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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. 98–062–3]

Update of Nursery Stock Regulations; Correction

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule; correction.

SUMMARY: We are correcting an error in the rule portion of a final rule that amended the regulations for importing nursery stock to require additional certifications for imported niger seed and lilac, to reflect changes in plant taxonomy and pest distributions, and to make various changes to the requirements for postentry quarantine of imported plants. The final rule was published in the **Federal Register** on August 20, 2003, and was effective on September 19, 2003.

EFFECTIVE DATE: September 19, 2003.

FOR FURTHER INFORMATION CONTACT: Mr. William Thomas, Import Specialist, Phytosanitary Issues Management Team, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737–1236; (301) 734–5214.

SUPPLEMENTARY INFORMATION: On August 20, 2003, we published in the **Federal Register** (68 FR 50039–50048, Docket No. 98–062–2) a final rule that amended the regulations for importing nursery stock to require additional certifications for imported niger seed and lilac, to reflect changes in plant taxonomy and pest distributions, and to make various changes to the requirements for postentry quarantine of imported plants.

In the rule portion of the final rule, § 319.37–8, in paragraph (g), we provided an address in Riverdale, MD, to which requests for the guidelines established by the International Plant Protection Convention of the United Nations' Food and Agriculture Organization for conducting pest risk assessments may be sent. The office that handles these requests has been transferred to another location, but we inadvertently did not update the address in the final rule. This document corrects that error.

In FR Doc. 03–21304, published on August 20, 2003 (68 FR 50039–50048), make the following correction: On page 50047, in the third column, in § 319.37–8(g), correct ''Permits and Risk Assessment, Commodity Risk Analysis Branch, 4700 River Road Unit 133, Riverdale, MD 20737'' to read ''Center for Plant Health Science and Technology, Plant Epidemiology and Risk Assessment Laboratory, 1017 Main Campus Drive, Suite 2500, Raleigh, NC 27606''.

Done in Washington, DC, this 17th day of October, 2003.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 03–26784 Filed 10–22–03; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

7 CFR Part 801

RIN 0580–AA57

Official Performance Requirements for Grain Inspection Equipment

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Direct final rule.

SUMMARY: The Grain Inspection, Packers and Stockyards Administration (GIPSA) is amending the regulations under the United States Grain Standards Act, as amended, entitled Official Performance Requirements for Grain Inspection Equipment by removing regulation on tolerance for dividers. This change is being made to simplify inspection regulations. The removed section has been determined to be unnecessary, since testing of dividers has been modified in current instructions and directives to eliminate testing with grain and to require only a visual condition examination of grain dividers.

DATES: This rule is effective December 22, 2003 without further action, unless adverse comments or written notice of intent to submit adverse comments are received by November 24, 2003. If adverse comments are received, GIPSA will publish a timely withdrawal of the rule in the **Federal Register**.

ADDRESSES: Comments or notice of intent must be sent to Tess Butler, USDA, GIPSA, Room 1647–S, STOP 3604, 1400 Independence Avenue, SW., Washington, DC 20250–3604, FAX (202) 690–2755. All comments received will be made available for public inspection at the above address during regular business hours (8 a.m.–3:30 p.m.) (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: John Giler, Chief, Policies and Procedures Branch at (202) 720–0252 or e-mail: *John.C.Giler@usda.gov.*

SUPPLEMENTARY INFORMATION: Each type (design) of grain divider receives a thorough laboratory test and evaluation, prior to approval. The type of divider must provide a statistically unbiased division of the sample into representative portions. Representative portions are sub-samples that contain the same percentage of various components as the sample from which they are taken. Also, for ease of use, each must meet criteria for accuracy and repeatability of portion weight delivered.

Testing of each individual divider on a periodic basis at field locations was intended to ensure that they function properly. After receiving recommendations from a task force on equipment testing requirements and from other experienced personnel, GIPSA determined that field testing dividers with grain samples to evaluate the weight of grain delivered to each collection pan is unnecessary. It was determined that the test was actually a user adjustment that was more appropriately performed as a maintenance function, on an as needed basis.

Because of the prior laboratory approval testing, testing of dividers was modified in instructions and directives to eliminate testing with grain and to require only a visual condition examination of grain dividers. This practice is in accord with the visual examination required of similar kinds of equipment used for sampling grain.

Executive Order 12866

The rule has been determined to be not significant for purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget. This action simplifies the regulations concerning official performance requirements for grain inspection equipment by removing unnecessary language. No cost to affected entities results from this action.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have a retroactive effect. The Act provides in section 87g that no State or subdivision may require or impose any requirements or restrictions concerning the inspection, weighing, or description of grain under the Act. Otherwise, this rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

Regulatory Flexibility Act Certification

Donna Reifschneider, Administrator, GIPSA, has determined that this rule will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). This action simplifies the regulations concerning official performance requirements for grain inspection equipment by removing unnecessary language concerning testing of dividers. There currently are 56 official agencies, 43 private, 7 States and 6 delegated states under the United States Grain Standards Act. Most users of the official inspection and weighing services and those entities that perform these services do not meet the requirements for small entities. Further the regulations are applied equally to all entities.

Information Collection and Recordkeeping Requirements

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995. (44 U.S.C. 3501, *et seq.*)

Background

FGIS is publishing this rule without a prior proposal because we view this action as noncontroversial and anticipate no adverse public comment. This rule will be effective, as published in this document, 60 days after the date of publication in the **Federal Register** unless we receive written comments or written notice of intent to submit comments within 30 days of the date of publication of this rule in the **Federal Register**. Adverse comments are comments that suggest the rule should not be adopted or suggest the rule should be changed.

If we receive written comments or written notice of intent to submit comments, we will publish a notice in the **Federal Register** withdrawing this rule before the effective date. We will then publish a proposed rule for public comment. Following the close of that comment period, the comments will be considered and a final rule addressing the comments will be published.

As discussed above, if we receive no written comments or written notice of intent to submit comments within 30 days of publication of this direct final rule, this final rule will become effective 60 days following its publication. We will publish a notice to this effect in the **Federal Register**, before the effective date of this final rule, confirming that it is effective on the date indicated in this document.

List of Subjects in 7 CFR Part 801

Grain inspection, Scientific equipment, and Weighing.

■ For reasons set forth in the preamble, 7 CFR part 801 is amended as follows:

■ 1. The authority citation for Part 801 continues to read as follows:

Authority: Pub. L. 94–582,90 Stat.2867, as amended, (7 U.S.C. 71 *et seq.*).

§ 801.10 [Removed]

■ 2. Section 801.10 is removed from the CFR and is reserved.

Donna Reifschneider,

Administrator.

[FR Doc. 03–26388 Filed 10–22–03; 8:45 am]

BILLING CODE 3410–EN–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 993

[Docket No. FV03–993–4 FIR]

Dried Prunes Produced in California; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim final rule which decreased the assessment rate established for the Prune Marketing Committee (Committee) under Marketing Order No. 993 for the 2003–04 and subsequent crop years from $2.60 to $2.00 per ton of salable dried prunes. The Committee locally administers the marketing order which regulates the handling of dried prunes grown in California. Authorization to assess dried prune handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program. The crop year began August 1 and ends July 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

EFFECTIVE DATE: November 24, 2003.

FOR FURTHER INFORMATION CONTACT: Toni Sasselli, Program Assistant, or Richard P. Van Diest, Marketing Specialist, California Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (559) 487–5901; Fax (559) 487–5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938.

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

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 993, both as amended (7 CFR part 993), regulating the handling of dried prunes grown in California, hereinafter referred to as the ''order.'' The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California dried prune handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable dried prunes beginning on August 1, 2003, and continue until

amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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

This rule continues to decrease the assessment rate established for the Committee for the 2003–04 and subsequent crop years from $2.60 per ton to $2.00 per ton of salable dried prunes.

The California dried prune marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of California dried prunes. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2002–03 and subsequent crop years, the Committee recommended, and USDA approved, an assessment rate that would continue in effect from crop year to crop year unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on June 26, 2003, and unanimously recommended 2003–04 expenditures of $341,000 and an assessment rate of $2.00 per ton of salable dried prunes. In comparison, last year's budgeted expenditures were $384,370. The assessment rate is $0.60 lower than the rate previously in effect. The Committee was able to recommend a lower assessment rate this year because salable prune production is expected to be 170,500 tons, 15,500 tons higher than production last year. With a larger 2003–04 prune crop and lower budget, an assessment rate of $2.00 per ton will provide sufficient funds for Committee operations this year. The following table compares major budget expenditures recommended by the Committee on June 26, 2003, and major budget expenditures in the 2002–03 budget.

Budget expense categories	2002–03	2003–04
Total Personnel Salaries	$232,575	$220,540
Total Operating Expenses	136,850	103,750
Reserve for Contingencies	14,945	16,710

The assessment rate recommended by the Committee was derived by dividing anticipated expenses by the estimated salable tons of California dried prunes. Production of dried prunes for the year continues to be estimated at 170,500 salable tons, which should provide $341,000 in assessment income. Income derived from handler assessments will be adequate to cover budgeted expenses. Interest income also will be available if assessment income is reduced for some reason. The Committee is authorized to use excess assessment funds from the 2002–03 crop year (currently estimated at $78,947) for up to 5 months beyond the end of the crop year to meet 2003–04 crop year expenses. At the end of the 5 months, the Committee refunds or credits excess funds to handlers (§ 993.81(c)).

The assessment rate will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate is effective for an indefinite period, the Committee will continue to meet prior to or during each crop year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2003–04 budget and those for subsequent crop years will be reviewed and, as appropriate, approved by USDA.

Final Regulatory Flexibility Analysis

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

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

There are approximately 1,205 producers of dried prunes in the production area and approximately 21 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $5,000,000.

Eight of the 21 handlers (38%) shipped over $5,000,000 of dried prunes and could be considered large handlers by the Small Business Administration. Thirteen of the 21 handlers (62%) shipped under $5,000,000 of dried prunes and could be considered small handlers. An estimated 32 producers, or less than 3% of the 1,205 total producers, may be considered large growers with annual income over $750,000. The majority of handlers and producers of California dried prunes may be classified as small entities.

This rule continues to decrease the assessment rate established for the Committee and collected from handlers for the 2003–04 and subsequent crop years from $2.60 per ton to $2.00 per ton of salable dried prunes. The Committee unanimously recommended 2003–04 expenditures of $341,000 and an assessment rate of $2.00 per ton of salable dried prunes.

The assessment rate is $0.60 lower than the rate previously in effect. The quantity of assessable dried prunes for the 2003–04 crop year continues to be estimated at 170,500 salable tons. Thus, the $2.00 rate should provide $341,000 in assessment income and be adequate to meet this year's expenses. Interest

income also will be available to cover budgeted expenses if the 2003–04 expected assessment income falls short.

The following table compares major budget expenditures recommended by the Committee on June 26, 2003, and major budget expenditures in the 2002–03 budget.

Budget expense categories	2002–03	2003–04
Total Personnel Salaries	$232,575	$220,540
Total Operating Expenses	136,850	103,750
Reserve for Contingencies	14,945	16,710

Prior to arriving at its budget of $341,000, the Committee considered information from various sources, such as the Committee's Executive Subcommittee. An alternative to this action was to continue with the $2.60 per ton assessment rate. However, an assessment rate of $2.60 per ton in combination with the estimated crop of 170,500 salable tons would have generated monies in excess of that needed to fund all the budget items for 2003–04. The assessment rate of $2.00 per ton of salable dried prunes was determined by dividing the total recommended budget by the estimated salable dried prunes. The Committee is authorized to use excess assessment funds from the 2002–03 crop year (currently estimated at $78,947) for up to 5 months beyond the end of the crop year to fund 2003–04 crop year expenses. At the end of the 5 months, the Committee refunds or credits excess funds to handlers (§ 993.81(c)). Anticipated assessment income and interest income during 2003–04 will be adequate to cover authorized expenses.

The grower price for the 2003–04 season is expected to average about the same as the estimated 2002–03 average grower price of about $800 per salable ton of dried prunes. Based on an estimated 170,500 salable tons of dried prunes, assessment revenue during the 2003–04 crop year is expected to be less than 1 percent of the total expected grower revenue.

This action continues to decrease the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers, and may reduce the burden on producers. In addition, the Committee's meeting was widely publicized throughout the California dried prune industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the June 26, 2003, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

This action imposes no additional reporting or recordkeeping requirements on either small or large California dried prune handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

An interim final rule concerning this action was published in the **Federal Register** on August 6, 2003 (68 FR 46436). Copies of that rule were also mailed or sent via facsimile to all prune handlers. Finally, the interim final rule was made available through the Internet by the Office of the Federal Register and USDA. A 60-day comment period was provided for interested persons to respond to the interim final rule. The comment period ended on October 6, 2003, and no comments were received.

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

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 993

Marketing agreements, Plums, Prunes, Reporting and Recordkeeping requirements.

PART 993—DRIED PRUNES PRODUCED IN CALIFORNIA

Accordingly, the interim final rule amending 7 CFR part 993 which was published at 68 FR 46436 on August 6, 2003, is adopted as a final rule without change.

Dated: October 17, 2003.

Kenneth C. Clayton,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 03–26713 Filed 10–22–03; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 993 and 999

[Docket No. FV03–993–3 FIR]

Dried Prunes Produced in California; Temporary Suspension of the Mandatory Outgoing Prune Inspection and Quality Requirements, and Modification of the Undersized Prune Disposition Requirements Under the Marketing Order, and Suspension of the Prune Import Regulation

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim final rule which suspended for three years the outgoing prune inspection and quality requirements under the California Dried Prune Marketing Order (Order) and its administrative rules and regulations, and the prune import regulation. Continued suspension of the outgoing inspection and quality requirements, and import regulation provisions ensures relief from these requirements. The Order regulates the handling of dried prunes produced in California and is administered locally by the Prune Marketing Committee (Committee). During the three-year suspension, the industry will have the opportunity to develop and implement outgoing inspection and finished product grade standards more consistent with current industry needs. In the absence of additional rulemaking to modify or terminate the suspended provisions, they will come back into effect automatically at the end of the three-year period. The modifications to the undersized prune disposition requirements made by the interim final rule also are continued without change.

EFFECTIVE DATE: November 24, 2003.

FOR FURTHER INFORMATION CONTACT: Richard P. Van Diest, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (559) 487–5901, Fax: (559) 487–5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, or Fax: (202) 720–8938.

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

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 993 (7 CFR part 993), both as amended, regulating the handling of dried prunes produced in California, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

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

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

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

This rule continues in effect the suspension of the outgoing prune inspection and quality requirements in the order and its administrative rules and regulations, and the prune import regulation for a three-year period, and modification of the undersized prune disposition requirements. These changes became effective with the start of the new crop year on August 1, 2003. The order regulates the handling of dried prunes produced in California and is administered locally by the Prune Marketing Committee (Committee). The Committee unanimously recommended suspension of the outgoing inspection, and outgoing prune quality requirements at meetings held on April 3, and May 1, 2003, because it is the quickest way to ensure relief from these regulations. During the three-year suspension period, the industry will have the opportunity to develop and implement outgoing inspection and finished product grade standards that are more in line with current industry needs. As discussed below, suspension of the prune import regulation is required under section 8e of the Act.

Marketing Order Authority To Modify and Suspend

Section 993.50(g) states in part: ''rules and regulations to insure proper disposition of the [undersized] prunes shall be established by the Committee with the approval of the Secretary.''

Section 993.90(a) states in part: ''The Secretary shall terminate or suspend the operation of any or all of the provisions of this subpart, whenever he finds that such provisions do not tend to effectuate the declared policy of the act.''

Outgoing Grade and Size Regulations

The order previously mandated outgoing inspections and outgoing prune quality, size, and labeling requirements of California produced prunes by California prune handlers to verify that such prunes meet quality requirements. These requirements were based on the U.S. Standards for Grades of Dried Prunes and marketing order grade standards. The objective of the inspection, grade, size, and labeling requirements was to ensure that only prunes of acceptable quality and size entered the domestic and foreign markets for human consumption, thereby ensuring consumer satisfaction, increasing sales, and improving returns to producers. While the industry continues to believe that quality is an important factor in maintaining sales, the Committee believes that the costs associated with existing minimum grade, size, and labeling standards may exceed the benefits accrued from such requirements at this time.

Prune Import Regulations

Section 8e of the Agriculture Marketing Agreement Act of 1937 (Act) provides that when certain domestically produced commodities, including prunes, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. Section 999.200 contained the prune import regulations that were comparable to the domestically produced prune outgoing quality and size requirements. Since this rule continues to suspend the outgoing quality and size requirements for domestically produced prunes for three years, these requirements in the import regulation must continue to be suspended during this period as well.

U.S. imports of dried prunes are insignificant compared to U.S. production. In 2002, while the U.S. produced 158,000 tons of dried prunes, only 616 tons were imported. In that year, the domestically produced tonnage was over 250 times as large as the imported tonnage. In 2001, 204 tons were imported, but the U.S. produced 150,000 tons. Production was 735 times as large as imports.

In recent years, about 90 percent of U.S. imports of dried prunes have come from Argentina. Other countries that export to the United States include Chile, France, Mexico, Iran, and Turkey.

Undersized Prune Disposition Regulations

The prune administrative rules and regulations previously required handlers to have a third party inspection of each lot of undersized prunes prior to shipment into nonhuman outlets or other disposition. Under § 993.51 of the Order, inspections are performed by the Dried Fruit Association of California. These requirements also required handlers to submit to the Committee comprehensive documentation verifying that they have satisfied their undersized prune obligation.

The prune administrative rules and regulations previously limited the quantities of larger size prunes that can be used to meet a handler's undersized disposition obligation. While the Committee plans to continue to restrict the shipment of undersized prunes into human consumption outlets, the Committee continues to believe that the costs associated with the inspection and documentation of the disposal of undersized prunes may exceed the benefits. To reduce the cost and time for handlers to file reports and verify the disposition of undersized prunes through inspection, the Committee unanimously recommended removing the inspection requirements, and simplifying the documentation required from handlers to satisfy their undersized obligation as well as removing the limits on the weights of larger prunes that can be used to meet undersized obligations.

Background and Action Taken

California prune handlers are currently selling prunes in many forms to customers throughout the world. The

majority of these sales involve sizing or processing the prunes to more stringent specifications than required under the order. Retail and wholesale buyers often visit handlers' plants in California to verify specification and quality procedures, which tend to be more stringent than the minimum outgoing quality requirements mandated in the marketing order. Handlers continue to improve the quality and outgoing inspection procedures to target the specific customer and market demands. Almost all prunes sold for consumption in the United States as prunes are pitted and packaged in consumer bags and canisters targeting much higher standards than those mandated by the marketing order.

Previously used procedures required detailed administrative notating and reporting of defect information, large numbers of line inspectors at handler plants, and tracking and segregating lots and bins of fruit to comply with the order. As a result, handlers expended significant amounts of time and money on the inspection process. Also, almost all fruit is inspected by international buyers upon receipt, and is accepted or rejected based on the fruits' condition at the time of that review, regardless of any prior inspection process or certification. Further, prunes produced in other countries must meet customer specifications and inspection criteria.

Because of increased foreign competition that sells quality-processed fruit, shifting consumer demand from natural condition to processed prunes, and increasingly competitive specifications, the minimum marketing order standards no longer reflect current industry needs. The Committee continues to believe that California prune handlers must reduce all unnecessary costs in order to remain competitive with imported fruit and to profitably sell fruit in international markets.

The mandatory outgoing inspections focused on cosmetic defects or defects that tend to be removed through steaming, pitting, or juicing the fruit. While the industry once sold primarily unprocessed prunes, consumer demand has changed and some processing is invariably required, leaving the outgoing inspection criteria inapplicable and out-dated.

With regard to import requirements, section 8e of the Act requires import regulations to be comparable to the domestic regulations, not more restrictive. Since this rule continues to suspend outgoing grade and size regulations for domestically produced prunes, and substantially relaxes the disposition and verification requirements on undersized prunes under the order, the import regulation must continue to be suspended as well.

During the three-year suspension period, the industry will have the opportunity to develop and implement more appropriate finished product grade standards through amendments to the order and administrative rules and regulations. In the interim, the suspension of these provisions continues to ensure that these provisions are not implemented. In the absence of any additional action, the provisions will automatically come back into effect at the end of the suspension period.

At its May 1, 2003, meeting, the Committee unanimously recommended suspension of all outgoing inspection, outgoing quality, size, and labeling requirements in the marketing order and the administrative rules and regulations for three years, beginning with the start of the new crop year on August 1, 2003. The suspension of these provisions continues to reduce some administrative costs.

This rule continues to suspend in their entirety §§ 993.50(a) through (f) and 993.97 Exhibit A—Part II of the order, and §§ 993.150(a) and (b), 993.150(d) through (g)(1), 993.515, 993.516, 993.517, 993.518 of the administrative rules and regulations, as well as the import regulation specified in § 999.200. Portions of §§ 993.50(g) and 993.51 of the order, and portions of §§ 993.601 of the administrative rules and regulations continue to be suspended. These sections of the order and administrative rules and regulations pertain to the various requirements of the outgoing inspection, outgoing quality, size, and labeling requirements, and import regulation provisions.

Prune handlers opposed the previously stated undersized prune regulations because they were costly to use. Undersized prunes have marginal value as cattle feed or use in tobacco products (about $40–$45 per ton), and the costs of completing the required Committee paperwork and having them inspected by the DFA of California may exceed the revenue received. The industry is now also less concerned about the minimal amount of poor quality undersized prunes. Supplies of undersized prunes are now lower because of the recent tree pull programs and growers field sizing programs to drop small prune plums in the orchard, rather than deliver them to handlers.

The Committee chose to recommend removal of the limits on the quantities of larger-sized prunes that can be used to meet a handler's undersized weight disposition obligation, and the requirement for inspection of the undersized prunes and certification of handlers' receipt of usage, because these changes eliminate certain inspection costs and reduce Committee and handler administration costs.

At the April 3, 2003, meeting, the Committee unanimously recommended modification of the undersized prune disposition provisions in the marketing order and the administrative rules and regulations, which began with the start of the new crop year on August 1, 2003. The modification of these provisions continues to reduce some committee and handler administrative costs.

This rule continues to remove § 993.150(g)(2)(i), § 993.150(g)(2)(iii), and § 993.150(g)(2)(iv) in the administrative rules and regulations. Portions of § 993.150(g)(3) continue to be amended.

Final Regulatory Flexibility Analysis

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

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

Industry Profile

There are approximately 1,205 producers of dried prunes in the production area and approximately 21 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than $750,000 and small agricultural service firms are defined as those having annual receipts of less than $5,000,000.

Eight of the 21 handlers (38 percent) shipped over $5,000,000 worth of dried prunes and could be considered large handlers by the Small Business Administration. Thirteen of the 21 handlers (62 percent) shipped less than $5,000,000 worth of dried prunes and could be considered small handlers. An estimated 32 producers, or less than 3 percent of the 1,205 total producers, would be considered large growers with annual incomes over $750,000. The

majority of handlers and producers of California dried prunes may be classified as small entities.

In addition, there are an estimated 30 importers and one third-party entity that performed inspections under the order. USDA does not have precise information on these entities, but believes that the majority of the importers and the inspection agency are small entities.

Summary of Rule Change

This rule continues to suspend the outgoing prune inspection and outgoing prune quality requirements under the order and the administrative rules and regulations, and the prune import provisions for a three-year period, and continues to modify the undersized prune disposition requirements. These changes continue to be effective since the start of the new crop year on August 1, 2003, for three years. In the absence of additional rulemaking, the suspended requirements will come back into effect at the end of the three-year period.

The industry chose suspension of the outgoing inspection, outgoing prune quality and size and labeling requirements, because suspension is the quickest way to ensure relief from these regulations. During the three-year suspension period, the industry continues will have the opportunity to develop and implement more effective finished product grade standards through amendments to the order and administrative rules and regulations. It also has an opportunity to decide whether these requirements should be terminated.

Authority to suspend these provisions of the marketing order and administrative rules and regulations is provided in § 993.90(a) of the order. Authority to modify the disposition requirements and procedures for undersized prunes in the administrative rules and regulations is provided in §§ 993.50(g) and 993.52 of the order. Authority for the import regulation is in section 8e of the Act.

Impact of Regulation

Regarding the impact of this rule on affected entities, this action continues the reduced reporting and recordkeeping burden on California prune handlers and continues the reduction in the Committee's and handlers' administrative costs. Also, this action continues to reduce the number of inspections performed by the inspection agency under the order. The Committee estimates that 21 California prune handlers are subject to these provisions and to filing the handler reports. Also under the prune import regulations, it is estimated that as many as 10 importers would file forms applicable to the import regulations. The handler annual burden to file these reports is 70.04 hours, and the respondent annual burden to file reports under the import regulations is 6.05 hours. Thus, there is a potential to reducing the annual handler and importer reporting burden by 76.09 hours during the suspension period. The benefits of this final rule apply to all prune handlers and importers, regardless of their size of operation.

The forms affected by this rule are as follows: (1) Form PMC 2.2, Application for Permission to Dispose of Substandard Prunes; (2) Form PMC 2.6, Statement of Proposed Disposition of Substandard Prunes; (3) Form PMC 4.72A, Foreign Export ''Notice of Substandard Prunes for Manufacturing Purposes; (4) Form PMC 4.72B, Foreign Export ''Notice of Usage of Substandard Prunes for Manufacturing Purposes; (5) Form PMC 2.21, Application for Permission to Dispose of Undersized Prunes for Non-Human Usage; (6) Form PMC 4.71A, User's Receipt of Dried Undersized Prunes for Non-Human Usage; (7) Form PMC 4.71B, User's Certificate of Non-Human Usage of Dried Undersized Prunes; (8) Form PMC 2.63, Statement of Proposed Disposition of Undersized Prunes; (9) Form FV–170, Prune Form No. 1; and (10) Form FV–171, Prune Form No. 2.

It should be noted that if the Committee determines that these suspensions are having an unfavorable impact on the industry, it could meet and recommend rescinding the suspensions. Also, as previously mentioned, the provisions automatically come back into effect at the end of the suspension period.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection requirements being suspended by this rule were previously approved by the Office of Management and Budget, under OMB No. 0581–0178. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

In addition, as noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

Alternatives Considered

At meetings held on April 3, and May 1, 2003, the Committee and industry members discussed different alternatives to these actions. The Committee discussed the possibility of suspending the total Federal prune marketing order, but its benefit in other areas is recognized by the industry. Another alternative discussed was to suspend all mandatory inspections (both incoming and outgoing inspections), but many on the Committee and in the industry deemed this action too extreme. Another alternative discussed was to exempt handlers from the inspection requirements if they could demonstrate that the automation of their plant assured consistent delivery of higher quality prunes, but this would not be practicable. Another alternative considered was a two-year suspension of the undersized prune regulation. This was opposed because it would increase the domestic salable tonnage and would add to the industry's oversupply.

The Committee's April 3, and May 1, 2003, meetings where the outgoing inspection, outgoing prune quality, size, and labeling requirement issues were deliberated were public meetings and widely publicized throughout the prune industry. At the April 3, 2003, meeting, the Committee recommended removing the limits on the quantity of larger-sized prunes that could be used to meet handler undersized obligations and eliminating the DFA of California undersized prune inspection and certification of receipt and usage. This was to reduce costs, including inspection fees and other Committee costs associated with mandatory inspection, and the reporting burden resulting from the inspection requirements.

All interested persons were invited to attend the meetings and participate in the industry's deliberations. Finally, interested persons were invited to submit information on the regulatory and informational impacts of these changes on small businesses.

An interim final rule concerning this action was published in the **Federal Register** on July 24, 2003. Copies of the rule were mailed by the Committee's staff to all Committee members, alternates and prune handlers. In addition, the rule was made available through the Internet by the Office of the Federal Register and USDA. That rule provided for a 60-day comment period which ended on September 22, 2003. No comments were received.

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

address in the **FOR FURTHER INFORMATION CONTACT** section.

The Office of the U.S. Trade Representative has reviewed this rule and concurs with its issuance.

After consideration of all relevant material presented, including the Committee's recommendation, and other information, it is found that finalizing the interim final rule, without change, as published in the **Federal Register** (68 FR 43614, July 24, 2003) will tend to effectuate the declared policy of the Act.

List of Subjects

7 CFR Part 993

Marketing agreements, Plums, Prunes, Reporting and recordkeeping requirements.

7 CFR Part 999

Dates, Filberts, Food grades and standards, Imports, Nuts, Prunes, Raisins, Reporting and recordkeeping requirements, Walnuts.

PART 993—DRIED PRUNES PRODUCED IN CALIFORNIA

PART 999—SPECIALTY CROPS: IMPORT REGULATIONS

Accordingly, the interim final rule amending 7 CFR parts 993 and 999 which was published at 68 FR 43614 on July 24, 2003, is adopted as a final rule without change.

Dated: October 17, 2003.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 03–26712 Filed 10–22–03; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–164–AD; Amendment 39–13308; AD 2003–19–05]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model DC–10–10, –10F, –15, –30, –30F (KC–10A and KDC–10), –40, and –40F Airplanes; and Model MD–10–10F and –30F Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; correction.

SUMMARY: This document corrects an error that appeared in airworthiness directive (AD) 2003–19–05 that was published in the **Federal Register** on September 22, 2003 (68 FR 54992). The error resulted in an incorrect Type Certificate holder name. This AD is applicable to certain McDonnell Douglas Model DC–10–10, –10F, –15, –30, –30F (KC–10A and KDC–10), –40, and –40F airplanes; and certain Model MD–10–10F and –30F airplanes. This AD requires inspections for cracking and corrosion of the bolt assemblies and bushings on the hinge fittings of the inboard and outboard flaps of the left and right wings, and follow-on and corrective actions.

DATES: Effective October 27, 2003.

FOR FURTHER INFORMATION CONTACT: Ron Atmur, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5224; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: Airworthiness Directive (AD) 2003–19–05, amendment 39–13308, applicable to certain McDonnell Douglas Model DC–10–10, –10F, –15, –30, –30F (KC–10A and KDC–10), –40, and –40F airplanes; and certain Model MD–10–10F and –30F airplanes; was published in the **Federal Register** on September 22, 2003 (68 FR 54992). That AD requires inspections for cracking and corrosion of the bolt assemblies and bushings on the hinge fittings of the inboard and outboard flaps of the left and right wings, and follow-on and corrective actions.

As published, the Type Certificate (TC) holder name appears as ''BOEING'' in the regulatory text of the AD. The correct TC holder name is McDonnell Douglas, which is correctly referenced throughout the preamble of the the AD.

Since no other part of the regulatory information has been changed, the final rule is not being republished in the **Federal Register**.

The effective date of this AD remains October 27, 2003.

§ 39.13 [Corrected]

On page 54993, in the second column, paragraph 2. of Part 39—Airworthiness Directives of AD 2003–19–05 is corrected to read as follows:

* * * * *

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

2003–19–05 McDonnell Douglas: Amendment 39–13308. Docket 2002–NM–164–AD.

* * * * *

Issued in Renton, Washington, on October 17, 2003.

Neil D. Schalekamp,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–26721 Filed 10–22–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99–NM–229–AD; Amendment 39–13347; AD 98–16–17 R1]

RIN 2120–AA64

Airworthiness Directives; Cessna Model 750 Citation X Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; rescission.

SUMMARY: This amendment rescinds Airworthiness Directive (AD) 98–16–17 R1, which is applicable to all Cessna Model 750 Citation X series airplanes. That AD requires repetitive in-flight functional tests to verify proper operation of the secondary horizontal stabilizer pitch trim system, and repair if necessary. The requirements of that AD were intended to detect and correct contamination and damage in the system actuator, which could result in simultaneous failure of both primary and secondary pitch trim systems, and consequent reduced controllability of the airplane. Since the issuance of that AD, an improved part has been developed, which, if installed, would terminate the repetitive tests; that improved part has been installed on all affected airplanes or is being installed in production. Therefore, the identified unsafe condition no longer exists.

EFFECTIVE DATE: October 23, 2003.

