRA submission to remove any burden from that collection of information. We are still considering that provision and, in a separate proposing release, we are requesting additional comments on it. In addition, we are separately proposing an alternative that, along with the ''noisy withdrawal'' proposal, also constitutes a collection of information under the PRA.

The Commission received two comments regarding the Paperwork Reduction Act section of the proposing release. One commenter indicated that the Commission has not considered the paperwork burdens of Part 205 on attorneys who do not specialize in securities law, but who may be considered to be appearing and practicing before the Commission under the rule.[133] The Commission believes that as adopted, the rule imposes little, if any, paperwork burdens on attorneys regardless of whether they specialize in securities law, especially in light of clarification to the rule's scope in the definition of ''appearing and practicing.'' Another commenter suggested that the Commission's original estimate that one quarter of the 18,200 issuers subject to the rule will form QLCCs may be understated, but offered no alternate estimate.[134] The Commission estimated in the proposing release that one quarter of issuers would form QLCCs and received comments suggesting both that it would be difficult to find people to serve on QLCCs[135] and, on the other hand, many companies would use QLCCs.[136] Moreover, the Commission is not adopting at this time the ''noisy withdrawal'' proposal, which may tend to cause fewer companies to form QLCCs. Accordingly, the Commission estimates that under the rule, as adopted, 20% of issuers will form QLCCs.

The Commission submitted the collection of information to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11, under the title of ''Reports of Evidence of Material Violations.'' Because of the changes to the nature of the information collected and because of the separate proposal for an alternative to ''noisy withdrawal,'' we have changed the name of the submission to ''QLCC and Other Internal Reporting.'' OMB has not yet approved the collection; we will separately publish the OMB control number. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Compliance with the collection of information requirements is in some cases mandatory and in some cases voluntary depending upon the circumstances. Responses to the requirements to make disclosures to the Commission will not be kept confidential.

IV. Costs and Benefits

Part 205 implements Section 307 of the Sarbanes-Oxley Act. Part 205 will affect all attorneys who appear and practice before the Commission in the representation of an issuer and who become aware of evidence that tends to show that a material violation of federal or state securities laws, a material breach of fiduciary duty, or a similar material violation by the issuer or an officer, director, agent, or employee of

[131] *See* 5 CFR 1320.3(b)(2).

[132] This estimate is based, in part, on the total number of operating companies that filed annual reports on Form 10–K (8,484), Form 10–KSB (3,820), Form 20–F (1,194) or Form 40–F (134) during the 2001 fiscal year, and an estimate of the average number of issuers that may have a registration statement filed under the Securities Act pending with the Commission at any time (100). In addition, we estimate that approximately 4,500 investment companies currently file periodic reports on Form N–SAR.

[133] Comments of the Mid-America Legal Foundation, at 3–4.

[134] Comments of Robert Eli Rosen, at 3.

[135] Comments of Clifford Chance, at 4–5; Comments of Emerson Electric Co., at 5.

[136] Comments of Susan P. Koniak *et al.*, at 11; Comments of Richard W. Painter, at 5; Comments of Thomas D. Morgan, at 12.

the issuer has occurred, is ongoing, or is about to occur. The rule we are issuing today implements a Congressional mandate to prescribe ''minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers * * * .'' Prior to passage of the Sarbanes-Oxley Act, attorneys appearing and practicing before the Commission were regulated as to their professional conduct primarily by the ethics standards of the various states where attorneys happened to practice. By passing the Sarbanes-Oxley Act, Congress has implicitly concluded that the benefits of setting such minimum federal standards justify their costs. We enumerate and discuss these costs and benefits below.

Part 205 implements an up-the-ladder reporting requirement upon attorneys representing an issuer before the Commission who become aware of a potential material violation about which a reasonably prudent investor would want to be informed. It is expected that, in the vast majority of instances of such reports, the situation will be addressed and remedied before it causes significant harm to investors.

In addition to these requirements, the rule would authorize a covered attorney to reveal to the Commission confidences or secrets relating to the attorney's representation of an issuer before the Commission to the extent the attorney reasonably believes it necessary to: (i) Prevent the issuer from committing a material violation likely to cause substantial harm to the financial interest or property of the issuer or investors; (ii) prevent the issuer from perpetrating a fraud upon the Commission; or (iii) rectify the consequences of the issuer's illegal act that the attorney's services had furthered.

A. Benefits

Part 205 is designed to protect investors and increase their confidence in public companies by ensuring that attorneys who represent issuers report up the corporate ladder evidence of material violations by their officers and employees. The Commission recognizes that some attorneys may already follow up-the-ladder reporting procedures, especially where the conduct at issue is directly related to the matter on which the attorney represents the issuer, but believes it will prove beneficial if all attorneys who appear and practice before the Commission comply with this requirement.

Part 205 should protect investors by helping to prevent instances of significant corporate misconduct and fraud. The rule requires that attorneys report up-the-ladder when they become aware of evidence of a material violation. Although many attorneys already do this, some may not, especially if the violation is unrelated to the purpose for which they were retained. The rule gives issuers the option of forming a QLCC, consisting of at least one member of the issuer's audit committee and two or more independent directors, which would investigate reports of material violations and would be authorized to recommend that the issuer adopt appropriate remedial measures. The Commission believes that these requirements will make it more likely that companies will address instances of misconduct internally, and act to remedy violations at earlier stages.

Part 205 is intended to increase investor confidence. By requiring attorneys to report potential misconduct up-the-ladder within a corporation, the rule provides a measure of comfort to investors that evidence of fraud will be known and evaluated by the top authorities in a corporation, including its board of directors, and not dismissed by lower-level employees. Furthermore, investors will know that a company that forms a QLCC will have reports of misconduct evaluated by at least one member of the company's audit committee as well as two or more of its independent directors. Investors will also know that if an issuer fails to implement a recommendation that the QLCC has recommended, the QLCC, after a majority vote, may notify the Commission.

Part 205 should serve to deter corporate misconduct and fraud. Corporate wrongdoers at the lower or middle levels of the corporate hierarchy will be aware that an attorney who becomes aware of their misconduct is obligated under the rule to report it up-the-ladder to the highest levels of the corporation. In the event that wrongdoing or fraud exists at the highest levels of a corporation, those committing the misconduct will similarly know that the corporation's attorneys are obligated to report any misconduct of which they become aware up-the-ladder to the corporation's board and its independent directors.

Part 205 may improve the governance of corporations that are subject to the rule. By mandating up-the-ladder reporting of violations, the rule helps to ensure that evidence of material violations will be addressed and remedied within the corporation, rather than misdirected or ''swept under the rug.'' The formation of QLCCs may also serve to improve corporate governance. The Commission believes that some issuers will choose to adopt QLCCs, and that they may prove to be a recognized and effective means of reviewing reported evidence of material violations. Because a QLCC must consist of at least two independent directors (as well as one member of the corporation's audit committee), it will give greater authority to independent directors. This should serve as an important check on corporate management.

Part 205 will give attorneys who appear and practice before the Commission guidance and clarity regarding their ethical obligations when confronted with evidence of wrongdoing by their clients. Part 205 requires that attorneys report up-the-ladder when they become aware of potential material violations and thus complies with an express Congressional directive to set minimum standards of professional conduct for attorneys who appear and practice before it. These benefits are difficult to quantify.

B. Costs

Part 205 will impose costs on issuers and law firms representing them. For issuers, the rule will require the chief legal officer of an issuer to investigate and, where necessary, cause remedial actions and/or sanctions to be taken and/or imposed. It also will cause the CEO, QLCC, and board of directors of the issuer to review evidence of material violations. We believe that most issuers already have procedures for reviewing evidence of misconduct. Similarly, we expect that most issuers already incur costs with investigating such reports.

Those companies that choose to form a QLCC to implement this provision will incur costs. These costs might include increased compensation and insurance for QLCC members, and administrative costs to establish the committee. Additionally, for purposes of the PRA, we assume that 20% of issuers will form such a committee and incur an annualized paperwork cost of two hours for a total annual burden of 7,280 hours. Assuming outside counsel accounts for half of these hours at a cost of $300 per hour,[137] and inside counsel accounts for the other half at $110 per hour,[138] this would result in a cost of $1,492,400.

[137] Estimate of outside counsel rate was obtained by contacting a number of law firms regularly involved in completing Commission documents. *See* Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Release Nos. 33–8138 (Oct. 22, 2002) and 33–8177 at n.69 (Jan. 23, 2003).

[138] Estimate of inside counsel rate is derived from the Securities Industry Association ''Report on Management & Professional Earnings in the

Continued

For lawyers, the rule could have an effect upon malpractice insurance premiums, which could, in turn, increase the cost of attorney services to issuers. The Commission received three comments suggesting that the rule, and particularly the provisions requiring mandatory withdrawal and reporting to the Commission, would lead to an increase in the number of malpractice suits brought against attorneys.[139] One of these comments, from an insurance carrier, indicated that the rule could cause malpractice insurance premiums for attorneys to rise by 10% to 50%.[140] The Commission has made a number of changes to the rule in light of these comments. The Commission has clarified and made explicit in Section 205.7 that no private right of action exists based on compliance or non-compliance with the rule. In addition, the Commission has made it clear in Section 205.6(c) that an attorney who complies in good faith with the rule will not be subject to discipline or otherwise liable under an inconsistent state standard. Moreover, the rule, as adopted, will not require attorneys to withdraw or report to the Commission, but will only require reporting to the Commission in the very limited circumstances occurring when a majority of a QLCC determines that an issuer has failed to take remedial action that was directed by the QLCC. Accordingly, the Commission believes that the rule will not have as great an effect on malpractice insurance premiums as suggested by commenters in response to the proposed rule.

Part 205 may also encourage some issuers to handle more legal matters in-house and may cause other issuers to limit the use of in-house counsel and rely more heavily on outside counsel, possibly increasing the cost of legal services. The Commission received one comment indicating that issuers would refer more matters to in-house counsel[141] and four comments indicating that the rule would result in more matters referred to outside counsel.[142] None of the commenters attempted to quantify the costs associated with these shifts. To the extent that the rule, as originally proposed, provided some perceived incentives to transfer functions to or from outside counsel, principally because of the ''noisy withdrawal'' requirements, we believe that those perceived incentives are not present in the rule as adopted.

There may also be some additional costs of the rule imposed on the market that are exceedingly difficult to predict or quantify. The Commission received comments indicating that the rule, and particularly the proposal regarding ''noisy withdrawal,'' would cause issuers to be less willing to seek legal advice and would result in issuers being less forthcoming with their counsel.[143] However, no commenters presented data or attempted to quantify any costs associated with this effect. The Commission also received comments indicating that the rule would not cause any decrease in attorney-client communication.[144] Since the rule, as adopted, will not require mandatory withdrawal or disclosure to the Commission, we believe that Part 205 will not have any adverse impact on attorney-client communications.

V. Effect on Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act (15 U.S.C. 78w(a)(2)) requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, Section 2(b) of the Securities Act (15 U.S.C. 77b(b)), Section 3(f) of the Exchange Act (15 U.S.C. 78c(f)), and Section 2(c) of the Investment Company Act (15 U.S.C. 80a–2(c)), require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

Part 205 is intended to ensure that attorneys representing issuers before the Commission are governed by standards of conduct that increase disclosure of potential impropriety within an issuer so that prompt intervention and remediation can take place. Doing so should boost investor confidence in the financial markets. We anticipate that this rule will enhance the proper functioning of the capital markets and promote efficiency by reducing the likelihood that illegal behavior would remain undetected and unremedied for long periods of time. Part 205 will apply to all issuers and attorneys appearing before the Commission and is therefore unlikely to affect competition.

The Commission invited comment on this analysis, and received one comment on it.[145] The commenter suggested that the rule could result in a large quantity of information being sent to a CLO or QLCC, which would be expensive and unwieldy to process, and would thus conflict with the goal of promoting efficiency, competition and capital formation. The Commission believes that Part 205 is consistent with the statutory goals and will substantially assist in attaining them by preventing corporate misconduct, restoring investor confidence and lowering the cost of capital.

VI. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis (''FRFA'') has been prepared in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601. An Initial Regulatory Flexibility Analysis (''IRFA'') was prepared in accordance with 5 U.S.C. 603 and was made available to the public.

A. Need for the Rule

Part 205 complies with Section 307 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7245), which requires the Commission to prescribe ''minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers. * * *'' The standards must include a rule ''requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof'' to the CLO or the CEO of the company (or the equivalent thereof); and, if they do not respond appropriately to the evidence, requiring the attorney to report the evidence to the audit committee, another committee of independent directors, or the full board of directors.

B. Significant Issues Raised by Public Comment

The Commission received no comments in response to the IRFA.

Securities Industry 2002,'' and represents the SIA value for an Assistant General Counsel in New York City.

[139] Comments of Chubb Specialty Insurance, at 2–3; Comments of the American Bar Association, at 26–7; Comments of Attorneys' Liability Assurance Society, Inc., at 8, 11.

[140] Comments of Chubb Specialty Insurance, at 5.

[141] Comments of Carter, Ledyard & Milburn, at 2.

[142] Comments of Committee on Investment Management Regulation, Association of the Bar of the City of New York, at 4; Comments of the American Corporate Counsel Association, at 4–5; Comments of Investment Company Institute, at 4; Comments of Debra M. Brown, at 2.

[143] *See, e.g.*, Comments of the American Bar Association, at 26.

[144] *See, e.g.*, Comments of Susan P. Koniak *et al.*, at 24.

[145] Comments of Los Angeles County Bar Association, at 7–8.

C. Small Entities Subject to Part 205

Part 205 would affect issuers and law firms that are small entities. Exchange Act Rule 0–10(a) (17 CFR 240.0–10(a)) defines an issuer, other than an investment company, to be a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year. As of October 23, 2002, we estimated that there were approximately 2,500 issuers, other than investment companies, that may be considered small entities. For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[146] We estimate that there are 211 small investment companies that would be subject to the rule. The revisions would apply to any small entity that is subject to Exchange Act reporting requirements.

Part 205 also would affect law firms that are small entities. The Small Business Administration has defined small business for purposes of ''offices of lawyers'' as those with under $6 million in annual revenue.[147] Because we do not directly regulate law firms appearing before the Commission, we do not have data to estimate the number of small law firms that practice before the Commission or, of those, how many have revenue of less than $6 million. We sought comment on the number of small law firms affected by the rules, but received none.

D. Reporting, Recordkeeping and Other Compliance Requirements

Paragraph 205.3(b) prescribes the duty of an attorney who appears or practices before the Commission in the representation of an issuer to report evidence of a material violation that has occurred, is ongoing, or is about to occur. The attorney is initially directed to make this report to the issuer's CLO, or to the issuer's CLO and CEO.

When presented with a report of a possible material violation, the rule obligates the issuer's CLO to conduct a reasonable inquiry to determine whether the reported material violation has occurred, is occurring or may occur. A CLO who reasonably concludes that there has been no material violation must advise the reporting attorney of this conclusion. A CLO who concludes that a material violation has occurred, is occurring or is about to occur must take reasonable steps to ensure that the issuer adopts appropriate remedial measures and/or sanctions, including appropriate disclosures. Furthermore, the CLO is required to report up-the-ladder within the issuer and to the reporting attorney what remedial measures have been adopted.

A reporting attorney who receives an appropriate response within a reasonable time has satisfied all obligations under the rule. In the event a reporting attorney does not receive an appropriate response within a reasonable time, he or she must report the evidence of a material violation to the issuer's audit committee, to another committee of independent directors if the issuer has no audit committee, or to the full board if the issuer has no such committee. Similarly, if the attorney reasonably believes that it would be futile to report evidence of a material violation to the CLO and CEO, the attorney may report directly to the issuer's audit committee, another committee of independent directors, or to the full board.

Alternatively, pursuant to paragraph 205.3(c), issuers may (but are not required to) establish a QLCC, consisting of at least one member of the issuer's audit committee and two or more independent members of the issuer's board, for the purpose of investigating reports of material violations made by attorneys. Such a QLCC would be authorized to recommend to the issuer that it adopt appropriate remedial measures to prevent ongoing or alleviate past material violations, and empowered to notify the Commission of the material violation if the QLCC decides, by a majority vote, that the issuer has failed to take any remedial measure that the QLCC has directed the issuer to take. The QLCC would be required to notify the board of the results of any inquiry. An attorney other than a CLO may satisfy entirely his or her reporting obligations under the rule by reporting evidence of a material violation to a QLCC. Further, a CLO to whom a report of a material violation has been made may refer the matter to a QLCC.

Paragraph 205.3(d) sets forth the specific circumstances under which an attorney is authorized to disclose confidential information related to his or her appearance and practice before the Commission in the representation of an issuer. Pursuant to this provision, an attorney may use any contemporaneous records he or she creates to defend against charges of attorney misconduct. Paragraph 205.3(d)(2) also allows an attorney to reveal confidential information to the extent necessary to prevent the commission of a material violation that the attorney reasonably believes will result either in perpetration of a fraud upon the Commission or in substantial injury to the financial or property interests of the issuer or investors. Similarly, the attorney may disclose confidential information to rectify an issuer's material violations when such actions have been advanced by the issuer's use of the attorney's services.

We expect that the various reporting requirements required by Part 205 would, at least to a limited extent, increase costs incurred by both small issuers and law firms. We believe that many of these reports are, however, already being made by those affected by the rule. We are unable to estimate the frequency with which reports would have to be prepared by small entities. The time required for the actual preparation of a report would vary, but should not be extensive. Small issuers and law firms may bolster, and in some instances institute, internal procedures to ensure compliance—although the rule does not dictate how these procedures should be implemented.

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the rule, we considered the following alternatives: (a) The establishment of differing compliance or reporting requirements that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of the reporting requirements for small entities; (c) an exemption from coverage of the requirements, or any part thereof, for small entities; and (d) the use of performance rather than design standards. As discussed above, the Sarbanes-Oxley Act directs the Commission to implement rules requiring up-the-ladder reporting. The Act does not contain any exemption or other limitation for small entities. Small business issuers may have some difficulty staffing a QLCC, as we presume that they may have fewer independent directors. We note that issuers are not required to have a QLCC under the rule.

The rule uses some performance standards and some design standards. While the rule establishes a framework for reporting evidence of material violations up-the-ladder, it does not set specific standards for how to comply with the rule's requirements. For the

[146] 17 CFR 270.0–10.

[147] 13 CFR 121.201.

most part, rather than requiring reports to contain specific, detailed disclosures, the rule prescribes general requirements for reporting. This should give small entities flexibility in complying with the rule.

By permitting issuers to establish QLCCs as an alternative mechanism for attorneys to report evidence of misconduct or fraud, the rule presents a performance standard (as opposed to a design standard). A performance standard is characterized by the provision for alternative means of fulfilling the regulatory standard. It has the advantage of permitting market participants to choose the method of meeting the standard that presents the least cost to them. The provision of alternative reporting mechanisms within this rule should serve to lower overall costs to issuers attributable to the rule in precisely this manner.

We believe that utilizing different reporting or other compliance requirements for small entities would undermine the effective functioning of the reporting regime. The rule is designed to restore investor confidence in the reliability of the financial statements of the companies they invest in—if small entities were not subject to such requirements, investors might be less inclined to invest in their securities. Further, we see no valid justification for imposing different standards of conduct upon small law firms than would apply to others who choose to appear and practice before the Commission. We also believe that the reporting requirements will be at least as well understood by small entities as would be any alternate formulation we might formulate to apply to them. Therefore, it does not seem necessary or appropriate to develop separate requirements for small entities.

VII. Statutory Authority

The Commission is adding a new Part 205 to Title 17, Chapter II, of the Code of Federal Regulations under the authority in Sections 3, 307, and 404 of the Sarbanes-Oxley Act of 2002,[148] Section 19 of the Securities Act of 1933,[149] Sections 3(b), 4C, 13, and 23 of the Securities Exchange Act of 1934,[150] Sections 38 and 39 of the Investment Company Act of 1940,[151] and Section 211 of the Investment Advisers Act of 1940.[152]

[148] 15 U.S.C. 7202, 7245, 7262.

[149] 15 U.S.C. 77s.

[150] 15 U.S.C. 78c(b), 78d–3, 78m, 78w.

[151] 15 U.S.C. 80a–37, 80a–38.

[152] 15 U.S.C. 80b–11.

Text of Rule

List of Subjects in 17 CFR Part 205

Standards of conduct for attorneys.

For the reasons set out in the preamble, the Commission amends Title 17, Chapter II, of the Code of Federal Regulations by adding Part 205 to read as follows:

PART 205—STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS APPEARING AND PRACTICING BEFORE THE COMMISSION IN THE REPRESENTATION OF AN ISSUER

Sec.

205.1 Purpose and scope.
205.2 Definitions.
205.3 Issuer as client.
205.4 Responsibilities of supervisory attorneys.
205.5 Responsibilities of a subordinate attorney.
205.6 Sanctions and discipline.
205.7 No private right of action.

Authority: 15 U.S.C. 77s, 78d–3, 78w, 80a–37, 80a–38, 80b–11, 7202, 7245, and 7262.

§ 205.1 Purpose and scope.

This part sets forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of an issuer. These standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part. Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.

§ 205.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Appearing and practicing* before the Commission:

(1) Means:

(i) Transacting any business with the Commission, including communications in any form;

(ii) Representing an issuer in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request, or subpoena;

(iii) Providing advice in respect of the United States securities laws or the Commission's rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document; or

(iv) Advising an issuer as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission's rules or regulations thereunder to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission; but

(2) Does not include an attorney who:

(i) Conducts the activities in paragraphs (a)(1)(i) through (a)(1)(iv) of this section other than in the context of providing legal services to an issuer with whom the attorney has an attorney-client relationship; or

(ii) Is a non-appearing foreign attorney.

(b) *Appropriate response* means a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes:

(1) That no material violation, as defined in paragraph (i) of this section, has occurred, is ongoing, or is about to occur;

(2) That the issuer has, as necessary, adopted appropriate remedial measures, including appropriate steps or sanctions to stop any material violations that are ongoing, to prevent any material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence; or

(3) That the issuer, with the consent of the issuer's board of directors, a committee thereof to whom a report could be made pursuant to § 205.3(b)(3), or a qualified legal compliance committee, has retained or directed an attorney to review the reported evidence of a material violation and either:

(i) Has substantially implemented any remedial recommendations made by such attorney after a reasonable investigation and evaluation of the reported evidence; or

(ii) Has been advised that such attorney may, consistent with his or her professional obligations, assert a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to the reported evidence of a material violation.

(c) *Attorney* means any person who is admitted, licensed, or otherwise qualified to practice law in any jurisdiction, domestic or foreign, or who

holds himself or herself out as admitted, licensed, or otherwise qualified to practice law.

(d) *Breach of fiduciary duty* refers to any breach of fiduciary or similar duty to the issuer recognized under an applicable Federal or State statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions.

(e) *Evidence of a material violation* means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.

(f) *Foreign government issuer* means a foreign issuer as defined in 17 CFR 230.405 eligible to register securities on Schedule B of the Securities Act of 1933 (15 U.S.C. 77a *et seq.*, Schedule B).

(g) *In the representation of an issuer* means providing legal services as an attorney for an issuer, regardless of whether the attorney is employed or retained by the issuer.

(h) *Issuer* means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78l), or that is required to file reports under section 15(d) of that Act (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), and that it has not withdrawn, but does not include a foreign government issuer. For purposes of paragraphs (a) and (g) of this section, the term ''issuer'' includes any person controlled by an issuer, where an attorney provides legal services to such person on behalf of, or at the behest, or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer.

(i) *Material violation* means a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law.

(j) *Non-appearing foreign attorney* means an attorney:

(1) Who is admitted to practice law in a jurisdiction outside the United States;

(2) Who does not hold himself or herself out as practicing, and does not give legal advice regarding, United States federal or state securities or other laws (except as provided in paragraph (j)(3)(ii) of this section); and

(3) Who:

(i) Conducts activities that would constitute appearing and practicing before the Commission only incidentally to, and in the ordinary course of, the practice of law in a jurisdiction outside the United States; or

(ii) Is appearing and practicing before the Commission only in consultation with counsel, other than a non-appearing foreign attorney, admitted or licensed to practice in a state or other United States jurisdiction.

(k) *Qualified legal compliance committee* means a committee of an issuer (which also may be an audit or other committee of the issuer) that:

(1) Consists of at least one member of the issuer's audit committee (or, if the issuer has no audit committee, one member from an equivalent committee of independent directors) and two or more members of the issuer's board of directors who are not employed, directly or indirectly, by the issuer and who are not, in the case of a registered investment company, ''interested persons'' as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19));

(2) Has adopted written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation under § 205.3;

(3) Has been duly established by the issuer's board of directors, with the authority and responsibility:

(i) To inform the issuer's chief legal officer and chief executive officer (or the equivalents thereof) of any report of evidence of a material violation (except in the circumstances described in § 205.3(b)(4));

(ii) To determine whether an investigation is necessary regarding any report of evidence of a material violation by the issuer, its officers, directors, employees or agents and, if it determines an investigation is necessary or appropriate, to:

(A) Notify the audit committee or the full board of directors;

(B) Initiate an investigation, which may be conducted either by the chief legal officer (or the equivalent thereof) or by outside attorneys; and

(C) Retain such additional expert personnel as the committee deems necessary; and

(iii) At the conclusion of any such investigation, to:

(A) Recommend, by majority vote, that the issuer implement an appropriate response to evidence of a material violation; and

(B) Inform the chief legal officer and the chief executive officer (or the equivalents thereof) and the board of directors of the results of any such investigation under this section and the appropriate remedial measures to be adopted; and

(4) Has the authority and responsibility, acting by majority vote, to take all other appropriate action, including the authority to notify the Commission in the event that the issuer fails in any material respect to implement an appropriate response that the qualified legal compliance committee has recommended the issuer to take.

(l) *Reasonable* or *reasonably* denotes, with respect to the actions of an attorney, conduct that would not be unreasonable for a prudent and competent attorney.

(m) *Reasonably believes* means that an attorney believes the matter in question and that the circumstances are such that the belief is not unreasonable.

(n) *Report* means to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing.

§ 205.3 Issuer as client.

(a) *Representing an issuer.* An attorney appearing and practicing before the Commission in the representation of an issuer owes his or her professional and ethical duties to the issuer as an organization. That the attorney may work with and advise the issuer's officers, directors, or employees in the course of representing the issuer does not make such individuals the attorney's clients.

(b) *Duty to report evidence of a material violation.* (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith. By communicating such information to the issuer's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer.

(2) The chief legal officer (or the equivalent thereof) shall cause such inquiry into the evidence of a material violation as he or she reasonably believes is appropriate to determine whether the material violation described in the report has occurred, is ongoing, or is about to occur. If the chief legal officer (or the equivalent thereof) determines no material violation has occurred, is ongoing, or is about to occur, he or she shall notify the

reporting attorney and advise the reporting attorney of the basis for such determination. Unless the chief legal officer (or the equivalent thereof) reasonably believes that no material violation has occurred, is ongoing, or is about to occur, he or she shall take all reasonable steps to cause the issuer to adopt an appropriate response, and shall advise the reporting attorney thereof. In lieu of causing an inquiry under this paragraph (b), a chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a qualified legal compliance committee under paragraph (c)(2) of this section if the issuer has duly established a qualified legal compliance committee prior to the report of evidence of a material violation.