FOR FURTHER INFORMATION CONTACT: Joel M. Ligon, Aerospace Engineer, Systems and Propulsion Branch, ACE–116W, FAA, Small Airplane Directorate, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209; telephone (316) 946–4138; fax (316) 946–4407.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all Cessna Model 750 Citation X series airplanes was published in the **Federal Register** on January 7, 2000 (65 FR 1075). That action proposed to rescind AD 98–16–17, amendment 39–10693 (63 FR 42206,

August 13, 1999), which currently requires repetitive in-flight functional tests of the secondary horizontal stabilizer pitch trim system, and repair if necessary.

Comments

We provided the public the opportunity to participate in the development of this AD. We received no comments on the proposed rescission.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require rescinding the AD as proposed.

FAA's Determination

Since AD 98–16–17 was issued, an improved part has been developed. Installation of that part terminates the repetitive tests required by the existing AD. The FAA has been advised that the improved part has been installed on all affected airplanes or will be installed in production. The FAA has determined that the previous part number is no longer available or allowed to be installed. Therefore, the identified unsafe condition no longer exists, and we have determined that it is necessary to rescind AD 98–16–17 to prevent operators from performing unnecessary actions.

The Rescission

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by adding an AD which removes amendment 39–10693, to read as follows:

98–16–17 R1 Cessna Aircraft Company: Amendment 39–13347. Docket No. 99–NM–229–AD. Rescinds AD 98–16–17, Amendment 39–10693.

Applicability: All Model 750 Citation X series airplanes, certificated in any category.

This rescission is effective October 23, 2003.

Issued in Renton, Washington, on October 17, 2003.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–26723 Filed 10–22–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9078]

RIN 1545–AY76

Qualified Subchapter S Trust Election for Testamentary Trust; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to final regulations.

SUMMARY: This document contains a correction to final regulations that were published in the **Federal Register** on July 17, 2003 (68 FR 42251) relating to a qualified subchapter S trust election for testamentary trust.

EFFECTIVE DATE: This correction is effective July 17, 2003.

FOR FURTHER INFORMATION CONTACT: Deane M. Burke (202) 622–3070 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations that are the subject of this correction are under section 1361 of the Internal Revenue Code.

Need for Correction

As published, the final regulations (TD 9078), contain an error that may prove to be misleading and is in need of clarification.

Correction of Publication

■ Accordingly, the publication of the final regulations (TD 9078), which were the subject of FR Doc. 03–18040, is corrected as follows:

■ On page 42251, column 3, in the preamble under the paragraph heading **''Summary of Comments and Explanation of Provisions''**, third paragraph, line 6, the language ''revocable trust (QRT) for which an'' is corrected to read ''revocable trust for which an''.

Cynthia E. Grigsby,

Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 03–26802 Filed 10–22–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 575

Exclusion of Certain Transactions With Respect to Certain Iraqi Property From the Scope of a General License

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Policy statement.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') has excluded certain transactions from the scope of the general license found in 31 CFR 575.533(a). This exclusion prohibits any attachment, judgment, decree, lien, execution, garnishment, or other judicial process with respect to certain property consisting of historic and modern books, documents, parchment scrolls, and other items pertaining to the Iraqi Jewish community that have been brought to the United States for restoration and temporary exhibition.

DATES: Effective August 28, 2003.

FOR FURTHER INFORMATION CONTACT: Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202/622–2500.

SUPPLEMENTARY INFORMATION: On August 2, 1990, the President issued Executive Order 12722, declaring a national emergency with respect to Iraq. This order was issued under the authority of, inter alia, the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (''IEEPA''), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), and section 301 of title 3 of the U.S. Code and imposed economic sanctions, including a complete trade embargo, with respect to Iraq. In keeping with United Nations Security Council Resolution 661 of August 6, 1990, and under the United Nations Participation Act (22 U.S.C. 287c), the President also issued Executive Order 12724 of August 9, 1990, which imposed additional restrictions. The Iraqi Sanctions Regulations, 31 CFR part 575 (the ''Regulations''), implement

Executive Orders 12722 and 12724 and are administered by the Treasury Department's Office of Foreign Assets Control (''OFAC'').

On May 22, 2003, the United Nations Security Council adopted Resolution 1483, which substantially lifted the multilateral economic sanctions with respect to Iraq. On May 23, 2003, OFAC issued a general license that reflected Resolution 1483 by authorizing most transactions that had been prohibited by the Regulations. This general license was published in the **Federal Register** on June 27, 2003, as new § 575.533 of the Regulations (68 FR 38188–38190).

Section 575.502 of the Regulations provides that the Director of OFAC reserves the right to exclude any person, property, or transaction from the operation of any license, or from the privileges therein conferred, or to restrict the applicability thereof with respect to particular persons, property, transactions, or classes thereof. On August 28, 2003, the Director of OFAC exercised this right to exclude certain transactions from the scope of the general license contained in § 575.533 of the Regulations. The text of the exclusion is reproduced below.

Exclusion From License

Under the authority of section 575.502 of the Iraqi Sanctions Regulations, 31 CFR part 575 (the ''Regulations''), except to the extent provided in section 203(b)(3) of IEEPA (50 U.S.C. 1702(b)(3)), any attachment, judgment, decree, lien, execution, garnishment, or other judicial process with respect to the following property is hereby prohibited and excluded from the transactions authorized in paragraph (a) of § 575.533 of the Regulations:

Historic and modern books, documents, parchment scrolls, and other items discovered in early May 2003 in the basement of the Mukhabahrat in Baghdad, most of which pertain to the Jewish community, which will be imported into the United States for temporary exhibition, including restoration necessary thereto, by the National Archives and Records Administration (NARA).

Dated: September 4, 2003.

R. Richard Newcomb,

Director, Office of Foreign Assets Control.

Approved: September 12, 2003.

Juan C. Zarate,

Deputy Assistant Secretary (Terrorist Financing and Financial Crimes), Department of the Treasury.

[FR Doc. 03–26738 Filed 10–20–03; 2:24 pm]

BILLING CODE 4810–25–P

Proposed Rules

Federal Register
Vol. 68, No. 205
Thursday, October 23, 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.

FARM CREDIT ADMINISTRATION

12 CFR Parts 614 and 615

RIN 3052–AB96

Loan Policies and Operations; Funding and Fiscal Affairs, Loan Policies and Operations, and Funding Operations; OFI Lending

AGENCY: Farm Credit Administration.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: The Farm Credit Administration (FCA, agency, or we) is reopening the comment period on the proposed rule to amend the agency's regulations governing other financing institutions (OFIs) and investments in Farmers' notes so all interested parties will have more time to respond.

DATES: Please send your comments to the FCA by December 22, 2003.

ADDRESSES: We encourage you to send comments by electronic mail to ''*reg-comm@fca.gov*'' or through the Pending Regulations section of FCA's Web site, ''*http://www.fca.gov.*'' You may also send comments to S. Robert Coleman, Director, Regulation and Policy Division, Office of Policy and Analysis, Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090 or by facsimile to (703) 734–5784. You may review copies of all comments we receive at our office in McLean, Virginia.

FOR FURTHER INFORMATION CONTACT: Dennis K. Carpenter, Senior Policy Analyst, Office of Policy and Analysis, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4498, TTY (703) 883–4434 or Richard A. Katz, Senior Attorney, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–2020.

SUPPLEMENTARY INFORMATION: On August 11, 2003, we published a proposed rule in the **Federal Register** seeking public comment on amendments to regulations governing other financing institutions and investments in Farmers' notes. The comment period expired on October 10, 2003. *See* 68 FR 47502, August 11, 2003. One member of the public has requested that the FCA provide interested parties an additional 60 days to comment. In response to this request, we are reopening the comment period until December 22, 2003, so all interested parties have more time to respond. The FCA supports public involvement and participation in its regulatory and policy process and invites all interested parties to review and provide comments on the proposed rule.

Dated: October 17, 2003.

Jeanette C. Brinkley,

Secretary, Farm Credit Administration Board.

[FR Doc. 03–26729 Filed 10–22–03; 8:45 am]

BILLING CODE 6705–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NE–38–AD]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc RB211 Trent 800 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for Rolls-Royce plc (RR) models RB211 Trent 875–17, Trent 877–17, Trent 884–17, Trent 892–17, Trent 892B–17, and Trent 895–17 turbofan engines, with low pressure (LP) compressor fan blades part number (P/N) FW18548 installed. This proposed AD would require LP compressor fan blade replacement with new or previously reworked blades, or rework of the existing LP compressor fan blades. This proposed AD is prompted by a number of new production LP compressor fan blades found with surfaces formed outside of design intent. Findings included sharp edges, burrs, and damage present in the area at the top of the shear key slots. We are proposing this AD to prevent possible multiple uncontained LP compressor fan blade failure, due to cracking in the blade root caused by increased stresses in the shear key slots.

DATES: We must receive any comments on this proposed AD by December 22, 2003.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD:

- By mail: Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003–NE–38–AD, 12 New England Executive Park, Burlington, MA 01803–5299.
- By fax: (781) 238–7055.
- By e-mail: *9-ane-adcomment@faa.gov.*

You can get the service information identified in this proposed AD from Rolls-Royce plc, PO Box 31, Derby, England, DE248BJ; telephone: 011–44–1332–242424; fax: 011–44–1332–245418.

You may examine the AD docket, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT: James Lawrence, Aerospace Engineer, Engine Certification Office, FAA, Engine And Propeller Directorate, 12 New England Executive Park; Burlington, MA 01803–5299; telephone (781) 238–7176; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''AD Docket No. 2003–NE–38–AD'' in the subject line of your comments. If you want us to acknowledge receipt of your mailed comments, send us a self-addressed, stamped postcard with the docket number written on it; we will date-stamp your postcard and mail it back to you. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. If a person contacts us verbally, and that contact relates to a substantive part of this proposed AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We are reviewing the writing style we currently use in regulatory documents.

We are interested in your comments on whether the style of this document is clear, and your suggestions to improve the clarity of our communications that affect you. You may get more information about plain language at *http://www.faa.gov/language* and *http://www.plainlanguage.gov.*

Examining the AD Docket

You may examine the AD Docket (including any comments and service information), by appointment, between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. *See* **ADDRESSES** for the location.

Discussion

The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom (U.K.), recently notified the FAA that an unsafe condition may exist on Rolls-Royce plc RB211 Trent 800 series turbofan engines. The CAA advises that the results of a recent examination of a number of new production LP compressor fan blades, found surfaces in the area of the shear key slot and the junction of the blade root profile, to be formed outside of design intent. Findings included sharp edges, burrs, and damage present in the area at the top of the shear key slots. This can lead to cracking in the blade root, causing multiple uncontained LP compressor fan blade failure.

Relevant Service Information

We have reviewed and approved the technical contents of service bulletin No. RB.211–72–E044, Revision 1, dated May 2, 2003, that describes procedures for reworking LP compressor fan blades, P/N FW18548.

FAA's Determination and Requirements of the Proposed AD

These Rolls-Royce plc (RR) models RB211 Trent 875–17, Trent 877–17, Trent 884–17, Trent 892–17, Trent 892B–17, and Trent 895–17 turbofan engines, manufactured in the U.K., are type-certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAA has kept us informed of the situation described above. We have examined the CAA's findings, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States. Therefore, we are proposing this AD, which would require, at or before the accumulation of certain cycles-since-new based on engine application, replacement of LP compressor fan blades, P/N FW18548, with new or previously reworked LP compressor fan blades, or rework of the existing blades.

Changes to 14 CFR Part 39—Effect on the Proposed AD

On July 10, 2002, we published a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs the FAA's AD system. This regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance. This material previously was included in each individual AD. Since this material is included in 14 CFR part 39, we will not include it in future AD actions.

Costs of Compliance

There are about 350 RR models RB211 Trent 875–17, Trent 877–17, Trent 884–17, Trent 892–17, Trent 892B–17, and Trent 895–17 turbofan engines of the affected design in the worldwide fleet. We estimate that 106 engines installed on airplanes of U.S. registry would be affected by this proposed AD. We also estimate that it would take about 100 work hours per engine to perform blade rework, and that the average labor rate is $65 per work hour. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $689,000.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this proposal and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include ''AD Docket No. 2003–NE–38–AD'' in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive:

Rolls-Royce plc: Docket No. 2003–NE–38–AD.

Comments Due Date

(a) The FAA must receive comments on this airworthiness directive (AD) action by December 22, 2003.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Rolls-Royce plc (RR) models RB211 Trent 875–17, Trent 877–17, Trent 884–17, Trent 892–17, Trent 892B–17, and Trent 895–17 turbofan engines, with low pressure (LP) compressor fan blades, part number (P/N) FW18548 installed. These engines are installed on, but not limited to, Boeing 777 series airplanes.

Unsafe Condition

(d) This AD was prompted by a number of new production LP compressor blades found with surfaces formed outside of design intent. Findings included sharp edges, burrs, and damage present in the area at the top of the shear key slots. We are issuing this AD to prevent possible multiple uncontained LP compressor fan blade failure, due to cracking in the blade root caused by increased stresses in the shear key slots.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified unless the actions have already been done.

Actions Required for LP Compressor Fan Blades

(f) Replace LP compressor fan blades with new or previously reworked LP compressor blades at or before accumulating the specified cycles in the following Table 1, or rework the existing blades as specified in paragraph (g) of this AD.

(g) Rework LP compressor fan blades at or before accumulating the specified cycles in the following Table 1. Follow paragraphs 3.A. through 3.B.(22) of Accomplishment Instructions of RR service bulletin (SB) No.

RB.211–72–E044, Revision 1, dated May 2, 2003, to do the blade rework.

TABLE 1.—LP COMPRESSOR FAN BLADE REPLACEMENT OR REWORK SCHEDULE

For engines installed on:	Engine model:	Replace or rework LP compressor fan blades at or before accumulating:
(1) Boeing 777–300	Trent 884–17 and Trent 892–17	2,400 cycles-since-new (CSN).
(2) Boeing 777–200IGW	(i) Trent 892–17	4,100 CSN.
	(ii) Trent 895–17	3,200 CSN.
(3) Boeing 777–200ER	Trent 892B–17	4,100 CSN.
(4) Boeing 777–200	Trent 875–17, Trent 877–17, and Trent 884–17.	4,100 CSN.

Alternative Methods of Compliance

(h) The Manager, Engine Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Material Incorporated by Reference

(i) You must use RR SB No. RB.211–72–E044, Revision 1, dated May 2, 2003, to perform the blade rework required by this AD.

Related Information

(j) CAA airworthiness directive 001–05–2003, dated June 20, 2003, also addresses the subject of this AD, and RR SB No. RB.211–72–E055, Revision 1, dated June 20, 2003, pertains to the subject of this AD.

Issued in Burlington, Massachusetts, on October 16, 2003.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 03–26720 Filed 10–22–03; 8:45 am]

BILLING CODE 4910–13–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Chapter II, Subchapter D

Ignition of Upholstered Furniture by Small Open Flames and/or Smoldering Cigarettes; Advance Notice of Proposed Rulemaking; Request for Comments and Information

AGENCY: Consumer Product Safety Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Consumer Product Safety Commission (CPSC or Commission) has found, based on available information, that a new flammability standard or other regulation may be needed for upholstered furniture products and for fabrics and related materials used in, or intended for use in, upholstered furniture, to protect the public against unreasonable risk of fire leading to death, personal injury, or significant property damage. The risk of fire addressed in today's advance notice of proposed rulemaking (ANPR) is from ignition of upholstered furniture by small open flames and/or smoldering cigarettes. This proceeding is being conducted under authority of the Flammable Fabrics Act (FFA).

In 1994, the Commission commenced a regulatory proceeding under the FFA addressing the risk of fire from ignition of upholstered furniture by small open flame sources such as matches, cigarette lighters, and candles. 59 FR 30735 (1994). This ANPR reflects the Commission's decision to expand that proceeding to explicitly address cigarette ignitions as well.[1]

The Commission solicits written comments from interested persons concerning the risk of injury and death associated with ignition of upholstered furniture by smoldering cigarettes and/or small open flames, data on cigarette or small open flame ignition testing of upholstered furniture, the regulatory alternatives discussed in this notice, other possible means to address this risk, and the economic impacts of the various alternatives. The Commission also invites interested persons to submit an existing standard, or a statement of intent to modify or develop a voluntary standard, to address the risk of death or injury due to ignition of upholstered furniture by small open flames and/or smoldering cigarettes.

DATES: Written comments and submissions in response to this notice must be received by December 22, 2003.

ADDRESSES: Comments and other submissions should be captioned ''Upholstered Furniture Flammability Proceeding'' 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. Comments and other submissions may also be filed by facsimile to (301) 504–0127 or by e-mail to *cpsc-os@cpsc.gov.*

FOR FURTHER INFORMATION CONTACT: Dale R. Ray, Project Manager, Directorate for Economic Analysis, U.S. Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504–7704; fax (301) 504–0109; e-mail *dray@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

A. The Product

Products within the scope of this ANPR include: (1) upholstered furniture used in homes, offices, and other places of assembly and public accommodation that consist in whole or in part of resilient materials (such as polyurethane foam, cotton batting, or related materials) enclosed within a covering consisting of fabric or related materials, and (2) fabric or related materials used or intended for use in the production of upholstered furniture. This scope is the same as that of the Commission proceeding commenced in 1994 under the FFA concerning small open flame ignition of upholstered furniture. 59 FR 30735 (1994).

B. The Upholstered Furniture Market

The Commission staff estimates that there were over 1,500 U.S. manufacturers of upholstered furniture, accounting for an estimated $8.4 billion in shipments in 1997, the most recent year for which Census of Manufacturers data are available.[2] In that year, imports

[1] The Commissioners voted 3–0 to issue this ANPR. Statements of Commissioners Moore and Gall concerning the vote are available on the CPSC Web site at *http://www.cpsc.gov.*

[2] The technical and economic information summarized in this ANPR is set forth in considerably more detail in the various CPSC staff briefing materials prepared on the subject of upholstered furniture flammability, including Upholstered Furniture Flammability: Analysis of Comments from the CPSC Staff's June 2002 Public Meeting, February 2003; Upholstered Furniture Flammability: Regulatory Options, October 2001; Upholstered Furniture Flammability: Regulatory Options for Small Open Flame & Smoking Material Ignited Fires, October 1997; and Briefing Package on Petition FP 93–1, Upholstered Furniture Flammability, April 1994. These and other documents pertinent to this proceeding may be obtained from the CPSC Web site at *http://www.cpsc.gov* or from the CPSC Office of the

Continued

accounted for about $550 million, for total shipments of about $8.9 billion. Shipments are concentrated among the major producers. The 50 largest firms reportedly accounted for approximately 70% of the total value of all upholstered furniture shipments in 1997. Most of the remaining manufacturers were small firms, none of which accounted for a significant portion of sales.

The average life of most upholstered furniture is about 15–17 years. The CPSC staff estimates that over 400 million pieces of upholstered furniture are in use in the U.S.

There are between 100 and 200 manufacturers of fabric for household upholstered furniture. This number includes textile mills that produce finished upholstery fabric, and textile finishers that purchase unfinished goods and perform additional operations, such as printing and dyeing. The top 16 firms account for about 80 percent of the upholstery fabric market.

U.S. upholstery fabric production in 1997 was 665.5 million square yards, about 345–360 million square yards of which went into production of residential upholstered furniture. Approximately two percent of total consumption of upholstery fabric for residential furniture production was imported. About 53 percent of upholstered furniture cover materials were predominantly synthetic, mostly thermoplastic fabrics such as polyester, polyolefin and nylon. About 27 percent were predominantly cellulosic fabrics like cotton and rayon. About 20 percent were leather.

C. Additional Background Information

1. Cigarette Ignitions

Cigarette ignitions of upholstered furniture have long been a leading cause of residential fire deaths, injuries and property damage. The Commission has extensively investigated this risk since the 1970s, when the CPSC staff prepared a draft proposed cigarette ignition standard. In 1977, a furniture industry group, the Upholstered Furniture Action Council (UFAC), established a voluntary industry program as an alternative to CPSC rulemaking. The UFAC voluntary guidelines were amended in 1983, and are widely followed among manufacturers today.

Based on a 1996 CPSC survey, more than 85 percent of currently manufactured upholstered furniture (including products from non-UFAC member firms) met the UFAC guidelines. Further, based on sales-weighted estimates of CPSC laboratory test results, more than 80 percent of currently produced furniture was estimated to resist cigarette ignition. This estimate, which reflects a gradual increase in the use of inherently cigarette-resistant upholstery fabrics and filling materials, represents about a 70 percent improvement in cigarette ignition resistance since 1980.

Upholstered furniture products meeting the existing State of California regulation, Technical Bulletin (TB) 117, offer a level of cigarette ignition resistance comparable to that of products conforming to the UFAC guidelines. In 1998, the California Bureau of Home Furnishings and Thermal Insulation initiated a project to upgrade the small open flame resistance provisions of TB–117. The cigarette resistance provisions of TB–117 are not being revised.

Both the American Furniture Manufacturers Association (AFMA) and a group of six upholstery fabric manufacturers known as the Fabric Coalition have expressed support for a mandatory national standard addressing cigarette and small open flame ignitions of upholstered furniture.[3]

2. Small Open Flame Ignitions

Beginning in 1994, CPSC staff developed a draft small open flame standard for residential upholstered furniture that would prevent or limit fire growth following exposure to a small open flame such as that from a match or cigarette lighter. The staff's draft standard contains flammability performance tests for seating areas and dust covers, as well as requirements for production testing and recordkeeping. The most recent draft appears in the CPSC staff's October 2001 briefing package.[4] The staff's draft standard contains no performance tests for cigarette ignition resistance.

Manufacturers have identified flame retardant (FR) upholstery fabrics as a likely means of limiting fire growth to meet the draft small open flame standard. FR fabrics are not needed to meet the existing California TB–117 regulation or the UFAC voluntary guidelines. CPSC laboratory testing suggested, however, that FR upholstery fabrics would reduce the risk of upholstered furniture fires ignited by smoldering cigarettes as well as by small open flame sources. CPSC staff estimates that about 80 percent of the projected benefits of a possible small open flame standard would accrue from reductions in cigarette fire losses.

D. Statutory Authority

This proceeding is conducted under authority of the Flammable Fabrics Act. 15 U.S.C. 1191–1204. An item of upholstered furniture is an ''interior furnishing'' ''product'' as those terms are defined in sections 2(e) and (h) of the FFA. 15 U.S.C. 1191(e) and (h). The Commission has authority under section 4(a) of the FFA to institute a proceeding to issue a flammability standard or other regulation, including labeling, for an interior furnishing product if it determines that such a standard ''may be needed to adequately protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage.'' 15 U.S.C. 1193(a).

A proceeding to promulgate a regulation establishing a flammability standard begins by publication of an ANPR. FFA section 4(g), 15 U.S.C. 1193(g). If the Commission elects to continue the rulemaking proceeding after considering responses to the ANPR, the Commission must publish a preliminary regulatory analysis along with the text of the proposed rule. FFA section 4(i), 15 U.S.C. 1193(i).

If the Commission then moves forward to issue a regulation, in addition to the text of the final rule, it must publish a final regulatory analysis that includes: (1) A description of the potential benefits and costs of the rule; (2) a summary of any alternatives that were considered, their costs and benefits, and the reasons for their rejection; and (3) a summary and assessment of any significant issues raised on the preliminary regulatory analysis that accompanied the proposed rule. FFA section 4(j)(1), 15 U.S.C. 1193(j)(1). In addition, the Commission must make findings concerning the inadequacy of any pertinent voluntary standard, that the benefits of the rule bear a reasonable relationship to its costs, and that the rule is the least burdensome requirement that prevents or adequately reduces the risk of injury. FFA section 4(j)(2), 15 U.S.C. 1193(j)(2).

E. The Risk of Injury and Death

Fires involving ignitions of upholstered furniture constitute a leading cause of residential fire losses. Furniture fires killed more people in 1998 (the latest year for which data are

Secretary. The documents are also available for inspection at the Commission's Public Reading Room, 4330 East-West Highway, room 419, Bethesda, Maryland 20814. For further information please contact the Office of the Secretary to the Commission at (301) 504–0800.

[3] Copies of the AFMA and Fabric Coalition correspondence to this effect may be obtained from the CPSC Web site at *http://www.cpsc.gov* or from the CPSC Office of the Secretary.

[4] Upholstered Furniture Flammability: Regulatory Options, October 2001. See fn. 1 supra regarding viewing and obtaining copies of this and other related documents.

available) than did fires involving any other category of consumer products under the Commission's jurisdiction. About four-fifths of the estimated deaths and about two-thirds of the estimated injuries that CPSC staff believes could be addressed by a mandatory standard were from smoldering ignition by smoking materials (almost always cigarettes), as shown below. In addition, about four-fifths of the estimated societal costs ($1.9 billion out of $2.4 billion) of upholstered furniture fires were cigarette ignition-related.

ESTIMATED 1998 ADDRESSABLE UPHOLSTERED FURNITURE FIRE LOSSES [5]

	Fires	Deaths	Injuries	Property Loss ($mil)
Smoking Materials	4,700	340	730	87
Small Open Flame	1,500	80	350	32
Total	6,200	420	1,080	120

Although cigarette-ignited furniture fire deaths have declined by about 70 percent over the past two decades, recent years' data suggest the decline may be leveling off. Even at the 1998 level, the number of deaths is large, and the potential economic benefits of reducing the $1.9 billion in societal costs are substantial.

F. Existing Standards

1. UFAC Program

The UFAC voluntary program contains six cigarette ignition performance tests for different upholstered furniture components (cover and interior fabrics, ''barriers'' *i.e.*, batting, decking and filling/padding materials, decorative trim and welt cord) as well as certification and product labeling provisions. The UFAC guidelines encourage the use of the inherently smolder-resistant materials that have become popular on the market.

The UFAC fabric classification test (now embodied in ASTM voluntary test method E–1390) denotes upholstery cover fabrics as either Class I or Class II. Class I fabrics are less ignition-prone. Class II fabrics are more ignition-prone. To conform to the UFAC guidelines, Class II fabrics may only be used in constructions with smolder-resistant batting (or other materials that conform to the UFAC ''barrier'' test) between the fabric and interior materials of the furniture. However, CPSC laboratory testing of full scale chairs demonstrated that UFAC-conforming products made with smolder-prone fabrics can ignite and burn even when polyester batting or other ignition-resistant fillings are present. Thus, CPSC staff believes that UFAC component conformance does not guarantee cigarette resistance of the finished article.

2. California Technical Bulletins

California Technical Bulletin 117, which is mandatory for all upholstered furniture sold in the state, contains component performance tests for cigarette ignition resistance of fibrous/loose fill and cellular foam filling materials. Upholstered furniture sold in California must also be labeled as complying with the TB–117 performance requirements.

Like the UFAC voluntary program, TB–117 is comprised of component tests. Another California standard, TB–116, is available to manufacturers on a voluntary basis. TB–116 incorporates a full-scale (or small-scale composite) cigarette test. Manufacturers whose products meet this standard may use labels stating that the products provide a higher level of fire protection.

TB–116 and 117 are not national standards. However, some manufacturers, importers and retailers offer TB–117-compliant products for nationwide distribution.

3. Fire Safe Cigarette Legislation

Regulations implementing New York State legislation requiring ''fire-safe,'' *i.e.*, lower ignition propensity (IP), cigarettes may become effective in 2003.[6] Lower IP cigarettes would presumably reduce fire losses, including those involving upholstered furniture. Several federal fire-safe cigarette bills were introduced unsuccessfully in the 107th Congress.[7] The extent to which lower-IP cigarettes may reduce the risk of ignition of upholstered furniture and other home furnishings is currently unknown.

G. Finding

Based on information currently available to it from investigations, research, and other sources, the Commission finds that a new flammability standard, or other regulation, may be needed for upholstered furniture products made from fabrics and related materials, and for fabrics and related materials used in, or intended for use in upholstered furniture, to protect the public against the unreasonable risk of the occurrence of fire leading to death, personal injury or significant property damage. FFA section 4(a), 15 U.S.C. 1193(a). The risk of the occurrence of fire addressed in this ANPR is that from ignition of upholstered furniture by small open flames and/or smoldering cigarettes. Commencing this proceeding expands the Commission's prior FFA proceeding addressing small open flame ignition sources such as matches, cigarette lighters, and candles to also include ignition by smoldering cigarettes.

H. Regulatory Alternatives Under Consideration

1. Flammability Standard

If the Commission finds that one is needed to adequately protect the public against an unreasonable risk of the occurrence of fire leading to death, injury, or significant property damage, it may promulgate a flammability standard for upholstered furniture. Any such standard must be stated in objective terms and be reasonable, technologically practicable, and appropriate. FFA section 4(b), 15 U.S.C. 1193(b). It also must be limited to those fabrics, related materials, or products that have been determined to present the unreasonable risk of fire at issue in the proceeding. Id.

2. Labeling Regulation

Either separately or as part of a flammability standard, the Commission may consider issuing a labeling regulation as part of this proceeding. FFA section 4(a), 15 U.S.C. 1193(a).

[5] Addressable losses from NFIRS cases identified as upholstered furniture, with appropriate coding for type of material ignited, area of origin, ignition factor, and equipment involved. Out-of-scope or inconsistently coded cases, including incendiary and suspicious fires, are excluded. *Source:* Upholstered Furniture Flammability: Regulatory Options, CPSC October 2001.

[6] Fire Safety Standards for Cigarettes, N.Y. Executive Law, Chapter 18, Article 6–C, § 156–c (McKinney 2003).

[7] *See, e.g.,* Fire Safe Cigarette Act of 2002, HR 5059 IH, 107th Congress, 2d Session, introduced June 27, 2002.

3. Voluntary Standard

If the Commission determines that any voluntary or other standard or portion thereof submitted in response to this ANPR would eliminate or adequately reduce the risk of injury in question it may issue that standard, or a portion of it, as a proposed regulation. FFA section 4(h)(1); 15 U.S.C. 1193(h). In general, the Commission may not promulgate a regulation if there is an existing voluntary standard addressing the same risk that would likely result in the elimination or adequate reduction of that risk and with which there would likely be substantial compliance. FFA sections 4(h)(2) and (j)(2); 15 U.S.C. sections 1193(h)(2) and (j)(2).

I. Solicitation of Information and Comments

This ANPR is the first step in a proceeding which could result in a mandatory flammability standard and/or labeling regulation, or a voluntary standard for upholstered furniture that presents an unreasonable risk of the occurrence of fire due to cigarette or small open flame ignition leading to death or personal injury or significant property damage. The Commission invites interested persons to submit their comments on any aspect of the alternatives discussed above. Specifically, in accordance with section 4(g) of the FFA, the Commission solicits:

1. Written comments with respect to: (a) The risk identified by the Commission; (b) the need for flammability performance requirements to address cigarette and/or small open flame ignition of upholstered furniture; (c) the need for a uniform national upholstered furniture flammability standard; (d) the relationship between cigarette and small open flame ignition performance; (e) the regulatory alternatives being considered and the potential effectiveness and economic impacts of these alternatives; and (f) other possible alternatives for addressing the risk and the effectiveness and economic impacts of these alternatives.

2. Any existing standard or portion of a standard which could be issued as a proposed regulation.

3. A statement of intention to modify or develop a voluntary standard to address the risk of injury discussed in this notice, together with a description of a plan to do so.

In addition, the Commission would like to receive data on cigarette and small open flame ignition tests of upholstered furniture.

Comments and other submissions should be captioned ''Upholstered Furniture Flammability Proceeding'' 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. Comments and other submissions may also be filed by facsimile to (301) 504–0127 or by e-mail to *cpsc-os@cpsc.gov.* All comments and other submissions must be received by December 22, 2003.

Dated: October 20, 2003.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 03–26809 Filed 10–22–03; 8:45 am]

BILLING CODE 6355–01–P

ADVISORY COUNCIL ON HISTORIC PRESERVATION

36 CFR Part 800

RIN 3014–AA06

Protection of Historic Properties

AGENCY: Advisory Council on Historic Preservation.

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Advisory Council on Historic Preservation is extending by 30 days the public comment period for the proposed amendments to the regulations implementing Section 106 of the National Historic Preservation Act. Such proposed amendments were published in the **Federal Register** on September 25, 2003. This extended comment period will afford greater opportunity to all interested parties to review and submit comments on the proposal.

DATES: Comments must be received on or before November 26, 2003.