(3) Unless an attorney who has made a report under paragraph (b)(1) of this section reasonably believes that the chief legal officer or the chief executive officer of the issuer (or the equivalent thereof) has provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to:

(i) The audit committee of the issuer's board of directors;

(ii) Another committee of the issuer's board of directors consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, ''interested persons'' as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19)) (if the issuer's board of directors has no audit committee); or

(iii) The issuer's board of directors (if the issuer's board of directors has no committee consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, ''interested persons'' as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19))).

(4) If an attorney reasonably believes that it would be futile to report evidence of a material violation to the issuer's chief legal officer and chief executive officer (or the equivalents thereof) under paragraph (b)(1) of this section, the attorney may report such evidence as provided under paragraph (b)(3) of this section.

(5) An attorney retained or directed by an issuer to investigate evidence of a material violation reported under paragraph (b)(1), (b)(3), or (b)(4) of this section shall be deemed to be appearing and practicing before the Commission. Directing or retaining an attorney to investigate reported evidence of a material violation does not relieve an officer or director of the issuer to whom such evidence has been reported under paragraph (b)(1), (b)(3), or (b)(4) of this section from a duty to respond to the reporting attorney.

(6) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if:

(i) The attorney was retained or directed by the issuer's chief legal officer (or the equivalent thereof) to investigate such evidence of a material violation and:

(A) The attorney reports the results of such investigation to the chief legal officer (or the equivalent thereof); and

(B) Except where the attorney and the chief legal officer (or the equivalent thereof) each reasonably believes that no material violation has occurred, is ongoing, or is about to occur, the chief legal officer (or the equivalent thereof) reports the results of the investigation to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee; or

(ii) The attorney was retained or directed by the chief legal officer (or the equivalent thereof) to assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation, and the chief legal officer (or the equivalent thereof) provides reasonable and timely reports on the progress and outcome of such proceeding to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee.

(7) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if such attorney was retained or directed by a qualified legal compliance committee:

(i) To investigate such evidence of a material violation; or

(ii) To assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation.

(8) An attorney who receives what he or she reasonably believes is an appropriate and timely response to a report he or she has made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section need do nothing more under this section with respect to his or her report.

(9) An attorney who does not reasonably believe that the issuer has made an appropriate response within a reasonable time to the report or reports made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section shall explain his or her reasons therefor to the chief legal officer (or the equivalent thereof), the chief executive officer (or the equivalent thereof), and directors to whom the attorney reported the evidence of a material violation pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section.

(10) An attorney formerly employed or retained by an issuer who has reported evidence of a material violation under this part and reasonably believes that he or she has been discharged for so doing may notify the issuer's board of directors or any committee thereof that he or she believes that he or she has been discharged for reporting evidence of a material violation under this section.

(c) *Alternative reporting procedures for attorneys retained or employed by an issuer that has established a qualified legal compliance committee.* (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney may, as an alternative to the reporting requirements of paragraph (b) of this section, report such evidence to a qualified legal compliance committee, if the issuer has previously formed such a committee. An attorney who reports evidence of a material violation to such a qualified legal compliance committee has satisfied his or her obligation to report such evidence and is not required to assess the issuer's response to the reported evidence of a material violation.

(2) A chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a previously established qualified legal compliance committee in lieu of causing an inquiry to be conducted under paragraph (b)(2) of this section. The chief legal officer (or the equivalent thereof) shall inform the reporting attorney that the report has been referred to a qualified legal compliance committee. Thereafter, pursuant to the requirements under § 205.2(k), the qualified legal compliance committee shall be responsible for responding to the evidence of a material violation reported to it under this paragraph (c).

(d) *Issuer confidences.* (1) Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue.

(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

§ 205.4 Responsibilities of supervisory attorneys.

(a) An attorney supervising or directing another attorney who is appearing and practicing before the Commission in the representation of an issuer is a supervisory attorney. An issuer's chief legal officer (or the equivalent thereof) is a supervisory attorney under this section.

(b) A supervisory attorney shall make reasonable efforts to ensure that a subordinate attorney, as defined in § 205.5(a), that he or she supervises or directs conforms to this part. To the extent a subordinate attorney appears and practices before the Commission in the representation of an issuer, that subordinate attorney's supervisory attorneys also appear and practice before the Commission.

(c) A supervisory attorney is responsible for complying with the reporting requirements in § 205.3 when a subordinate attorney has reported to the supervisory attorney evidence of a material violation.

(d) A supervisory attorney who has received a report of evidence of a material violation from a subordinate attorney under § 205.3 may report such evidence to the issuer's qualified legal compliance committee if the issuer has duly formed such a committee.

§ 205.5 Responsibilities of a subordinate attorney.

(a) An attorney who appears and practices before the Commission in the representation of an issuer on a matter under the supervision or direction of another attorney (other than under the direct supervision or direction of the issuer's chief legal officer (or the equivalent thereof)) is a subordinate attorney.

(b) A subordinate attorney shall comply with this part notwithstanding that the subordinate attorney acted at the direction of or under the supervision of another person.

(c) A subordinate attorney complies with § 205.3 if the subordinate attorney reports to his or her supervising attorney under § 205.3(b) evidence of a material violation of which the subordinate attorney has become aware in appearing and practicing before the Commission.

(d) A subordinate attorney may take the steps permitted or required by § 205.3(b) or (c) if the subordinate attorney reasonably believes that a supervisory attorney to whom he or she has reported evidence of a material violation under § 205.3(b) has failed to comply with § 205.3.

§ 205.6 Sanctions and discipline.

(a) A violation of this part by any attorney appearing and practicing before the Commission in the representation of an issuer shall subject such attorney to the civil penalties and remedies for a violation of the federal securities laws available to the Commission in an action brought by the Commission thereunder.

(b) An attorney appearing and practicing before the Commission who violates any provision of this part is subject to the disciplinary authority of the Commission, regardless of whether the attorney may also be subject to discipline for the same conduct in a jurisdiction where the attorney is admitted or practices. An administrative disciplinary proceeding initiated by the Commission for violation of this part may result in an attorney being censured, or being temporarily or permanently denied the privilege of appearing or practicing before the Commission.

(c) An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.

(d) An attorney practicing outside the United States shall not be required to comply with the requirements of this part to the extent that such compliance is prohibited by applicable foreign law.

§ 205.7 No private right of action.

(a) Nothing in this part is intended to, or does, create a private right of action against any attorney, law firm, or issuer based upon compliance or noncompliance with its provisions.

(b) Authority to enforce compliance with this part is vested exclusively in the Commission.

By the Commission.

Dated: January 29, 2003.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 03–2480 Filed 2–5–03; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 205, 240 and 249

[Release Nos. 33–8186; 34–47282; IC–25920; File No. S7–45–02]

RIN 3235–AI72

Implementation of Standards of Professional Conduct for Attorneys

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is soliciting comments on proposed rules setting standards of professional conduct for attorneys who appear and practice before the Commission on behalf of issuers. Section 307 of the Sarbanes-Oxley Act of 2002 requires the Commission to prescribe minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers. The Commission in a companion release has adopted rules under Section 307. The Commission also is extending the comment period for certain other rules under Section 307. In particular, the Commission is extending the comment period for the provisions regarding an attorney's notification to the Commission (more commonly referred to as ''noisy withdrawal'') when an attorney, after reporting evidence of a material violation up-the-ladder of the issuer's governance structure, reasonably believes an issuer's directors have either made no response (within a reasonable time) or have not made an appropriate response. This release solicits additional comments on the ''noisy withdrawal'' provisions previously proposed and proposes an alternative approach. This release also solicits additional comments on the rules that the Commission adopted under Section 307.

DATES: Comments should be received on or before April 7, 2003.

ADDRESSES: To help us process and review your comments efficiently, comments should be sent by hard copy or by e-mail, but not by both methods.

Comments sent by hard copy should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Alternatively, comments may be submitted electronically to the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. S7–45–02; this file number should be included on the subject line if e-mail is used. All comment letters received will be available for public inspection and copying in the Commission's Public Reference Room at the same address. Electronically submitted comments will be posted on the Commission's Internet Web site (*http://www.sec.gov).*[1]

FOR FURTHER INFORMATION CONTACT: Laura Walker, Office of the General Counsel, U.S. Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549. Phone: (202) 942–0835.

SUPPLEMENTARY INFORMATION: The Commission is proposing amendments to Rule 205.3[2] of Title 17, Chapter II, of the Code of Federal Regulations, establishing standards of professional conduct for attorneys who appear and practice before the Commission in the representation of issuers, under the Securities Act of 1933,[3] the Securities Exchange Act of 1934,[4] the Investment Company Act of 1940,[5] the Investment Advisers Act of 1940,[6] and the Sarbanes-Oxley Act of 2002.[7] The Commission also is proposing new Rules 13a–17[8] and 15d–17[9] and amendments to Rules 13a–11[10] and 15d–11[11] and Forms 20–F[12], 40–F[13], and 8–K[14] under the Exchange Act.

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I. Background

Section 307 of the Sarbanes-Oxley Act of 2002 (the ''Act'') mandates that the Commission:

> shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—
>
> (1) Requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
>
> (2) If the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

On November 21, 2002, the Commission proposed rules under Section 307 to implement those provisions, including an up-the-ladder reporting system mandated by the Act.[15] On January 23, 2003, the Commission voted to approve the up-the-ladder reporting system.[16] In addition to the up-the-ladder reporting requirement, the Proposing Release proposed several corollary provisions in 205.3(d) that are not explicitly required by Section 307, but that the Commission considered potentially important minimum standards for attorneys appearing and practicing before the Commission in the representation of issuers. Under certain circumstances, these provisions would have permitted or required attorneys to withdraw from representation of an issuer, to notify the Commission that they have done so, and to disaffirm documents filed or submitted to the Commission on behalf of the issuer.

The Commission received numerous comment letters concerning these ''noisy withdrawal'' provisions. A number of commenters supported the proposal. They were of the view that the ''noisy withdrawal'' proposal is

[1] The Commission does not edit personal identifying information, such as names or electronic mail addresses, from electronic submissions. Interested person submitting comments should only submit information that they wish to make publicly available.

[2] 17 CFR 205.3.

[3] 15 U.S.C. 77a *et seq.*

[4] 15 U.S.C. 78a *et seq.*

[5] 15 U.S.C. 80a–1 *et seq.*

[6] 15 U.S.C. 80b–1 *et seq.*

[7] 15 U.S.C. 7201 *et seq.*

[8] 17 CFR 240.13a–17.

[9] 17 CFR 240.15d–17.

[10] 17 CFR 240.13a–11.

[11] 17 CFR 240.15d–11.

[12] 17 CFR 249.220f.

[13] 17 CFR 249.240f.

[14] 17 CFR 249.308.

[15] Release No. 33–8150 (December 2, 2002) [67 FR 71670] (the ''Proposing Release'').

[16] Release No. 33–8185 (Jan. 29, 2003) (the ''Adopting Release''). The effective date of the rule is 180 days following publication in the **Federal Register**. Until the effective date, those wishing to see the text of the rule should refer to the Adopting Release.

consistent with the Commission's mandate under Section 307 and is necessary to effectuate the up-the-ladder reporting rule, because it addresses the situation where an issuer inappropriately refuses to implement remedial measures.[17] One commenter not only thought the Commission's proposed rule was sound, but opined that ''considerably more demanding reporting obligations would be consistent with the most plausible interpretation of corporate interests in confidentiality.''[18] Other commenters supported the proposal but recommended certain modifications.[19]

On the other hand, a greater number of commenters opposed the ''noisy withdrawal'' provisions. Some commenters objected to the proposal because they are of the view that the Commission does not have the statutory authority to require ''noisy withdrawal.'' They pointed to legislators'' comments that, in their view, supported the position that Section 307 does not require the Commission to promulgate a rule mandating ''noisy withdrawal.'' [20] Other objectors were concerned that the provision would conflict with longstanding requirements under state ethics laws and therefore would infringe on the jurisdiction of state ethics-setting bodies.[21] One commenter argued that such a provision would subject attorneys to conflicting liability claims, whether or not they complied with the rule. Several commenters from outside the United States stated that compliance with the ''noisy withdrawal'' requirement would cause them to violate the laws of their home jurisdiction.[22] Finally, several commenters believed that the rule would not further the Commission's goals because it would cause clients to exclude attorneys from meetings where information was exchanged that could lead an attorney to believe a material violation had been committed.[23]

The vast majority of commenters suggested that the Commission defer action on a rule mandating ''noisy withdrawal'' and provide interested parties an additional opportunity to comment. Their principal concerns were that: The rule raises novel issues with respect to establishing ethical rules for attorneys that require reporting to a third party; the rules are complex and the period of time provided under Section 307 did not allow adequate time for the preparation of comments or for the Commission to consider those comments; and because Section 307 requires the Commission only to issue the up-the-ladder reporting requirements within 180 days, the Commission need not issue a ''noisy withdrawal'' provision at the time it adopts the up-the-ladder reporting system and can postpone its consideration of the issue.

In light of these comments, the Commission has determined to extend the comment period on proposed § 205.3(d) of the proposed rule.[24] The Commission is soliciting comments on proposed alternative provisions, which prescribe attorney withdrawal in a narrower set of circumstances, and which require the issuer, rather than the attorney, to report to the Commission the attorney's withdrawal or written notice of failure to receive an appropriate response to a report of a material violation. The Commission also requests comment on whether any rules we are currently adopting under Section 307 should be revised if we adopt either of these proposals. The Commission is interested especially in receiving comments from interested parties outside the legal profession, such as issuers and investors, who might be affected by, or benefit from, the final rule or the proposals.[25]

II. The Role of Attorneys Who Appear Before the Commission

As discussed in more detail in the Proposing Release and the Adopting Release, attorneys play a varied and crucial role in the Commission's processes. Attorneys prepare, or assist in preparing, materials that are filed with or submitted to the Commission by or on behalf of issuers. Public investors rely on these materials in making their investment decisions. Thus, the Commission, and the investing public, must be able to rely upon the integrity of in-house and retained lawyers who represent issuers before the Commission. Attorneys also play an important and expanding role in the internal processes and governance of issuers, ensuring compliance with applicable reporting and disclosure requirements, including requirements mandated by the federal securities laws.

The actions of some attorneys have drawn increasing scrutiny and criticism in light of recent events demonstrating that at least ''some lawyers have forgotten their responsibility.'' [26] Moreover, existing state ethical rules have not proven an effective deterrent to attorney misconduct.[27] The July 16, 2002 *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility* (the ''Cheek Report'') noted that ''a disturbing series of recent lapses in corporations involving false or misleading financial statements and alleged misconduct by executive officers'' has compromised investors' confidence in both the ''quality and the integrity'' of public company governance.[28] Indeed, the Cheek Report concluded that ''the system of corporate governance at many public companies has failed dramatically.'' Moreover, the Cheek Report acknowledges that attorneys representing and advising corporate clients bear some share of the blame for this failure.[29]

[17] See, *e.g.*, Comments of Susan P. Koniak, *et al.*, at 23.

[18] *See* Comments of William Simon, at 2.

[19] *See, e.g.*, Comments of Richard Painter, at 2–3.

[20] *See* Comments of Attorneys' Liability Assurance Society, Inc., at 8; Comments of Frederick Lipman, at 1–3.

[21] *See* Comments of the Conference of Chief Justices, at 3; Comments of Attorneys' Liability Assurance Society, Inc., at 8.

[22] *See, e.g.*, Comments of Shearman & Sterling, at 3–7.

[23] *See* Comments of Attorneys' Liability Assurance Society, Inc., at 8.

[24] Proposed Part 205.3(d) should not be confused with Part 205.3(d) as adopted (''Issuer Confidences''). In the event that proposed Part 205.3(d), or an alternative thereto, is adopted, current Part 205.3(d) will be re-numbered.

[25] Persons who previously commented on proposed Part 205 need not re-submit the same comment letters. We will consider all relevant comment letters previously submitted, as well as any new comment letters we receive, in our deliberations on the rule.

[26] *See* remarks by Senator John Edwards, 148 Cong. Rec. at S6551 (July 10, 2002). *See also* Speech by SEC Chairman Harvey L. Pitt: Remarks Before the Annual Meeting of the American Bar Association's Business Law Section (Aug. 12, 2002) (''recent events have refocused our attention on the need for the profession to assist us in ensuring that fundamental tenets of professionalism, ethics and integrity work to ensure investor confidence in public companies''), available at *http://www.sec.gov/news/speech/spch579.htm.*

[27] *See* remarks by Senator Michael Enzi, 148 Cong. Rec. at S6555 (''I am usually in the camp that believes that [s]tates should regulate professionals within their jurisdiction. However, in this case, the [s]tate bars as a whole have failed. They have provided no specific ethical rule of conduct to remedy this kind of situation. Even if they do have a general rule that applies, it often goes unenforced'').

[28] *See* Cheek Report at 3–4.

[29] *See* Cheek Report at 7 (''It is a clear failure of corporate responsibility if executive officers aware of potential accounting irregularities sell millions of dollars of stock to public investors who are unaware of [earnings misstatements and self-dealing by corporate officers]. It is a clear failure of corporate responsibility for insiders to borrow enormous amounts from their companies without adequate security beyond inflated stock of the company itself. And it is a clear failure of corporate responsibility when outside directors, auditors and lawyers, who have important roles in our system of independent checks on the corporation's management, fail to avert or even discover—and sometimes actually condone or contribute toward the creation of—the grossest of financial manipulations and fraud'').

III. Discussion of Proposals

The proposals regarding ''noisy withdrawal'' contained in the Proposing Release, and the alternative provisions discussed below, are intended to further the purposes of the up-the-ladder requirement and enhance investor confidence in the financial reporting process. The proposed rules are designed to deter instances of attorney and issuer misconduct, and, where misconduct has occurred, reduce its impact on issuers and their shareholders.

At the same time, the Commission does not want the rule to impair zealous advocacy, which is important to the Commission's processes. The Commission also does not want the rule to discourage issuers from seeking and obtaining appropriate and effective legal advice. In this regard, the Commission today is proposing for comment alternative provisions to the ''noisy withdrawal'' provisions contained in the Proposing Release.

A. Part 205 as Adopted

In a companion release, we adopted rules under § 307 of the Act that mandate attorneys appearing and practicing before the Commission in the representation of an issuer to report evidence of a material violation up-the-ladder within the issuer.[30] The rules require an attorney to report such evidence to the issuer's chief legal officer, or to its chief legal officer and chief executive officer. The issuer's chief legal officer is required to inquire into the evidence of the material violation and, unless he or she reasonably believes that no material violation has occurred, is ongoing, or is about to occur, he or she must take reasonable steps to cause the issuer to adopt an appropriate response to the attorney's report. Unless an attorney, who has made a report of evidence of a material violation, reasonably believes that the chief legal officer or chief executive officer has provided an appropriate response within a reasonable period of time to his or her report, the attorney shall report the evidence to an appropriate committee of the issuer's board of directors. An attorney who reasonably believes that the issuer has not made an appropriate response shall explain his or her reasons to the issuer's chief legal officer, chief executive officer, or board of directors. An attorney retained or employed by an issuer that has established a qualified legal compliance committee (''QLCC'') (a committee established to consider and investigate attorney reports under the rule and to recommend appropriate responses to such reports) may, as an alternative to the reporting requirements described above, report evidence of a material violation to the QLCC.

The final rule provides that members of the QLCC may not be ''employed, directly or indirectly, by the issuer.'' This language, which is also included in § 205.3(b)(3), is drawn directly from § 307 of the Sarbanes-Oxley Act. The Commission considers it appropriate and consistent with the mandate of the Act, however, to ensure a high degree of independence in QLCC members and members of committees to whom reports are made. Accordingly, we anticipate that these provisions will be amended to conform to final rules defining who is an ''independent'' director under § 301 of the Act, upon adoption of those rules.[31] We request comment on who should be considered independent in this context.

The rule as adopted does not require either an attorney or an issuer to report evidence of a material violation, or an issuer's response to such evidence, outside the issuer. We request additional comment on the rule as adopted. Commenters should consider whether any aspects of the rule, as adopted, should be revised if we adopt any of the proposals discussed in this release. If yes, how should they be revised? If not, why not?

B. Extension of Comment Period/ Solicitation of Comments for ''Noisy Withdrawal'' Provisions as Previously Proposed

As explained in the Proposing Release, proposed § 205.3(d) addresses what we hope is the rare situation in which an attorney reasonably believes an issuer has either made no response (within a reasonable time) or has not made an appropriate response to reported evidence of a material violation. The proposed section distinguishes between material violations that have already occurred and are not ongoing, and material violations that are either ongoing or are about to occur. The proposed section also distinguishes between outside attorneys retained by an issuer and in-house attorneys employed by an issuer. The section requires an attorney to withdraw from representing an issuer and/or to disaffirm documents filed with the Commission in some circumstances; it also requires a withdrawing attorney to notify the Commission in writing of his or her withdrawal.

As proposed in the Proposing Release, § 205.3(d)(1) prescribes actions by an attorney who has not received an appropriate response to his or her report of a material violation and who believes that a material violation is ongoing or about to occur.[32] It states:

(d) *Notice to the Commission where there is no appropriate response within a reasonable time.* (1) Where an attorney who has reported evidence of a material violation under paragraph 3(b) of this section rather than paragraph 3(c) of this section does not receive an appropriate response, or has not received a response in a reasonable time, to his or her report, and the attorney reasonably believes that a material violation is ongoing or is about to occur and is likely to result in substantial injury to the financial interest or property of the issuer or of investors:

(i) An attorney retained by the issuer shall:

(A) Withdraw forthwith from representing the issuer, indicating that the withdrawal is based on professional considerations;

(B) Within one business day of withdrawing, give written notice to the Commission of the attorney's withdrawal, indicating that the withdrawal was based on professional considerations; and

(C) Promptly disaffirm to the Commission any opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading;

(ii) An attorney employed by the issuer shall:

(A) Within one business day, notify the Commission in writing that he or she intends to disaffirm some opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading; and

(B) Promptly disaffirm to the Commission, in writing, any such opinion, document, affirmation, representation, characterization, or the like; and

(iii) The issuer's chief legal officer (or the equivalent) shall inform any attorney retained or employed to replace the attorney who has withdrawn that the previous attorney's withdrawal was based on professional considerations.

Proposed § 205.3(d)(2) concerns situations in which the reported

[30] *See* Adopting Release. While we summarize here certain salient aspects of the rules as adopted, for a complete discussion, please review the Adopting Release.

[31] *See* Standards Related to Listed Company Audit Committees, Release No. 33–8173 (Jan. 8, 2003).

[32] Proposed § 205.3(d) would follow §§ 205.3(b) and (c) as adopted, which set forth the duty of an attorney to report evidence of a material violation up-the-ladder of the issuer's governance structure, and, if appropriate, to explain to the issuer his or her reasons for believing that the issuer has not made a timely or appropriate response.

material violation has already occurred and is not ongoing. It provides:

(2) Where an attorney who has reported evidence of a material violation under paragraph (b) rather than paragraph (c) of this section does not receive an appropriate response, or has not received a response in a reasonable time, to his or her report under paragraph (b) of this section, and the attorney reasonably believes that a material violation has occurred and is likely to have resulted in substantial injury to the financial interest or property of the issuer or of investors but is not ongoing:

(i) An attorney retained by the issuer may:

(A) Withdraw forthwith from representing the issuer, indicating that the withdrawal was based on professional considerations;

(B) Give written notice to the Commission of the attorney's withdrawal, indicating that the withdrawal was based on professional considerations; and

(C) Disaffirm to the Commission, in writing, any opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading; and

(ii) An attorney employed by the issuer may:

(A) Notify the Commission in writing that he or she intends to disaffirm some opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading; and

(B) Disaffirm to the Commission, in writing, any such opinion, document, affirmation, representation, characterization, or the like; and

(iii) The issuer's chief legal officer (or the equivalent) shall inform any attorney retained or employed to replace the attorney who has so withdrawn that the previous attorney's withdrawal was based on professional considerations.

Proposed § 205.3 (d)(3) restates what is largely settled law:

(3) The notification to the Commission prescribed by this paragraph (d) does not breach the attorney-client privilege.

Interested persons are invited to comment on any aspect of this proposal,[33] including: (1) Whether the proposed rule should include any provision permitting or requiring notification to the Commission when an attorney receives no response or an inappropriate response or whether this is a matter best left to state or local bar disciplinary processes; (2) whether a higher standard should apply to notification to the Commission than to reporting up-the-ladder within the issuer and, if so, how much higher it should be and how should such a higher test be framed; (3) whether ''noisy withdrawal'' should be mandatory under some circumstances but permissive under others and, if so, what circumstances should make ''noisy withdrawal'' mandatory and what circumstances should make ''noisy withdrawal'' permissive, or whether ''noisy withdrawal'' should be mandatory under all circumstances covered by § 205.3(d) or should be permissive under all such circumstances; (4) whether it is appropriate to distinguish between material violations that are ongoing or impending and material violations that are past and have no continuing effect, and whether such a distinction would be meaningful to investors; (5) whether the attorney who has reported evidence of a material violation to which the issuer has not made an appropriate response must know that the reported material violation has occurred, is occurring, or is about to occur before the attorney is required, or permitted, to make a ''noisy withdrawal''; (6) whether an attorney should be required, or permitted, to make a ''noisy withdrawal'' where the attorney has not received an appropriate response to reported evidence of a material violation, and the attorney reasonably believes that the reported material violation has occurred, is occurring, or is about to occur; (7) whether there is an appropriate basis for a ''noisy withdrawal'' under circumstances in which an attorney reasonably believes that the reported material violation is likely to have occurred, be ongoing, or be about to occur; (8) whether there is an appropriate basis for a ''noisy withdrawal'' under circumstances in which the attorney reasonably believes that it is reasonably likely that the reported material violation has occurred, is ongoing, or is about to occur; (9) whether substantial injury to the financial interest of investors is an appropriate prerequisite to a ''noisy withdrawal''; (10) whether substantial injury to the financial interest of the issuer client is an appropriate prerequisite to a ''noisy withdrawal'' and, if so, whether such substantial injury to a financial interest must be reasonably certain, likely, or merely possible; (11) whether the rule should distinguish between outside attorneys and those employed by the issuer and, if so, under what circumstances, how, and why; (12) whether an attorney who is employed by an investment adviser or manager and who is appearing and practicing before the Commission in the representation of the investment company should be treated as an outside attorney retained by the investment company under proposed paragraph (d)(1)(i) or should be treated as an in-house attorney under proposed paragraph (d)(1)(ii); (13) whether the rule should specify the content of a disaffirmance of an opinion or representation; (14) whether the rule should require that any disaffirmance be in writing; (15) whether there are any other actions the rule should require an attorney to take when the attorney does not receive an appropriate response to his or her report of evidence of a material violation (*e.g.*, should an in-house attorney be required to cease participating in or assisting in any matter relating to the violation); (16) what is the appropriate length of time to permit an attorney to make a ''noisy withdrawal''; (17) whether it is important to require any successor attorney to be notified that the previous attorney withdrew based on ''professional considerations'' and, if so, whether there is a better way to require such notification be made than is proposed in paragraph (d)(1)(iii); (18) whether such notification should be required where ''noisy withdrawal'' is merely permissive; (19) whether it is important to provide a ''safe harbor'' from civil suits for the attorney who notifies the Commission that he or she has withdrawn based on professional considerations under proposed paragraph (d) and/or disaffirmed a document; and (20) whether the ''noisy withdrawal'' provisions would create conflicts with applicable law for any attorneys (foreign or U.S.) not excluded by the definition of ''non-appearing foreign attorney'' (section 205.2(j) of the rule as adopted). Should ''noisy withdrawal'' apply to these attorneys? If not, why not? If the provisions would create conflicts for these attorneys, please describe the conflicts and how they appropriately may be resolved.