ADDRESSES: Address all comments concerning this proposed rule to the Executive Director, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Suite 809, Washington, DC 20004. Fax (202) 606–8672. You may submit electronic comments to: *achp@achp.gov.* For electronic comments, please type ''Regs Amendment 2003'' in the subject line of the e-mail.

FOR FURTHER INFORMATION CONTACT: Javier Marqués, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Suite 809, Washington, DC 20004; (202) 606–8503.

SUPPLEMENTARY INFORMATION: In response to requests filed with the Advisory Council on Historic Preservation (ACHP), the comment period for the proposed amendments to the regulations implementing Section 106 of the National Historic Preservation Act now ends on November 26, 2003. This is an extension of 30 days beyond the comment period established in the **Federal Register** on September 25, 2003.

The Section 106 regulations set forth how Federal agencies take into account the effects of their undertakings on historic properties and afford the ACHP a reasonable opportunity to comment, pursuant to Section 106 of the National Historic Preservation Act. Most of the proposed amendments to those regulations respond to recent court decisions which held that (1) the ACHP could not force a Federal agency to change its determinations regarding whether its undertakings affected or adversely affected historic properties, and (2) that Section 106 does not apply to undertakings that are merely subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency. Another proposed amendment clarifies the time period for objections to ''No Adverse Effect'' findings. The last proposed amendments clarify that the ACHP can propose an exemption to the Section 106 process on its own initiative, rather than needing a Federal agency to make such a proposal. See the proposal as published in the **Federal Register** (68 FR 55354, September 25, 2003) for further information.

Dated: October 20, 2003.

John M. Fowler,

Executive Director.

[FR Doc. 03–26799 Filed 10–22–03; 8:45 am]

BILLING CODE 4310–10–P

Notices

Federal Register

Vol. 68, No. 205

Thursday, October 23, 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

Agricultural Marketing Service

[Doc. # TM–03–12]

Notice of Request for Extension and Revision of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces the Agricultural Marketing Service's (AMS) intention to request an extension and revision of a currently approved information collection for the Farmers Market Questionnaire.

DATES: Comments on this notice must be received by December 22, 2003 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Contact or send comments to Ed Ragland, Marketing Service Branch, Transportation and Marketing, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Ave., SW., Room 2646, South Building, Washington DC 20250–0269; (202) 720–8317 and Fax (202) 690–0031.

SUPPLEMENTARY INFORMATION:

Title: Farmers Market Questionnaire.

OMB Number: 0581–0169.

Expiration Date of Approval: March 31, 2004.

Type of Request: Revision of a currently approved information collection.

Abstract: Under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Service (AMS) is responsible for collecting data to provide market access for small and medium sized farmers. One of the elements of this function is to collect data on farmers markets throughout the country and publish this information. This information is critical to State and local governments ability to make decisions on the formation and management of local farmers markets. States and localities need this information not only to support small and medium sized farmers, but also to make decisions concerning rural business activities. Information will be collected on the size and growth of markets, consumers and farmers served, products sold, sales, days of operation , and management structure. Information will be collected every two years on the size and growth of farmers markets to monitor how this marketing method changes over time and the impact farmers markets have on the farming community nationwide.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .25 hours per response.

Respondents: Farmers market managers.

Estimated Number of Respondents: 3,100.

Estimated Total Annual Responses: 1,550.

Estimated Number of Responses per Respondent: .5.

Estimated Total Annual Burden on Respondents: 388 hours.

Comments are invited on: (1) 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) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Ed Ragland, Marketing Services Branch, Transportation and Marketing, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Ave., SW., Room 2646, South Building, Washington DC 20250–0269. All comments received will be available for public inspection during regular business hours at the same address.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

AMS is committed to implementation of the Government Paperwork Elimination Act, which provides for the use of information resources to improve the efficiency and effectiveness of government operations, including providing the public with the option of submitting information or transacting business electronically to the extent possible.

Dated: October 16, 2003.

Kenneth C. Clayton,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 03–26714 Filed 10–22–03; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Advisory Committee on Biotechnology and 21st Century Agriculture; Nominations

AGENCY: Office of the Under Secretary, Research, Education, and Economics, USDA.

ACTION: Advisory Committee on Biotechnology and 21st Century Agriculture; Nominations.

SUMMARY: The Agricultural Research Service is requesting nominations for qualified persons to serve as members of the Secretary's Advisory Committee on Biotechnology and 21st Century Agriculture (AC21). The charge for the AC21 is two-fold: to examine the long-term impacts of biotechnology on the U.S. food and agriculture system and USDA; and to provide guidance to USDA on pressing individual issues, identified by the Office of the Secretary, related to the application of biotechnology in agriculture.

DATES: Written nominations must be received by fax or postmarked on or before November 24, 2003.

ADDRESSES: All nomination materials should be sent to Michael Schechtman, Designated Federal Official, Office of the Deputy Secretary, USDA, 202B Jamie L. Whitten Federal Building, 14th and Independence Avenue, SW.,

Washington, DC 20250. Forms may also be submitted by fax to (202) 690–4265.

FOR FURTHER INFORMATION CONTACT: Questions should be addressed to Michael Schechtman, Designated Federal Official, telephone (202) 720–3817; fax (202) 690–4265; e-mail *mschechtman@ars.usda.gov.* To obtain form AD–755 ONLY please contact Dianne Harmon, Office of Pest Management Policy, telephone (202) 720–4074, fax (202) 720–3191; e-mail *dharmon@ars.usda.gov.*

SUPPLEMENTARY INFORMATION: AC21 members serve staggered 2-year terms, with terms for half of the Committee members expiring in any given year. Nominations are being sought for open Committee seats. The terms of 9 members of the AC21 will expire in early 2004. The AC21 Charter allows for flexibility to appoint up to a total of 11 members. Members can be reappointed to serve up to 6 consecutive years. Equal opportunity practices, in line with USDA policies, will be followed in all membership appointments to the Committee. To ensure that the recommendations of the Committee have taken into account the needs of the diverse groups served by USDA, membership shall include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

Nominees of the AC21 should have recognized expertise in one or more of the following areas: recombinant-DNA (rDNA) research and applications using plants; rDNA research and applications using animals; rDNA research and applications using microbes; food science; silviculture and related forest science; fisheries science; ecology; veterinary medicine; the broad range of farming or agricultural practices; weed science; plant pathology; biodiversity; applicable laws and regulations relevant to agricultural biotechnology policy; risk assessment; consumer advocacy and public attitudes; public health/epidemiology; ethics, including bioethics; human medicine; biotechnology industry activities and structure; intellectual property rights systems; and international trade. Members will be selected by the Secretary of Agriculture in order to achieve a balanced representation of viewpoints to address effectively USDA biotechnology policy issues under consideration.

Nominations for AC21 membership must be in writing and provide the appropriate background documents required by USDA policy, including background disclosure form AD–755.

The AC21 meets in Washington, DC, up to four (4) times per year. The function of the AC21 is solely advisory. Members of the AC21 and its subcommittees serve without pay, but with reimbursement of travel expenses and per diem for attendance at AC21 and subcommittee functions for those AC21 members who require assistance in order to attend the meetings. While away from home or their regular place of business, those members will be eligible for travel expenses paid by REE, USDA, including per diem in lieu of subsistence, at the same rate as a person employed intermittently in the government service is allowed under Section 5703 of Title 5, United States Code.

Submitting Nominations: Nominations should be typed and include the following:

1. A brief summary of no more than two (2) pages explaining the nominee's suitability to serve on the AC21.
2. A resume or curriculum vitae.
3. A completed copy of form AD–755.

Nominations should be sent to Michael Schechtman at the address listed above, and be post marked no later than [the date set forth above].

Dated: October 15, 2003.

Joseph Jen,

Under Secretary for Research, Education and Economics.

[FR Doc. 03–26790 Filed 10–22–03; 8:45 am]

BILLING CODE 3401–03–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 03–089–1]

Notice of Request for Extension of Approval of an Information Collection

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection in support of the Cooperative Agricultural Pest Survey.

DATES: We will consider all comments that we receive on or before December 22, 2003.

ADDRESSES: You may submit comments by postal mail/commercial delivery or by e-mail. If you use postal mail/commercial delivery, please send four copies of your comment (an original and three copies) to: Docket No. 03–089–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road, Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 03–089–1. If you use e-mail, address your comment to *regulations@aphis.usda.gov.* Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and ''Docket No. 03–089–1'' on the subject line.

You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

APHIS documents published in the **Federal Register**, and related information, including the names of organizations and individuals who have commented on APHIS dockets, are available on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html.*

FOR FURTHER INFORMATION CONTACT: For information regarding the Cooperative Agricultural Pest Survey, contact Ms. Coanne O'Hern, National Survey Coordinator, Pest Detection and Management Programs, PPQ, APHIS, 4700 River Road, Unit 137, Riverdale, MD 20737–1236; (301) 734–4387. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

SUPPLEMENTARY INFORMATION:

Title: Cooperative Agricultural Pest Survey.

OMB Number: 0579–0010.

Type of Request: Extension of approval of an information collection.

Abstract: Under the Plant Protection Act (7 U.S.C. 7701–7772), the Secretary of Agriculture is responsible for preventing the introduction and interstate spread of plant pests and noxious weeds that are new to or not widely distributed within the United States.

To this end, the Animal and Plant Health Inspection Service, Plant Protection and Quarantine (PPQ) program, has joined forces with the States and other agencies to create a program called the Cooperative Agricultural Pest Survey (CAPS). The CAPS program collects and manages

data on plant pests, weeds, and biological control agents, which may be used to control plant pests or noxious weeds.

This program allows the States and PPQ to conduct surveys to detect and measure the presence of exotic plant pests and weeds and to enter survey data into a national computer-based system known as the National Agricultural Plant Information System (NAPIS). This, in turn, allows APHIS to obtain a more comprehensive picture of pest conditions in the United States as well as detect, in collaboration with the National Plant Diagnostic Network and the U.S. Department of Agriculture's Cooperative State Research, Education, and Extension Service (CSREES), population trends that could indicate an agricultural bioterrorism act.

The information generated by this program is used by States to predict potential pest situations in the United States and by Federal interests (*e.g.*, PPQ and CSREES) to promptly detect and respond to the occurrence of new exotic pests and to provide documentation on plant pests to facilitate and record the location of those pest incursions that could directly hinder the export of U.S. farm commodities. The system also provides data management support for PPQ pest programs such as imported fire and gypsy moth.

The CAPS program entails the use of several information collection activities, including a cooperative agreement and a Specimens for Determination Form (PPQ Form 391).

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the 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 our estimate of the burden of the information collection, 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 information collection on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies, *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.1091824 hours per response.

Respondents: State cooperators participating in the Cooperative Agricultural Pest Survey.

Estimated annual number of respondents : 103.

Estimated annual number of responses per respondent: 352.932.

Estimated annual number of responses: 36,352.

Estimated total annual burden on respondents: 3,969 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 17th day of October, 2003.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 03–26786 Filed 10–22–03; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 03–094–1]

Notice of Request for Extension of Approval of an Information Collection

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection in support of regulations for user fees for processing applications and permits to import certain animals and animal products.

DATES: We will consider all comments that we receive on or before December 22, 2003.

ADDRESSES: You may submit comments by postal mail/commercial delivery or by e-mail. If you use postal mail/commercial delivery, please send four copies of your comment (an original and three copies) to: Docket No. 03–094–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road, Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 03–094–1. If you use e-mail, address your comment to *regulations@aphis.usda.gov.* Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and ''Docket No. 03–094–1'' on the subject line.

You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

APHIS documents published in the **Federal Register**, and related information, including the names of organizations and individuals who have commented on APHIS dockets, are available on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html.*

FOR FURTHER INFORMATION CONTACT: For information regarding user fee regulations for the importation of animals and animal products, contact Mrs. Kris Caraher, Section Head, User Fees Section, Financial Systems and Services Branch, Financial Management Division, MRPBS, APHIS, 4700 River Road, Unit 54, Riverdale, MD 20737–1232; (301) 734–5743. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

SUPPLEMENTARY INFORMATION:

Title: Veterinary Services User Fees for Permit Applications.

OMB Number: 0579–0167.

Type of Request: Extension of approval of an information collection.

Abstract: The Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture charges applicants a fee for processing applications for permits to import animals and animal products (including byproducts, organisms, vectors, and germ plasm). Regulations regarding user fees to reimburse APHIS for processing permit applications and for providing other import- and export related services for live animals and birds and animal products are contained in the Code of Federal Regulations, title 9, part 130. Veterinary Services, APHIS, is responsible for reviewing the import applications and issuing permits.

The user fees vary depending on such factors as the type of application or the type of animal or product. In order to determine the appropriate fees, Veterinary Services may need to contact applicants for additional information.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the 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 our estimate of the burden of the information collection, 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 information collection on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies, *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.02 hours per response.

Respondents: Importers, brokers, and the importing public.

Estimated annual number of respondents: 2,350.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 2,350.

Estimated total annual burden on respondents: 47 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 17th day of October, 2003.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 03–26787 Filed 10–22–03; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 03–053–2]

Hydrilla; Availability of an Environmental Assessment and Finding of No Significant Impact

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that an environmental assessment and finding of no significant impact have been prepared by the Animal and Plant Health Inspection Service relative to the continued release of the nonindigenous leaf-mining flies *Hydrellia pakistanae* Deonier and *H. balciunasi* Bock (Diptera: Ephydridae) as biological control agents to reduce the severity of infestations of the aquatic weed hydrilla (*Hydrilla verticillata*) in the continental United States. Based on its finding of no significant impact, the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

ADDRESSES: Copies of the environmental assessment and finding of no significant impact are available for public inspection in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. Tracy A. Horner, Ecologist, Environmental Services, PPD, APHIS, 4700 River Road, Unit 149, Riverdale, MD 20737–1236; (301) 734–5213.

SUPPLEMENTARY INFORMATION:

Background

The Animal and Plant Health Inspection Service (APHIS) is considering an application by a researcher at the U.S. Army Engineer Research and Development Center in Vicksburg, MS, for a permit for the continued release of the nonindigenous leaf-mining flies *Hydrellia pakistanae* Deonier and *H. balciunasi* Bock (Diptera: Ephydridae) in the continental United States. These agents, which have previously been released in the United States, would be used by the applicant for the biological control of the aquatic weed hydrilla (*Hydrilla verticillata* (L.F.) Royle (Hydrocharitaceae) in new areas infested with hydrilla.

Hydrilla, which is native to the warmer areas of Asia, was first discovered in the United States in 1960. A submersed aquatic plant, it has the ability to multiply profusely, producing long, thick stands. It has become a major nuisance in many aquatic systems, displacing native aquatic plants such as pondweeds and eel grass, causing navigational interference, hindering waterflow, and detracting from recreational use of water bodies.

The biological control agents *H. pakistanae* and *H. balciunasi,* which have been released previously in several States, have the potential to reduce the severity of infestations of hydrilla in other areas of the continental United States. *H. pakistanae* and *H. balciunasi* are flies in the family Ephydridae. Female *Hydrellia* spp. lay their eggs on hydrilla, and after several days, the eggs hatch into larvae. The larvae of both species damage hydrilla plants by mining leaves.

On May 23, 2003, we published in the **Federal Register** (68 FR 28190–28191, Docket No. 03–053–1) a notice in which we announced the availability, for public review and comment, of an environmental assessment (EA) that examined the potential environmental impacts associated with the proposed release of these biological control agents into additional areas of the United States.

We solicited comments on the EA for 30 days ending June 23, 2003. We did not receive any comments by that date.

In this document, we are advising the public of our finding of no significant impact (FONSI) regarding the continued release of the nonindigenous leaf-mining flies *Hydrellia pakistanae* Deonier and *H. balciunasi* Bock (Diptera: Ephydridae) as biological control agents to reduce the severity of infestations of hydrilla in the continental United States. The finding, which is based on the EA, reflects our determination that release of these biological control agents will not have a significant impact on the quality of the human environment.

The EA and FONSI may be viewed on the Internet at *http://www.aphis.usda.gov/ppq/* by following the link for ''Document/Forms Retrieval System,'' then clicking on the triangle beside ''6-Permits-Environmental Assessments'' and selecting document number 0035. You may request paper copies of the EA and FONSI by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT.** Please refer to the title of the EA when requesting copies. The EA and FONSI

are also available for review in our reading room (information on the location and hours of the reading room is listed under the heading **ADDRESSES** at the beginning of this notice).

The EA and FONSI have been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Done in Washington, DC, this 17th day of October, 2003.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 03–26785 Filed 10–22–03; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Chloride Bush Project, Idaho Panhandle National Forests, Bonner County, Idaho

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) to document and disclose the potential environmental effects of proposed activities within the Gold Creek watershed on the Sandpoint Ranger District, Idaho Panhandle National Forests. The watershed is located about 25 miles south of Sandpoint, Idaho, near the town of Lakeview.

The proposal was designed using science from broad scale assessments including the Interior Columbia Basin Ecosystem Management Project. The proposal is intended to improve the health and productivity of aquatic and terrestrial habitats, and provide for human uses and values by: (1) Reducing road densities and sediment risks from roads and trails, (2) restoring desired forest cover, structure, pattern and species composition across the landscape where they are outside natural or accepted ranges, (3) maintaining or improving stands where desired species are being crowded out, or are declining from competition, (4) promoting the long-term persistence and stability of wildlife habitat diversity, (5) reducing the level of forest fuels and the risk of catastrophic wildfire, (6) providing motorized recreation opportunities while protecting resource values such as wildlife and water, and (7) producing timber as a byproduct of ecosystem restoration and maintenance.

Activities would include: (1) Selective cutting where opportunities exist to maintain or improve stands where desired species are being crowded out, or are declining from competition, (2) regenerating stands where widespread mortality is being caused by insects and disease and replanting them with longer lived seral species, (3) burning to reduce fuels, improve growing conditions, and improve forage for wildlife, (4) constructing several temporary spur roads to facilitate vegetation management activities, (5) decommissioning unneeded road segments, (6) placing a system road into storage, (7) converting two existing roads to motorized trails, and (8) improving Trail #113 in the Packsaddle Inventoried Roadless Area.

The Sandpoint Ranger District of the Idaho Panhandle National Forests in Bonner County, Idaho will administer these activities. The EIS will tier to the Idaho Panhandle National Forests Plan (September 1987).

DATES: Comments should be postmarked within 30 days after publication of this notice. Please include your name and address and the name of the project you are commenting on.

ADDRESSES: Submit written comments and suggestions on the proposed management activities or request to be placed on the project mailing list by writing to: Chloride Bush Project, Attn: A.J. Helgenberg, Sandpoint Ranger District, 1500 Hwy 2, Suite 110, Sandpoint, ID 83864.

FOR FURTHER INFORMATION CONTACT: A.J. Helgenberg, Project Team Leader, Sandpoint Ranger District at 208–265–6643 or by e-mail at *ajhelgenberg@fs.fed.us.*

Comments received in response to this solicitation, 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; however, those who submit anonymous comments will not have standing to appeal the subsequent decision under 36 CFR parts 215 or 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. For persons requesting such confidentiality; it 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 10 days.

SUPPLEMENTARY INFORMATION: More information about the Chloride Bush Project can be found on the Internet at *www.fs.fed.us/ipnf/eco/manage/nepa/index.html.* The legal description for the project area includes all or portions of sections 1–3, 10–16, 20–29, and 34–36 in Township 53 North; Range 1 West and section 18 in Township 53 North; Range 1 East.

The Forest Service will be preparing an environmental impact statement for the following proposed activities and alternative courses of action based on public comments. To improve the health of aquatic habitats, 10.4 miles of existing classified roads would be decommissioned, 7.1 miles of overgrown, undrivable roads would be taken off transportation system maps, 5.0 miles of road would be placed into storage and 4.8 miles of road would be upgraded. To achieve vegetation management objectives, helicopter and road-based logging systems, prescribed burning and reforestation would be used. Additionally, several short logging spurs totaling 1.8 miles would be constructed to access stands for treatment using road-based logging systems. Of the 9,413 acres in the project area, 860 acres would be selectively cut, and 1,637 acres would be regenerated. Prescribed fire would be used on regenerated areas, selectively cut dry sites (423 acres), and to maintain old growth ponderosa pine stands and shrub fields (145 acres). Regenerated areas would be reforested with larch, white pine and ponderosa pine seedlings. Motorized recreation opportunities would be managed by converting 3.3 miles of road to motorized trail, and upgrading 5.0 miles of an existing motorized trail. Preliminary issues identified relate to the effects of roads and road construction on sediment, water yield, fish habitat, noxious weed spread, motorized access, and wildlife security, the effects of logging and creating openings on water yield, fish and wildlife habitat and wildlife security, and the effects of road decommissioning on private land access and ability to manage forest vegetation. Current alternatives consist of the proposed action and no action.

Two periods are specifically designated for comments on this analysis: (1) During the scoping period which is 30 days from the date of this notice in the **Federal Register** and (2) during the draft EIS comment period. In accordance with 36 CFR 215.5, as published in the **Federal Register**, Volume 68 No. 107, June 4, 2003, the draft EIS comment period will be the designated time in which ''substantive'' comments will be considered. The mailing list for this project will include those individuals who have expressed interest in this project as well as adjacent landowners and those responding to this NOI or to the Idaho Panhandle National Forests Quarterly Schedule of Proposed Actions. In addition, the public is encouraged to contact or visit with Forest Service officials during the analysis and prior to the decision. The Forest Service will continue to seek information, comments, and assistance from Federal, Tribal, State, and local agencies and other individuals or organizations that may be interested in or affected by the proposed actions. The United States Fish and Wildlife Service will be consulted concerning any effects to threatened and endangered species. The agency invites written comments and suggestions on this action, particularly in terms of identification of issues and alternative development.

Comments from the public and other agencies will be used in preparation of the Draft EIS to identify potential issues and concerns, potential alternatives to the proposed action and to promote communications with members of the public or other agencies. The draft environmental impact statement (DEIS) will be filed with the Environmental Protection Agency (EPA) and made available for public review in spring of 2004. The final environmental impact statement is expected to be completed in fall of 2004. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

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 environment review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts and 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 environmental statement stage but that are not raised until after completion of the final environmental statement 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 environmental impact statement.

To assist the Forest Service in identifying and considering issues related to the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement 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 United States Department of Agriculture (USDA) prohibits discrimination in its programs on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, and marital or familial status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means of communication of program information (braille, large print, audiotape, *etc.*) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD). To file a complaint, write the Secretary of Agriculture, U.S. Department of Agriculture, Washington, DC 20250, or call 1–800–245–6340 (voice) or 202–720–1127 (TDD). USDA is an equal employment opportunity employer.

The Idaho Panhandle National Forests Supervisor is the Deciding Officer on this project. The decision will be made after considering comments and responses, environmental consequences discussed in the Final EIS, and applicable laws, regulations and policies. The decision and supporting reasons will be documented in a Record of Decision upon release of the Final EIS.

Dated: October 16, 2003.

Ranotta K. McNair,

Forest Supervisor, Idaho Panhandle National Forests.

[FR Doc. 03–26722 Filed 10–22–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Vail Valley Forest Health Project; White River National Forest, Eagle County, Colorado

AGENCY: Forest Service, USDA.

ACTION: Notice of Intent to Prepare an Environmental Impact Statement in conjunction with planning the Vail Valley Forest Health Project.

SUMMARY: The USDA Forest Service, White River National Forest, gives notice of the agency's intent to prepare an environmental impact statement (EIS) to disclose the environmental effects of commercial and non-commercial timber cutting and prescribed fire, in conjunction with designing the Vail Valley Forest Health Project for the Holy Cross Ranger District of the White River National Forest. These proposed actions are being considered together because they represent either connected or cumulative actions as defined by the Council on Environmental Quality (40 CFR 1508.25). This notice describes the project area, the purpose and need for the action, the proposed action, potential environmental issues, information concerning public participation, estimated dates for filing the environmental impact statement, and the names and addresses of the agency officials who can provide additional information.

Project Area

The Vail Valley Forest Health Project area encompasses approximately 72,000 acres in the Vail Valley on the Holy Cross Ranger District of the White River National Forest, Eagle County, CO. It extends approximately 2.5 miles on either side of the I–70 corridor from Vail Pass on the east to the town of Avon on the west. The area is located in T6S, R79W, Sec 4–6, 8–10, 15, 16; T5S, R79W, Sec. 5–9, 16–18, 19–21, 28–30, 32–34; T4S, R79W, Sec 30–32; T5S, R80W, Sec 1–25; T4S, R80W, Sec 22, 27–34; T6S, R81W, Sec 3, 5, 6; T5S, R81W, Sec 1–36; T4S, R81W, Sec 25, 30–36; T6S, R82W, Sec 1, 2; T5S, R82W, Sec 1–3, 10–16, 21–27, 35, 36; and T4S, R82W, Sec 25, 26, 35, 36.

Purpose & Need

The mountain pine beetle population in the Vail Valley is currently at

epidemic levels. The large beetle populations are responding to the homogenous landscape-level forest conditions. The high density of older, large-diameter lodgepole pine across this landscape provides ideal conditions for rapid spread of mountain pine beetle. Epidemic mountain pine beetle populations can be a natural component of lodgepole pine dominated ecosystems, however, such high levels can kill 50–70% of the mature lodgepole pine over vast areas. High mortality in the lodgepole pine in the Vail Valley would be detrimental to scenic quality, recreational opportunities and wildlife habitat in this highly valued area. As the dead trees begin to fall, the ability to maintain acceptable fuel loads within the wildland/urban interface is also compromised.

There is a need to modify the mountain pine beetle activity in this important setting. Manipulating lodgepole pine stand conditions in critical areas by creating a mosaic of forested ages, a variety of tree densities and sizes and increasing the aspen component will work toward managing future mountain pine beetle risk and wildland fuel hazard. There is also a need to maintain acceptable fuel loads in the wildland/urban interface by removing dead, dying, and high-risk trees while they have some economic value to offset the treatment cost.

Much of the shrublands in the Vail Valley are outside their historic range of variability due to fire suppression. This has resulted in homogenous, over-mature shrublands that pose a risk of higher intensity fires due to the buildup of hazardous fuels.

Creating a mosaic of age and structural classes in the shrublands will reduce the intensity and severity of wildfires and their detrimental effects to these mountain communities, such as higher risk to firefighters, loss of homes, and landslides.

The Project proposes to use a variety of techniques to improve stand structure and species diversity and consequently the health of the forest, while protecting the heritage, recreation, visual, watershed and wildlife resources.

The Proposed Action

Through this proposed action, the White River National Forest intends to:

Manage the lodgepole pine stands in the Vail Valley south of I–70 for future mountain pine beetle (MPB) risk and wildland fuel hazard by increasing structural and species diversity using vegetation treatments. Approximately 1215 acres of vegetation management are proposed.

- 871 acres of lodgepole pine stands will be thinned to leave approximately 50–70% of the basal area. This will open up the stands to increased sun and wind to disrupt the MPB broods. In areas where the dbh is 10–11 inches or greater, small patch cuts will be made to remove the primary MPB host trees.
- 344 acres of aspen within the lodgepole pine stands will be enhanced in the wildland/urban interface for forested fuel breaks and for MPB flight interruption. For patches of aspen, the pine will be removed within the aspen and for 1–2 tree lengths around the patch. This area is within an inventoried roadless area as identified by the 2002 White River National Forest Land and Resource Management Plan.

Manage the shrublands and aspen stands north of I–70 to move them toward their historic range of variability. Mechanical vegetation treatments and prescribed fire will create a mosaic of age and structural classes in order to reduce the intensity and severity of wildfires in the wildland/urban interface. Approximately 1884 acres of vegetation management are proposed.

- 905 acres of shrublands will be broadcast burned. This will change the fuel types to reduce future potential wildfire intensity and aid firefighters in wildfire suppression.
- 521 acres in the Eagle's Nest Wilderness will be broadcast burned to maintain and improve aspen stands, reducing future potential wildfire intensity and rate of spread. This will create a forested fuel break between conifer stands and the town of Vail and will help facilitate wildland fire use should a wildfire start in the wilderness area.
- 231 acres within the wildland/urban interface and outside the Eagle's Nest Wilderness will be treated to maintain and improve aspen stands, reducing future potential wildfire intensity and rate of spread. Dead trees will be cut, piled and burned. The area will then be broadcast burned. This will create a forested fuel break between confier stands and the town of Vail and will help facilitate wildland fire use should a wildfire start in the wilderness area.
- 227 acres within the wildland/urban interface will be treated to maintain and improve aspen stands, reducing future potential wildfire intensity and rate of spread. All conifers will be cut and aspen will be patch-cut, piled and burned within 200′ of private land. This will create a forested fuel break between confier stands and the town of Vail.

Project Design and Mitigation Measures

All proposed treatments and activities would follow the standards and guidelines found in the Revised White River Land and Resource Management Plan—2002.

Roadless

No road construction or commercial timber harvest is proposed in the inventoried roadless areas designated by the Revised Forest Plan.

Preliminary Issues

Issues identified to date include: impacts of timber harvesting and prescribed burning on visual quality in a recreation setting; the impacts of timber harvesting and prescribed burning on water quality; the impacts of prescribed burning in a wilderness area; impacts of vegetation management in an inventoried roadless area; potential impacts to heritage resources; potential spread of noxious weeds; air quality impacts from burning; and effects on threatened, endangered, sensitive and management indicator species.

Possible Alternatives

Possible alternatives to the proposed action may include no burning within the Eagle's Nest Wildness area, no vegetation management within the inventoried roadless area, or a combination of the activities described above.

Involving the Public

Pursuant to Part 36 Code of Federal Regulations (CFR) 219.10(g), the Forest Supervisor for the White River National Forest gives notice of the agency's intent to prepare an environmental impact statement for the Vail Valley Forest Health Project described above. The Forest Service is seeking information, comments, and assistance from individuals, organizations and federal, state, and local agencies that may be interested in or affected by the proposed action (36 CFR 219.6).

Public participation will be solicited by notifying in person and/or by mail known interested and affected publics. A legal notice and news releases will be used to give the public general notice. Public participation activities will include requests for written comments and an open house to be held at a local venue. The public is invited to help identify issues and define the range of alternatives to be considered in the environmental impact statement.

A reasonable range of alternatives will be evaluated and reasons will be given for eliminating some alternatives from detailed study. A ''non-action alternative'' is required, meaning that

management will not change the present condition. Alternatives will provide different ways to address and respond to public issues, management concerns, and resource opportunities identified during the scoping process. Scoping comments and existing condition reports will be used to develop alternatives.

DATES: Comments concerning the proposed action should be received in writing by November 29, 2003.

ADDRESSES: Send written comments to: Vail Valley Forest Health Project, Holy Cross Ranger District, P.O. Box 190, Minturn, CO 81645.

FOR FURTHER INFORMATION CONTACT: Peech Keller at (970) 468–5400 or Bob Currie at (970) 827–5715.

Release and Review of the EIS

The DEIS is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public comment in June 2004. At that time, the EPA will publish a notice of availability for the DEIS in the **Federal Register**. The comment period on the DEIS will be 45 days from the date the EPA publishes the notice of availability in the **Federal Register.**

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 the DEIS 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 DEIS stage but are not raised until after completion of the Final environmental Impact Statement (FEIS) 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 FEIS.

To assist the Forest Service in identifying and considering issues and concerns on the proposed actions, comments on the DEIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the DEIS or the merits of the alternatives formulated and discussed in the statements. 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.

After the comment period ends on the DEIS, comments will be analyzed, considered, and responded to by the Forest Service in preparing the Final EIS. The FEIS is scheduled to be completed in September 2004. The responsible official will consider the comments, responses, environmental consequences discussed in the FEIS, and applicable laws, regulations, and policies in making decisions regarding these revisions. The responsible official will document the decisions and reasons for the decisions in a Record of Decision for the revised Plan. The decision will be subject to appeal in accordance with 36 CFR 217.

Responsible Official

Martha J. Ketelle, Forest Supervisor, White River National Forest. P.O. Box 948, Glenwood Springs, CO 81602–0948. ''As the Responsible Official, I will decide which, if any, of the proposed projects will be implemented. I will document the decision and reasons for the decision in the Record of Decision. That decision will be subject to Forest Service appeal regulations.''

Dated: October 17, 2003.

Martha J. Ketelle,

Forest Supervisor, White River National Forest.