The Commission is particularly interested in learning commenters' views on how common it is for attorneys to alert their issuer-clients' management or directors to evidence of violations of law but to receive either no response or an inappropriate response. How often would attorneys be required to make a ''noisy withdrawal'' under this provision, if adopted? Should we revise the provision so that attorneys must make a ''noisy withdrawal'' less often or more often? If so, how?

[33] *See also* the solicitation of comments in the Proposing Release.

C. Alternative Proposal to ''Noisy Withdrawal''

In response to comments received to date on § 205.3(d) as proposed in the Proposing Release and described above, the Commission also proposes, and solicits comments on, the following alternative proposal. The alternative proposal does not contain ''noisy withdrawal'' and disaffirmation requirements and requires attorney action only where the attorney reasonably concludes that there is substantial evidence that a material violation is ongoing or about to occur and is likely to cause substantial injury to the issuer.

Section 205.3(e) of the alternative proposal requires an issuer (rather than its attorney) to report to the Commission an attorney's written notice of withdrawal or failure to receive an appropriate response, as described in § 205.3(d) of the alternative proposal. In connection with § 205.3(e) of the alternative proposal, the Commission also proposes to amend Forms 8–K, 20–F, and 40–F to require issuers to disclose publicly an attorney's written notice of withdrawal within two business days of that notice.[34] Section 205.3(f) of the alternative proposal permits (but does not require) an attorney to inform the Commission of his or her withdrawal if the issuer does not comply with paragraph (e).

1. Requiring an Attorney to Provide Written Notice of Withdrawal to the Issuer Where the Attorney Does Not Receive an Appropriate Response to His or Her Report of a Material Violation

Alternative proposed § 205.3(d) requires an attorney retained by the issuer who has reported evidence of a material violation and has not received an appropriate or timely response to withdraw from representing the issuer and to notify the issuer, in writing, that the withdrawal is based on professional considerations. In the same circumstances, an attorney employed by the issuer is required to cease participating or assisting in any matter concerning the violation and to notify the issuer, in writing, that he or she believes the issuer has not provided an appropriate response.

Unlike the original proposed § 205.3(d)(1), this proposed paragraph does not require a withdrawing attorney to notify the Commission of his or her withdrawal, and it does not require an attorney to disaffirm documents filed with the Commission. The proposed paragraph also does not require an attorney to withdraw or cease participation or assistance in a matter if he or she would be prohibited from doing so by order or rule of a court, administrative body, or other authority with jurisdiction over the attorney. Alternative proposed § 205.3(d) provides:

(d) *Actions required where there is no appropriate response within a reasonable time.* (1) Where an attorney who has reported evidence of a material violation under paragraph (b) of this section rather than paragraph (c) of this section (i) does not receive an appropriate response, or has not received an appropriate response in a reasonable time, and (ii) has followed the procedures set forth in paragraph (b)(3) of this section, and (iii) reasonably concludes that there is substantial evidence of a material violation that is ongoing or about to occur and is likely to cause substantial injury to the financial interest or property of the issuer or of investors:

(A) An attorney retained by the issuer shall withdraw from representing the issuer, and shall notify the issuer, in writing, that the withdrawal is based on professional considerations.

(B) An attorney employed by the issuer shall cease forthwith any participation or assistance in any matter concerning the violation and shall notify the issuer, in writing, that he or she believes that the issuer has not provided an appropriate response in a reasonable time to his or her report of evidence of a material violation under paragraph (b) of this section.

(2) An attorney shall not be required to take any action pursuant to paragraph (d)(1)(A) or (B) of this section if the attorney would be prohibited from doing so by order or rule of any court, administrative body or other authority with jurisdiction over the attorney, after having sought leave to withdraw from representation or to cease participation or assistance in a matter. An attorney shall give notice to the issuer that, but for such prohibition, he or she would have taken such action pursuant to paragraph (d)(1)(A) or (B), and such notice shall be deemed the equivalent of such action for purposes of this part.

(3) An attorney employed or retained by an issuer who has reported evidence of a material violation under this part and reasonably believes that he or she has been discharged for so doing shall notify the issuer's chief legal officer (or the equivalent thereof) forthwith.

(4) The issuer's chief legal officer (or the equivalent thereof) shall notify any attorney retained or employed to replace an attorney who has given notice to an issuer pursuant to paragraph (d)(1), (d)(2) or (d)(3) of this section that the previous attorney has withdrawn, ceased to participate or assist or has been discharged, as the case may be, pursuant to the provisions of this paragraph.

Interested persons are invited to comment on any aspect of alternative proposed section 205.3(d), including: (1) Whether requiring a different and higher evidentiary standard for withdrawal than for reporting up-the-ladder of the issuer, such as requiring an attorney to ''conclude'' there is ''substantial evidence,'' will make the circumstances in which an attorney must withdraw (triggering an issuer's notification of the Commission) too narrow adequately to protect investors; (2) whether requiring an attorney to make a separate, more definitive, determination that evidence shows that a material violation ''is'' ongoing or ''is'' about to occur (rather than is likely to be ongoing or is likely to occur) too narrows the circumstances in which an attorney must withdraw (triggering an issuer's notification of the Commission) and fails adequately to protect investors; (3) whether requiring an attorney to make a separate determination of whether ''substantial injury'' is likely will make the circumstances in which an attorney must withdraw (triggering an issuer's notification to the Commission) too narrow adequately to protect investors; (4) whether the proposed alternative's requirement that the attorney make all three determinations addressed in the three preceding questions (higher level of evidence, more definitiveness, and substantial injury) so narrows the circumstances in which an attorney would withdraw (and an issuer would notify the Commission) so that the withdrawal and reporting requirements would be rendered ineffective; (5) whether an issuer's ability under the adopted rule to respond appropriately to a report of evidence of a material violation by retaining or directing an attorney to assert a colorable defense (should one exist), with the consent of the board of directors, would mitigate issuer concerns about withdrawal being required in situations where no violation actually has occurred; (6) whether failing to apply mandatory withdrawal (triggering an issuer's notification of the Commission) to past violations fails adequately to protect investors; (7) whether requiring an attorney to make a determination as to whether a violation ''has occurred'' or whether it ''is ongoing'' adequately protects investors; (8) whether the proposed rule should include a provision permitting or requiring withdrawal from representation when an attorney does not receive an appropriate response to his or her report of a material violation; (9) whether alternative proposed section (d) is more compatible with existing state standards

[34] On June 17, 2002, the Commission proposed to shorten the current deadlines for filing Form 8–K to two business days. ''Additional Form 8–K Requirements and Acceleration of Filing Date,'' Release No. 33–8106. The Commission is still considering that rulemaking proposal and may address it separately from this release.

governing attorney conduct than the ''noisy withdrawal'' and disaffirmation requirements of proposed section 205.3(d)(1)–(3) described above and, if so, how; (10) whether alternative proposed section (d) is otherwise preferable to original proposed § 205.3(d)(1)–(3) as described above and in the Proposing Release; (11) whether alternative proposed section (d) is more compatible with foreign law governing attorney conduct than the ''noisy withdrawal'' and disaffirmation requirements of proposed § 205.3(d)(1)–(3) described above; if so, why; if not, why not; (12) whether an attorney who has reported evidence of a material violation to which the issuer has not made an appropriate response must know that the reported material violation is occurring or is about to occur before the attorney is required to withdraw or cease participation or assistance on a matter; (13) whether an attorney who is required to withdraw under this paragraph should be required to withdraw from all representation of the issuer, or only from representation on the matter concerning the material violation; (14) whether investors and issuers will receive adequate protection if the rule does not require attorneys to disaffirm any opinion, affirmation, representation or the like in a document the attorney or issuer filed with the Commission and that the attorney reasonably believes is or may be (or is reasonably likely to be) materially false or misleading; (15) whether investors and issuers will receive adequate protection if the rule contains no requirement that either an attorney or an issuer notify the Commission when the attorney withdraws or gives the issuer notice that he or she has not received an appropriate response to a report of a material violation; (16) whether an attorney who is prohibited from withdrawing or ceasing participation or assistance in a matter by a court or administrative body or other authority with jurisdiction over the attorney should be required to give notice to the issuer that, absent such prohibition, he or she would have taken such action or whether such a requirement is likely to be inconsistent with the attorney's continuing representation of the issuer; and (17) whether the proposal's withdrawal requirements would conflict with the obligations of attorneys not excluded by the ''non-appearing foreign attorney'' definition under applicable foreign law or professional standards of conduct.

2. Requiring an Issuer to Report an Attorney's Written Notice of Withdrawal

As noted above, the Commission received many comments opposing the ''noisy withdrawal'' provisions of the proposed rule. One commenter suggested that the requirement would ''risk destroying the trust and confidence many issuers have up to now placed in their legal counsel, creating divided loyalties and driving a wedge into the attorney-client relationship,'' [35] and others expressed similar views.[36] Several commenters believed that the rule would not further the Commission's goals because it would cause clients to exclude attorneys from discussions that might prompt the attorney to begin the up-the-ladder reporting process.[37] Foreign lawyers and law associations expressed concerns, both in written comments and at the Commission's December 17, 2002 Roundtable on the International Impact of the Proposed Rules Regarding Attorney Conduct, that the ''noisy withdrawal'' requirements of the proposed rule would conflict with the laws and principles of confidentiality and attorney-client privilege recognized in certain foreign jurisdictions.[38] Some foreign commenters stated that it violated principles of international comity for the Commission to exercise jurisdiction over the legal profession outside the U.S.[39]

Accordingly, the Commission solicits comments on an alternative proposal that would require an issuer, rather than an attorney, to disclose publicly an attorney's withdrawal under the rule. The Commission believes that this alternative approach to ''reporting out,'' by placing the responsibility on the issuer for such disclosure, addresses a number of the commenters' concerns noted above (those related to attorney-client privilege and those of foreign lawyers), yet provides some assurance that issuers will respond appropriately to reports of material violations by attorneys. Requiring issuers to report attorney withdrawals in a public filing with the Commission may also provide protection to investors by alerting them to the possibility of ongoing material violations by issuers. At least one commenter proposed requiring issuers, rather than attorneys, to report attorney resignations on Form 8–K, arguing that the proposed ''noisy withdrawal'' requirement ''does little to warn investors about what is going on at the issuer.'' [40] In addition, the Commission invites comment on whether, from a corporate governance perspective, there may be advantages to vesting the obligation to ''report out'' an attorney's withdrawal for professional considerations in the board of directors of an issuer.

Proposed § 205.3(e) would require an issuer who has received notice from an attorney under alternative proposed § 205.3(d) to report the notice and the circumstances related thereto in an appropriate filing with the Commission. Proposed section 205.3(e) provides:

(e) *Duties of an issuer where an attorney has given notice pursuant to paragraph (d).* (1) Where an attorney has provided an issuer with a written notice pursuant to paragraph (d)(1), (d)(2), or (d)(3) of this section, the issuer shall, within two business days of receipt of such written notice, report such notice and the circumstances related thereto on Form 8–K, 20–F, or 40–F, as applicable.

Proposed § 205.3(e) provides that the filing must be made by the issuer on Form 8–K, 20–F or 40–F, as applicable. Accordingly, the Commission is proposing to amend Forms 8–K, 20–F and 40–F to require issuers to report an attorney's written notice under alternative proposed paragraph (d) of the rule. These proposed amendments are described below.

In connection with proposed § 205.3(e), the Commission seeks comment on whether any circumstances exist in which an issuer should not be required to disclose an attorney's written notice under the rule. The Commission specifically seeks comment on whether an issuer should be permitted not to disclose an attorney's written notice where:

a committee of independent directors of the issuer's board determines, based on the advice of counsel that was not involved in the matters underlying the reported material violation, (i) that the attorney providing such written notice acted unreasonably in providing such notice, or (ii) that the issuer has, subsequent to such written notice, implemented an appropriate response.

The Commission requests comment on the following questions: (1) Whether an issuer should be able to determine not to report an attorney's notice if an independent committee of the issuer's board of directors determines, based on

[35] Comments of the American Bar Association, at 26.

[36] *See, e.g.*, Comments of 77 Law Firms, at 2; Comments of the American College of Trial Lawyers, at 2.

[37] *See, e.g.*, Comments of Attorneys' Liability Assurance Society, Inc., at 8.

[38] *See, e.g.*, Comments of the International Bar Association, at 5–6; Comments of the Law Society of England and Wales, at 1; Comments of the Japanese Federation of Bar Associations, at 3–4.

[39] *See* Comments of De Brauw Blackstone Westbroek, at 2; Comments of Stibbe, at 2.