[FR Doc. 03–26719 Filed 10–22–03; 8:45 am]

BILLING CODE 3410–11–m

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Resource Advisory Committee Meeting

AGENCY: North Central Idaho Resource Advisory Committee, Kamiah, Idaho, USDA, Forest Service.

ACTION: Notice of meeting.

SUMMARY: 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 Nez Perce and Clearwater National Forests' North Central Idaho Resource Advisory Committee will meet Friday, November 14, 2003 in Orofino, Idaho for a business meeting. The meeting is open to the public.

SUPPLEMENTARY INFORMATION: The business meeting on November 14, begins at 10 a.m. (PST) at the Clearwater National Forest, Supervisor's Office, 12730 Highway 12, Orofino, Idaho. Agenda topics will include discussion of potential projects. A public forum will begin at 2:30 p.m. (PST).

FOR FURTHER INFORMATION CONTACT: Ihor Mereszczak, Staff Officer and Designated Federal Officer, at (208) 935–2513.

Dated: October 15, 2003.

Ihor Mereszczak,

Acting Forest Supervisor

[FR Doc. 03–26769 Filed 12–22–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–831]

Fresh Garlic From the People's Republic of China: Notice of Extension of Time Limit for the Preliminary Results of Antidumping Duty Administrative and New Shipper Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of extension of time limit for the preliminary results of antidumping duty administrative and new shipper reviews.

SUMMARY: The Department of Commerce is extending the time limit for the preliminary results of the administrative and new shipper reviews of the antidumping duty order on fresh garlic from the People's Republic of China until December 1, 2003. This extension applies to the administrative review of four exporters, Jinan Yipin Corporation, Ltd., Shandong Heze International Trade and Developing Company, Top Pearl Ltd., and Wo Hing (H.K.) Trading Co., and the new shipper reviews of two exporters, Jining Trans-High Trading Company and Zhengzhou Harmoni Spice Co., Ltd. The period of review is November 1, 2001, through October 31, 2002.

EFFECTIVE DATE: October 23, 2003.

FOR FURTHER INFORMATION CONTACT: Jennifer Moats or Minoo Hatten, AD/CVD Enforcement 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230;

telephone: (202) 482–5047 and (202) 482–1690, respectively.

Background

On December 26, 2002, the Department of Commerce (the Department) published the *Notice of Initiation of Antidumping and Countervailing Duty Administrative Reviews* (67 FR 78772), in which it initiated an administrative review of the antidumping duty order on fresh garlic from the People's Republic of China. On January 6, 2003, the Department published the *Notice of Initiation of New Shipper Antidumping Duty Reviews: Fresh Garlic from the People's Republic of China* (68 FR 542), in which it initiated new shipper reviews for three companies. On March 10, 2003, we aligned the new shipper reviews with the administrative review pursuant to 19 CFR 351.214(j)(3). As such, the time limits for the new shipper reviews were aligned with those for the administrative review. See memorandum to the File from Jennifer Moats entitled ''Request for Alignment of Annual and New Shipper Reviews,'' dated March 10, 2003. On July 31, 2003, we issued a notice partially rescinding the administrative review covering sales made during the period by Clipper Manufacturing Ltd., Fook Huat Tong Kee Pte., Ltd., Huaiyang Hongda Dehydrated Vegetable Company, Golden Light Trading Company, Ltd., Good Fate International, Philo-Sino International Trading Inc., and Mai Xuan Fruitex Co., Ltd. On August 7, 2003, we extended the deadline for issuance of the preliminary results by 90 days, until October 31, 2003 (68 FR 47020). On September 26, 2003, we issued the preliminary results for the new shipper review of Xiangcheng Yisheng Foodstuffs Co., Ltd., one of the three companies listed in our January 6, 2003, notice of initiation of new shipper antidumping duty reviews.

Extension of Time Limit for Preliminary Results of Administrative and New Shipper Reviews

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), provides that the Department will issue the preliminary results of an administrative review of an antidumping duty order within 245 days after the last day of the anniversary month of the date of publication of the order. The Act provides further that the Department may extend that 245-day period to 365 days if it determines it is not practicable to complete the review within the foregoing time period. Section 751(a)(2)(B)(iv) of the Act also provides that we may extend the deadlines in a new shipper review period if we determine that the case is extraordinarily complicated.

The Department has determined that the aligned administrative review and new shipper reviews of Jinan Yipin Corporation Ltd., Shandong Heze International Trade and Developing Company, Jining Trans-High Trading Company, and Zhengzhou Harmoni Spice Co., Ltd., are extraordinarily complicated and that it is not practicable to complete the preliminary results by the partially extended deadline of October 31, 2003. There are a number of complex factual and legal questions related to the calculation of the antidumping margins in the administrative review and new shipper reviews, in particular the analysis of the *bona fides* of certain sales at issue and the valuation of the factors of production. We require additional time to address these matters through the gathering and verification of certain information.

Therefore, in accordance with sections 751(a)(2)(B)(iv) and 751(a)(3)(A) of the Act, the Department is extending the time limit for the preliminary results by an additional 30 days, until no later than December 1, 2003.[1]

Dated: October 17, 2003.

Jeffrey May,

Deputy Assistant Secretary for AD/CVD Enforcement I.

[FR Doc. 03–26798 Filed 10–22–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–847]

Notice of Antidumping Duty Order: Hard Red Spring Wheat From Canada

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of antidumping duty order.

EFFECTIVE DATE: October 23, 2003.

FOR FURTHER INFORMATION CONTACT: Julie Santoboni or Cole Kyle, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4194 or (202) 482–1503, respectively.

Scope of Order

For purposes of this order, the products covered are all varieties of hard red spring (''HRS'') wheat from Canada. This includes, but is not limited to, varieties commonly referred to as Canada Western Red Spring, Canada Western Extra Strong, and Canada Prairie Spring Red. The merchandise subject to this investigation is currently classifiable under the following Harmonized Tariff Schedule of the United States (''HTSUS'') subheadings: 1001.90.10.00, 1001.90.20.05, 1001.90.20.11, 1001.90.20.12, 1001.90.20.13, 1001.90.20.14, 1001.90.20.16, 1001.90.20.19, 1001.90.20.21, 1001.90.20.22, 1001.90.20.23, 1001.90.20.24, 1001.90.20.26, 1001.90.20.29, 1001.90.20.35, and 1001.90.20.96. This investigation does not cover imports of wheat that enter under the subheadings 1001.90.10.00 and 1001.90.20.96 that are not classifiable as hard red spring wheat. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Antidumping Duty Order

In accordance with section 735(a) of the Tariff Act of 1930, as amended (''the Act''), the Department of Commerce (''the Department'') published its final determination that HRS wheat from Canada is being sold in the United States at less than fair value. *See Notice of Final Determinations of Sales at Less Than Fair Value: Certain Durum and Hard Red Spring Wheat from Canada*, 68 FR 52741 (September 5, 2003). Subsequently, the Department amended its final determination of the antidumping duty investigation of HRS wheat from Canada to correct certain ministerial errors in the final margin calculation. *See Notice of Amended Final Determination of Sales at Less Than Fair Value: Hard Red Spring Wheat from Canada*, 68 FR 57666 (October 6, 2003). On October 16, 2003, the International Trade Commission notified the Department of its final determination pursuant to section 735(b)(1)(A)(i) of the Act that an industry in the United States is materially injured by reason of less-than-fair-value imports of subject merchandise from Canada.

Therefore, in accordance with section 736(a)(1) of the Act, the Department will direct U.S. Customs and Border Protection (''CBP'') to assess, upon further advice by the Department,

[1] A 30-day extension of the current deadline for the preliminary results of review would fall on November 30, 2003, which is a Sunday. Therefore, the new deadline for the preliminary results is the following business day.

antidumping duties equal to the amount by which the normal value of the subject merchandise exceeds the export price of the subject merchandise for all relevant entries of HRS wheat from Canada. These antidumping duties will be assessed on (1) all unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after May 8, 2003, the date of publication of the Department's preliminary determination in the **Federal Register**[1] and before October 12, 2003, the date on which the Department is required pursuant to section 733(d)(3) of the Act to terminate the suspension of liquidation; and (2) on all subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination in the **Federal Register**.

On or after the date of publication of the ITC's notice of final determination in the **Federal Register**, CBP officers must require, at the same time as importers would normally deposit estimated duties, a cash deposit equal to the estimated weighted-average antidumping duty margins as noted below. The ''All Others'' rate applies to all exporters of subject merchandise not specifically listed. The weighted-average dumping margins are as follows:

Exporter/manufacturer	Amended weighted-average margin percentage
Canadian Wheat Board	8.86
All Others	8.86

This notice constitutes the antidumping duty order with respect to HRS wheat from Canada, pursuant to section 736(a) of the Act. Interested parties may contact the Central Records Unit, Room B–099 of the main Commerce building, for copies of an updated list of antidumping duty orders currently in effect.

This order is published in accordance with section 736(a) of the Act and 19 CFR 351.211.

Dated: October 17, 2003.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 03–26796 Filed 10–22–03; 8:45 am]

BILLING CODE 3510–DS–P

[1] *Notice of Preliminary Determinations of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat From Canada*, 68 FR 24707 (May 8, 2003).

DEPARTMENT OF COMMERCE

International Trade Administration

[C–122–848]

Notice of Countervailing Duty Order: Hard Red Spring Wheat From Canada

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of countervailing duty order.

EFFECTIVE DATE: October 23, 2003.

FOR FURTHER INFORMATION CONTACT: Stephen Cho or Audrey Twyman, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3798 or (202) 482–3534, respectively.

Scope of Order

For purposes of this order, the products covered are all varieties of hard red spring (''HRS'') wheat from Canada. This includes, but is not limited to, varieties commonly referred to as Canada Western Red Spring, Canada Western Extra Strong, and Canada Prairie Spring Red. The merchandise subject to this investigation is currently classifiable under the following *Harmonized Tariff Schedule of the United States* (''HTSUS'') subheadings: 1001.90.10.00, 1001.90.20.05, 1001.90.20.11, 1001.90.20.12, 1001.90.20.13, 1001.90.20.14, 1001.90.20.16, 1001.90.20.19, 1001.90.20.21, 1001.90.20.22, 1001.90.20.23, 1001.90.20.24, 1001.90.20.26, 1001.90.20.29, 1001.90.20.35, and 1001.90.20.96. This investigation does not cover imports of wheat that enter under the subheadings 1001.90.10.00 and 1001.90.20.96 that are not classifiable as hard red spring wheat. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Countervailing Duty Order

In accordance with section 705(a) of the Tariff Act of 1930, as amended (''the Act''), the Department of Commerce (''the Department'') published its final determination that countervailable subsidies are being provided to producers and exporters of HRS wheat from Canada. *See Notice of Final Affirmative Countervailing Duty Determinations: Certain Durum and Hard Red Spring Wheat from Canada,* 68 FR 52747 (September 5, 2003). On October 16, 2003, in accordance with section 705(d) of the Act, the International Trade Commission notified the Department of its final determination that a U.S. industry is ''materially injured'' within the meaning of section 705(b)(1)(A) of the Act by reason of imports of HRS wheat from Canada.

Therefore, in accordance with section 706(a)(3) of the Act, the Department will direct U.S. Customs and Border Protection (''CBP'') to assess, upon further advice by the Department, countervailing duties for all relevant entries of HRS wheat from Canada. For all producers and exporters countervailing duties will be assessed on all unliquidated entries of HRS wheat entered, or withdrawn from warehouse, for consumption on or after March 10, 2003, the date of publication of the Department's preliminary determination in the **Federal Register**[1] and before July 8, 2003, the date the Department instructed CBP to discontinue the suspension of liquidation in accordance with section 703(d) of the Act,[2] and on all subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination in the **Federal Register**.

On or after the date of publication of the ITC's notice of final determination in the **Federal Register**, CBP officers will require, at the same time as importers would normally deposit estimated duties on this merchandise, cash deposits for the subject merchandise equal to the net subsidy rate, as noted below. The ''All Others'' rate applies to all exporters of subject merchandise not specifically listed. The cash deposit rates are:

Exporter/manufacturer	Net subsidy rate (percent)
Canadian Wheat Board	5.29
All Others	5.29

This notice constitutes the countervailing duty order with respect to HRS wheat from Canada, pursuant to section 706(a) of the Act. Interested parties may contact the Central Records Unit, Room B–099 of the main Commerce building, for copies of an

[1] *Preliminary Affirmative Countervailing Duty Determinations and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Certain Durum Wheat and Hard Red Spring Wheat From Canada,* 68 FR 11374 (March 10, 2003).

[2] *See also,* The Statement of Administrative Action, H. Doc. No. 103–316, Vol. 1 at 874 (1994), reprinted in 1994 U.S.C.C.A.N. 3773, 4163).

updated list of countervailing duty orders currently in effect.

This countervailing duty order is published in accordance with sections 706(a) and 777(i) of the Act and 19 CFR 351.211.

Dated: October 17, 2003.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 03–26795 Filed 10–22–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–427–819, C–428–829, C–421–809, C–412–821]

Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom: Extension of Preliminary Results of Countervailing Duty Administrative Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of extension of time limit for preliminary results of countervailing duty administrative reviews.

EFFECTIVE DATE: October 23, 2003.

FOR FURTHER INFORMATION CONTACT: Tipten Troidl, Office of AD/CVD Enforcement VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–2786.

Statutory Time Limits

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department of Commerce (Department) to make a preliminary determination within 245 days after the last day of the anniversary month of an order/finding for which a review is requested and a final determination within 120 days after the date on which the preliminary determination is published. However, if it is not practicable to complete the review within the time period, section 751(a)(3)(A) of the Act allows the Department to extend these deadlines to a maximum of 365 days and 180 days, respectively.

Background

On March 25, 2003, the Department published a notice of initiation of administrative reviews of the countervailing duty orders on low enriched uranium from France, Germany, the Netherlands, and the United Kingdom, covering the period May 14, 2001, through December 31, 2002 (*see* 68 FR 14394). The preliminary results are currently due no later than October 31, 2003.

Extension of Time Limit for Preliminary Results of Reviews

We determine that these cases are extraordinarily complicated because there are a large number of complex issues which require thorough consideration and analysis by the Department, including numerous existing programs from the original investigation and changes to certain programs found countervailable in the investigation. In order to complete our analysis, we not only require additional information, but may also possibly conduct verification of this information. Therefore, we require more time to properly analyze these issues. As a result, it is not practicable to complete the preliminary results of these reviews within the original time limits. Therefore, the Department is extending the time limits for completion of the preliminary results until no later than January 29, 2004. This date constitutes a 90-day extension for the administrative reviews of low enriched uranium from France, Germany, the Netherlands, and the United Kingdom.

This extension is in accordance with section 751(a)(3)(A) of the Act.

Dated: October 17, 2003.

Holly A. Kuga,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 03–26797 Filed 10–22–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Evaluation of State Coastal Management Programs and National Estuarine Research Reserves

AGENCY: Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), DOC.

ACTION: Notice of intent to evaluate and notice of availability of final evaluation findings.

SUMMARY: The NOAA Office of Ocean and Coastal Resource Management (OCRM) announces its intent to evaluate the performance of the Alabama Coastal Management Program and the Weeks Bay National Estuarine Research Reserve, Alabama. The Coastal Zone Management Program evaluation will be conducted pursuant to section 312 of the Coastal Zone Management Act of 1972, as amended, (CZMA) and regulations at 15 CFR part 923, subpart L. The National Estuarine Research Reserve evaluation will be conducted pursuant to sections 312 and 315 of the CZMA and regulations at 15 CFR part 921, subpart E and part 923, subpart L.

The CZMA requires continuing review of the performance of states With respect to coastal program implementation. Evaluation of Coastal Zone Management Programs and National Estuarine Research Reserves requires findings concerning the extent to which a State has met the national objectives, adhered to its Coastal Management Program document or Reserve final management plan approved by the Secretary of Commerce, and adhered to the terms of financial assistance awards funded under the CZMA.

The evaluations will include a site visit, consideration of public comments, and consultations with interested Federal, State and local agencies and members of the public. Public meetings will be held as part of the site visits.

Notice is hereby given of the dates of the site visits for the listed evaluations, and the dates, local times, and locations of the public meetings during the site visits.

The Alabama Coastal Management Program evaluation site visit will be held December 8–12, 2003. One public meeting will be held during the week. The public meeting will be on Wednesday, December 10, 2003, from 6 p.m. to 7 p.m., in the Killian Room, International Trade Center, 250 North Water Street, Mobile, Alabama.

The Weeks Bay National Estuarine Research Reserve evaluation site visit will be held December 8–12, 2003. One public meeting will be held during the week. The public meeting will be on Thursday, December 11, 2003, from 5 p.m. to 6 p.m., at the Interpretive Center Auditorium, Weeks Bay National Estuarine Research Reserve, 11300 U.S. Highway 98, Fairhope, Alabama.

Copies of States' most recent performance reports, as well as OCRM's notifications and supplemental request letters to the States, are available upon request from OCRM. Written comments from interested parties regarding these Programs are encouraged and will be accepted until 15 days after the last public meeting. Please direct written comments to Ralph Cantral, Chief, National Policy and Evaluation Division, Office of Ocean and Coastal Resource Management, NOS/NOAA,

1305 East-West Highway, 10th Floor, Silver Spring, Maryland 20910. When the evaluations are completed, OCRM will place a notice in the **Federal Register** announcing the availability of the Final Evaluation Findings.

Notice is hereby given of the availability of the final evaluation findings for the Delaware, Hawaii, Louisiana, Michigan, Mississippi, and Pennsylvania Coastal Management Programs (CMPs); and the Ace Basin (South Carolina), Delaware (Delaware), and Jobos Bay (Puerto Rico) National Estuarine Research Reserves (NERRs). Sections 312 and 315 of the Coastal Zone Management Act of 1972 (CZMA), as amended, require a continuing review of the performance of coastal states with respect to approval of coastal management programs, and the operation and management of NERRs.

The states of Delaware, Hawaii, Louisiana, Michigan, Mississippi, and Pennsylvania were found to be implementing and enforcing their federally approved coastal management programs, addressing the national coastal management objectives identified in CZMA Section 303(2)(A)–(K), and adhering to the programmatic terms of their financial assistance awards. Delaware and Ace Basin NERRs were found to be adhering to programmatic requirements of the NERR System. Jobos Bay NERR was found to be not fully adhering to the programmatic requirements of the NERR System.

Copies of these final evaluation findings may be obtained upon written request from: Ralph Cantral, Chief, National Policy and Evaluation Division, Office of Ocean and Coastal Resource Management, NOS/NOAA, 1305 East-West Highway, 10th Floor, Silver Spring, Maryland 20910, or *Ralph.Cantral@noaa.gov*, (301) 713–3155, extension 118.

FOR FURTHER INFORMATION CONTACT: Ralph Cantral, Chief, National Policy and Evaluation Division, Office of Ocean and Coastal Resource Management, NOS/NOAA, 1305 East-West Highway, 10th Floor, Silver Spring, Maryland 20910, (301) 713–3155, extension 118.

(Federal Domestic Assistance Catalog 11.419 Coastal Zone Management Program Administration)

Dated: October 16, 2003.

Richard W. Spinrad,

Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 03–26777 Filed 10–22–03; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Expansion of the New Hampshire Coastal Management Program Boundary; Availability of an Environmental Assessment and Proposed Finding of No Significant Impact

AGENCY: National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

ACTION: Notice of availability of draft environmental assessment and request for comments.

SUMMARY: Notice is hereby given of the availability of the Draft Environmental Assessment (EA) and proposed Finding of No Significant Impact for the National Oceanic and Atmospheric Administration's (NOAA) approval of the State of New Hampshire request to expand its coastal management program boundary. The EA was prepared pursuant to the National Environmental Policy Act (NEPA) U.S.C. 4321 *et seq.* to assess the environmental impacts associated with the approval and implementation of an expanded coastal boundary for the New Hampshire Coastal Program (NHCP) submitted to NOAA by the State of New Hampshire. Pursuant to Section 306(g) of the Coastal Zone Management Act of 1972, as amended (CZMA) and NOAA's Office of Ocean and Coastal Resource Management (OCRM) regulations (15 CFR part 923, subpart H), OCRM is required to approve any amendment, modification, or other change to a State's federally-approved coastal management program. This includes changes in a State's coastal boundary. *See* 15 CFR part 923, subpart D.

For the purposes of this EA, the proposed action is approval of the proposed expanded NHCP coastal boundary to include the full geographic jurisdiction of the State's 17 coastal municipalities. The NHCP's boundary revision will expand the State's coastal management boundary from its current, narrower delineation by a two-tier geographical system related to distance from coastal waste body features, to encompassing the entire jurisdiction of all coastal municipalities. The practical effect will be to increase the State's ability to review State and federal activities in a larger area of the coast for their consistency with the State's federally-approved coastal policies, and to provide CZMA funds for additional activities in the expanded coastal area.

NOAA finds that the NHCP has met the requirements for submitting an amendment to OCRM and proposes to approve the program change. Based upon the EA, NOAA proposes to conclude that a Finding of No Significant Impact is appropriate, and therefore, an Environmental Impact Statement is unnecessary. The Council on Environmental Quality's regulations to implement NEPA requires agencies to provide public notice of the availability of environmental documents. 40 CFR section 1506.6. This notice is part of NOAA's action to comply with this requirement.

A copy of the Draft EA and proposed Finding of No Significant Impact may be found on the NOAA Web site at *http://www.ocrm.nos.noaa.gov.czm* or may be obtained upon request from: Helen Farr, Coastal Programs Division (N/ORM3), Office of Ocean and Coastal Resource Management, NOS, NOAA, 1305 East-West Highway, Silver Spring, Maryland, 20910, phone: (301) 713–3155, x150, e-mail: *helen.farr@noaa.gov.*

DATES: Individuals or organizations wishing to submit comments on the Draft EA or proposed Finding of No Significant Impact should do so by November 24, 2003.

ADDRESSES: Comments should be made to: John King, Acting Chief, Coastal Programs Division (N/ORM3), Office of Ocean and Coastal Resource Management, NOS, NOAA, 1305 East-West Highway, Silver Spring, Maryland, 20910, phone: (301) 713–3155, x188, e-mail: *john.king@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Helen Farr, Coastal Programs Division (N/ORM3), Office of Ocean and Coastal Resource Management, NOS, NOAA, 1305 East-West Highway, Silver Spring, Maryland, 20910, phone: (301) 713–3155, x150, e-mail: *helen.farr@noaa.gov.* (Federal Domestic Assistance Catalog 11.419 Coastal Zone Management Program Administration)

Richard W. Spinrad,

Assistant Administrator, Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration.

[FR Doc. 03–26783 Filed 10–22–03; 8:45 am]

BILLING CODE 3510–08–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 101703A]

Gulf of Mexico 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 Gulf of Mexico Fishery Management Council will convene public meetings.

DATES: The meetings will be held November 9 through 12, 2003.

ADDRESSES: These meetings will be held at the Palace Casino Resort, 158 Howard Avenue, Biloxi, MS; telephone: 800–725–2239.

Council address: Gulf of Mexico Fishery Management Council, 3018 U.S. Highway 301 North, Suite 1000, Tampa, FL 33619.

FOR FURTHER INFORMATION CONTACT: Wayne E. Swingle, Executive Director, Gulf of Mexico Fishery Management Council; telephone: 813–228–2815.

SUPPLEMENTARY INFORMATION:

Meeting Dates, Times, and Agendas

November 9, 2003

9–10 a.m.--(Partially Closed Session) Convene a joint meeting of the Personnel and Administrative Policy Committees to review past personnel issues.

10–11:30 a.m.--Convene the Administrative Policy Committee to review changes to the Administrative Handbook.

1–5:30 p.m.--Convene the Reef Fish Management Committee to review Secretarial Reef Fish Amendment 1 that contains alternatives for arresting overfishing of red grouper by the commercial and recreational fishermen. They will also review Draft Reef Fish Amendment 22 that contains alternatives for a red snapper rebuilding plan; and a Vermilion Snapper Regulatory Amendment that contains alternatives for arresting overfishing of that stock by commercial and recreational fishermen. Public hearings will be held on both of these amendments in December or January. The Committee will also review the yellowtail snapper assessment and will develop recommendations for consideration by full Council on Tuesday afternoon.

November 10, 2003

8:30–10 a.m.--Reconvene the Reef Fish Management Committee if necessary.

10–12 noon--Convene the Shrimp Management Committee to review Draft Shrimp Amendment 13/Environmental Assessment that includes alternatives for status criteria and benchmarks as well as a revised standardized bycatch reporting methodology: The Shrimp Committee will also review a Draft Options Paper for Shrimp Amendment 14/Supplemental and Environmental Impact Statement that includes alternatives to improve the bycatch reporting methodology, further reduce bycatch, and for a limited access program and vessel monitoring system.

1:30–2:30 p.m.--Convene the Migratory Species Management Committee to review information on bycatch of sharks in the menhaden fishery.

2:30–4 p.m.--Convene the Habitat Protection Committee to review and revise a Council policy for mariculture developed by the Gulf States Marine Fisheries Commission.

4–5:30 p.m.--Convene the Data Collection Committee to hear a report on the Fishery Information System program implemented by the states for collection of fishery statistics from recreational and commercial fishermen. The Committee will also discuss a study proposal to collect some of these statistics, data quality assurance and control measures, and separation of guide boats from charter and headboats in the statistical program.

November 11, 2003

8:30 a.m.--Convene Council.

8:45 a.m.--Appointment of Committee members.

9–9:45 a.m.--Receive a presentation on Coral Research on Middle Grounds.

9:45–12 noon--Receive public testimony on Secretarial Reef Fish Amendment 1.

1:30–3:30 p.m.--Receive the Reef Fish Management Committee report.

3:30–5 p.m.--Receive the Administrative Policy Committee report.

5–5:30 p.m.--(Closed Session) Receive the Personnel Committee report.

November 12, 2003

8:30–8:45 a.m.--Receive the Shrimp Management Committee report.

8:45–9 a.m.--Receive the Habitat Protection Committee report.

9–9:15 a.m.--Receive the Migratory Special Management Committee report.

9:15–9:30 a.m.--Receive the Data Collection Committee report.

9:30–9:45 a.m.--Receive a report of the Council Orientation Session.

9:45–10 a.m.--Receive the International Commission for the Conservation of Atlantic Tunas Advisory Committee report.

10–10:15 a.m.--Receive a report of the NMFS Highly Migratory Species Advisory Panel meeting.

10:15–10:30 a.m.--Receive a report of the Texas Shrimp Association Meeting.

10:30–11 a.m.--Receive Enforcement Reports.

11–11:15 a.m.--Receive the NMFS Regional Administrator's Report.

11:15–11:45 a.m.--Receive Director's Reports.

11:45–12 noon--Other Business

Although non-emergency issues not contained in the agenda may come before the Council for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal Council action during this meeting. Council 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 Act, provided the public has been notified of the Council's intent to take final action to address the emergency. A copy of the Committee schedule and agenda can be obtained by calling 813–228–2815.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Anne Alford at the Council (see **ADDRESSES**) by November 3, 2003.

Dated: October 17, 2003.

Richard W. Surdi,

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

[FR Doc. 03–26801 Filed 10–22–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 100703D]

Marine Mammals; Photography Permit Application No. 997–1704

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

ACTION: Issuance of permit.

SUMMARY: Notice is hereby given that Bob McLaughlin, P.O. Box 496, 339 Glenwood, Eastsound, Washington 98245, has been issued a permit to take several species of non-listed marine mammals for purposes of commercial/educational photography.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources,

NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376;

Northwest Region, NMFS, 7600 Sand Point Way NE, BIN C15700, Bldg. 1, Seattle, WA 98115–0700; phone (206)526–6150; fax (206)526–6426;

Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668; phone (907)586–7221; fax (907)586–7249; and,

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018.

FOR FURTHER INFORMATION CONTACT: Jennifer Jefferies or Ruth Johnson, (301)713–2289.

SUPPLEMENTARY INFORMATION: On June 26, 2003, notice was published in the **Federal Register** (68 FR 38011) that a request for a photography permit to take several species of non-listed marine mammals for purposes of commercial/educational photography had been submitted by the above-named individual. A correction to the first Notice was published on July 9, 2003 (68 FR 40911) in order to correct an erroneous statement as stated in the first Notice. The original Notice stated that NMFS was unable to issue photography permits for depleted marine mammal species but the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) does not prohibit these activities for depleted species. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216).

The purpose of the proposed project is to film several species of non-listed marine mammals for an ongoing project that is tentatively titled ''Death of an Ecosystem?''. While this project has been ongoing for several years, Mr. McLaughlin desires to film from a closer vantage point, i.e. within 100 yards of an individual animal. The closeness of filming would be considered Level B harrassment and therefore would require a permit under the MMPA. The photographers intend to attempt to document marine mammal movement and aggregation under varying conditions including the presence of boat traffic. This will be done using a fusion of passive acoustic recording equipment with different filming equipment, including still and video, as well as different filming platforms, including elevated filming platforms. The action area will include waters off the coasts of California, Oregon, Washington and Alaska. The resulting film footage will be dispensed in part for print and broadcast media, to researchers as well as for educational purposes. The Permit will expire on October 31, 2005.

Dated: October 17, 2003.

Stephen L. Leathery,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 03–26800 Filed 10–22–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

[Docket No. 031016259–3259–01]

Request for Comment on Improvements to the U.S. Preparation Process for World Radiocommunication Conferences

AGENCY: National Telecommunications and Information Administration.

ACTION: Notice, Request for Comments.

SUMMARY: The General Accounting Office (GAO) in *Telecommunications: Better Coordination and Enhanced Accountability Needed to Improve Spectrum Management* (GAO–02–096), recommends that the State Department, Federal Communications Commission (FCC) and the National Telecommunications and Information Administration (NTIA) ''jointly review the adequacy of the preparation process following the 2003 World Radiocommunication Conference (WRC) and develop recommendations for improvements.''[1] Since the conclusion of the 2003 WRC, NTIA has held meetings with the FCC and the State Department to discuss GAO's recommendations. NTIA initiated staff review and Federal agency review of its own internal WRC preparatory process, including the Radio Conference Subcommittee (RCS) of the Interdepartment Radio Advisory Committee (IRAC). Similarly, the FCC initiated a review of its internal processes used to prepare for the 2003 WRC and assessed whether the process could be improved.[2] NTIA is currently conducting an overall review of the entire conference preparatory process and how the current process can be improved or modified. By this notice and request for comments, NTIA is soliciting the views of the industry and the public on these issues.

DATES: Comments must be received no later than November 24, 2003.

ADDRESSES: The National Telecommunications and Information Administration invites the public to submit written comments in paper or electronic form. Comments may be mailed to Darlene A. Drazenovich, International Spectrum Plans and Policy Division, National Telecommunications and Information Administration, U.S. Department of Commerce, Room 4076, 1401 Constitution Avenue, NW., Washington, DC 20230 or e-mailed to *ddrazenovich@ntia.doc.gov*. Paper submissions should include an electronic version on diskette in ASCII, WordPerfect (please specify version) or Microsoft Word (please specify version) format.

FOR FURTHER INFORMATION CONTACT: Darlene A. Drazenovich, (202) 482–3480, *ddrazenovich@ntia.doc.gov*, or James Vorhies, (202) 482–3590, *jvorhies@ntia.doc.gov*, International Spectrum Plans and Policy Division, Office of Spectrum Management, NTIA.

SUPPLEMENTARY INFORMATION:

Background

The International Telecommunication Union (ITU) is an intergovernmental organization within the United Nations that specializes in the field of telecommunications. The ITU brings together international governments and private industries to coordinate the establishment and operation of global telecommunication networks and services. Every three to four years, the ITU convenes World Radiocommunication Conferences (WRCs)—an international forum for world agreement, to review and revise the International Radio Regulations. The Radio Regulations constitute an international treaty on radiocommunications covering the use of the radio-frequency spectrum by radiocommunication services. These conferences set the world stage for future technological development by allocating radio frequency spectrum to radio services, establishing spectrum use coordination methods, setting international rules for radio equipment operation, and identifying spectrum for specific uses such as Third Generation (3G) wireless systems.