[40] Comments of Jeffrey L. Schultz, at 2.

the advice of counsel, that subsequent to the attorney's notice, the issuer has implemented an appropriate response, or whether such a provision would be undesirable because the rule already provides issuers with sufficient opportunity to implement an appropriate response; (2) whether an issuer should be able to determine not to report an attorney's notice if an independent committee of the board of directors determines, based on the advice of counsel, that the attorney providing such notice acted unreasonably, or whether this provision would undermine the objectives of the rule; (3) whether, if an issuer should be able to determine not to report an attorney's notice to the Commission if an independent committee of the issuer's board of directors makes the appropriate determination, it is necessary to require the committee to obtain the advice of counsel not involved in the matters underlying the material violation; (4) whether there should be an alternative standard identifying when a board of directors could determine not to report an attorney's notice; (5) whether, with regard to foreign private issuers, ''an independent committee of the issuer's board of directors'' is the right group to make the determination that an attorney had acted unreasonably in providing a notice pursuant to § 205.3(d) or that the issuer had implemented an appropriate response subsequent to the notice and, if so, why? If not, what other bodies or groups at a foreign private issuer, or with oversight or audit responsibilities for the foreign private issuer, might be more appropriate? The Commission also requests comment on whether such an issuer should be required to inform the reporting attorney in writing of a decision by a committee of independent directors of the issuer's board not to report the attorney's written notice in a filing with the Commission.[41]

Interested persons are invited to comment on any other aspect of alternative proposed § 205.3(e), including: (1) Whether an issuer should be required to report an attorney's notice under paragraph (d)(1), (d)(2) or (d)(3); (2) whether a requirement that an issuer report an attorney's notice is preferable to the ''noisy withdrawal'' requirement in the original proposed rule; (3) whether investors will receive adequate protection if neither the issuer nor the attorney is required to report to the Commission an attorney's withdrawal or other notice of failure to receive an appropriate response; (4) whether it is inconsistent with the attorney-client privilege to require an issuer to report the circumstances related to an attorney's notice under paragraph (d)(1) or (d)(2), and whether an issuer should instead be permitted to report only the fact of the attorney's notice; (5) whether, if issuers should be required to report the circumstances related to an attorney's notice, and if the rule should specify which circumstances must be reported, which circumstances should be reported; (6) whether an issuer's report to the Commission under paragraph (e) should be confidential (*e.g.*, in the form of confidential correspondence) or public; (7) whether there are circumstances in which requiring a public filing under paragraph (e) could harm an issuer or its shareholders; (8) whether investors will receive adequate protection if issuer reports to the Commission under paragraph (e) are confidential; and (9) whether the requirement that a foreign private issuer report an attorney's notice of withdrawal would conflict with applicable foreign law or foreign principles of attorney-client privilege or corporate governance.

3. Permitting an Attorney To Inform the Commission Where an Issuer Has Not Complied With the Issuer Reporting Requirements

Proposed § 205.3(f) would permit an attorney, if an issuer had not complied with paragraph (e), to inform the Commission that he or she had provided the issuer with notice under paragraph (d)(1), (d)(2) or (d)(3). The Commission proposes, in this paragraph, making attorney notification to the Commission permissive in light of the numerous comments it received that were critical of ''noisy withdrawal.'' Proposed § 205.3(f) states:

(f) *Additional actions by an attorney.* (1) An attorney retained or employed by the issuer may, if an issuer does not comply with paragraph (e) of this section, inform the Commission that the attorney has provided the issuer with notice pursuant to paragraph (d)(1), (d)(2), or (d)(3) of this section, indicating that such action was based on professional considerations.

Interested persons are invited to comment on any aspect of alternative proposed § 205.3(f), and to address the following questions in particular: (1) Would it be more consistent with the protection of investors to require, rather than permit, an attorney to inform the Commission of his or her written notice where an issuer does not comply with the issuer disclosure requirement? Would mandatory, rather than permissive, ''reporting out'' under these circumstances raise the same concerns as ''noisy withdrawal?'' If not, why not? If so, which ones; (2) assuming an issuer were permitted not to disclose an attorney's written notice if an independent committee of the issuer's board of directors were to make an appropriate determination, should an attorney be permitted to inform the Commission that he or she has provided the issuer with notice pursuant to paragraph (d) where the attorney disagrees with the independent committee's determination, or should the attorney be permitted to inform the Commission that he or she has provided the issuer with notice only where the issuer fails to report the notice without the required determination by the independent committee?

D. Proposed Amendments to Forms

1. Proposed Amendment to Form 8–K

The Commission proposes to amend Form 8–K to add a new item specifically designed for issuer disclosure, under alternative proposed § 205.3(e), of an attorney's written notice under alternative proposed § 205.3(d). Form 8–K prescribes information, such as material events or corporate changes, that an issuer subject to the reporting requirements of Sections 13(a) or 15(d) of the Exchange Act must disclose on a current basis. The proposed amendment to Form 8–K would require an issuer to report an attorney's written notice of withdrawal or failure to receive an appropriate response under alternative proposed § 205.3(e) within two business days of receiving the written notice.

Proposed § 205.3(e) also would apply to issuers that are registered investment companies. Exchange Act Rules 13a–11(b)[42] and 15d–11(b),[43] however, generally exempt registered investment companies from Form 8–K filing requirements. We recently amended those rules to require registered investment companies to file on Form 8–K in order to meet any filing obligations that might arise under Regulation BTR.[44] We are today

[41] Such a provision may be necessary in light of the proposal (discussed below) to permit an attorney to notify the Commission where an issuer has not complied with the issuer's reporting requirement in proposed § 205.3(e).

[42] 17 CFR 240.13a–11(b).

[43] 17 CFR 240.15d–11(b).

[44] *See* Release No. 34–47225 (Jan. 22, 2003). Regulation Blackout Trading Restriction (BTR) under the Exchange Act (17 CFR 245.100–104) clarifies the scope and application of Section 306(a) of the Sarbanes-Oxley Act of 2002, which prohibits any director or executive officer of an issuer from, directly or indirectly, purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants and

proposing an additional amendment to Exchange Act Rules 13a–11(b) and 15d–11(b) that would subject registered investment companies to Form 8–K filing requirements for the purpose of meeting any filing obligations that arise under proposed section 205.3(e).

We solicit comments on all aspects of this proposal and the effects it would have on issuers and the benefits it would provide to investors. We ask the following additional questions: (1) Is Form 8–K the appropriate form to use for this type of disclosure or should the Commission adopt a new form exclusively for such reports; (2) should issuers be permitted to make such reports in their periodic filings, such as Form 10–Q [45] or Form 10–K; [46] (3) is two business days the appropriate amount of time in which to require issuers to make the filing? What other amount of time might be more appropriate and what factors should we consider in determining the right amount of time under this rule? Should the time calculation use calendar days or U.S. business days; (4) should we exclude registered investment companies from proposed requirements to disclose under section 205.3(e)? If so, what would be the rationale for the exclusion? If we exclude registered investment companies, should we require them to meet their filing obligations under proposed § 205.3(e) in some other manner, *e.g.*, by filing a new form specifically for registered investment companies, Form N–CSR, [47] or some other means? With regard to the proposed Form 8–K filing requirement, we request public comment on the applicability of this requirement to registered investment companies, as well as feasible alternatives that would reduce the reporting burdens on registered investment companies. In addition, we request comment on the utility to investors of the reports to the Commission in relation to the costs to registered investment companies and their affiliated persons of providing those reports.

2. Proposed Amendments to Forms 20–F and 40–F for Foreign Private Issuers

With the globalization of the U.S. capital markets, there has been a marked increase in the number of companies from non-U.S. jurisdictions registering securities with the Commission. At present, there are over 1,300 foreign private issuers [48] from 59 countries that are filing reports with the Commission under the Exchange Act, as compared with approximately 400 issuers from less than 30 countries in 1990. The Commission realizes that the application of Section 307 and the rules we are proposing under Part 205 to foreign law firms, multijurisdictional law firms, foreign lawyers employed by those law firms and foreign registrants, raises a number of significant and difficult issues. We are requesting comment on a broad range of questions in this area, including whether foreign law firms and foreign lawyers should be exempt from Part 205.

Foreign private issuers that are subject to the periodic reporting requirements under the Exchange Act generally are not required to file current reports on Form 8–K. [49] Rather, many of the disclosures required of foreign private issuers are made on either Form 20–F or Form 40–F (in the case of some Canadian issuers), which are integrated forms used both as registration statements for purposes of registering securities of qualified foreign private issuers under Section 12 of the Exchange Act [50] or as annual reports under Section 13(a) [51] or 15(d) [52] of the Exchange Act.

Our rules pertaining to attorney conduct apply to attorneys for foreign private issuers, and we believe that foreign private issuers should have the same reporting duties as those proposed for domestic issuers in the alternative proposed section 205.3(e). Accordingly, we propose to require foreign private issuers to file a report on either Form 20–F or 40–F, as applicable, in order to make these disclosures. The proposal to amend these forms is designed to respond to comments we received from foreign attorneys and regulators stating that the original proposed ''noisy withdrawal'' requirement may conflict with foreign standards of attorney conduct. The proposed amendments to these forms would require an issuer to report to the Commission an attorney's written notice of withdrawal or failure to receive an appropriate response. The foreign private issuer would be required to make the disclosure by filing the form within two business days of the attorney's written notice. The proposed amendments provide that a filing for this purpose may consist only of the facing page of the form, the information required under the appropriate item of the form, and a signature page; issuers would not be required to file a complete Form 20–F or 40–F each time they made a disclosure of an attorney's written notice. [53]

We solicit comments on all aspects of this proposal and the effects it would have on foreign private issuers and the benefits it would provide to investors. Furthermore, we ask the following additional questions: (1) Is it appropriate to require a filing on Form 20–F or 40–F in order to meet these new disclosure requirements, or should we require that this disclosure be made on some other form? Would it be more appropriate to require that this disclosure be made on Form 6–K? [54] Should the Commission create a separate disclosure form (similar to Form 8–K) for these reports by foreign private issuers; (2) will there be any additional consequences to requiring that this disclosure be made on Form 20–F or 40–F; (3) would this type of mandatory disclosure requirement impose undue burdens on foreign companies that have chosen to register their securities in the United States? What might those burdens be? Would it discourage foreign companies from registering their securities in the United States? If so, would a broad exception for foreign companies disadvantage U.S. companies? Would such an exception lead U.S. companies to relocate off-shore; (4) is two business days the appropriate amount of time to allow foreign private issuers to make the required filing? What other amount of time might be more appropriate and what factors should we consider in determining the right amount of time under this rule? Should the time calculation use calendar days or U.S. business days? Would it be sufficient to require foreign private issuers to report this information on an annual basis in their annual reports on Form 20–F or 40–F; (5) should we allow any exceptions for certain foreign private issuers to this new proposed rule in light of the differing regulatory regimes for foreign attorneys and foreign private issuers? Which foreign private issuers would need such an exception and when should it be granted? How would

beneficiaries from engaging in transactions involving issuer equity securities held in their plan accounts.

[45] 17 CFR 308a.

[46] 17 CFR 310.

[47] 17 CFR 249.331 and 17 CFR 274.128.

[48] The term ''foreign private issuer'' is defined in Exchange Act Rule 3b–4(c) [17 CFR 240.3b–4(c)].

[49] *See* Exchange Act Rules 13a–11(b) and 15d–11(b) [17 CFR 240.13a–11(b) and 240.15d–11(b)].

[50] 15 U.S.C. 78*l*.

[51] 15 U.S.C. 78m(a).

[52] 15 U.S.C. 78o(d).

[53] Similarly, the report would not need to be certified by the issuer's principal executive officer or principal financial officer under Exchange Act Rules 13a–14 and 15d–14 [17 CFR 240.13a–14 and 240.15d–14].

[54] 17 CFR 249.30b. *See generally* Release No. 33–8106, ''Proposed Rule: Additional Form 8–K Disclosure Requirements and Acceleration of Filing Date'', for a discussion of the types of information reported on Form 6–K and for our solicitation of comment as to whether the requirements of that form should be otherwise modified.

any exceptions we might grant affect the benefits to investors that would otherwise accrue from the application of this rule to foreign private issuers; (6) would the disclosure requirements of proposed paragraph (e) effect a waiver of the attorney-client privilege by a foreign private issuer or present other special problems for foreign private issuers under applicable foreign law?

IV. General Request for Comments

The Commission requests comments on the rules and amendments proposed in this release, whether any further changes to our rules or forms are necessary or appropriate to implement the objectives of our proposed amendments, and on other matters that might have an effect on the proposals contained in this release.

V. Paperwork Reduction Act

The proposed rules and form amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA''). [55] We are submitting the proposed rules and form amendments to the Office of Management and Budget (''OMB'') for review in accordance with the PRA. [56] The title for the proposed collection of information with respect to the proposed amended Rule 205.3 is ''Notifications Under Part 205.'' The titles for the collections of information with respect to the proposed form amendments are ''Form 20–F'' (OMB Control No. 3235–0288), ''Form 40–F'' (OMB Control No. 3235–0381) and ''Form 8–K'' (OMB Control No. 3235–0060).

The Commission has adopted rules to impose an up-the-ladder reporting requirement when attorneys appearing and practicing before the Commission become aware of evidence of a material violation by the issuer or any officer, director, employee or agent of the issuer. The information collections in the proposed amendments to the rules are necessary to implement the Standards of Professional Conduct for Attorneys prescribed by the proposed rule. Specifically, the collections of information are intended to ensure that in the rare cases in which issuers do not act appropriately after being informed of possible violations, the information would be communicated to the public and the Commission, so that the Commission could take appropriate action. The collection of information is, therefore, an important component of the Commission's program to discourage violations of the federal securities laws and promote ethical behavior of attorneys appearing and practicing before the Commission.