The United States is a key player in this important global endeavor because it brings new and innovative technologies to the world community while balancing global security, national

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[1] *See* U.S. General Accounting Office, *Telecommunications—Better Coordination and Enhanced Accountability Needed to Improve Spectrum Management*, GAO–02–906 at pg. 35 (September 30, 2002).

[2] *See* Public Forum to Assess FCC's Preparatory Process for World Radiocommunication Conferences, *Public Notice*, DA–03–02858 (rel. September 10, 2003).

defense, and the public interest. NTIA, with the support of the Federal agencies, is partners with the State Department and the FCC in preparing for and participating in these conferences. Over the last several WRC cycles, the United States has made important strides in preparation for these critical intergovernmental meetings. NTIA believes that various aspects of the United States' preparation process to develop and promote U.S. objectives in upcoming conferences can be further improved upon.

The United States preparatory process for World Radiocommunication Conferences follows two related paths—technical and proposal/position preparation. The technical preparation are conducted in the International Telecommunications Union Radiocommunications Sector (ITU–R) Study Group process and includes Federal and Non-Federal Government participation. The U.S. International Telecommunication Advisory Committee (ITAC) is the mechanism by which the U.S. prepares technical studies for WRCs. The General Services Administration chartered this committee to the U.S. State Department as an advisory committee under the Federal Advisory Committee Act (FACA)[3]. The ITAC–R National Committee (NC) assists the U.S. Government in technical preparations for international meetings and negotiations. Under this advisory committee, the public is afforded the opportunity to participate actively in government decision-making activities. With respect to technical preparations for WRCs, the State Department uses the ITAC to develop technical study inputs to the ITU–R study groups and the CPM to form the technical, operational and regulatory basis for WRC decisions, but does not employ the ITAC to develop preliminary views or proposals directly related to WRCs.

The Federal and non-Federal WRC positions and proposal preparation processes are independent. The Federal preparation process includes NTIA, which represents the views of the administration. NTIA is the President's principal adviser on telecommunications and information policy and manages the Federal Government's use of radio spectrum.[4] The Radio Conference Subcommittee (RCS) of NTIA's Interdepartment Advisory Committee (IRAC) meets monthly to discuss and approve Federal agency views, positions and proposals, on WRC issues.

The Non-Federal Preparation is performed by the FCC. The FCC, an independent agency established by the Communications Act of 1934, manages the use of radio spectrum by state and local governments and the private sector. The FCC, as an independent agency, represents the views of its constituents and receives their input on WRC views, positions, and proposals.

Questions for Public Comment

To assist in the assessment, NTIA seeks public comment on any issue of fact, law, or policy that may inform the agency about improvements needed in the WRC preparatory process. Specific comments are requested on the questions below. These questions are designed to assist the public and should not be construed as a limitation on the issues on which public comments may be submitted. Please provide copies of any studies, research and other empirical data referenced in the comments.

1. Federal Government Preparation Process

A. How should NTIA as the President's advisor seek the views and inputs of the non-Federal entities?

B. How can NTIA better educate the commercial sector on the Federal agencies' radiocommunication requirements, and related policies and decisions that affect U.S. conference proposals?

2. WRC Advisory Committee (WAC) Preparation Process

A. The WAC is part of the FCC's WRC preparation process. How can the Federal agencies best participate in the WAC?

3. FCC/NTIA Proposal Coordination Process

A. Should the Federal and non-Federal advisory processes remain independent? Why or why not?

B. Federal views and proposals sent to the FCC represent NTIA's review and modification of RCS inputs and thus the Administration's output, while the FCC sends WAC views and proposals directly to NTIA for consideration without bureau review. Would it improve the process to take a similar approach on both sides (circulation of RCS and WAC inputs, or circulation of NTIA and FCC outputs)?

C. Please specify how communications/coordination between the FCC processes and the Executive Branch processes under the purview of NTIA can be improved? Include in your discussion such topics as involvement of senior agency management, early agreements on WRC positions, NTIA-FCC reconciliation process and timeframes.

D. What steps can be taken to resolve difficult issues? Should timelines be developed in order to identify these issues early in the process?

4. Study Group/National Committee Process Related to WRC Agenda Items

A. Should the U.S. National Committee set objectives and policy regarding WRC studies?

B. Is closer coordination among various study groups required? If so, why and how can this be accomplished?

C. The U.S. Study Group consists of government and non-government participants who prepare for ITU meetings. Should the U.S. Study Group process be guided to align with U.S. WRC goals and objectives? If so why, and by what means?

D. Should a Federal government/non-government position on agenda items and supporting information/studies to pursue U.S. positions be developed, approved and disseminated?

E. To ensure success of U.S. objectives for WRC agenda items, technical studies must begin early in the process. Is it necessary to energize an agenda item and its associated studies by a certain point in the preparation process if no activity has occurred? If so, how can this be accomplished (*e.g.*, what mechanisms and by what point in time)?

5. Forming the WRC Delegation

A. Is there a lack of continuity in leadership between WRC conferences? If so, how can this be better managed?

B. When in the preparation process should the core delegation group, vice-chairs, and principals be formed to begin work? How can these groups be better used to improve the effectiveness and efficiency of the United States' WRC agenda?

C. Agencies, companies, and organizations nominate representatives to be on the U.S. WRC delegation. Is the nominated delegation formed early enough in the process to develop and approve final positions in a timely manner? If not, how can this process be improved?

D. Is the accredited delegation formed early enough to develop and approve U.S. positions, strategy, and fallback positions? If not, how can this be improved?

E. At what point in the preparation process should delegation assignments be made and spokespersons identified?

[3] *See* 5 U.S.C. app.

[4] 47 U.S.C. § 902 (2000).

F. How could the appointment and role of the U.S. Ambassador be improved?

G. Is the United States' negotiating strength improved or hindered by the use of an appointed political representative working with career spectrum managers and ITU experts from other countries?

H. Assuming the continued appointment of a WRC ambassador, at what point does the Ambassador's appointment need to be effective?

I. During conference preparatory meetings, administrations meet to agree on the final report of studies, which is used as the technical basis at a WRC. Is it important to bring the Ambassador on board in some capacity prior to the conference preparatory meeting? If so, how can this be accomplished?

6. Budgeting WRC Activities

A. Funding for the WRC Ambassador has been an ongoing concern. To ensure the Ambassador and the delegation staff are able to complete their missions, is it necessary to provide the Ambassador with an operational budget? Is so, how can representational funds best be used to conduct outreach efforts?

B. What facilities are critical to the functioning of the delegation and the Ambassador at the conference site?

C. Recognizing that agencies and companies send representatives to the delegation to participate in debates, negotiations, and outreach efforts, how should support be provided to cover the Editorial Committee of each WRC?

7. Outreach and Consultations With Other Countries

A. Are consultations with other administrations needed? If so, at what point in the process should they begin?

B. Is it important to work with other countries outside of the ITU study groups and the conference preparatory meeting? If so, why and how can this be improved?

C. Should the Country Contact/Outreach program that is developed and utilized at a conference be maintained between conferences? If so, how can this be accomplished? Who should lead this effort? What role can the private sector play?

D. Should WRC outreach activities be integrated with other international activities of the State Department, NTIA and FCC? If so, how?

E. How effective were the Delegation Consultations prior to WRC–03? Were they started in a timely manner?

8. Training

A. Are trained and qualified Federal Government Spokespersons and issue coordinators available throughout the WRC preparatory process and especially at the Conference?

B. Are training programs needed for spokespersons and delegates? If so, what should they consist of?

C. Is preparatory training needed for general participation in ITU-R Study Groups in support of WRC activities? If so, what should it consist of?

D. What steps should be taken to maintain a cadre of experienced personnel in the Federal government in order for them to assume leadership and spokesperson roles at future WRCs?

9. WRC Domestic Implementation Process

A. In the past, the United States has been faced with challenges regarding the implementation of WRC decisions. What can be done to improve this process?

B. The GAO report noted that Federal agencies are concerned that WRC allocation decisions of primary interest to the Federal government go without action, how can the process be improved to ensure equal treatment of both government and private sector interests?

C. Should FCC/NTIA develop a plan and schedule to complete rulemaking for each WRC agenda item? If so, within what timeframe of WRC completion should the plan be executed?

General Areas

A. In broad terms, what goals should the United States have for WRCs? How should these goals be established?

B. How effective has the United States been in the WRC process?

C. What have been the benefits and costs of regional preparation for WRCs?

D. How often should WRCs occur and what, if any, limitations should the U.S. support regarding WRC agendas.

E. Over the years, there has been concern among WRC participants (government and non-government) regarding staffing issues. Do NTIA and the Federal agencies have sufficient staff with appropriate expertise to support spectrum management activities in the WRC preparation process?

Dated: October 20, 2003.

Kathy Smith,

Chief Counsel.

[FR Doc. 03–26789 Filed 10–22–03; 8:45 am]

BILLING CODE 3510–60–P

DEPARTMENT OF DEFENSE

Uniformed Services University of the Health Sciences

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Uniformed Services University of the Health Sciences, DoD.

TIME AND DATE: 8 a.m. to 4 p.m., November 4, 2003.

PLACE: Uniformed Services University of the Health Sciences, Board of Regents Conference Room (D3001), 4301 Jones Bridge Road, Bethesda, MD 20814–4799.

STATUS: Open—under ''Government in the Sunshine Act'' (5 U.S.C. 552b(e)(3)).

MATTERS TO BE CONSIDERED:

8 a.m. Meeting—Board of Regents

(1) Approval of Minutes—August 4, 2003
(2) Faculty Matters
(3) Departmental Reports
(4) Financial Report
(5) Report—President, USUHS
(6) Report—Dean, School of Medicine
(7) Report—Dean, Graduate School of Nursing
(8) Comments—Chairman, Board of Regents
(9) New Business

FOR FURTHER INFORMATION CONTACT: Mr. Charles Mannix, Executive Secretary, Board of Regents, (301) 295–3981.

Dated: October 10, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer Department of Defense.

[FR Doc. 03–26849 Filed 10–21–03; 10:34 am]

BILLING CODE 5001–08–M

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before November 24, 2003.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Lauren Wittenberg, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington,

DC 20503 or should be electronically mailed to the internet address *Lauren_Wittenberg@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: October 17, 2003.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

Office of Special Education and Rehabilitative Services

Type of Review: Revision.

Title: Application for Grants under Disability and Rehabilitation Research.

Frequency: One time.

Affected Public: Not-for-profit institutions; Individuals or household; Businesses or other for-profit; State, local, or tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden: Responses: 1,000. Burden Hours: 20,000.

Abstract: The National Institute on Disability and Rehabilitation Research (NIDRR) provides grants for research and related activities in rehabilitation of individuals with disabilities. The grant application package contains program profiles, standard forms, program regulations, sample rating forms, and transmitting instructions. Applications are primarily institutions of higher education, but may also include hospitals, State rehabilitation education agencies and voluntary and profit organizations.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1890–0001). Therefore, the 30-day public comment period notice will be the only public comment notice published for this information collection.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 2358. When you access the information collection, click on ''Download Attachments'' to view. 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 electronically mailed to the internet address *OCIO_RIMG@ed.gov* or faxed to 202–708–9346. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Sheila Carey at her e-mail address *Sheila.Carey@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. 03–26705 Filed 10–22–03; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[CFDA No.: 84.264A–1]

Rehabilitation Continuing Education Programs (RCEP)—Regional Rehabilitation Continuing Education Projects (RRCEP); Notice Inviting Applications for New Awards for Fiscal Year (FY) 2004

Purpose of Program: To support training centers that serve either a Federal region or another geographical area and provide for a broad, integrated sequence of training activities that focus on meeting recurrent and common training needs of employed rehabilitation personnel throughout a multi-State geographical area.

Eligible Applicants: States and public or nonprofit agencies and organizations, including Indian tribes and institutions of higher education. Applications under this notice are invited for the provision of training for Department of Education Regions I and IV only.

Applications Available: October 31, 2003.

Deadline for Transmittal of Applications: January 8, 2004.

Deadline for Intergovernmental Review: March 8, 2004.

Estimated Available Funds: $1,688,610.

Estimated Range of Awards: $325,000–$550,935.

Estimated Average Size of Awards: $375,000.

Maximum Awards by Rehabilitation Services Administration (RSA) Region: We will reject any application that proposes a budget exceeding the following stated maximum award amount for a single budget period of 12 months.

Maximum Level of Awards by RSA Region:

Region I—$405,965.
Region IV—$550,935.

Estimated Number of Awards: 3. We expect to make one award in Region I and two awards in Region IV.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit Part III to the equivalent of no more than 45 pages, using the following standards:

(1) A page is 8.5″ by 11″, on one side only, with 1″ margins at the top, bottom, and both sides.

(2) Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.

(3) Use a font that is either 12-point or larger or no smaller than 10 pitch (characters per inch).

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, you must include all of the application narrative in Part III.

We will reject your application if—

- You apply these standards and exceed the page limit; or
- You apply other standards and exceed the equivalent of the page limit.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 85, and 86. (b) The regulations for this program in 34 CFR parts 385 and 389.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

Selection Criteria: In evaluating an application for a new grant under this competition, we use the selection criteria in 34 CFR 385.31 and 389.30. The selection criteria to be used for this competition will be provided in the application package for this competition.

Performance Measures: The Government Performance and Results Act (GPRA) of 1993 directs Federal departments and agencies to improve the effectiveness of their programs by engaging in strategic planning, setting outcome-related goals for programs, and measuring program results against those goals. Program officials must develop performance measures for all their grant programs to assess their performance and effectiveness. The Rehabilitation Services Administration (RSA) has established objectives with specific performance indicators to assess the effectiveness of the Rehabilitation Training program. The objective for the RCEP—RRCEP is to maintain and upgrade the knowledge and skills of personnel currently employed in the public VR system. In order to measure this objective, grantees under the RCEP—RRCEP will include in their annual performance report to RSA their summary analysis of the evaluations submitted by training project participants. After RCEP—RRCEP training, participants evaluate each training session and indicate the applicability of the training to their current work.

Application Procedures:

Note: Some of the procedures in these instructions for transmitting applications differ from those in the Education Department General Administrative Regulations (EDGAR) (34 CFR 75.102). Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed regulations. However, these amendments make procedural changes only and do not establish new substantive policy. Therefore, under 5 U.S.C. 553(b)(A), the Secretary has determined that proposed rulemaking is not required.

Governmentwide Grants.gov Project for Electronic Submission of Applications

We have been accepting applications electronically through the Department's e-Application system since FY 2000. In order to expand on those efforts and comply with the President's Management Agenda, we are participating as a partner in the new governmentwide Grants.gov Apply site in FY 2004. The Rehabilitation Continuing Education Programs (RCEP)—Regional Rehabilitation Continuing Education Projects (RRCEP), CFDA number 84.264A–1, is one of the programs included in this project. If you are an applicant under RCEP—RRCEP, you may submit your application to us in either electronic or paper format.

The project involves the use of the Grants.gov Apply site (Grants.gov). If you use Grants.gov, you will be able to download a copy of the application package, complete it offline, and then upload and submit the application via the Grants.gov site. You may not e-mail an electronic copy of a grant application to us. We request your participation in Grants.gov.

If you participate in Grants.gov, please note the following:

- Your participation is voluntary.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation. We strongly recommend that you do not wait until the application deadline date to begin the application process through Grants.gov.
- To use Grants.gov, you, as the applicant, must have a D-U-N-S Number and register in the Central Contractor Registry (CCR). You should allow a minimum of five days to complete the CCR registration.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You may submit all documents electronically, including all information typically included on the Application for Federal Education Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- Your application must comply with any page limit requirements described in this notice.
- After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Department will retrieve your application from Grants.gov and send you a second confirmation, which will include a PR/Award number (an ED-specified identifying number) unique to your application.
- We may request that you give us original signatures on forms at a later date.
- If you experience technical difficulties on the application deadline date and are unable to meet the 4:30 p.m. (Washington, DC time) deadline, print out your application and follow the instructions included in the application package for the transmittal of paper applications.

You may access the electronic grant application for RCEP—RRCEP at: *http://www.grants.gov.*

Note: Please note that you must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search.

For Applications Contact: Education Publications Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), you may call (toll free): 1–877–576–7734.

You may also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs.html.*

Or you may contact ED Pubs at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.264A–1.

Individuals with disabilities may obtain a copy of the application package in an alternative format by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 3317, Switzer Building, Washington, DC 20202–2550. Telephone: (202) 205–8207. If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339. However, the Department is not able to reproduce in an alternative format the standard forms included in the application package.

FOR FURTHER INFORMATION CONTACT: Christine Marschall, U.S. Department of Education, 400 Maryland Avenue, SW., room 3325, Switzer Building, Washington, DC 20202–2649. Telephone: (202) 205–8926 or via Internet: *Christine.Marschall@ed.gov.*

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

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

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/news/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.gpoaccess.gov/nara/index.html.*

Program Authority: 29 U.S.C. 772.

Dated: October 17, 2003.

Robert H. Pasternack,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 03–26700 Filed 10–22–03; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Meeting

AGENCY: National Assessment Governing Board; Education.

ACTION: Notice of open meeting and partially closed meetings.

SUMMARY: The notice sets forth the schedule and proposed agenda of a forthcoming meeting of the National Assessment Governing Board. This notice also describes the functions of the Board. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify members of the general public of their opportunity to attend. Individuals who will need special accommodations in order to attend the meeting (*i.e.;* interpreting services, assistive listening devices, materials in alternative format) should notify Munira Mwalimu at 202–357–6938 or at *Munira.Mwalimu@ed.gov* no later than November 3, 2003. We will attempt to meet requests after this date, but cannot guarantee availability of the requested accommodation. The meeting site is accessible to individuals with disabilities.

DATES: November 13–November 15, 2003.

Times:

November 13

Committee Meetings

Assessment Development Committee: Closed Session—12:30 p.m. to 3 p.m.;

Executive Committee: Open Session—4 p.m. to 5 p.m.; Closed Session 5 p.m. to 6 p.m.

November 14

Full Board: Open Session—8:30 a.m. to 10 a.m.

Committee Meetings

Assessment Development Committee: Open Session—10 a.m. to 12 p.m.;

Committee on Standards, Design and Methodology: Open Session—10 a.m. to 12 p.m.;

Reporting and Dissemination Committee: Open Session—10 a.m. to 12 p.m.;

Full Board: Closed Session—12 p.m. to 1:30 p.m.; Open Session—1:30 p.m. to 4:30 p.m.

November 15

Nominations Committee: Open Session—7:45 a.m. to 8:45 a.m.

Full Board: Open Session—9 a.m. to 12 p.m.

Location: Westin Embassy Row, 2100 Massachusetts Avenue NW., Washington, DC 20008.

FOR FURTHER INFORMATION CONTACT: Munira Mwalimu, Operations Officer, National Assessment Governing Board, 800 North Capitol Street, NW., Suite 825, Washington, DC 20002–4233, Telephone: (202) 357–6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board is established under section 412 of the National Education Statistics Act of 1994, as amended.

The Board is established to formulate policy guidelines for the National Assessment of Educational Progress (NAEP). The Board's responsibilities include selecting subject areas to be assessed, developing assessment objectives, developing appropriate student achievement levels for each grade and subject tested, developing guidelines for reporting and disseminating results, and developing standards and procedures for interstate and national comparisons.

On November 13, the Assessment Development Committee will meet in closed session from 12:30 p.m. to 3 p.m. to review secure test items for the National Assessment of Educational Progress (NAEP) 2005 Math Pilot Test. The meeting must be conducted in closed session as disclosure of proposed test items from the 2005 NAEP Math Pilot Test would significantly impede implementation of the NAEP program, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 U.S.C.

The Executive Committee will meet in open session on November 13 from 4 p.m. to 5 p.m. The committee will then meet in closed session from 5 p.m. to 6 p.m. to discuss independent government cost estimates for contracts related to the National Assessment of Educational Progress (NAEP). This meeting must be conducted in closed session because public disclosure of this information would likely have an adverse financial effect on the NAEP program. The discussion of this information would be likely to significantly impede implementation of a proposed agency action if conducted in open session. Such matters are protected by exemption 9(B) of section 552b(c) of Title 5 U.S.C.

On November 14, the full Board will meet in open session from 8:30 a.m. to 10 a.m. The Board will approve the agenda, introduce new Board members, hear the Executive Director's report, and receive an update on the work of the National Center for Education Statistics (NCES) from the Associate Commissioner of NCES, Val Plisko.

From 10 a.m. to 12 p.m. on November 14, the Board's standing committees—the assessment Development Committee; the Committee on Standards, Design, and Methodology; and the Reporting and Dissemination Committee—will meet in open session.

The full Board will meet in closed session on November 14, 2003 from 12 p.m. to 1:30 p.m. to receive to receive independent cost estimates for contracts related to the National Assessment of Educational Progress (NAEP). This part of the meeting must be conducted in closed session because public disclosure of this information would likely have an adverse financial effect on the NAEP program. The discussion of this information would be likely to significantly impede implementation of a proposed agency action if conducted in open session. Such matters are protected by exemption 9(B) of section 552b(c) of Title 5 U.S.C.

The full Board will meet in open session on November 14 to receive an update on the 2009 NAEP Reading Framework Project at 1:30 p.m. followed by an update on the NAEP 12th Grade Commission by former vice Board Chair Michael Nettles from 2:45 p.m. to 3:30 p.m. This presentation will be followed by a briefing on the Grade 12 Mathematics achievement Levels contract from 3:30 p.m. to 4 p.m. Board members will receive Ethics Training from staff of the Office of General Counsel from 4 p.m. to 4:30 p.m., after

which the November 14 session of the Board meeting will adjourn.

On November 15, the Nominations Committee will meet in open session from 7:45 a.m. to 8:45 a.m. Thereafter, the full Board will meet in open session from 9 a.m. to 12 p.m. The Board will discuss NAEP reports from 9 a.m. to 10 a.m. Board actions on policies and Committee reports are scheduled to take place between 10 a.m. and 12 p.m., when the November 15, 2003 session of the Board meeting will adjourn.

A final agenda of the November 13–15, 2003 Board meeting can be accessed after November 3, 2003 at *http://www.nagb.org*. Detailed minutes of the meeting, including summaries of the activities of the closed sessions and related matters that are informative to the public and consistent with the policy of section 5 U.S.C. 552b(c) will be available to the public within 14 days of the meeting. Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, Suite #825, 800 North Capitol Street, NW, Washington, DC, from 9 a.m. to 5 p.m. Eastern Standard Time.

Dated: October 20, 2003.

Charles E. Smith,

Executive Director, National Assessment Governing Board.

[FR Doc. 03–26718 Filed 10–22–03; 8:45 am]

BILLING CODE 400–01–M

DEPARTMENT OF ENERGY

Office of Science; DOE/NSF Nuclear Science Advisory Committee

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the DOE/NSF Nuclear Science Advisory Committee (NSAC). Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Friday, November 7, 2003; 8:30 a.m. to 5 p.m.; and Saturday, November 8, 2003; 8:30 a.m. to 5 p.m.

ADDRESSES: Doubletree Hotel, 1750 Rockville Pike, Rockville, Maryland 20852–1699.

FOR FURTHER INFORMATION CONTACT: Brenda L. May, U.S. Department of Energy; SC–90/Germantown Building, 1000 Independence Avenue, SW., Washington, DC 20585–1290; Telephone: 301–903–0536.

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: To provide advice and guidance on a continuing basis to the Department of Energy and the National Science Foundation on scientific priorities within the field of basic nuclear science research.

Tentative Agenda: Agenda will include discussions of the following:

Friday, November 7, 2003, and Saturday, November 8, 2003

- Reports from Department of Energy and National Science Foundation
- Perspectives from Department of Energy and National Science Foundation
- Presentation from Office of Management and Budget
- Perspective from the Office of Science and Technology Policy
- Presentation and Discussion on the Report from the Sub-Committee on Milestones
- Discussion of NSAC Response and Transmittal Letter on Milestones Charge
- Presentation and Discussion on the Report from the Sub-Committee on Nuclear Theory
- Discussion of NSAC Response and Transmittal Letter on Nuclear Theory
- Discussion on the Committee of Visitors
- Public Comment (10-minute rule)

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of these items on the agenda, you should contact Brenda L. May, 301–903–0536 or *Brenda.May@science.doe.gov* (e-mail). You must make your request for an oral statement at least 5 business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of the meeting will be available for public review and copying within 30 days at the Freedom of Information Public Reading Room; Room 1E–190; Forrestal Building; 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC, on October 20, 2003.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 03–26763 Filed 10–22–03; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Northern New Mexico

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Wednesday, November 19, 2003; 6 p.m.–8:30 p.m.

ADDRESSES: Courtyard by Marriott, 3347 Cerrillos Road, Santa Fe, NM.

FOR FURTHER INFORMATION CONTACT: Menice Manzanares, Northern New Mexico Citizens' Advisory Board, 1660 Old Pecos Trail, Suite B, Santa Fe, NM 87505. Phone (505) 995–0393; fax (505) 989–1752 or e-mail: *mmanzanares@doeal.gov*.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE and its regulators in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

6 p.m. Call to Order by Ted Taylor, DDFO; Roll Call and Establishment of a Quorum; Welcome and Introductions by Jim Brannon, Board Chair; Approval of Agenda; Approval of September 17 Meeting Minutes
6:30 p.m. Public Comment
6:45 p.m. Consideration and Action on Recommendation 2003–5 (Tentative-Environmental Monitoring and Surveillance (EMS) Committee)
7 p.m. Presentation on ''Risk Based End State'' Document for Los Alamos National Laboratory, David Gregory (Los Alamos Site Office) (Tentative)
8 p.m. Break
8:10 p.m. Public Comment
8:15 p.m. Board Comment and Recap of Meeting
8:30 p.m. Adjourn

This agenda is subject to change at least one day in advance of the meeting.

Public Participation: The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Menice Manzanares at the address or telephone number listed above. Requests must be received five

days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comment will be provided a maximum of five minutes to present their comments at the beginning of the meeting.

Minutes: Minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585 between 9 a.m. and 4 p.m., Monday–Friday, except Federal holidays. Minutes will also be available at the Public Reading Room located at the Board's office at 1660 Old Pecos Trail, Suite B, Santa Fe, NM. Hours of operation for the Public Reading Room are 9 a.m.–4 p.m. on Monday through Friday. Minutes will also be made available by writing or calling Menice Manzanares at the Board's office address or telephone number listed above. Minutes and other Board documents are on the Internet at: *http://www.nnmcab.org*.

Issued at Washington, DC, on October 20, 2003.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 03–26761 Filed 10–22–03; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Nevada

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Nevada Test Site. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Wednesday, November 12, 2003; 6 p.m.–9 p.m.

ADDRESSES: Grant Sawyer State Office Building, 555 East Washington Avenue, Room 4412, Las Vegas, Nevada.

FOR FURTHER INFORMATION CONTACT: Kay Planamento, Navarro Research and Engineering, Inc., 2721 Losee Road, North Las Vegas, Nevada 89130, phone: 702–657–9088, fax: 702–295–5300, e-mail *kozeliskik@nv.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE and its regulators in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda:

1. The U.S. Department of Energy Nevada Site Office Environmental Management Program will update the community with a progress report on the Industrial Sites Program.

2. The CAB will discuss its recently developed FY 2004 work plan.

Copies of the final agenda will be available at the meeting.

Public Participation: The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Kelly Kozeliski, at the telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comment will be provided a maximum of five minutes to present their comments.

Minutes: The minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585 between 9 a.m. and 4 p.m., Monday-Friday, except Federal holidays. Minutes will also be available by writing to Kay Planamento at the address listed above.

Issued at Washington, DC, on October 20, 2003.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 03–26762 Filed 10–22–03; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7577–6]

Nonpoint Source Program and Grants Guidelines for States and Territories

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: EPA has developed guidelines for States' implementation of nonpoint source management programs under Section 319 of the Clean Water Act and for the award of Section 319 grants to States to implement those programs. These guidelines apply to grants appropriated by Congress in Fiscal Year 2004 and in subsequent years. The guidelines continue EPA's policy of focusing a significant portion of Section 319 funds ($100 million annually) to address watersheds where nonpoint source pollution has resulted in impairment of water quality. The remaining funds are to be used by States to assist in their implementation of their broad array of programs and authorities to address all of the water quality threats and impairments caused by nonpoint source pollution.

DATES: The guidelines are effective October 23, 2003.

ADDRESSES: Persons requesting additional information should contact Romell Nandi at (202) 566–1203; *nandi.romell@epa.gov;* or U.S. Environmental Protection Agency (4503T), 1200 Pennsylvania Avenue, NW, Washington, DC 20460. The complete text of today's guidelines is also available at EPA's Nonpoint Source Web site: *http://www.epa.gov/owow/nps/cwact.html*.

Dated: October 7, 2003.

Diane Regas,

Director, Office of Wetlands, Oceans, and Watersheds.

Preface

These guidelines are built upon and replace the *Nonpoint Source Program and Grants Guidance for Fiscal Year 1997 and Future Years* (May 1996), as well as all of the supplemental annual nonpoint source guidances and guidelines that have been published subsequently. The May 1996 guidance was developed collaboratively in a series of highly productive meetings between key representatives of the U.S. Environmental Protection Agency (EPA) and senior representatives of State nonpoint source agencies from each of the ten EPA Regions. The guidance was endorsed by the President of the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) as well as by the State Co-Chair of the State/EPA Nonpoint Source Program Workgroup in a Forward which stated, ''This guidance represents a sound framework for setting the future course of the nonpoint source program.''

Nonpoint source pollution continues to be, and is increasingly recognized by the public as, the largest remaining source of water quality impairments in the nation. State and Territory (hereinafter collectively referred to as ''State'') nonpoint source programs, originally developed and approved under Section 319 of the Clean Water

Act in 1989–90, have developed and matured to meet this challenge. During the past five years, each State has upgraded its nonpoint source management program to address nine key elements that had been agreed to by the States and EPA in the May 1996 guidance.

In the intervening years since 1996, States have enhanced their technical tools and capabilities, strengthened and increased their partnerships, nurtured a vast network of community-based action on a watershed basis, and, in many cases, developed stronger financial bases and legal support for their upgraded programs. As a result, the nation is experiencing increasingly positive results in terms of both on-the-ground action and actual water quality improvements. Examples of these improvements are summarized in *Section 319 Success Stories, Volume III: The Successful Implementation of the Clean Water Act's Section 319 Nonpoint Source Pollution Program* (EPA 841–S–01–001, February 2002), available on the Internet at *http://www.epa.gov/owow/nps/Section319III*. Most of these successes are the direct result of State nonpoint source agencies' cooperation with other governmental agencies, private sector interests, and citizen groups at the State and watershed level.

Congress has also recognized the need for greater and more effective action to expedite our national efforts to control nonpoint source pollution and to focus our attention on sources of nonpoint pollution that contribute to impairment of waters. During the past four years of Congressional appropriations, Congress has increased its appropriations from $105 million in FY 1998 to $238.4 million in FY 2003 to help States focus more resources upon the restoration of impaired waters as well as to generally implement more robust programs.

Despite all of these program improvements, EPA, States, and all of our partners have continued to face daunting challenges in our efforts to implement nonpoint source programs that will protect both our good-quality and threatened waters and restore those that are impaired. To improve States' and EPA's ability to meet these remaining challenges, as well as to implement new directives or recommendations from Congress, EPA has in the past few years issued supplements to the May 1996 guidance. These have been particularly designed to focus increased attention on waters that are most in need of attention, especially those waters that remain impaired even after all required technology-based controls for point sources have been implemented (*i.e.*, those waters that have been listed by States under Section 303(d) of the Clean Water Act as needing total maximum daily loads (TMDLs)). They have also addressed the recognized need to improve EPA's and States' ability to account for our accomplishments as well as shortcomings in implementing the national nonpoint source program.

EPA recognizes that these periodic issuances of supplemental guidance have made it more difficult to follow and comprehend the current national nonpoint source program, its central themes, and its priorities. For this reason, EPA is today publishing new guidelines that build upon and replace the *Nonpoint Source Program and Grants Guidance for Fiscal Year 1997 and Future Years* (May 1996) as well as all of the supplemental annual guidance and grants guidelines that have been published subsequently.

These new guidelines do not significantly modify the previous set of guidance documents. For the most part, they consolidate the pertinent portions of earlier guidance documents in a cohesive manner; eliminate or shorten discussion of program aspects that have reduced relevance to future activities (such as the upgrading of States' nonpoint source management programs, which all of the States have successfully completed), and clarify certain issues that States and Regions have raised from time to time with regard to the program's implementation during the past several years.

The concepts presented in these guidelines, such as the emphases on watershed-based planning and on restoring impaired waters through developing and implementing TMDLs, represent the current state of the art in fashioning watershed-based solutions to prevent and remedy water quality problems. These guidelines have benefitted significantly from a multi-year, evolving process working with States (*e.g.*, through the ''State/EPA Nonpoint Source Partnership'' initiated in 2000). EPA looks forward to continuing to work with the States and our other partners to implement an effective and successful nonpoint source program that makes rapid progress towards our goals of eliminating our remaining water quality problems and preventing new threats from creating future impairments.

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I. Our Vision

Our long-term vision, established by EPA and the States in 1996, remains: All States and territories implement dynamic and effective nonpoint source programs designed to achieve and maintain beneficial uses of water.

II. Introduction

A. Statutory Background

Congress enacted Section 319 of the Clean Water Act in 1987, establishing a national program to control nonpoint sources of water pollution. Nonpoint source pollution is caused by rainfall or snowmelt moving over and through the ground and carrying natural and human-made pollutants into lakes, rivers, streams, wetlands, estuaries, other coastal waters, and ground water. Atmospheric deposition and hydrologic modification are also sources of nonpoint pollution.

Under Section 319(a), all States and Territories (hereinafter collectively referred to as ''States'') have addressed nonpoint source pollution by developing nonpoint source assessment reports that identify nonpoint source pollution problems and the nonpoint sources responsible for the water quality problems. Under Section 319(b), all States have also adopted management programs to control nonpoint source pollution. Since 1990, Congress has annually appropriated grant funds to States under Section 319(h) to help them to implement those management programs.

B. Scope of These Guidelines

These guidelines are primarily directed towards nonpoint source management programs and grants administered by State lead nonpoint source agencies designated under Section 319 of the Clean Water Act. Indian Tribes that have approved nonpoint source assessments and management programs and also have ''treatment-as-a-State'' status may also administer nonpoint source management programs and grants under Section 319 of the Clean Water Act. Apart from providing a brief overview in Section VI below, these guidelines are not specifically directed to Tribal nonpoint source management. Because of differing statutory provisions that apply to Tribes, EPA publishes separate guidance for Tribal nonpoint source programs and grants.

For grants awarded in FY 2004 and subsequent years, these guidelines supersede and replace all of the following guidance documents: Nonpoint Source Program and Grants Guidance for Fiscal Year 1997 and Future Years (May 1996); Process and Criteria for Funding State and Territorial Nonpoint Source Management Programs in FY 1999 (August 18, 1998); Funding the Development and Implementation of Watershed Restoration Action Strategies under Section 319 of the Clean Water Act (December 4, 1998); Supplemental Guidance for the Award of Section 319 Nonpoint Source Grants in FY 2000 (December 21, 1999); Supplemental Guidelines for the Award of Section 319 Nonpoint Source Grants in FY 2001 (November 28, 2000; 65 FR 70899); Supplemental Guidelines for the Award of Section 319 Nonpoint Source Grants to States and Territories in FY 2002 and Subsequent Years (September 13, 2001; 66 FR 47653); and Supplemental Guidelines for the Award of Section 319 Nonpoint Source Grants to States and Territories in FY 2003 (August 26, 2002; 67 FR 54806). (While these superceded guidance documents will no longer directly apply to State programs, they contain useful background information and will remain available for reference at EPA's nonpoint source Web site at *http://www.epa.gov/owow/nps/cwact.html*.)

These guidelines are intended to serve as the basis for a nationally consistent approach for State nonpoint source management programs and grants. Therefore, EPA Regions will not issue separate, supplemental guidelines specifically for State nonpoint source programs or grants. If particular Regional circumstances require additional clarifications on a particular issue, the Region will consult with the affected States and with EPA Headquarters on the appropriate next steps.

C. Watershed Protection and Total Maximum Daily Loads (TMDLs)

EPA has been working with the States to realign our programs to strengthen our support for watershed-based environmental protection, whereby local stakeholders join forces to develop and implement watershed-based plans that make good sense for the particular conditions found within their communities. The watershed approach is a coordinating framework for management that focuses public and private sector efforts to address the highest priority water-related problems within geographic areas, considering both surface and ground water flow. The watershed approach is commonly characterized by four principles: (a) Diverse, well integrated partnerships; (b) a specific geographic focus; (c) action driven by environmental objectives and by strong science and data; and (d) coordinated priority setting and integrated solutions.

These guidelines are intended to help advance the watershed approach as a means for resolving and preventing nonpoint source pollution problems and threats. In the initial stages of the national nonpoint source program, some States and EPA Regions focused their nonpoint source programs narrowly on demonstrations of particular technologies, supported by Federal Section 319 grants. In upgrading their nonpoint source programs during the last few years, many States have incorporated watershed-based approaches as a significant and sometimes central organizing theme of their programs. As a result, State nonpoint source programs have improved their capacity to solve nonpoint source pollution problems at the watershed scale. At the same time, EPA and the States have sharpened our focus upon waterbodies listed by States as impaired under Section 303(d) of the Clean Water Act. This is particularly critical, as nonpoint source pollution is reported by States and others to be responsible for the majority of remaining water pollution in the United States. The two key steps needed to solve nonpoint source problems within a watershed context are the development of a watershed-based plan that addresses a waterbody's water quality needs (including the incorporation of any TMDLs that have been developed) and the actual implementation of the plan.

These guidelines discuss the use of detailed watershed-based plans to help solve water quality problems at the watershed level. As discussed in more detail in Section III.D below, careful analysis of the sources of water quality problems, their relative contributions to the problems, and alternatives to solve those problems, provide the best basis for sound decision-making and implementation that will actually solve those water quality problems. For this reason, these guidelines emphasize using watershed-based planning and implementation processes to solve water quality problems using Section 319 funds.

III. Nonpoint Source Management Programs

A. Progress to Date

Nonpoint source pollution continues to be, and is increasingly recognized as, the largest remaining threat to water quality and source of water quality impairments in the nation. State nonpoint source programs, originally developed and approved under Section 319 of the Clean Water Act in 1989–90, have developed and matured to meet this challenge. Pursuant to the May 1996 guidance, each State and Territory has upgraded its nonpoint source management program to address nine key elements that had been agreed to by the States and EPA in the May 1996 guidance. These nine elements include explicit short- and long-term goals, objectives, and strategies to protect and restore water quality; strengthened working partnerships with appropriate State, interstate, Tribal, regional and local entities, private sector groups, citizens groups, and Federal agencies; balanced approaches that emphasize both State-wide programs and on-the-ground management of individual watersheds where waters are impaired or threatened; focus on both abating existing problems and preventing new ones; and using a periodic feedback loop to evaluate progress and make appropriate program revisions.

Since 1996, States have enhanced their technical tools and capabilities, strengthened and expanded their partnerships, nurtured a vast network of community-based action on a watershed basis, and, in many cases, developed stronger financial bases and legal support for their programs. As a result, the nation is experiencing increasingly positive results in terms of both on-the-ground action and actual water quality improvements. Examples of these improvements are summarized in *Section 319 Success Stories, Volume III: The Successful Implementation of the Clean Water Act's Section 319 Nonpoint Source Pollution Program* (EPA 841–S–01–001, February 2002). Most of these successes are the direct result of State nonpoint source agencies' cooperation with other governmental agencies, private sector interests, and citizen groups at the State and watershed level.

In addition, to further strengthen our collective efforts to implement successful nonpoint source control programs, the States and EPA have been implementing since FY 2000 a new State/EPA Nonpoint Source Partnership. The purpose of this new cooperative process has been to identify, prioritize, and address the States' needs for technical, programmatic, and financial assistance to overcome any remaining obstacles to successfully implementing States' nonpoint source programs. The partnership consists of a State/EPA Steering Committee and workgroups to help identify and solve States' highest-priority nonpoint source needs, including: watershed planning and implementation; nonpoint source capacity building and funding; grants management; information transfer and outreach; monitoring; documenting nonpoint source results; rural nonpoint sources; and urban nonpoint sources.

B. Continued Focus on Restoring Waters Impaired by Nonpoint Source Pollution

While we and our partners are achieving considerable success nationwide, significant challenges remain. Since publication of the May 1996 guidance, EPA's and States' nonpoint source programs have continued to evolve to meet these challenges. Beginning in FY 1999, EPA and the States have increased our focus on solving water quality problems in those waterbodies that are most in need of attention, including those waters that remain impaired even after all point source technological controls have been implemented (*i.e.*, those that have been listed by States under Section 303(d) of the Clean Water Act as needing TMDLs).

In FY 1999 and again in FY 2000, EPA asked Congress to double Section 319 funding from $100 million to $200 million. The purpose of the incremental $100 million was to develop and implement watershed restoration action strategies (WRASs) in high-priority ''Category I'' watersheds (sized at the 8-digit ''hydrologic unit code'' level). In FY 2001, EPA recognized the need to increasingly focus Section 319 grant dollars on implementing nonpoint source TMDLs or the nonpoint source components of mixed-source TMDLs (hereafter, both of these types of TMDLs will be referred to as ''NPS TMDLs''). Based on this need, EPA directed that incremental funds be used to develop and implement approved NPS TMDLs for any 303(d)-listed waterbodies (whether or not these were located within a Category I watershed), as well as to develop and implement WRASs. In FY 2002 and 2003, EPA shifted the focus of the incremental funds entirely to developing NPS TMDLs, developing watershed-based plans to implement the TMDLs, and implementing the plans. The FY 2003 guidelines provided that where a NPS TMDL for the affected waters has already been developed and approved or is being developed, the watershed-based plan must be designed to achieve the load reductions called for in the NPS TMDL. The FY 2003 guidelines further recognized that where a NPS TMDL has not yet been developed and approved or is not yet being developed for the waters, the State may use these funds to develop a watershed-based plan in the absence of the TMDL. In such cases, the FY 2003 guidelines required that the plan be designed to reduce nonpoint source pollutant loadings that are contributing to non-attainment of water quality standards. Once the TMDL is completed and approved, the plan was required to be modified as appropriate to be consistent with the TMDL.

The guidelines published today for FY 2004 and future years maintain the approach of focusing $100 million of annual Section 319 funds on the development and implementation of watershed-based plans to achieve NPS TMDLs. NPS TMDLs, together with watershed-based plans designed to implement the NPS TMDLs, provide the necessary analytic link between actions on the ground and the water quality results to be achieved. In the absence of such an analytic framework, it is difficult to develop and implement a watershed project that will achieve water quality standards, or to determine causes of failure when that occurs. Therefore, EPA believes that continuing to focus on an analytic and implementation framework that integrates NPS TMDLs, watershed-based plans to implement these NPS TMDLs, and actual implementation of those plans, will provide the most effective means to accelerate achievement of water quality standards.

For these reasons, EPA will continue to implement the general approach that we have developed during the past few years and finalized in FY 2003, using the steps outlined below. These steps are designed to promote the development and implementation of NPS TMDLs based upon the TMDL regulations that have been published at 40 CFR 130.7 in 1985 and 1992, as well as guidance published by EPA to assist in the implementation of those regulations. (Currently applicable guidance as well as other technical and other resources concerning the TMDL program is available at *http://www.epa.gov/owow/tmdl*.)

General Principles for Awarding Section 319 Grants

Each year, EPA will award Section 319 grants in accordance with the following four principles:

1. States may use the ''base funds'' (*i.e.*, all Section 319 funds other than the ''incremental funds'' described below) for the full range of activities addressed in their approved nonpoint source

management programs. Thus these funds may be used both for protection of unimpaired waters and for restoration of impaired waters. For example, States may use these funds to protect sources of drinking water, critical high-quality waters, and threatened waters from current and future threats.

In general, States have great flexibility as to how to use these base funds. They may use the watershed-based approaches discussed in greater detail in Section III.D below (''Watershed-Based Plans''). States may also choose to use these funds to implement technology-based approaches. In particular, EPA recommends that coastal States use these funds to assist in the implementation of both the technology-based and water-quality-based management measures contained in their coastal nonpoint pollution control programs under Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (''CZARA'').

2. States may use up to 20% of the base funds to develop NPS TMDLs (consistent with their TMDL development schedule) and watershed-based plans to implement NPS TMDLs; develop watershed-based plans in the absence of or prior to completion of TMDLs (incorporating the TMDL's load allocations once it has been completed and approved); develop watershed-based plans that focus on the protection of threatened waters, source water, or other high-priority unimpaired waters; and conduct other NPS monitoring and program assessment/development activities. (Monitoring the results of implementing a watershed project is not subject to this 20% limitation.)

3. Except as noted in the next paragraph, States must use $100 million of Section 319 funds (referred to as ''incremental funds'') to develop and implement watershed-based plans that address nonpoint source impairments in watersheds that contain Section 303(d)-listed waters. (However, these plans may also include activities that address waterbodies within the watershed that are not currently impaired where appropriate to prevent future impairments within the watershed.) Regions will include in each grant a condition that provides that the State will use these funds to implement a watershed-based plan only after the State completes the development of a watershed-based plan that addresses each of the watershed planning elements (a) through (i) that are listed later in this section. (See Appendix F to these guidelines.)

Regions may authorize States to use a portion of incremental funds to address watersheds that do not include impaired waters in special circumstances where it is necessary to address a uniquely high-priority State need to protect waters that currently are not impaired by nonpoint source pollution to assure that they remain unimpaired. This particularly includes waters in which good water quality is threatened by such factors as changing land uses and the presence of unique aquatic resources that are especially valuable and at serious risk of irreparable harm and that therefore require a special focus on protection activities (*e.g.*, aquatic habitat for salmon migration, spawning, and rearing). These resources and threats to them should be documented in the State's 305(b) report. Prior to authorizing use of incremental funds to address a uniquely high-priority State need, the Region must find the State has established a schedule for TMDL development for its NPS-impaired waters consistent with an even pace and completion of needed TMDLs within 8 to 13 years of listing; the State is completing TMDLs in reasonable accord with the established development schedules; and the State is making reasonable progress developing and implementing watershed-based plans to implement NPS TMDL's, balancing the State's protection and restoration needs.

4. States may use up to 20% of the $100 million incremental funds to develop: NPS TMDLs; watershed-based plans to implement NPS TMDLs; and watershed-based plans in the absence of or prior to completion of TMDLs in Section 303(d)-listed waters (incorporating the TMDL's load allocations once it has been completed and approved). The Region may authorize the State to use over 20% of the incremental funding to develop watershed-based plans in Section 303(d)-listed waters, but the Region should assure that a proper balance exists between funding the development of watershed-based plans and the implementation of watershed-based plans. On one hand, funding should support the development of watershed plans at a sufficient pace to support implementation efforts that may be implemented through 319 funding; funding from a separate State or Federally-supported program (*e.g.*, via the U.S. Department of Agriculture); or other programs or mechanisms. See further discussion in the next section below on integrating other environmental protection programs. On the other hand, watershed-based plan development should not be funded at a pace that significantly exceeds the pace of implementation. This is necessary to maximize implementation of watershed-based plans that have been completed and minimize the development of numerous plans that ''sit on the shelf.''

C. Integrating Other Environmental Protection Programs

As discussed in the preceding paragraph, these guidelines authorize Regions to increase the level of incremental funding that is available to develop watershed-based plans (previously limited to 20%) so long as a proper balance exists between funding the development of watershed-based plans and the implementation of watershed-based plans. Such an increase may well be warranted where non-319 resources may be available to help implement the plans. EPA encourages States to leverage funding from other environmental protection programs to support the implementation of these plans, as discussed below.

USDA-Supported Programs

EPA wishes to particularly emphasize the significant benefits of working closely with the United States Department of Agriculture (USDA) to achieve our common goals of improving restoration and protection of water quality. This is especially important in light of the new Farm Security and Rural Investment Act of 2002 (Farm Bill), which presents tremendous opportunities for integrating funding and other resources and for creating partnerships to help achieve our common goals, including meeting water quality standards. Information about partnership opportunities through programs such as the Environmental Quality Incentives Program (EQIP) can be found on the internet at *http://www.usda.gov/farmbill* and *http://www.nrcs.usda.gov/programs/farmbill/2002.* Most notably, USDA's EQIP regulations have assigned a top priority to reducing nonpoint source pollution in impaired watersheds consistent with TMDLs, where available, and this priority will be used as a guide in the allocation of EQIP funds.

It is important to consider how Section 319 funding can be used in a way that does not duplicate, but rather complements, these other programs. Section 319 funding is especially suitable to support activities that are either not eligible for or typically do not receive significant USDA funding, including: (1) Developing watershed-based plans in Section 303(d)-listed and other high priority watersheds; (2) monitoring water quality in high priority watersheds to design and assess the effectiveness of watershed-based plans; and (3) funding watershed coordinators to work with local

communities to help assist and promote the development and implementation of watershed-based plans. The planning and development of such watershed-based plans should be done in coordination with local communities, Conservation Districts, agricultural producers, and other watershed stakeholders in a cooperative way that will result in locally led partnerships, with USDA support, choosing to implement the plan. Achieving local buy-in and commitment to implement watershed-based plans once they are complete is key to successful watershed planning and implementation.

USDA's primary conservation funding programs (Environmental Quality Incentives Program, Conservation Reserve Program, and Wetlands Reserve Program) are particularly well-designed to support the implementation of both agricultural best management practices (BMPs) and a suite of conservation, restoration, and land retirement measures for wetlands, riparian areas, and other areas of critical importance to the success of watershed-based plans. States should strive to work with the agricultural community to accomplish win-win situations whereby Farm Bill funds are actively used to support the implementation of watershed-based plans developed under Section 319. Where this approach is successful, Section 319 funds could be focused (in addition to monitoring, planning, and providing coordination support for projects) on the implementation of agricultural BMPs that are not eligible for Farm Bill funding (*e.g.*, BMPs that are not in the Natural Resources Conservation Service's Field Office Technical Guide of conservation standards); implementation of agricultural projects in concert with other agencies and groups to help solve watershed problems; and promoting and testing emerging technologies.

EPA recognizes that situations will arise where a State appropriately places a high priority on implementing agricultural components of a watershed-based plan for which Farm Bill funding is not being provided, or is available at only modest levels that require supplementation with Section 319 funds. State and watershed managers should certainly take advantage of whatever funding sources and mechanisms are the best available and most appropriate to accomplish their watershed goals. In most cases, the resources needed to implement an entire watershed-based plan will be significant, and success will depend greatly on enlisting and obtaining the support of all important stakeholders and the resources that they can provide, including especially the resources made available by Congress through the Farm Bill.

Other Environmental Programs

In addition to USDA-supported programs, many other programs that are implemented at the Federal and State level have common and overlapping areas with the Section 319 program. States' activities to upgrade their nonpoint source programs in recent years have strengthened their links with these various State and Federal programs. Today's guidelines particularly encourage the integration of State nonpoint source management programs with other environmental programs by providing for increased Section 319 funding support for the development and implementation of watershed-based plans. Such integration provides a vehicle for cooperative design and implementation of watershed-based plans in a coordinated manner that employ the resources, authorities, and expertise of all relevant programs.

A number of EPA/State programs are closely related to nonpoint source pollution control and to watershed protection. To maximize effectiveness, State nonpoint source programs need to continue to be well integrated with these other State programs to best meet States' water quality needs. These include:

- The National Pollutant Discharge Elimination System (NPDES) point source program, particularly with respect to urban runoff, construction, inactive and abandoned mines, concentrated animal feeding operations, and marinas;
- Coastal protection programs, including especially coastal nonpoint pollution control programs under Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA, co-administered by EPA and the National Oceanic and Atmospheric Administration and co-implemented by our State counterparts), as well as the National Estuary Program;
- Wetlands protection programs implemented under Section 404 of the Clean Water Act as well as pursuant to a variety of other Federal and State authorities and programs;
- Source water protection programs under the Safe Drinking Water Act;
- Clean Lakes programs and wetlands protection and restoration programs under the Clean Water Act;
- Watershed planning programs; and
- Ambient monitoring programs.

In addition to coordinating program implementation with these various programs, State NPS program mangers should coordinate their funding needs with other CWA sources of funding. Most significant is the Clean Water State Revolving Fund (SRF) under Title VI of the Clean Water Act. The SRF is currently providing over $200 million annually to control pollution from nonpoint sources and for estuary protection. However, most States have under-utilized this resource to date. EPA believes that the SRF is particularly well suited to assisting in the implementation of nonpoint source projects requiring capital investment. States are encouraged to increase their use of this copious financial resource to help implement their nonpoint source watershed-based plans and other nonpoint source projects. For more information on the SRF program, see *http://www.epa.gov/owm/cwfinance/cwsrf/index.htm.*

In addition to coordinating with these water quality programs, States should coordinate with programs administered by the Federal land management agencies (*e.g.*, Bureau of Land Management, Forest Service, and National Park Service), water management agencies (*e.g.*, Bureau of Reclamation, Corps of Engineers, Federal Energy Regulatory Commission, and Tennessee Valley Authority), and resource management agencies. For example, Section 319 funds may be used to benefit Federal lands, which strengthens the ability of States to coordinate nonpoint source and TMDL implementation with Federal land management programs and policies.

Finally, two other Federal agencies whose policies and practices can greatly influence and/or protect riparian areas, wetlands, and other sensitive areas and corridors are the Department of Transportation and the Federal Emergency Management Agency. Both of these agencies have programs that can help protect these areas or mitigate potential impairment to these areas, and both have funding programs that can be used to benefit water quality. EPA strongly encourages States to work with these partner agencies to achieve common goals.

D. Watershed-Based Plans

These guidelines promote the use of Section 319 funding for developing and implementing watershed-based plans to protect unimpaired waters and restore impaired waters. Watershed-based plans to restore impaired waters are required, as described above, for all projects implemented with incremental dollars. However, even for watershed projects implemented with base funds, EPA recommends that whenever feasible, watershed-based plans be developed

and implemented for all watershed projects, whether they are designed to protect unimpaired waters, restore impaired waters, or both.

For projects funded with incremental dollars, where a NPS TMDL for the affected waters has already been developed and approved or is being developed, the watershed-based plan must be designed to achieve the load reductions called for in the NPS TMDL. However, where a NPS TMDL has not yet been developed and approved or is not yet being developed for the waters, the State may use Section 319 funds to develop a watershed-based plan in the absence of the TMDL. In such cases, the plan must be designed to reduce nonpoint source pollutant loadings that are contributing to water quality threats and impairments. Where feasible, the plan should be designed to meet water quality standards. In this way, progress towards achieving water quality standards continues even before a TMDL is established. Once the TMDL is completed and approved, the plan must be modified as appropriate to be consistent with the load allocation portion contained within the TMDL. Alternatively, through the course of implementing the plan, the State may find that water quality standards are met, obviating the need to establish the TMDL. EPA believes that improving the integration of TMDLs and watershed plans to implement nonpoint source management measures will provide the most effective means for accelerating achievement of water quality standards.

To ensure that Section 319 projects make good progress towards remediating waters impaired by nonpoint source pollution, a watershed-based plan must have been completed before a State implements a watershed-based plan funded with incremental Section 319 dollars. These watershed-based plans must include the information set forth in items (a)–(i) below. This information will help provide assurance that the nonpoint source load allocations identified in the NPS TMDL (and/or anticipated in NPDES permits for the watershed) will be achieved. Furthermore, this information is critical in any case for ensuring the development of realistic plans to achieve protection goals or water quality standards, while at the same time providing a significant degree of flexibility to work with stakeholders in the watershed to use a range of innovative approaches to implement the plan.

To the extent that necessary information already exists in other documents (*e.g.*, various State and local watershed planning documents, or watershed plans developed to help implement conservation programs administered by USDA), the information may be incorporated by reference. In addition, we encourage States to incorporate by reference any voluminous material that already exists in other documents. Thus, the State need not duplicate any existing process or document that already provides needed information.

Components of a Watershed-Based Plan

Beginning in FY 2004, the following information must be included in watershed-based plans to restore waters impaired by nonpoint source pollution using incremental Section 319 funds. These requirements are not retroactive to watershed plans developed in accordance with the FY 2002 or FY 2003 Section 319 guidelines; those plans may continue to be developed and implemented with funds available in FY 2004 and future years in accordance with the previously applicable requirements of the Section 319 guidelines.

a. An identification of the causes and sources or groups of similar sources that will need to be controlled to achieve the load reductions estimated in this watershed-based plan (and to achieve any other watershed goals identified in the watershed-based plan), as discussed in item (b) immediately below. Sources that need to be controlled should be identified at the significant subcategory level with estimates of the extent to which they are present in the watershed (*e.g.*, X number of dairy cattle feedlots needing upgrading, including a rough estimate of the number of cattle per facility; Y acres of row crops needing improved nutrient management or sediment control; or Z linear miles of eroded streambank needing remediation).

b. An estimate of the load reductions expected for the management measures described under paragraph (c) below (recognizing the natural variability and the difficulty in precisely predicting the performance of management measures over time). Estimates should be provided at the same level as in item (a) above (*e.g.*, the total load reduction expected for dairy cattle feedlots; row crops; or eroded streambanks).

c. A description of the NPS management measures that will need to be implemented to achieve the load reductions estimated under paragraph (b) above (as well as to achieve other watershed goals identified in this watershed-based plan), and an identification (using a map or a description) of the critical areas in which those measures will be needed to implement this plan.

d. An estimate of the amounts of technical and financial assistance needed, associated costs, and/or the sources and authorities that will be relied upon, to implement this plan. As sources of funding, States should consider the use of their Section 319 programs, State Revolving Funds, USDA's Environmental Quality Incentives Program and Conservation Reserve Program, and other relevant Federal, State, local and private funds that may be available to assist in implementing this plan.

e. An information/education component that will be used to enhance public understanding of the project and encourage their early and continued participation in selecting, designing, and implementing the NPS management measures that will be implemented.

f. A schedule for implementing the NPS management measures identified in this plan that is reasonably expeditious.

g. A description of interim, measurable milestones for determining whether NPS management measures or other control actions are being implemented.

h. A set of criteria that can be used to determine whether loading reductions are being achieved over time and substantial progress is being made towards attaining water quality standards and, if not, the criteria for determining whether this watershed-based plan needs to be revised or, if a NPS TMDL has been established, whether the NPS TMDL needs to be revised.

i. A monitoring component to evaluate the effectiveness of the implementation efforts over time, measured against the criteria established under item (h) immediately above.

EPA recognizes the difficulty of developing the information described above with precision and, as this guidance reflects, believes that there must be a balanced approach to address this concern. On one hand, it is absolutely critical that States make, at the subcategory level, a reasonable effort to identify the significant sources; identify the management measures that will most effectively address those sources; and broadly estimate the expected load reductions that will result. Without such information to provide focus and direction to the project's implementation, it is much less likely that the project can efficiently and effectively address the nonpoint sources of water quality impairments. On the other hand, EPA recognizes that even with reasonable steps to obtain and analyze relevant data, the available

information at the planning stage (within reasonable time and cost constraints) may be limited; preliminary information and estimates may need to be modified over time, accompanied by mid-course corrections in the watershed plan; and it often will require a number of years of effective implementation for a project to achieve its goals. EPA fully intends that the watershed planning process described above should be implemented in a dynamic and iterative manner to assure that projects with plans that contain the information above may proceed even though some of the information in the watershed plan is imperfect and may need to be modified over time as information improves.

E. Scale and Scope of Watershed-Based Plans

The watershed-based plan must address a large enough geographic area so that its implementation will address all of the sources and causes of impairments and threats to the waterbody in question. These plans should include mixed ownership watersheds when appropriate to solve the water quality problems (*e.g.*, Federal, State, and private lands). While there is no rigorous definition or delineation for this concept, the general intent is to avoid single segments or other narrowly defined areas that do not provide an opportunity for addressing a watershed's stressors in a rational and economic manner. At the same time, the scale should not be so large as to minimize the probability of successful implementation. Once a watershed plan that contains the information identified in Section III.D has been established, a State may choose to implement it in prioritized portions (*e.g.*, based on particular segments, other geographic subdivisions, nonpoint source categories in the watershed, or specific pollutants or impairments), consistent with the schedule established pursuant to item (f) above.

EPA recognizes that States already have in place or have been developing watershed plans and strategies of varying levels of scale, scope, and specificity that may contribute significantly to the process of developing and implementing watershed-based plans. We encourage States to use these plans and strategies, where appropriate, as building blocks for developing and implementing the watershed-based plans. In doing so, to the extent that other documents contain the information identified above in Section III.D, this information may be incorporated by reference into States' watershed-based plans. (Where these plans and strategies have been developed at a large geographic scale, they will in many cases need to be refined at a smaller watershed scale to provide the information needed to produce effective watershed-based plans.) In particular, we recommend that States use their continuing planning processes, water quality management plans (WQMPs), Watershed Restoration Action Strategies (WRASs), comprehensive conservation and management plans (CCMPs), CZARA programs, and other similar holistic watershed documents, to help guide their watershed-based approaches to watershed-based plan development and implementation.

EPA encourages States to develop NPS TMDLs or, where applicable, sets of NPS TMDLs on a watershed basis. We encourage States to implement watershed-based plans holistically, as this approach usually provides the most technically sound and economically efficient means of addressing water quality problems. Consistent with this approach, EPA encourages States to include in their watershed-based plans approaches that will address all of the sources and causes of impairments and threats to the watersheds in question. Thus, the watershed-based plans should address not only the sources of water quality impairment, but also any pollutants and sources of pollution that need to be addressed to assure the long-term health of the watershed, including both surface and ground water that serve as sources of drinking water. Finally, since watersheds with completed TMDLs have the best documentation of the load reductions needed to achieve water quality standards, EPA recommends that States assign the highest priority to implementing watershed-based plans for waters that have completed TMDLs.

We further recommend that States give their highest funding priority to projects that are supported by additional funding from other Federal, State, and local agencies (particularly USDA-supported programs), SRF, or private sector funding. Additionally, States should consult their SRF Program's Integrated Planning and Priority Setting System, if such system is in use, to address the highest priority water quality improvement projects (see *http://www.epa.gov/owm/finan.html*). Given the significant expense of many watershed projects, such an approach will help expedite successful implementation of needed practices and thus speed the restoration of water quality. It will also help assure that watersheds are addressed in a holistic manner that accounts for the broad variety of stressors in the watersheds.

F. Monitoring Our Progress

As States continue to strengthen their focus upon restoring waters that have been listed as impaired on their Section 303(d) lists, as well as to protect waters that are currently not impaired, it is critical that they monitor both: (1) the progress that they are making towards achieving and maintaining water quality standards; and (2) the implementation of their programs and projects to assure that they are successfully implemented. In Section IV.E below, we discuss the use of the Section 319 program's Grants Reporting and Tracking System (GRTS) to track implementation of programs and projects, estimate pollutant load reductions, and report the amount of acres of wetlands and feet of riparian areas protected or restored. In addition, EPA's Watershed Assessment, Tracking and Environmental Results (WATERS) Information System, which combines a variety of water quality information, including that which is developed by States in Section 305(b) reports and 303(d) lists, will provide information that indicates when an impaired waterbody achieves water quality standards. (For more general information on WATERS, and on the Consolidated Assessment and Listing Methodology (CALM) that supports the 305(b) and 303(d) processes, see *http://www.epa.gov/waters* and *http://www.epa.gov/owow/monitoring/calm.html*.)

There are a variety of technical tools that can be used by States to monitor their progress at a program or project level. EPA strongly encourages States to enter their water quality monitoring data, for data collected in a waterbody pursuant to the implementation of a Section 319 project, into EPA's ''storage and retrieval'' (STORET) data system. States that are not yet prepared to use STORET for storage of data generated in the development and implementation of Section 319 watershed projects should in the interim store their assessment in an accessible electronic database.

We discuss some recommended tools and methods immediately below. In addition, States with approved CZARA programs are responsible under CZARA for monitoring and tracking progress through successful implementation of CZARA management measures. EPA has also published several detailed guidance documents to assist States and others in conducting monitoring programs to both track implementation and determine the success of on-the-ground projects in achieving water-quality-improvement goals. See Monitoring Guidance for Determining the Effectiveness of Nonpoint Source Controls (U.S.