The respondents to the proposed collections of information would be lawyers, issuers, and officers, directors and committees of issuers. We cannot estimate with precision how many attorneys will be subject to the ''noisy withdrawal'' requirements, if adopted. There are approximately 18,200 issuers that may employ or retain attorneys that would be subject to the rule. [57] These issuers may employ in-house attorneys, outside counsel, or a combination of both. We believe, however, that it will be the rare occasion when, as a last resort, a disclosure will be made to the Commission. In the vast majority of cases, we expect that problems will be resolved at the corporate level, and the Commission will not be notified. We therefore estimate for the purposes of the PRA that approximately 10 attorneys, CLOs, CEOs, or QLCCs will make one disclosure to the Commission per year. Depending on the circumstances, the disclosure could consist of a notice of withdrawal (and, in some cases, a similar notice to the issuer and a CLO's notice to successor attorneys), a notice of material violations, a notice of discharge, a notice of disaffirmation, a disaffirmation, or some combination thereof. The burden hours for the disclosure will obviously vary depending on the circumstances. We believe that none of the components of the disclosure, however, would require a significant amount of time to compile. We therefore estimate, for purposes of the PRA, that on average, each disclosure would require 10 burden hours. Under these assumptions, this aspect of the collection of information would impose approximately 100 annual burden hours. Assuming half the burden hours will be incurred by outside counsel at a rate of $300 per hour, the total cost would be $15,000.

Lawyers under the alternative proposal would not be required to report out, but they would be required, if they do not receive an appropriate response to a report of a material violation, to notify the issuer in writing that their withdrawal is based on professional considerations or that they believe that the issuer has not provided an appropriate response in a reasonable time period to their report. In addition, in the cases where a lawyer provides notice to an issuer, the CLO will be required to notify the successor attorney of the predecessor lawyer's withdrawal. For purposes of the PRA, we estimate that 10 lawyers or CLOs will make such written notifications each year and that each notification will require one hour. Proposed § 205.3(f) permits, but does not require, a withdrawing attorney to notify the Commission if the issuer does not comply with proposed § 205.3(e). For purposes of the PRA, we estimate that five lawyers will make a voluntary submission under § 205.3(f) and that each report would impose a burden of 10 hours.

We therefore estimate that this collection of information will have a total annual burden of 100 hours if the ''noisy withdrawal'' proposal is adopted and a total annual burden of 60 hours if the alternative proposal is adopted.

As we stated above, we estimate that there are approximately 18,200 issuers that would be subject to the proposed rule. We cannot estimate with precision how many issuers will be subject to the alternative rule's requirements or, if adopted, how frequently they will be required to notify the Commission that their attorney has notified them that they withdrew or that they did not receive an appropriate response to a report of a material violation. Under those circumstances, the issuer must file a form with the Commission. We estimate for the purposes of the PRA that approximately eight U.S. issuers, one Canadian issuer and one foreign private issuer per year will make one disclosure to the Commission. We estimate, for purposes of the PRA, that on average, each disclosure would require five burden hours. Under these assumptions, this aspect of the collection of information would impose approximately 40 annual burden hours to file Form 8–K, five hours to file Form 40–F and five hours to file Form 20–F. We assume that 25% of the burden hours for issuers that file on Form 8–K, and 75% of the burden hours for issuers that file on Form 20–F or 40–F, will be incurred by outside counsel at a rate of $300 per hour. [58] Using these assumptions, we estimate this aspect of these collections of information would result in a cost of $5,250.

[55] 44 U.S.C. 3501 *et seq.*

[56] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[57] This estimate is based, in part, on the total number of operating companies that filed annual reports on Form 10–K (8,484), Form 10–KSB (3,820), Form 20–F (1,194) or Form 40–F (134) during the 2001 fiscal year, and an estimate of the average number of issuers that may have a registration statement filed under the Securities Act pending with the Commission at any time (100). In addition, we estimate that approximately 4,500 investment companies currently file periodic reports on Form N–SAR.

[58] This allocation of the burden is consistent with our recent PRA submissions for Exchange Act Reports. See, *e.g.*, Release No. 33–8098 (May 10, 2002) [67 FR 35620].

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

Persons submitting comments on the collections of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609, with reference to File No. S7–45–02. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–45–02, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services. OMB is required to make a decision concerning its review of the collections of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is assured of having its full effect if OMB receives it within 30 days of publication.

An agency may not conduct or sponsor, and a person is not required to respond to, a collections of information unless it displays a currently valid control number. Compliance with the collections of information requirements is, as described above, in some cases mandatory and in some cases voluntary depending upon the circumstances. There is no mandatory record retention period. Responses to the requirements to make disclosures to the Commission will not be kept confidential.

VI. Costs and Benefits

We are proposing amendments to section 205.3 and Forms 8–K, 20–F and 40–F to more fully implement Section 307 of the Sarbanes-Oxley Act and recently adopted Part 205. Part 205 affects all attorneys who appear and practice before the Commission in the representation of an issuer and who become aware of evidence of a material violation of the federal securities laws, a material breach of fiduciary duty, or a similar material violation by the issuer or an officer, director, agent or employee of the issuer that has occurred, is ongoing, or is about to occur. We are sensitive to the costs and benefits of our proposal. We discuss these costs and benefits below.

Part 205 imposes an up-the-ladder reporting requirement for attorneys representing an issuer before the Commission who become aware of potential misconduct of which a reasonably prudent investor in the issuer would want to be informed. It is expected that, in the vast majority of instances of such reports, the situation will be addressed and remedied before it causes significant harm to investors. Where the potential impropriety is ongoing and not taken care of internally following a report mandated by the rule, we are proposing an alternative means of providing notice to the Commission and the public. Previously, we have proposed that the attorney, if retained by the issuer, effectuate a ''noisy withdrawal'' from representation of the issuer and disaffirm to the Commission any tainted documents, which will alert the Commission to investigate the issuer. In this release we are proposing that the attorney would have to inform the issuer and the issuer would be required to inform the Commission.

A. Benefits

Many commenters on our original proposal noted that a ''noisy withdrawal'' may violate the attorney-client privilege, chill the zealous advocacy of lawyers and create an incentive for issuers not to seek legal advice on certain matters. Our alternative therefore allows the attorney to withdraw without notifying the Commission. Instead, the issuer must report the attorney's withdrawal to the Commission in a public filing. Thus, the Commission and the public obtain the benefit of the information of the attorney's withdrawal (at least when the issuer acts properly) where a violation of the law is likely, the lawyer may preserve the attorney-client privilege and the issuer has the opportunity to remedy the situation before disclosure is required. In addition, attorneys licensed in foreign jurisdictions would not be required to violate applicable professional obligations. These benefits are difficult to quantify. Interested persons are invited to comment upon this benefits analysis. Are there other foreseeable benefits? What is the likely economic impact of these benefits? Can the benefits be quantified in any meaningful way? If so, how, and what conclusions should be drawn?

B. Costs

The proposed form amendments will impose costs on issuers. Issuers would be subject to the additional cost of preparing and filing a brief report to the Commission on Forms 8–K, 20–F or 40–F, as applicable. This may require the issuer to report its own potentially illegal act to the Commission (although an issuer accused of wrongdoing may be less likely to report itself than the withdrawing attorney may be). Investors may treat the news that an attorney has resigned as proof of wrongdoing before any formal proceedings are brought. The issuer's cost of capital may increase. Unlike the ''noisy withdrawal'' proposal, this proposal would not require the attorney to disaffirm any corporate filings that he or she participated in drafting, which would provide clearer information about what the withdrawal signifies.

Issuers that receive notice that their lawyers have withdrawn for professional considerations will be required to file a Form 8–K (or comparable forms by foreign private issuers). For purposes of the PRA, we estimated that ten issuers will file such a report each year and that each form will impose a burden of five hours. Using estimates derived from our Paperwork Reduction Analysis, we estimate that the incremental impact of our proposals will result in a total cost of $8,825.[59] In addition, the withdrawing lawyer will be required to notify the issuer and may notify the Commission. For purposes of the PRA, we estimated that lawyers will make ten such required notifications and five such permissive notifications a year, for a combined burden of 60 hours. Assuming a cost of $300 an hour, this paperwork burden imposes a cost of $18,000.

Interested persons are invited to comment upon this costs analysis. Are there other foreseeable costs? What is the likely economic impact of these costs? Can the costs be quantified in any meaningful way? If so, how, and what conclusions should be drawn? Interested persons are invited to address

[59] For purposes of the Paperwork Reduction Act, we estimate that the proposals would result in 32.5 burden hours and $5,250 in external costs. Assuming a cost of $110/hour for in-house professional staff, the total cost of the burden would be $8,825. The $110/hour estimate is derived from *The SIA Report on Management and Professional Earnings for the Securities Industry* (Oct. 2001).

all aspects of costs and benefits attributable to proposed Part 205. The Commission requests data to quantify the expected costs and the value of the anticipated benefits.

VII. Effect on Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act (15 U.S.C. 78w(a)(2)) requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, Section 2(b) of the Securities Act,[60] Section 3(f) of the Exchange Act,[61] and Section 2(c) of the Investment Company Act[62] require us when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

The proposals should boost investor confidence in the financial markets. We anticipate that these proposals would enhance the proper functioning of the capital markets and promote efficiency by reducing the likelihood that illegal behavior would remain undetected and unremedied for long periods of time. Proposed section 205.3(d)–(f) would apply to all issuers and attorneys appearing before the Commission and is therefore unlikely to affect competition.

Interested persons are invited to comment upon any aspect of this analysis. We request comment on whether proposed section 205.3(d)–(f), if adopted, would impose a burden on competition. For example, would U.S. lawyers face a competitive disadvantage because attorneys practicing outside the U.S. would not be required to comply with the proposal's withdrawal requirements to the extent that such compliance is prohibited by applicable foreign law? Commenters are requested to provide empirical data and other factual support for their views if possible.

VIII. Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603.

A. Reasons for the Proposed Action

We are proposing section 205.3 to more fully implement Section 307 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7245 *et seq.*) (''the Act'') and recently adopted Part 205 of Title 17 of the Code of Federal Regulations.

B. Objectives

Section 307 of the Act requires the Commission to prescribe ''minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers.'' The standards must include a rule requiring an attorney to report ''evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the company or any agent thereof'' to the chief legal counsel or the chief executive officer of the company (or the equivalent); and, if they do not respond appropriately to the evidence, requiring the attorney to report the evidence to the audit committee, another committee of independent directors, or the full board of directors. This proposal is designed to address those circumstances where the attorney withdraws from representation due to professional considerations. We originally proposed to require the attorney to report such a withdrawal to the Commission; we are still considering that option. However, we are now also proposing an alternative whereby the withdrawing attorney would notify the issuer and the issuer would be required to notify the Commission. An objective is to provide notice of such an event to both the Commission and the public without unduly intruding on the attorney-client relationship.

C. Legal Basis

We are proposing the new rules and amendments under the authority set forth in Sections 7, 10 and 19 of the Securities Act of 1933, Sections 3(b), 4C, 12, 13, 15 and 23(a) of the Securities Exchange Act of 1934, Sections 30, 38 and 39 of the Investment Company Act of 1940, Section 211 of the Investment Advisers Act of 1940, and Sections 3(a), 307 and 404 of the Sarbanes-Oxley Act of 2002.

D. Small Entities Subject to Proposed Part 205

The proposed additions to Part 205 would affect issuers that are small entities. Exchange Act Rule 0–10(a) (17 CFR 240.0–10(a)) defines an issuer, other than an investment company, to be a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year. As of October 23, 2002, we estimated that there were approximately 2,500 issuers, other than investment companies, that may be considered small entities. For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[63] We estimate that there are 211 small investment companies that would be subject to the proposed rule. The proposed revisions would apply to any small entity that is subject to Exchange Act reporting requirements.

The proposed additions to Part 205 also would affect law firms that are small entities. The Small Business Administration has defined small business for purposes of ''offices of lawyers'' as those with under $6 million in annual revenue.[64] Because we do not directly regulate law firms appearing before the Commission, we do not have data to estimate the number of small law firms that practice before the Commission or, of those, how many have revenue of less than $6 million. We request data on that issue.

E. Reporting, Recordkeeping, and Other Compliance Requirements

Lawyers who believe that their issuer client is engaged in ongoing illegal conduct would be required to notify their client and withdraw from the representation. Issuers who receive such notices would be required to notify the Commission and the successor lawyer of the withdrawal. The time required for the actual preparation of a report would vary, but should not be extensive.

F. Duplicative, Overlapping, or Conflicting Federal Rules

Proposed § 205.3 would not duplicate, overlap, or conflict with other federal rules. There are no other statutory federal requirements that small entities make similar reports or provide similar information.

G. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed rule, we considered the following alternatives: (a) The establishment of differing compliance or

[60] 15 U.S.C. 77b(b).

[61] 15 U.S.C. 78c(f).

[62] 15 U.S.C. 80a–2(c).

[63] 17 CFR 270.0–10.

[64] 13 CFR 121.201.

reporting requirements that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of the reporting requirements for small entities; (c) an exemption from coverage of the requirements, or any part thereof, for small entities; and (d) the use of performance rather than design standards.

The Act does not contain any exemption or other limitation for small entities. We believe that utilizing different reporting or other compliance requirements for small entities would seriously undermine the effective functioning of the proposed reporting regime. The proposed rule is designed to help restore investor confidence in the reliability of the financial statements of the companies they invest in—if small entities were not subject to such requirements, investors might decline to invest in their securities. Further, we see no valid justification for imposing different standards of conduct upon small law firms than would apply to others who choose to appear and practice before the Commission. We also believe that the proposed reporting and recordkeeping requirements will be at least as well understood by small entities as would be any alternate formulation we might propose to apply to them. Therefore, it does not seem necessary or appropriate to develop separate requirements for small entities. We nevertheless solicit comment on whether small entities should be subject to different requirements.