Environmental Protection Agency, Office of Water (EPA 841–B–96–004) (1997)) and other publications that are listed at *http://www.epa.gov/owow/nps/bestnpsdocs.html#nps*.

1. Environmental Indicators

States need to use several sets of measures to fully determine their success in implementing their nonpoint source programs. These include measures that indicate progress towards achieving and maintaining beneficial uses of water; towards other long-term goals of the State's program (*e.g.*, achieving load reductions, installing appropriate technology at all animal waste facilities that need to be upgraded, or implementing particular watershed projects); and towards shorter-term goals and objectives (*e.g.*, successfully implementing a particular technology) that are designed to lead to the achievement of longer-term goals.

As discussed in Section IV.E of these guidelines, States must include in their annual reports at least the three measures of progress that are required by Section 319(h)(11), including implementation milestones, available information on reductions in nonpoint source pollutant loadings, and available information on improvements in water quality. Approaches that can be used to meet either short-term tracking or longer-term project evaluation needs include ambient water quality monitoring (*e.g.*, edge-of-field, small watersheds, multiple watersheds, in-lake, in-aquifer monitoring), beneficial use assessment (*e.g.*, biological/ habitat assessment, attainment of water quality standards), implementation monitoring (*e.g.*, audits, activity tracking, geographic information system tracking of land use and land management), model projections, and photographic evidence. Ambient monitoring and beneficial use assessment tracking should be included for projects wherever feasible.

Appendix A of these guidelines contains an illustrative set of these and other indicators and measures, including those required to implement Section 319(h)(11) and TMDLs, that can help the States and the public gauge the progress and success of their programs. States may identify and use other indicators and measures that are most relevant to their particular nonpoint source problems, programs, and projects. However, States should in all cases use environmental indicators to the greatest extent feasible, so that the State and the public may best recognize the State's progress in addressing water quality problems in terms that are most relevant to the public's concerns.

2. Monitoring in Watershed Projects

Appropriate monitoring of watershed project implementation is an essential tool to enable States to identify nonpoint source pollution problems, develop effective watershed-based plans, evaluate the effectiveness of actions taken, and meet reporting requirements under Section 319(h)(11). All watershed projects designed to implement a watershed-based plan must describe how the plan's monitoring component will be used to evaluate the effectiveness of the implementation efforts over time, measured against the specific criteria that are established in the watershed plan. As described in Section III.D (''Watershed-Based Plans''), the criteria against which progress is being monitored should be designed to focus on whether loading reductions are being achieved over time and substantial progress is being made towards attaining or maintaining water quality standards. This can be achieved through watershed-scale monitoring to measure the impacts of multiple programs, projects, and trends over time (*i.e.*, monitoring need not be conducted for individual BMPs unless that is particularly relevant to the project). Information on reductions in nonpoint pollutant loads will then be tracked and reported in the Section 319 Grants Reporting and Tracking System (GRTS) as described below in Section IV.E.

While States may use Section 319(h) grant funds for monitoring activities for particular watershed projects, States are encouraged to also explore other cost-effective approaches to conducting monitoring. For example, the U.S. Geological Survey and the National Oceanic and Atmospheric Administration hold an array of ambient data and can provide support for various monitoring activities. In addition, volunteer monitoring programs are used by many States to obtain water quality data in a cost-effective manner.

3. National Monitoring Program

To provide a national documentation of the feasibility of controlling and preventing pollution resulting from nonpoint sources, and to improve technical understanding of nonpoint source pollution and the effectiveness of nonpoint source control technology and approaches, EPA and many States have been implementing a more rigorous and standardized monitoring framework that can be used for a representative subset of watershed projects funded under Section 319. Monitoring for this subset of selected watershed projects is being conducted at appropriate frequency intervals and for appropriately long periods of time that include monitoring before, during, and following implementation to assure the accounting of various sources of variation. We encourage States to conduct intensive water quality monitoring of one or more of their projects as part of this national evaluation.

EPA has developed a framework for selecting national monitoring projects, issued guidelines for minimum monitoring activities, and developed software for managing and reporting data. To date, 23 high-quality national projects have been selected across the country through a rigorous but collaborative process involving the States, EPA Regions, and EPA Headquarters. Additional high-quality monitoring projects will be selected in future years using the same collaborative process. For all projects, EPA provides specialized technical support in project development, monitoring design, data management and analysis, and reporting. From time to time, and in close collaboration with relevant States and project managers, EPA will publish progress reports and results. The most recent report, *Section 319 National Monitoring Program Projects* (December 2001), includes information on each of the 23 projects and highlights the documented water quality improvements achieved by some of the projects to date. To view or download this report, or to obtain further information on the National Monitoring Program, see *http://h2osparc.wq.ncsu.edu/319index.html.* This report illustrates the water quality benefits of well-designed and implemented watershed projects.

IV. Grants

Section 319 grants are important resources available to States to restore impaired waters and to protect threatened and good-quality waters. These guidelines provide States with a framework to use Section 319 grant funds in a manner that will implement their nonpoint source management programs effectively to achieve the vision established at the beginning of these guidelines and to achieve the specific goals and objectives established in their upgraded State nonpoint source management programs. Moreover, EPA and States will continue to minimize administrative responsibilities to assure that the funds are being used effectively and in a legally appropriate manner.

While Section 319 funds are important resources, it remains critical for States to continue to build their existing partnerships and to develop

new ones as necessary to achieve their water quality goals. While Section 319 funds have grown, they remain, taken alone, only a modest response to the broad range of national nonpoint source impairments and threats. Therefore, the effectiveness of State nonpoint source programs will depend on the effective use of their funds, authorities, and other resources to leverage the funds, resources, and authorities of other public and private sector entities that have a role to play in abating and preventing nonpoint source pollution problems.

A. Relationship to Performance Partnership Grants

On January 9, 2001, EPA published rules to revise and update its grant regulations that apply to Section 319 and other EPA grants programs. (See 66 FR 1725–1747 (January 9, 2001), 40 CFR part 35, available at *http://www.access.gpo.gov/su_docs/*.) The regulation advances ongoing efforts to build more effective State-EPA partnerships and to improve environmental conditions by providing States with increasing flexibility to direct resources where they are needed most to address environmental and health needs.

EPA believes that the States' efforts to upgrade State nonpoint source programs during the past five years have much in common with goals and principles of the Performance Partnership Grants (PPG) program and the broader National Environmental Performance Partnership System (NEPPS) of which the PPG program is a part. These included promoting a focus upon improved environmental results by directing scarce public resources toward the States' highest priority, highest value activities; providing States with greater flexibility to achieve those results; improving public understanding of environmental conditions and choices; and enhancing accountability to the public and taxpayers.

These new guidelines have similarly been drafted to be consistent with the overall framework of the NEPPS and PPG. They focus on broad environmental goals (*e.g.*, achieving water quality standards in impaired waters through the implementation of TMDLs) while providing flexibility to States in prioritizing their efforts among their many impaired waters and in developing and implementing appropriate practices and systems to solve their water quality problems. They also focus on reporting environmental outcomes (*e.g.*, ''reductions in nonpoint source pollutant loading and improvements in water quality'' as called for in Section 319(h)). The nonpoint source program is an eligible grant program in a PPG. For those States that wish to include the nonpoint source program in their request for a PPG and/or NEPPS Agreement, these guidelines should be used as the foundation for substantive discussions on establishing nonpoint source environmental goals and program performance expectations.

B. Funding Process

1. Allocation of Funds

EPA uses the allocation formula presented in Appendix D to determine the amount of funding to be awarded to each State. The factors used in the allocation formula, as well as the weights used in the formula, have remained the same as they have been since the Section 319 grants program began. Each year, the Congressional appropriation for Section 319 will be multiplied by the applicable percentage presented in Appendix E to determine each State's allocation for that year. As soon as the annual Section 319 appropriation is made by Congress, EPA Headquarters will immediately notify the EPA Regional offices of each State's allocation, and the Regions will immediately notify the States.

EPA will continue to award funds to States in two portions. EPA will first subtract $100 million from the total Section 319 appropriation. That portion is referred to as the ''incremental funds'' while the remaining portion is referred to as the ''base'' funds. Both of these portions are allocated to the States in accordance with the allocation formula discussed in the preceding paragraph. As discussed in Section III.B above, the base funds are to be used by the States to generally implement all aspects of their nonpoint source programs, while the incremental funds are to be primarily focused upon the implementation of watershed-based plans to restore waters impaired by nonpoint source pollution.

2. Schedule for Awarding Section 319 Grants

a. Background

These guidelines present a six-step process for awarding Section 319 grants. EPA recognizes that there is a wide disparity among States as to their desired schedules (*e.g.*, due to differing fiscal years, timeliness of weather-related projects, etc.), and is presenting this process to help provide States and EPA with a general outline of the steps to be followed without dictating a uniform schedule for State submissions.

States are strongly encouraged to begin their internal project development processes (such as identification of priority areas for funding and solicitation of project proposals) as early as possible to assure more time for the State and other project proponents to develop excellent projects in advance of the formal grant application process. States should reference their approved nonpoint source management programs (*e.g.*, in a Request for Proposal) so that project sponsors are focusing on activities consistent with the State's program. States and Regions are also encouraged, where feasible, to informally discuss proposed projects prior to formal submission of the draft application to EPA so that the subsequent submission can be reviewed and approved quickly and smoothly. In particular, EPA encourages States to submit early drafts of project proposals to EPA if they believe that there are difficult issues that may arise (*e.g.*, whether the proposed project is legally fundable or meets criteria established in applicable guidelines) or if they desire technical assistance from EPA.

b. Six-Step Process to Awarding Section 319 Grants

- *Step 1:* EPA Headquarters issues brief annual guidance.

EPA Headquarters will strive to issue brief annual guidance, if any is needed, in the early Spring preceding the Fiscal Year for which the Section 319 funding will be applicable.

- *Step 2:* States submit draft grant applications, including a draft work plan.

States should expeditiously implement their processes to develop or solicit draft grant applications (*e.g.*, the Request for Proposals process used by many States to solicit grant projects from agencies, watershed groups, and other organizations within the State). They should also develop expeditious processes (*e.g.*, using State Nonpoint Source Task Forces such as have been established in many States) to review project proposals and select the best ones for inclusion in their draft work plan, so that they can submit good-quality draft applications in a timely manner.

EPA strongly recommends that the State provide clear written or oral guidance to all project applicants to assure that the applicants are aware of Federal requirements for project eligibility and State criteria for project selection.

Each State will submit a draft grant application, including a draft work plan. EPA encourages States choosing to submit any voluminous materials do so

electronically to minimize resources and expenses. Each Region will work closely and collaboratively with each State at this stage to promote the development and submission of high-quality work plans. Regions must be able to determine from the draft work plans that: (1) They conform to all applicable legal requirements of Section 319, EPA's general grant regulations in 40 CFR parts 31 and 35, and the requirements of OMB Circulars A–21, A–87, A–102, A–110, A–122, A–133; (2) they are consistent with these guidelines and with the goals, objectives and priorities in the State nonpoint source management program; (3) they only include expenditures that are necessary, eligible, reasonable, and consistent with the grant; (4) the State and EPA will mutually be able to assess the success of grant activities in meeting State program goals; (5) nation-wide progress in reducing nonpoint source pollutant loads and in achieving and maintaining water quality standards can be tracked, as discussed in Section IV.E below.

Work Plans To Develop Watershed-Based Plans

The work plan to develop a watershed-based plan must include, at a minimum: (1) An identification of the geographical extent of the watershed to be covered by the plan; (2) a schedule for developing the watershed plan; and (3) an estimate of the Section 319 funds that will be used for developing the watershed plan. All watershed-based plans that are developed with Section 319 funds must ultimately include all of the information identified in Section III.D above (''Watershed-Based Plans'').

Work Plans To Implement Watershed-Based Plans

States are not required to submit their detailed watershed-based plans for EPA approval. However, they must submit a brief work plan that: (1) Identifies the watershed-based plan that will be implemented; (2) provides a schedule for implementing the watershed-based plan; (3) includes a brief summary of the plan; and (4) provides an estimate of the Section 319 funds that will be used to implement the watershed plan. If a State requests funding to implement a watershed-based plan at the same time that it submits a request for funding to develop the plan, the State must make its best effort to provide the information regarding the implementation phase of the project. If the State believes that it does not yet have enough information to do so, the Region and State should discuss whether the State has enough information at this time to provide a reasonable basis for the State to make a request for implementation funding prior to completing the development of the watershed-based plan. When appropriate, the request for implementation funding may be regarded as premature and deferred to the following year.

In lieu of requiring States to submit their watershed-based plans to EPA for approval, EPA has chosen to defer to States' expertise and judgment in developing and implementing these plans. However, EPA recognizes that watershed-based plans are such critical components that the success of a State NPS management program rests significantly on States' success in developing good-quality plans and implementing them effectively. Therefore, EPA expects that Regional management and oversight of Section 319(h) grants (see Section V of these guidelines) will place a special emphasis on reviewing these activities from time to time and that Regions will therefore periodically review and discuss State progress in developing plans in conformity with these guidelines and implementing them effectively. Regions must include a condition in the grant that contains the language set forth in Appendix F to these guidelines. That language provides that, upon Regional request, the State will provide copies of any (*i.e.*, one or more, depending on the Region's request) 319-funded watershed-based plans and other information relevant to implementing those plans. This information would provide a basis for periodic Regional reviews of, and discussions with the State regarding, the State's implementation of its Section 319 program, its Section 319 grants and, more specifically, its development and implementation of watershed-based plans that are in conformity with these guidelines.

Work Plans for All Other Section 319 Projects and Activities

Work plans for all other projects and activities should include a brief and concise synopsis explaining the State's strategy for using Section 319 funds in the current fiscal year. This synopsis should outline the problem to be addressed; the project's goals and objectives; the lead implementing agency and other agencies that will be authorized to expend project funds; the types of measures or practices that will be implemented; the projected implementation schedule; the outputs to be produced by performance of the project; and the environmental indicators and/or other performance measures that will be used to evaluate the success of the project.

Outputs for activities should always be quantified whenever it is practicable to do so (*e.g.*, all on-the-ground implementation projects should have quantified outputs). States that include all or a portion of their Section 319 grants in a Performance Partnership Grant should note that their work plan similarly is required by regulation to describe each significant category of nonpoint source activity to be addressed and the work plan commitments to be produced for each category. (See 40 CFR 35.268(d)(4)).

Multi-Year Work Plans

EPA encourages States to develop multi-year work plans for Section 319 grants. For example, the State may wish to present a three-year work plan which would guide the State's grant activities for the next three years. This work plan, when approved by EPA, would not have to be resubmitted and re-approved except to the extent that the State wishes to change it to address new circumstances. In addition to the information required above (as applicable), the work plan should include the interim milestones and final dates for completion of activities. The interim milestones should be sufficiently frequent to assure timely performance throughout the project period, so that the State can identify problems and correct them expeditiously.

EPA would like to clarify that the use of a multi-year work plan does not require the award of all project funds in a single year. It may rather be used to establish the State's and EPA's mutual intent to award funds over a several-year period to implement subsequent phases of the work plan. This may be particularly appropriate in the case of a watershed-based plan that will require multiple years to implement.

The multi-year planning approach will reduce paper work and will improve the State's ability to engage in long-term planning and implementation with respect to both programmatic activities and specific watershed projects. States will, however, retain the option of developing and modifying aspects of their programs or projects on an annual basis where they deem appropriate.

- *Step 3:* Regions conduct reviews of State draft applications and provide written comments to the State.

The Region will review each State's draft application and meet or conduct a telephone conversation with each State to resolve any technical or administrative issues. Following this

collaboration, the Region should provide a written reply to the State. Regions will strive to conduct such reviews and provide feedback to States within 60 days of receipt of the State application.

The Regional response should include written comments on the State's draft application, paying particular attention to its consistency with applicable legal requirements; applicable guidelines and guidance; and the goals, objectives, and priorities established in the State management program. The Region will work with the State to jointly ensure that: The work plan is designed to help achieve the goals and objectives contained in EPA's guidelines and in the State's nonpoint source management program; the work plan has programmatic, technical, and/or scientific merit; the costs are reasonable and necessary; the work plan is well-coordinated with other State and Federal programs; gaps between program objectives and planned activities are identified and resolved; and the work plan clearly identifies the specific outcomes, outputs, and other results that are linked to funding and includes target dates and milestones for achieving them.

In addition to commenting on the consistency of the State program with applicable requirements, guidelines, guidance, and State program goals, objectives, and priorities, Regions may also provide technical comments to the State on ways in which particular proposed projects or programs could be clarified, improved, or otherwise modified to result in a better project or program. These comments should be offered as technical suggestions and should not be regarded by the Region or State as a prerequisite to grant award unless they raise significant concerns that a proposed project may fail for technical reasons.

- *Step 4:* States submit final work plans and grant applications to EPA Regions.

States are encouraged to submit final work plans and grant applications to EPA Regions as quickly as possible. States should contact EPA to discuss any questions and the intended responses to EPA comments and concerns, and the final work plan must provide a response to all comments. Good communication between the States and EPA will help assure work plan approval will occur as quickly as possible and reduce the need for additional rounds of comment from EPA.

- *Step 5:* Regions award grants to State.

Each Region will review its States' final work plans. If the State's work programs meet all applicable legal requirements, guidelines and guidance, and the goals, objectives, and priorities established in the State management program, the Region will award the final grant as quickly as possible. Regions will strive to conduct final reviews and award the grant to the State within 60 days of receipt of the final work plans. Where issues remain, the Region will elevate discussions to more senior management levels quickly to achieve a satisfactory resolution of the problem. In the event that funds cannot be fully awarded to a particular State within a reasonable time, the Region may reallocate the funds to another State. However, the Region and State should make all reasonable efforts to avoid such an unsatisfactory result.

The grant award is contingent upon the Region determining in writing that the State has made ''satisfactory progress'' in the preceding fiscal year in meeting the schedule specified in the State's Section 319 nonpoint source management program (as discussed further below in Section IV.D).

- *Step 6:* States obligate funds as expeditiously as possible.

States will obligate the awarded funds as quickly as possible and conduct funded activities according to the schedules contained in the approved work plan. EPA has interpreted Section 319(h)(6) to provide that Section 319(h) funds granted to a State shall remain available for obligation by the State for one year from the grant award. For example, grant funds awarded to a State on December 1, 2003, remain available for obligation until December 1, 2004. The amount of any such funds that cannot be obligated by one year from the grant award shall, under Section 319(h)(6), be available to EPA for granting to other States. Regions should include in each grant a condition requiring the grant recipient to award all proposed contracts and interagency agreements within one year after the grant award.

EPA recognizes that each State has a different process, often governed or influenced by State laws, regulations, or control mechanisms, that result in varying time periods for the award of State sub-grants or sub-contracts to implement the projects. States should make every effort, including modifying State procedures if appropriate, to assure that the funds are made available to project implementers as soon as possible after the grant is awarded to the State. Projects often depend upon the active cooperation of private individuals, many of whom are not professional nonpoint source personnel; it is important to be responsive to their needs to assure that credibility of the State's program is maintained and that participation in the program continues to grow.

The term ''obligate'' does not mean to ''expend.'' As defined in 40 CFR Section 31.3, ''obligations'' means ''the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period of time that will require payment by the grantee during the same or a future period.''

EPA believes that it is important that funds appropriated by Congress do not languish unused for significant amounts of time. Generally speaking, it is in the public interest for States to expend appropriated and awarded funds as rapidly as practicable upon receipt by the State. Where States are implementing multi-year watershed projects, the preferred approach may be to award the funds gradually over a period of years rather than to award all of the funds at one time. Regions and States are encouraged to work together to assure that funds awarded are sufficient to support any implementation activities in the watershed that may occur within a reasonable time, while agreeing that additional funds would be made available in future funding years to enable the project to be fully implemented over a period of years. EPA intends to engage in dialogue with the States during the coming year to assure that we meet the dual goals of putting the public's funds to work expeditiously while at the same time providing assurance to the States that they will receive enough funds to carry implementation efforts to successful completion.

C. Grant Eligibility

Section 319 grant funds are to be directed towards the States' and EPA's common vision that all States implement dynamic and effective programs designed to achieve and maintain beneficial uses of water. Approved State nonpoint source management programs provide the framework for determining what activities are eligible for funding under Section 319(h). While these guidelines emphasize the use of Section 319 funds for the development and implementation of watershed-based plans to restore priority waters, States may also use Section 319 base funds for other activities that will generally support these goals, as well as water quality protection goals, including nonregulatory or regulatory programs

for enforcement; technical assistance, including staffing; financial assistance; education; training; technology transfer; demonstration projects; and monitoring to assess the success of specific nonpoint source implementation projects.

1. Ground-Water Activities and Source Water Protection Programs

As in the past, EPA's policy will be to award all Section 319 grants under Section 319(h), in lieu of awarding separate grants under Section 319(i). Thus, these guidelines apply to all Section 319 grants. This approach will encourage integration of ground-water activities with overall State nonpoint source control programs, while maximizing State flexibility to consider and prioritize all causes and effects of nonpoint sources of water pollution.

Ground-water activities are eligible for Section 319(h) grants to the extent that they are identified directly in the State's nonpoint source management program or through incorporation in the management program by reference to the State's Ground-Water Protection Strategy, Comprehensive State Ground-Water Protection Program, or Source Water Protection Program. If such activities are not currently included in the State's nonpoint source management program, the program should be amended to include them.

EPA encourages States to coordinate their nonpoint source management programs with their source water protection programs. This will assure that programs, authorities, and funding sources to protect sources of drinking water from nonpoint source pollution are appropriately coordinated to maximize the effectiveness and efficiency of both programs' efforts.

2. Urban Storm Water Runoff

Section 319 funds may be used to fund any urban storm water activities that are not specifically required by a draft or final NPDES permit. EPA has issued several ''phases'' of regulations defining what activities are subject to the NPDES permit requirements of Section 402(p)(2) of the Clean Water Act. Phase I, in place since 1990, requires operators of medium and large municipal separate storm sewer systems (MS4s) located in incorporated places and counties with populations of more than 100,000, certain industrial activities, and construction activities disturbing 5 acres of land or more to obtain an NPDES permit to discharge storm water runoff (see 55 FR 47990, November 1990). In 1999, EPA expanded the Federal storm water program with the promulgation of the ''Phase II'' rule (see 64 FR 68722, December 8, 1999). Phase II requires operators of small MS4s (non-Phase I regulated MS4s) in ''urbanized areas'' and small construction activities disturbing between 1 and 5 acres of land to obtain an NPDES permit.

States may use section 319(h) funds for those urban storm water discharges that are not addressed by Phase I and Phase II stormwater program requirements. These include aspects of Phase I and II activities that support but do not directly implement activities required by Phase I or Phase II permits.

EPA and the States recognize the benefits of integrating nonpoint source funds and storm water activities as much as is legally allowable. Listed below are a variety of urban runoff management activities that could be eligible for Section 319(h) funding:

- Technical assistance to State and local storm water programs;
- Monitoring needed to design and evaluate the effectiveness of implementation strategies;
- Best management practices for pollution prevention and runoff control (except for BMPs required by a draft or final NPDES permit);
- Information and education programs;
- Technology transfer and training; and
- Development and implementation of regulations, policies, and local ordinances to address storm water runoff. (These may apply to areas covered by NPDES permits, provided that the regulations, policies and ordinances apply to non-permitted areas as well.)

Historically, urban storm water management control efforts have focused on water drainage problems (i.e., water quantity). Now many storm water control BMPs are designed to control both water quantity and water quality. Section 319(h) funds may be used to assist in the incremental funding of certain water quality components of such practices, except as described below.

Section 319(h) nonpoint source control funds may not be used to implement specific requirements of draft or final NPDES storm water permits, nor to implement permit application requirements of EPA's storm water regulations. For example, Section 319(h) funds may not be used to meet permit application requirements such as mapping storm water systems, identifying illicit connections, characterizing storm water discharges, or monitoring required by permits. Section 319(h) grant funds may not be used to pay for BMPs or ''end of pipe'' treatments which are required as part of a draft or final NPDES permit.

These prohibitions are based on the statutory limitations on the use of Section 319 funds, including Congressional intent that these funds be used to address nonpoint sources, rather than permitted point sources. Congress determined that permitted point sources would generally comply with NPDES permit requirements without obtaining Federal grants. (However, EPA notes that ''publicly owned treatment works,'' which includes publicly owned methods or systems for preventing, abating, reducing, storing, treating, separating or disposing of ''storm water runoff'' are eligible to receive Federal loans under the State Revolving Loan Fund program.)

3. Abandoned Mine Lands

Abandoned mine land reclamation projects that are designed to restore water quality are eligible for Section 319 funding except where funds are used to implement specific requirements in a draft or final NPDES permit. For example, Section 319 funds cannot be used to build treatment systems required by an NPDES permit for an inactive mine, but they may be used to fund a variety of other remediation activities at the same mine. Examples of activities that could be eligible for funding include:

- Remediation of water pollution from abandoned mines that have not yet been issued a draft or final permit;
- Remediation of water pollution from portions of abandoned mine sites that are not covered by a draft or final permit;
- Mapping and planning remediation at abandoned mine land sites;
- Monitoring needed to design and evaluate the effectiveness of implementation strategies;
- Technical assistance to State and local abandoned mine land programs;
- Information and education programs;
- Technology transfer and training; and
- Development and implementation of policies to address abandoned mine lands.

The Natural Resources Conservation Service and local soil conservation districts have a vast array of on-the-ground experience in the area of rural abandoned mine lands. In addition, the Office of Surface Mining has a 10% set-aside from its Abandoned Mine Land program to address water quality problems from abandoned mines.

4. Animal Feeding Operations

Section 319 funds may be used to support the implementation of a wide range of animal waste storage, treatment, and disposal options for animal feeding operations (AFO) that are not subject to NPDES permits requirements. The NPDES regulations, published on December 15, 2002, may be reviewed at *http://cfpub.epa.gov/npdes/afo/cafofinalrule.cfm.* Any AFO that is defined or designated to be a ''concentrated'' AFO (*i.e.,* a ''CAFO'') under 40 CFR section 122.23 is ineligible for funding under Section 319. However, the off-site management of wastes that have been generated by a CAFO and then transported to an off-site facility that is not subject to NPDES permit requirements is eligible for funding if it is managed consistently with the State's nonpoint source management program.

In March 1999, EPA and USDA published the Unified Animal Feeding Operation Strategy (AFO Strategy). (This Strategy is available at *http://www.epa.gov/owm.*) This Strategy discusses the relationship between AFOs and environmental and public health; sets forth a national performance expectation for all AFO owners and operators; and presents a series of actions to minimize public health impacts and improve water quality while complementing the long-term sustainability of livestock production.

The AFO Strategy includes a goal that all AFOs will have comprehensive nutrient management plans (''CNMP's''). USDA and EPA funding assistance programs such as the Environmental Quality Incentives Program and the Section 319 grants program are critical tools to help assure the development and implementation of several hundred thousand CNMP's for non-permitted AFOs in the United States. To this end, Regions must assure that all Section 319 grants that include programs or projects that assist AFOs include a provision (either as a grant condition or through a separate document such as a workplan or BMP implementation plan) to assure that any AFO that receives financial assistance pursuant to the grant has and will implement a CNMP. (Any aspect of a CNMP that is not directly related to water quality concerns—*e.g.,* is related to dust or odor suppresion—is not fundable under Section 319 and is therefore excluded from this requirement.)

USDA has developed a variety of practice standards, guidance documents, and other technical assistance tools to assist in the development and implementation of CNMP's. We recommend that any CNMP for Section 319-funded AFO projects be developed, reviewed, or approved by a person who has been certified through a certification program accepted by USDA or by another equivalent certification program. An ''equivalent certification program'' may include State programs for certifying private and public sector nutrient management planners.

5. Lake Protection and Restoration Activities

Lake protection and restoration activities are eligible for funding under Section 319(h) to the same extent, and subject to the same criteria, as activities to protect and restore other types of waterbodies from nonpoint source pollution. Where a lake is listed as impaired on the Section 303(d) list, Section 319 funding can be used to develop and implement watershed-based plans that contain the information in Section III.D.

States are encouraged to use Section 319 funding for eligible activities that might have been funded in previous years under Section 314 of the Clean Water Act. Section 319 funds should not be used for in-lake work such as aquatic macrophyte harvesting or dredging, unless the sources of pollution have been addressed sufficiently to assure that the pollution being remediated will not recur. This policy is fully consistent with the Clean Lakes regulations at 40 CFR 35.1650–2 (5)(i) and (ii) which provide:

> The project does not include costs for harvesting aquatic vegetation, or for chemical treatment to alleviate temporarily the symptoms of eutrophication, or for operating and maintaining lake aeration devices, or for providing similar palliative methods and procedures, unless these procedures are the most energy efficient or cost effective lake restorative method.

A recommendation by the Senate Appropriations Committee (see Senate Report 106–161) suggests that each State use at least 5 percent of its Section 319 funds for Clean Lakes activities to address the restoration and protection needs of priority lakes, ponds and reservoirs. We suggest that States give priority to funding:

a. Lake Water Quality Assessment (LWQA) Projects

LWQA projects are projects which are intended to compile a comprehensive statewide assessment of lake water quality, to enhance overall State lake management programs, and to increase public awareness and commitment to protecting lakes. Specific activities might include: developing a statewide lake monitoring program; developing an integrated Section 305(b) water quality report and Section 303(d) list of impaired waters; building and enhancing the State's lake-related public outreach and volunteer monitoring activities; and developing and enhancing state lakes programs including travel/training for program managers to attend the annual meeting on ''Enhancing State Lake Management Programs.''

b. Phase 1 Diagnostic/Feasibility Studies

Phase 1 Diagnostic/Feasibility Studies are studies which are intended to: perform comprehensive studies of particular lakes included on State's priority lists including Section 303(d) lists; determine the causes, sources, and extent of pollution to the lake; evaluate possible solutions; and recommend the most feasible and cost-effective methods and measures for restoring and protecting lake resources.

The specific requirements for Phase 1 studies are listed in the Section 314 Clean Lakes Program regulations (40 CFR part 35, subpart H). The Clean Lakes Program regulations are still valid and provide a sound basis for the design of Phase 1 studies, and thus, we suggest that you consult these regulations when you develop work plans for Phase 1 projects. In many cases, Phase 1 studies should provide the basis for the development of a TMDL and watershed-based plan for a particular lake or reservoir.

c. Phase 2 Restoration/Implementation Projects

Phase 2 Restoration/Implementation Projects are projects which are intended to implement lake protection and restoration measures recommended in Phase 1 studies. For lakes that are listed as impaired on the Section 303(d) list, such restoration measures should be integrated into a watershed-based plan that contains the information in Section III.D.

d. Phase 3 Post-Restoration Monitoring Studies

Phase 3 Post-Restoration Monitoring Studies are studies to determine the longevity and effectiveness of various restoration techniques and to advance the science of lake restoration. Funding priorities should support the primary purpose of these studies which is to assess the effectiveness of restoration techniques that have been applied through Phase 2 projects. Lower priority consideration should be given to projects that generally support activities to improve and advance the science of lake restoration and management but are

not specifically assessing Phase 2 projects.

Section 319-funded Clean Lakes activities should be funded in the same manner as other parts of a State's Section 319 work program, and all operative Section 319 grant requirements and guidelines (including provisions for the use of incremental funds, and reporting on the amount of funding devoted to Clean Lakes activities) will apply to these projects as well. Please note that while a State may decide to fund a LWQA and several Phase 2 studies with Section 319 funds, such funds are included within the overall limitation allowing States to use no more than 20 percent of their entire Section 319 allocation to upgrade and refine their nonpoint source programs and assessments. Additionally, Clean Lakes activities should be funded only in lakes that are publicly owned and that have public access, consistent with the Clean Lakes regulations at 40 CFR 35.1605–3.

EPA has published additional, separate guidance for lakes and reservoirs. (See ''Guidance on Use of Clean Water Act and Safe Drinking Water Act Authorities to Address Management Needs for Lakes and Reservoirs,'' issued July 9, 1998, signed by Robert H. Wayland III, Director, Office of Wetlands, Oceans and Watersheds (available at: *http://www.epa.gov/owow/lakes/policy.html*). This guidance discusses eligibility of lake and reservoir restoration and protection activities under Section 319; listing of impaired and threatened lakes and reservoirs on Section 303(d) lists; and the use of additional funding authorities such as the Clean Water Act State Revolving Fund for implementing priority lake and reservoir management projects in approved State nonpoint source management programs.