H. Solicitation of Comments

Interested persons are invited to comment upon any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments concerning: (1) The number of law practices that constitute small entities; (2) the number of small entities that may be affected by proposed section 205.3; (3) the existence or nature of the potential impact of the proposed rule on small entities; and (4) how to quantify the impact of the proposed revisions. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule is adopted, and will be placed in the same public file as comments on the proposed rule itself.

IX. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''),[65] we must advise the OMB as to whether the proposed rule constitutes a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results or is likely to result in an annual effect on the economy of $100 million or more (either in the form of an increase or a decrease); a major increase in costs or prices for consumers or individual industries; or significant adverse effects on competition, investment, or innovation. Where a rule is ''major,'' its effectiveness will generally be delayed for 60 days pending Congressional review. We request comment on the potential impact of the proposed rule on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

X. Statutory Basis and Text of Proposed Amendments to Parts 205, 240 and 249

The proposals contained in this document are being proposed under the authority in Sections 3, 307, and 404 of the Sarbanes-Oxley Act of 2002,[66] Sections 7, 10 and 19 of the Securities Act of 1933,[67] Sections 3(b), 4C, 12, 13, 15 and 23 of the Securities Exchange Act of 1934,[68] Sections 30, 38 and 39 of the Investment Company Act of 1940,[69] and Section 211 of the Investment Advisers Act of 1940.[70]

List of Subjects

17 CFR Part 205

Standards of conduct for attorneys.

17 CFR Parts 240 and 249

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, the Commission proposes to amend Title 17, Chapter II, of the Code of Federal Regulations to read as follows:

PART 205—STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS APPEARING AND PRACTICING BEFORE THE COMMISSION IN THE REPRESENTATION OF AN ISSUER

1. The authority citation for Part 205 continues to read as follows:

Authority: 15 U.S.C. 77s, 78d–3, 78w, 80a–37, 80a–38, 80b–11, 7202, 7245, and 7262.

2. Amend § 205.3 by:

a. Redesignating paragraph (d) as paragraph (g); and

b. Adding new paragraphs (d), (e) and (f).

The additions read as follows:

§ 205.3 Issuer as client.

* * * * *

(d) *Actions required where there is no appropriate response within a reasonable time.*

(1) Where an attorney who has reported evidence of a material violation under paragraph (b) of this section rather than paragraph (c) of this section:

(i) Does not receive an appropriate response, or has not received a response in a reasonable time,

(ii) Has followed the procedures set forth in paragraph (b)(3) of this section, and

(iii)Reasonably concludes that there is substantial evidence of a material violation that is ongoing or is about to occur and is likely to cause substantial injury to the financial interest or property of the issuer or of investors:

(A) An attorney retained by the issuer shall withdraw from representing the issuer, and shall notify the issuer, in writing, that the withdrawal is based on professional considerations.

(B) An attorney employed by the issuer shall cease forthwith any participation or assistance in any matter concerning the violation and shall notify the issuer, in writing, that he or she believes that the issuer has not provided an appropriate response in a reasonable time to his or her report of evidence of a material violation under paragraph (b) of this section.

(2) An attorney shall not be required to take any action pursuant to paragraph (d)(1) of this section if the attorney would be prohibited from doing so by order or rule of any court, administrative body or other authority with jurisdiction over the attorney, after having sought leave to withdraw from representation or to cease participation or assistance in a matter. An attorney shall give notice to the issuer that, but for such prohibition, he or she would have taken such action pursuant to this paragraph (d)(1) or (d)(2), and such notice shall be deemed the equivalent of such action for purposes of this part.

(3) An attorney employed or retained by an issuer who has reported evidence of a material violation under this part and reasonably believes that he or she has been discharged for so doing shall notify the issuer's chief legal officer (or the equivalent thereof) forthwith.

(4) The issuer's chief legal officer (or the equivalent thereof) shall notify any attorney retained or employed to replace

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[65] Pub. L. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C., and as a note to 5 U.S.C. 601).

[66] 15 U.S.C. 7202, 7245, 7262.

[67] 15 U.S.C. 77g, 77j and 77s.

[68] 15 U.S.C. 78c(b), 78d–3, 78*l*, 78m, 78o and 78w.

[69] 15 U.S.C. 80a–29, 80a–37, 80a–38.

[70] 15 U.S.C. 80b–11.

an attorney who has given notice to an issuer pursuant to paragraph (d)(1), (d)(2) or (d)(3) of this section that the previous attorney has withdrawn, ceased to participate or assist or has been discharged, as the case may be, pursuant to the provisions of this paragraph.

(e) *Duties of an issuer where an attorney has given notice pursuant to paragraph (d).* Where an attorney has provided an issuer with a written notice pursuant to paragraph (d)(1), (d)(2) or (d)(3) of this section, the issuer shall, within two business days of receipt of such written notice, report such notice and the circumstances related thereto on Form 8–K, 20–F, or 40–F (§§ 249.308, 220f or 240f of this chapter), as applicable.

(f) *Additional actions by an attorney.* An attorney retained or employed by the issuer may, if an issuer does not comply with paragraph (e) of this section, inform the Commission that the attorney has provided the issuer with notice pursuant to paragraph (d)(1), (d)(2), or (d)(3) of this section, indicating that such action was based on professional considerations.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for Part 240 is amended by adding the following citations in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

Section 240.13a–11 is also issued under Secs. 3(a) and 307, Pub. L. 107–204, 116 Stat. 745.

* * * * *

Section 240.13a–17 is also issued under Secs. 3(a) and 307, Pub. L. 107–204, 116 Stat. 745.

* * * * *

Section 240.15d–11 is also issued under Secs. 3(a) and 307, Pub. L. 107–204, 116 Stat. 745.

* * * * *

Section 240.15d–17 is also issued under Secs. 3(a) and 307, Pub. L. 107–204, 116 Stat. 745.

* * * * *

4. Section 240.13a–11 is amended by revising paragraph (b) to read as follows:

§ 240.13a–11 Current reports on Form 8–K (§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6–K (17 CFR 249.306) pursuant to § 240.13a–16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except where such investment companies are required to file:

(1) Notice of a blackout period pursuant to § 245.104 of this chapter, or

(2) A notice regarding an attorney withdrawal pursuant to § 205.3(e) of this chapter.

5. Add § 240.13a–17 to read as follows:

§ 240.13a–17 Reports of foreign private issuers pursuant to § 205.3(e) of this chapter.

Every foreign private issuer which is subject to § 240.13a–1 shall make reports pursuant to § 205.3(e) of this chapter. If a foreign private issuer is filing a report on Form 20–F (§ 249.220f of this chapter) or Form 40–F (§ 249.240f of this chapter) solely to provide information pursuant to § 205.3(e) of this chapter, the foreign private issuer is not required to include the certifications required by § 240.13a–14 in such report.

6. Section 240.15d–11 is amended by revising paragraph (b) to read as follows:

§ 240.15d–11 Current reports on Form 8–K (§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6–K (17 CFR 249.306) pursuant to § 240.15d–16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file periodic reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except where such investment companies are required to file:

(1) Notice of a blackout period pursuant to § 245.104 of this chapter, or

(2) A notice regarding an attorney withdrawal pursuant to § 205.3(e) of this chapter.

7. Add § 240.15d–17 to read as follows:

§ 240.15d–17 Reports of foreign private issuers pursuant to § 205.3(e) of this chapter.

Every foreign private issuer which is subject to § 240.15d–1 shall make reports pursuant to § 205.3(e) of this chapter. If a foreign private issuer is filing a report on Form 20–F (§ 249.220f of this chapter) or Form 40–F (§ 249.240f of this chapter) solely to provide information pursuant to § 205.3(e) of this chapter, the foreign private issuer is not required to include the certifications required by § 240.15d–14 in such report.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

8. The authority citation for Part 249 is amended by revising the sectional authority for §§ 249.220f, 249.240f and 249.308 to read as follows:

Authority: 15 U.S.C. 78a, *et seq.,* unless otherwise noted.

* * * * *

Section 249.220f is also issued under secs. 3(a), 202, 208, 301, 302, 306(a), 307, 401(a), 401(b), 406 and 407, Pub. L. 107–204, 116 Stat. 745.

Section 249.240f is also issued under secs. 3(a), 202, 208, 301, 302, 306(a), 307, 401(a), 406 and 407, Pub. L. 107–204, 116 Stat. 745.

Section 249.308 is also issued under 15 U.S.C. 80a–29, 80a–37 and secs. 3(a), 306(a), 307, 401(b) and 406, Pub. L. 107–204, 116 Stat. 745.

* * * * *

9. Amend Form 20–F (referenced in § 249.220f) by:

a. Adding a paragraph on the cover page before the line beginning with the phrase ''Commission file number'';

b. Adding paragraph (d) to General Instruction A;

c. Removing the word ''annual'' in each place where it appears in paragraphs (a) and (b) of General Instruction D;

d. Adding Item 16E; and

e. Removing the phrase ''[annual report]'' in the paragraph after ''Signatures'' and adding in its place ''[report]''.

The additions read as follows:

Note: The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 20–F

* * * * *

Or

[ ] Report Pursuant to Rules 13a–17 and 15d–17 Under the Securities Exchange Act of 1934

Commission file number * * *

* * * * *

General Instructions

A. Who May Use Form 20–F and When It Must Be Filed

* * * * *

(d) A foreign private issuer must file a report on this Form within two business days after receipt of an attorney's written notice pursuant to 17

CFR 205.3(d)(1), (d)(2) or (d)(3). Such filing may consist only of the following: the facing page, the information required by Item 16E of this Form and the signature page. If such filing is made solely to provide information pursuant to 17 CFR 205.3(e), the foreign private issuer is not required to include the certifications required by 17 CFR 240.13a–14 or 17 CFR 240.15d–14 in the report.

* * * * *

Item 16E. Receipt of an Attorney's Written Notice Pursuant to 17 CFR 205.3(d)

Upon receipt of written notice from an attorney (as defined in 17 CFR 205.3(d)), provide the information specified in 17 CFR 205.3(e). You do not need to provide the information called for by this Item 16E unless you are using this form pursuant to General Instruction A.(d).

* * * * *

10. Amend Form 40–F (referenced in § 249.240f) by:

a. Revising the line on the cover page that begins with the phrase ''For the fiscal year ended'';

b. Adding paragraph (5) to General Instruction A;

c. Adding paragraph (15) to General Instruction B;

d. Removing the word ''annual'' in each place where it appears in paragraphs (7) and (8) of General Instruction D;

e. Removing the phrase ''[annual report]'' in the paragraph after ''Signatures'' and in its place adding ''[report]''; and

f. Removing the word ''annual'' in the first sentence of Instruction A to ''Signatures.''

The revisions and additions read as follows:

Note: The text of Form 40–F does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 40–F

* * * * *

For the fiscal year ended * * *

Or

[ ] Report Pursuant to Rules 13a–17 and 15d–17 Under the Securities Exchange Act of 1934

Commission file number * * *

* * * * *

General Instructions

A. Rules as to Use of Form 40–F

* * * * *

(5) If the Registrant uses Form 40–F to file reports with the Commission pursuant to Section 13(a) of the Exchange Act (15 U.S.C. 78m(a)) and Rule 13a–3 thereunder (17 CFR 240.13a–3) or pursuant to Section 15(d) of the Exchange Act (15 U.S.C. 78o(d)) and Rule 15d–4 thereunder (17 CFR 240.15d–4), the Registrant must file a report on this Form 40–F within two business days after receipt of an attorney's written notice pursuant to 17 CFR 205.3(d)(1), (d)(2) or (d)(3). Such filing may consist only of the following: the facing page, the information required by General Instruction B.(15) of this Form 40–F and the signature page. If such filing is made solely to provide information pursuant to 17 CFR 205.3(e), the Registrant is not required to include the certifications required by 17 CFR 240.13a–14 or 17 CFR 240.15d–14 in the report.

* * * * *

B. Information To Be Filed on This Form

* * * * *

(15) Receipt of an Attorney's Written Notice Pursuant to 17 CFR 205.3(d). Upon receipt of written notice from an attorney (as defined in 17 CFR 205.3(d)), provide the information specified in 17 CFR 205.3(e). You do not need to provide the information called for by this General Instruction B.(15) unless you are using this form pursuant to General Instruction A.(5).

* * * * *

11. Form 8–K (referenced in § 249.308) is amended by:

a. Removing the word ''and'' after the phrase ''Rule 15d–11'' and in its place adding a comma and adding the phrase ''and for reports of an attorney's written notice required to be disclosed by 17 CFR 205.3(e)'' before the period at the end of General Instruction A;

b. Adding a sentence to the end of General Instruction B(1); and

c. Adding Item 13 under ''Information to be Included in the Report.''

The additions read as follows:

Note: The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8–K

* * * * *

General Instructions

* * * * *

B. Events To Be Reported and Time for Filing of Reports

1. * * * A report on this form pursuant to Item 13 is required to be filed within two business days after receipt of an attorney's written notice pursuant to 17 CFR 205.3(d)(1), (d)(2) or (d)(3).

* * * * *

Information To Be Included in the Report

* * * * *

Item 13. Receipt of an Attorney's Written Notice Pursuant to 17 CFR 205.3(d)

Upon receipt of written notice from an attorney (as defined in 17 CFR 205.3(d)) provide the information specified in 17 CFR 205.3(e).

Dated: January 29, 2003.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 03–2520 Filed 2–5–03; 8:45 am]

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The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

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LIST OF PUBLIC LAWS

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H.J. Res. 13/P.L. 108–4

Making further continuing appropriations for the fiscal year 2003, and for other purposes. (Jan. 31, 2003; 117 Stat. 8)

Last List January 15, 2003

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