D. Criteria That Apply to the Award of Section 319 Grants

As noted previously, Section 319 grants must meet certain statutory, regulatory and other administrative criteria that have been established to assure that Section 319 funds are used in a fiscally prudent manner. (A reference document produced by the State-EPA Nonpoint Source Partnership Grants Management Workgroup in March 2003 provides an overview of the Federal requirements for administering Section 319 grants. This document can be found at: *http://www.epa.gov/owow/nps/funding.html*.) All Section 319 grants must be consistent with applicable provisions of Section 319 of the Clean Water Act; EPA's general grant regulations in 40 CFR parts 31 and 35; OMB circulars; and applicable EPA guidelines.

State nonpoint source program managers should note that EPA has most recently revised the grant regulations at 40 CFR part 35 on January 9, 2001. (See 66 FR 1725–1747.) These regulations contain new Sections 35.260—268, that address the purpose of nonpoint source management grants (Section 260); the maximum Federal share (Section 265); the maintenance of effort requirement (Section 266); and some of the award limitations contained in Section 319 (Section 268).

We discuss below some of the most significant criteria that apply to the award of Section 319 grants.

1. The Work Plan Must Demonstrate That Each Funded Element Will Implement Specific Activities Identified in the Approved Management Program

Section 319(h) of the Clean Water Act provides that Section 319(h) grants are to be made ''for the purpose of assisting the State in implementing such management program.'' The grant work program must therefore be designed to ''implement'' the approved nonpoint source management program. Each funded program activity or project must in fact lead to accomplishment of management program objectives that are identified in the State's approved and upgraded nonpoint source management program. Grant work plans must link the funded activities or projects to the relevant element or elements of the States nonpoint source management program.

2. Section 319 Grants Must Be Awarded as Continuing Environmental Program Grants

All Section 319(h) grants must be awarded as continuing environmental program grants, consistent with 40 CFR, part 35. Section 319(h) grants have some unique administrative characteristics (i.e., multi-year vs. one-year budget and project periods), which are different from other EPA continuing environmental grant programs. Unlike most other continuing environmental grants, Section 319(h) grants are not required to be closed out annually. However, Regions are encouraged to award new continuing environmental program grants each year rather than to add funds to an existing State grant through amendments. This will allow for greater program accountability over the multi-year duration of these grants. The Regions must also ensure that all existing State grants are properly closed out at the conclusion of the project period.

3. The Non-Federal Share Must Be at Least 40 Percent

Section 319(h)(3) provides: ''The Federal share of the cost of each management program implemented with Federal assistance * * * in any fiscal year shall not exceed 60 percent of the cost incurred by the State in implementing such management program and shall be made on the condition that the non-Federal share is provided from non-Federal sources.'' The match need not be on an item-by-item basis; rather, a single figure that covers the entire non-Federal share of the costs of implementing a State's Section 319 program. The non-Federal match does not need to be contributed at the time of the grant award, but the funds must be contributed in a timely manner as needed to meet the schedules established in the work plan milestones. EPA Regions must verify that grantees have satisfied the match requirements upon review and submittal of the grantee's final financial status report.

Nonpoint source program managers should be aware that recycled State Revolving Funds under Title VI of the CWA can be used to provide a match for Section 319 grants. These are funds that have been loaned by the State and subsequently repaid by the borrower to the State. The repaid funds are then recycled by the State Revolving Fund program to provide loans that fund other water quality projects. These recycled funds are regarded as State monies and therefore are eligible to be used as match for Section 319 funds, provided that they, like any other Section 319 match funds, are used to implement the State's approved Section 319 management program.

4. Section 319 May Provide Cost Sharing to Individuals Only in the Case of Demonstration Projects

Section 319(h)(7) provides that States may use Section 319(h) funds to provide financial assistance to ''persons'' only if the costs are related to implementing ''demonstration projects.'' EPA does not interpret this provision to mean that a BMP or management measure may be funded in only one location. A successful or potentially successful approach may need to be assessed and demonstrated in many locations to indicate its widespread utility in a variety of hydro-geological and sociological settings. Moreover, projects should be implemented in a variety of locations within each State so that they may in fact provide education, information, and outreach to others who may wish to avail themselves of the same approaches used in the projects.

In particular, EPA does not believe that Congress intended to preclude the funding of demonstration watershed projects that may require the State to share the cost of a particular practice or set of practices at a number of sites within the watershed in order to demonstrate the overall effectiveness of the adopted approach in solving the water quality problem. EPA's and the States' experiences during the past decade have demonstrated that watershed problems cannot generally be solved without implementing a comprehensive plan with appropriate measures and practices at appropriate sites throughout the watershed.

Although there have now been an increasing number of nonpoint source success stories that have improved water quality on a very small geographic scale, our nation has generally not yet achieved success in abating or preventing nonpoint source pollution at a scale that achieves the restoration or protection of entire watersheds to meet water quality standards. Thus, at this early stage in our collective attempts to protect and restore watersheds by abating nonpoint source pollution, each State needs to implement watershed-scale projects that demonstrate how to successfully implement nonpoint source watershed-based plans to restore and protect watersheds. For this reason, as discussed earlier in Section III.B of this guidance, EPA is focusing incremental Section 319 funds upon the development and implementation of watershed-based plans to implement NPS TMDLs that will restore water quality.

To ensure widespread implementation of BMPs in demonstration projects in high-priority watersheds, we encourage States to supplement Section 319 cost-share to individuals with additional cost-share from State funds, as well as to work with other funding authorities and persons that can contribute resources. Where such an approach is followed, the total cost-share to an individual from Section 319, State and other Federal (*e.g.* USDA) funds may not exceed 100% of the total cost of the practice.

5. The State Must Demonstrate Satisfactory Progress

Section 319(h)(8) of the Clean Water Act provides that no Section 319 grant may be made to a State in any fiscal year unless the Administrator ''determines that such State made satisfactory progress in such preceding fiscal year in meeting the schedule specified by such State under subsection (b)(2).'' Section 319(b)(2) in turn provides that States' approved Section 319 management programs shall include:

> A schedule containing annual milestones for (i) utilization of the program implementation methods identified in subparagraph (B), and (ii) implementation of the best management practices identified in subparagraph (A) by the categories, subcategories, or particular nonpoint sources designated under paragraph (1)(B). Such schedule shall provide for utilization of the best management practices at the earliest practicable date.

The Region must determine, based on an examination of State activities, reports, reviews, and other documents and discussions with the State in the previous year, whether the State's progress for the previous fiscal year in meeting the schedule set forth in its nonpoint source management program was satisfactory. A very high level of significance should be assigned to the State's development and implementation of watershed-based plans in accordance with these guidelines and in accordance with any schedules that have been established. In addition, for States with approved CZARA programs, successful implementation of CZARA management measures can assist Regions in determining satisfactory progress.

Regions must include in each Section 319 grant (or in a separate document, such as the grant-issuance cover letter, that is signed by the same EPA official who signs the grant), a written determination that the State has made satisfactory progress during the previous fiscal year in meeting the schedule of milestones specified by the State in its nonpoint source management program. The Regions must include brief explanations that support their determinations.

We discuss States' grants reporting requirements in Section IV.E below. These reports can, if appropriately done, provide much of the written information needed by the Regions to determine whether the States have made satisfactory progress.

6. States Must Maintain Their Level of Effort

Section 319(h)(9) of the Clean Water Act requires any State applying for Section 319 grants to establish and maintain its aggregate annual level of State nonpoint source pollution control expenditures for improving water quality at the average level of such expenditures in FY 1985 and 1986. This is referred to as the State's ''Maintenance of Effort'' (MOE) requirement. States should establish their FY 1985 and 1986 levels and annual levels based on expenditures by the lead State agency or agencies responsible for the State's nonpoint source pollution control activities. Federal funds may not be included in calculating the MOE base level.

- Calculation of expenditures is based on activities of the State lead nonpoint source agency or agencies responsible for the State's nonpoint source pollution control activities, not on what might be termed related activities of other State agencies with primary missions other than nonpoint source control. For example, if the State water quality agency and agricultural agency both have specific nonpoint source water quality control programs, these should be counted in the MOE. State soil conservation programs having water quality improvement or maintenance as a primary objective also should be included in a State's MOE.
- The MOE base level or annual level cannot include the MOE or matching expenditures for other Federal programs, such as Sections 106, 319, 205(j)(5), 314, and 117.
- Determination of whether the State expenditures meet the MOE level for purposes of awarding a Section 319(h) grant will be based on the grantee expenditures projected in the grant application. (The State will report whether it has met its MOE requirements in its final Financial Status Report at the end of the budget year.)

(For additional guidance regarding MOEs, see memorandum Nonpoint Source FY–88–39, issued by EPA's Office of Water on July 12, 1988).

7. Administrative Costs Funded by Section 319 Funds May Not Exceed 10% of the Grant Award

Pursuant to Section 319(h)(12), administrative costs in the form of salaries, overhead, or indirect costs for services provided and charged against activities and programs carried out with the grant shall not exceed 10 percent of the grant award. The costs of implementing enforcement and regulatory activities, education, training, technical assistance, demonstration projects, and technology transfer are not subject to this limitation.

8. Section 319 Grants Must Contain a Condition Requiring Operation and Maintenance

Each Section 319 grant must contain a condition requiring that the State assure that any management practices implemented for the project be properly operated and maintained for the intended purposes during its life span. Operation includes the administration, management, and performance of non-

maintenance actions needed to keep the completed practice safe and functioning as intended. Maintenance includes work to prevent deterioration of the practice, repairing damage, or replacement of the practice to its original condition if one or more components fail.

The condition must require the State to assure that any sub-award of Section 319 funds similarly include the same condition in the sub-award. Additionally, such condition must reserve the right of EPA and the State, respectively, to periodically inspect a practice during the life span of the project to ensure that operation and maintenance are occurring, and shall state that, if it is determined that participants are not operating and maintaining practices in an appropriate manner, EPA or the State, respectively, will request a refund for that practice supported by the grant.

The life span of a project will be determined on a case-by-case basis, tailored to the types of practices expected to be funded in a particular project, and should be specified in the grant condition. For assistance in determining the appropriate life span of the project, States may wish to consult with colleagues implementing similar programs, such as USDA's conservation programs. For example, for conservation practices, it may be appropriate to construct the life span consistent with the life span for similar conservation practices as determined by the Commodity Credit Corporation (pursuant to the implementation of the Environmental Quality Incentives Program). Following the approach used in many State and Federal funding programs, practices will generally be operated and maintained for a period of at least five to ten years.

A sub-awardee and the State may agree to transfer a grant to another party. The transferee must be determined by the State to be eligible to participate in the administration of the Section 319 grant and must assume full responsibility under the grant, including operation and maintenance of those practices already installed and to be installed as a condition of the grant. The State should require a participant to refund all or a portion of the grant if the participant sells or loses control of the land under the grant and the new owner or controller is not eligible to participate in the program or refuses to assume responsibility under the contract.

E. Reporting Requirements To Be Included in All Grants

All Section 319(h) grants are subject to EPA's general grant regulations in 40 CFR parts 31 and 35, which specify a variety of basic grant reporting requirements for awarding grants to States and localities. The grant regulations outline a range of administrative reporting requirements, including performance and financial reports.

In addition to the broad rules specified in 40 CFR parts 31 and 35, section 319 contains two significant provisions that are specifically focused upon reporting for the Section 319 program:

1. Section 319(h)(10) authorizes EPA to request information, data and reports as necessary to determine a State's continuing eligibility to receive Section 319 grants.

2. Section 319(h)(11) requires States to report annually on their progress in meeting the schedule of milestones contained in their nonpoint source management programs, and to report available information on reductions of nonpoint source pollutant loadings and on improvements to water quality resulting from implementation of nonpoint source management programs.

Regions and States should work together to assure that appropriate reporting requirements are incorporated into each grant, either through specific grant conditions, or within the work program document (see Appendix B for generic grant condition language). The specific reporting requirements reflected in that language are discussed immediately below. The Regions and States are encouraged to assess the effectiveness of the reporting process and determine annually if adjustments or modifications are necessary and mutually beneficial.

In general, reporting should be sufficiently detailed to enable a reviewer to ascertain whether outputs and milestones are being achieved on schedule, to identify any problems that may be developing in carrying out tasks in the grant work plan, to identify corrective actions to address such problems expeditiously, and to adequately account for all Federal funds expended.

1. Basic Reporting Requirements

Recipients of funds awarded under Section 319(h) are required by applicable laws and regulations to provide information to EPA under the following reporting categories, each of which is further described below: (a) Grantee performance reports; (b) nonpoint source annual reports; and (c) financial status reports.

a. *Grantee Performance Reports.* 40 CFR section 31.40(b)(1) requires States to submit performance reports on the status of Section 319(h) grants. At a minimum, States should submit these reports on an annual basis by a date agreed to by the Region and the State. Final reports are due 90 days after the expiration or termination of grant support, pursuant to 40 CFR part 31.

Performance reports should include at a minimum:

- Performance/Milestone Summary: A listing of major program and project accomplishments for the period (based on the project and program milestones or commitments contained within approved work plans, grant agreements, or special conditions/agreements), as well as progress made toward meeting future milestones. (The State may accomplish some or all of this reporting requirement through its annual report, as discussed below.)
- Slippage Reports: Provide reasons for delays in meeting scheduled milestones/commitments and discuss what actions (State, Federal or other) will be taken to resolve any current or anticipated problems.
- Additional pertinent information including, when appropriate, analysis and explanation of cost overruns, unanticipated events/consequences, etc.

b. *Annual Reports.* Section 319(h)(11) requires States to report annually on progress in meeting the schedule of milestones contained in their nonpoint source management programs, and, to the extent that appropriate information is available, report reductions in nonpoint source pollutant loadings and improvements in water quality resulting from program implementation. This information may be provided in a streamlined format suggested immediately below. As noted in Section IV.E.2 below, some States may wish to use the Grants Reporting and Tracking System to meet appropriate portions of their annual reporting requirements.

1. A brief summary of progress in meeting approved milestones and the short- and long-term goals and objectives identified in the State nonpoint source management program.

2. A matrix displaying milestones from the current year for the approved State program with the following information for each milestone:

a. Applicable project or program

b. Scheduled project completion date

c. Percent completed

3. A discussion of the extent to which Federal agencies, lands and activities within the State are supporting the State in meeting approved milestones.

4. A summary of the available information on the extent of reductions in nonpoint source loadings achieved as a result of nonpoint source program implementation. (More detailed information would be provided through

the Grants Reporting and Tracking System, discussed below.)

5. A summary of the available information on the amount of improvement in water quality (including aquatic habitat quality) as the result of nonpoint source program implementation. (More detailed information would be provided through the Grants Reporting and Tracking System, discussed below.)

6. Where information is not yet available under items 4 and 5 above for waters or watersheds where implementation is being assisted, surrogate measures of environmental progress (such as environmental indicators) should be used and progress should be reported in terms of the degree or percentage of completion of the project.

In the past, some States have chosen to include additional information in their annual report, using the report as a means of assessing progress to date and the need to modify the program; providing case studies of particular projects; and conveying information to a broader audience on the activities being conducted by the State. States may continue to include such additional information, as a supplement to the basic information required by law. States may wish to include the following types of information in their reports, or to include such information on their Web sites and refer to the information in their reports:

1. Listing of further actions necessary to achieve the goals of the Clean Water Act, including any recommendations for future State or national programs to control nonpoint source pollution.

2. Brief case studies of any particularly successful nonpoint source control efforts.

3. Information on increases in public awareness of nonpoint source pollution and public involvement in addressing it.

4. Copies of products produced by the State program (*e.g.*, outreach materials or BMP documents).

The Results Workgroup of the State/EPA Nonpoint Source Partnership has discussed ways in which annual reports can be written and presented in a manner that (analogous to contemporary corporate reports) promotes greater public knowledge and understanding of nonpoint source pollution and of States' efforts to prevent and reduce nonpoint source pollution. Several States have begun to do so, and the results are promising to improve communication with both the public and decision-makers about nonpoint source pollution. Possible outputs of that workgroup include guidance, suggested formats, and examples of such annual reports. Another option may be to do a separate shorter, reader-friendly annual report that is designed specifically for public education. EPA encourages all States to consider how their annual reports can be improved in terms of content, format, presentation, and style to enhance public support for their programs.

c. *Financial Status Reports.* 40 CFR section 31.41(b) requires grantees to submit financial status reports using Standard Form 269 or 269(a) to report the status of funds under each grant. At a minimum, States should submit financial status reports annually. Final financial status reports are due within 90 days after the expiration or termination of the grant agreement.

2. Reporting Procedures and the Grants Reporting and Tracking System

EPA has developed a computerized system, which States and EPA Regions may now access directly on the World Wide Web, to manage and report data on Section 319 grants. This system, known as Section 319 Grant Reporting and Tracking System (GRTS), provides States with the capability to fulfill grant reporting requirements and has created a database of nonpoint source program information which can be used to enhance State, Regional, and national understanding of nonpoint source projects and programs.

States are required to use GRTS to report the specific nationally mandated data elements listed in Appendix C. This list consists of information needed by EPA and the States to account successfully to Congress, State legislatures, and the public for our accomplishments in implementing the national nonpoint source program. A memorandum, *Modifications to Nonpoint Source Reporting Requirements for Section 319 Grants* (September 27, 2001), that discusses each of the mandated data elements in detail, as well as other improvements to GRTS, is available on EPA's Web site at *http://www.epa.gov/owow/nps/section319/grts.html.*

The most important new features of the modified GRTS are: (1) Precisely geo-locating Section 319 projects; (2) including a concise summary of each project; (3) using common geo-locational information to link funded projects to improvements in waters quality over time, which will be reported through EPA's WATERS database (which includes States' 305(b) and 303(d) information); and (4) providing information on reductions in nonpoint pollutant loads. The new GRTS assists the States in meeting the load reduction reporting requirements of Section 319(h)(11) by providing computer-based tools and formats that have been designed to simplify the effort as much as possible.

In addition to these mandated elements, GRTS has the capacity to accept a great deal of additional information on State programs and projects. States can, if they choose, include detailed project descriptions or project implementation plans, and attach maps, tables, photographs, and spreadsheets. In fact, States can attach appropriate portions of their Section 319(h)(11) annual report to GRTS. Similarly, States can provide much or all of the information needed by EPA Regions to make annual ''satisfactory progress'' determinations as required by Section 319(h)(8). Finally, due to its Web-enabled format, States may allow sub-State organizations that receive Section 319 funds to directly enter data into the system, thereby reducing the States' own reporting burdens.

Regions are encouraged to work with their States to design reporting procedures utilizing GRTS that will promote efficiency and eliminate duplication of work. In particular, States are encouraged to use GRTS to submit grantee performance reports pursuant to 40 CFR 31.40(b)(1). States are also encouraged to use GRTS' project description, project evaluation, and other data fields for more complete data management and project reporting purposes. In addition, the Regions should explore ways to coordinate and synchronize the submittal of performance reports of other EPA programs managed within the same State office (*e.g.*, Section 106, 104(b), 305(b) and 604(b)).

Since GRTS is an official reporting vehicle for programs or projects conducted by States under Section 319(h) grants, a State's cost to enter data and otherwise utilize GRTS is itself eligible for funding under Section 319. Regions and States should work together to ensure that the States are provided sufficient resources in their Section 319 grants to meet these reporting requirements and management support needs. Examples of GRTS support needs include: providing adequate staff support; purchasing necessary equipment, materials, and supplies (including high-speed data switches or other links that enable fast and efficient transfer of data to and from GRTS); and attending GRTS conferences and training.

3. STORET

In March 2003, EPA published ''Elements of a State Water Monitoring and Assessment Program'' (available at

http://www.epa.gov/owow/monitoring/repguide.html). The document recommends the ten basic elements of a State water monitoring program. One of the ten elements is the use of an accessible electronic data system for water quality that meets State/Federal geo-locational standards with timely data entry and public access. EPA's new STORET (STOrage and RETrieval) system provides an accessible, nationwide central repository of water information of known quality.

In the future, EPA will require that all States use STORET either directly or indirectly (*e.g.*, via the Central Data Exchange (CDX) which will include the Monitoring Data Standard). For States that do not currently operate STORET, the Elements document cited above states that these States' monitoring strategies should provide for the use of STORET as soon as it is practicable. In the interim, the document states that States should store their assessment information in an accessible electronic database. Consistent with this approach, States that are not yet prepared to use STORET for storage of data generated in the development and implementation of Section 319 watershed projects should in the interim store their assessment in an accessible electronic database.

EPA's goal is that, as soon as possible, all States will use STORET to store data generated in the development and implementation of Section 319 watershed projects. STORET broadly contains water quality data with actual concentrations of pollutants that are measured in the water or other similar parameters that may be used, such as macroinvertebrate counts. Because STORET is publicly accessible and utilized on a large scale, it is critical that monitoring data from all EPA-funded projects be entered into STORET so that the information can be available to all interested practitioners. Over the past decade EPA has developed a modernized STORET system that has improved the quality of entered data (including adding biological data) and is fully interactive and more user friendly. For more information on STORET, see *http://www.epa.gov/storet.*

4. Reporting and Record-Keeping for Sub-State Organizations

Just as the grant agreement specifies outputs and milestones to be achieved by the States, States should assure that agreements with sub-State organizations specify outputs, milestones, and reporting and record keeping requirements in memoranda of agreement, contracts or other appropriate documents. As indicated in the preceding section, States may, where appropriate, include in these agreements a provision requiring the sub-State organization to enter data into STORET and GRTS reporting worksheets for entry into GRTS.

Where a sub-grantee provides a portion of the State's match, the State should ensure that adequate records are kept with respect to that portion. 40 CFR section 31.41(a)(2) specifies that grantees shall not impose more burdensome requirements on sub-grantees than they are subject to themselves.

V. Management and Oversight of Section 319(h) Grants

EPA's oversight approach will emphasize cooperative partnerships based upon EPA's and the States' mutual goal of implementing dynamic and effective national nonpoint source programs designed to achieve and maintain beneficial uses of water. The guidelines established in a new joint performance evaluation process will promote continuous monitoring throughout the life of projects to help ensure the mutual understanding of expectations and outputs of particular grants (see 40 CFR 35.115 and EPA Order 5700.6).

In conducting its oversight activities, EPA will rely to a significant extent on information and reports provided by the State as well as data entered by the State into STORET and GRTS. EPA will review this information and then contact the States if EPA needs additional information. In addition to reviewing the State's reports, EPA or the State should endeavor to meet at least annually to discuss the State's progress in implementing its program.

Of primary importance is the discussion of State progress in developing and implementing watershed-based plans and achieving results from these implementation activities. To the extent relevant and appropriate to fully evaluating this progress, Regions should review at least some of the State's watershed-based plans and discuss both their strengths and weaknesses with the State. Regions should also review and discuss with the State the rate of progress in successfully implementing these plans.

EPA and the State should also discuss ways in which EPA can better assist the State during the forthcoming year in implementing the State's program. Types of assistance to be considered include: support for State efforts to assess water quality problems; support for State design and implementation of watershed-based plans; technical assistance to help the State monitor the progress and results of watershed projects; and assistance in the development of outreach tools.

When evaluation results show that grant and contract provisions have not been substantially achieved, the State and Region should work cooperatively to take corrective action. If performance or the results achieved by the State are poor, the Region may be required to determine that the State has not made ''satisfactory progress'' under Section 319(h)(8) and to deny the State's grant application the following year. As discussed above, one particular area of importance for Regional determination is whether States have made satisfactory progress in addressing their impaired waters through the development and implementation of watershed-based plan. Other forms of corrective action are described at 40 CFR 31.43.

When a State lead nonpoint source agency is providing EPA grant funds to other State or local agencies to carry out the terms of a nonpoint source grant, the lead agency remains responsible for all outputs in its Section 319(h) work program. Thus, if a local agency has difficulties performing particular funded activities, the Region should work with the State lead agency to resolve the problem.

Periodic Reviews

Using its ''feedback loop'' established in States'' upgraded nonpoint source management programs, the State should periodically review and evaluate its nonpoint source management program (*i.e.*, every five years). Using environmental and functional measures of success, the State will assess the goals and objectives of the nonpoint source management program, and revise the program as appropriate, in light of its review.

VI. Grants to Indian Tribes

These guidelines are not specifically directed to Tribal nonpoint source management programs. Given the differing statutory provisions and approaches applicable to Tribal programs, EPA publishes separate nonpoint source guidance for Tribes. However, we present a brief overview below. For detailed information about Tribal nonpoint source programs, we recommend referring to the *Tribal Nonpoint Source Planning Handbook* (EPA–841–B–97–004, August 1997) as well as additional guidance documents written for Tribal nonpoint source programs that are located at *http://www.epa.gov/owow/nps/tribal.html.*

Tribes, like States, must have EPA-approved nonpoint source assessments and management programs (as well as approval for treatment in a similar

manner as a State) in order to be eligible for Section 319(h) grants. EPA is very pleased that to date, more than 80 Tribes, comprising over 70% of all Indian country, have approved nonpoint source assessments and management programs. EPA encourages other Tribes that have significant nonpoint source pollution problems to similarly develop assessments and programs that focus on their highest priority nonpoint source problems. While Section 319 funds may not be used to develop nonpoint source assessments and management programs, other EPA funding programs are available to Tribes to develop nonpoint source assessment reports and management programs. Technical assistance with the development of assessment and management programs is available from EPA.

Section 518(f) states that the Administrator may reserve for Indian Tribes treated similarly to States not more than one-third of one percent of the amount appropriated for any fiscal year under Section 319(j) for Sections 319(h) and (i). In each of the Fiscal Years 2000–2003, Congress has authorized EPA to exceed the 1/3% limitation and EPA has done so. EPA will annually inform the Tribes as to the amount of funding that is available for the forthcoming year. To be eligible for Section 319 nonpoint source grants, Tribes must meet the requirements in Section 518(e) of the Clean Water Act, as well as applicable provisions of EPA's general grant regulations in 40 CFR parts 31 and 35.

Indian Tribes are required to meet the 40 percent matching and maintenance-of-effort requirements under Section 319(h); however, if a Tribe can demonstrate financial cause, its match requirement may be reduced to 10 percent, with the Federal share of Section 319(h) funds increased to 90 percent. In addition, Tribes, like States, may use in-kind contributions to meet matching requirements.

VII. Waiver Process

Circumstances may arise in which a State believes it is required to develop and submit a work plan for a particular year that fails to meet one or more requirements in these guidelines. If such circumstances arise, and the State believes the circumstances justify a waiver from one or more requirements in these guidelines, the State may submit a request for a waiver to EPA's Regional Water Division Director. The request should identify the requirement from which a waiver is requested; the circumstances requiring the waiver; a description of the activities and projects that the State will be implementing in lieu of those required by these guidelines; and a commitment to adhere to the guidelines to the greatest extent possible. The Regional Division Director may approve the waiver for the year requested with the concurrence of the Director of the Assessment and Watershed Protection Division (a division of the Office of Water in EPA Headquarters).

This waiver process applies only to the requirements established by these guidelines; it does not apply to any statutory or regulatory requirements reiterated in these guidelines. In addition, this process is not required for any Regional authorization of the use of more than 20% of incremental funds to develop watershed-based plans as discussed earlier in these guidelines in Section III.B.

Appendix A—Measures and Indicators of Progress and Success

To measure the progress and success of their nonpoint source programs, States will generally need to use at least three sets of measures. These include measures to indicate progress towards: (1) The State's overall water quality vision of achieving and maintaining beneficial uses of water; (2) the long-term goals set by the State in its program (*e.g.,* successfully completing the implementation of a watershed-based plan and achieving water quality standards, or installing appropriate technologies at all animal waste facilities that need to be upgraded within a watershed); and (3) the shorter-term goals and objectives set by the State (*e.g.,* successfully demonstrating a particular technology).

The following list illustrates measures and indicators which States may choose from or add to that will help the States and the public measure the progress and success of their programs. States may identify and use other measures and indicators that are most relevant to their nonpoint source problems, programs, and projects. However, States must report on at least the three measures of progress that are identified in Section 319(h)(11) (i.e., implementation milestones, available information on reductions in nonpoint source pollutant loadings, and available information on improvements in water quality).

Well-designed State programs will usually include several appropriate measures and indicators from each of the categories set forth below for each of their projects or program activities. For overall program status and trends, States will generally include measure 1.A. below as part of their Section 305(b) reports.

The categories below are approaches which have been successfully used as water-quality and implementation measures and indicators, as well as measures of enhanced public education, awareness and action. They are presented as examples, not requirements, and should be used as starting points for discussion.

1. Water Quality Improvement From Nonpoint Source Controls

a. Number (or percentage) of river/stream miles, lake acres, and estuarine and coastal square miles that fully meet all water quality standards.

b. Number (or percentage) of river/stream miles, lake acres, and estuarine and coastal square miles that come into compliance with one or more designated uses (*e.g.,* a river segment that is neither fishable nor swimmable becomes fishable), or with one or more numeric water quality standard (*e.g.,* achieves a standard for phosphorus while continuing to exceed a standard for nitrogen).

c. Demonstrable improvements in relevant surface and ground water quality parameters.

d. Demonstrable improvements in biological or physical parameters (*e.g.,* increase in diverse fish or macroinvertebrate populations, or improved riparian areas or other measures of habitat).

e. Opening of previously closed shellfish beds.

f. Lifting of fish consumption advisories.

g. Prevention of new impairments (*e.g.,*, number of river miles removed from the ''threatened'' lists, or number of miles of high-quality waters protected).

2. Nonpoint Source Pollutant Load Reduction

a. Reductions in pollutant loadings (*e.g.*, by pounds or percentage) from nonpoint sources in watersheds of impaired/threatened waters.

b. Reductions in pollutant loadings (*e.g.*, by pounds or percentage) from nonpoint sources in high-priority watersheds identified by the State.

c. State-wide reduction in pollutant loadings from nonpoint sources.

d. In the case of nonpoint source pollution which may result from activities conducted in the future, prevention or minimization of new loadings, and/or offset of new loadings by reductions from existing sources.

e. Reductions in frequencies, or prevention of increases, of peak flows in developing or developed areas.

3. Implementation of Nonpoint Source Controls

a. Number of measures implemented in watersheds of impaired/threatened waters (*e.g.*, number of on-the-ground practices implemented that reflect, for example, the ''best practicable'' approach to solve the identified problem.)

b. Percentage of ''needed'' measures implemented in watersheds of impaired/threatened waters (*e.g.*, where watershed analysis has shown the need to implement measures at 20 sites, annual progress in implementing a watershed project can be shown by the number of BMPs installed).

c. Combination of 2.b and 3.b.

d. Number of approved or certified plans (*e.g.*, written to address erosion and sediment control, storm water, nutrient management, or pest management).

e. Percent of the watershed(s) covered by plans described in item 3d.

f. Percent of facilities covered by plans described in item 3d.

g. Statistically-based survey of implementation rates (*e.g.*, results of State-approved BMP use and effectiveness surveys).

h. Percent of priority ground water addressed by nonpoint source controls.

4. Public Education, Awareness, and Action

a. Participation rates in education programs specifically directed to solving particular nonpoint source pollution problems.

b. Statistically-based survey of public awareness, knowledge, and action to measure changes in attitudes and action over time.

c. Participation rates in various nonpoint source activities, such as citizen monitoring and watershed resource restoration activities.

d. Participation rates in various public awareness and education efforts.

Appendix B—Generic Grant Condition Establishing State Reporting Requirements

The recipient (name of State lead nonpoint source agency) agrees to comply with all reporting requirements required by EPA regulation and Sections 319(h)(10) and (11) of the Clean Water Act. All reporting information will be submitted according to the schedule(s) required in 40 CFR parts 31 and 35 regulations and in the ''Nonpoint Source Program and Grants Guidelines'' or as subsequently amended. The three basic reporting categories include: Grantee Performance Reports [40 CFR, part 31.40(b)(1)]; Nonpoint Source Progress Reports [CWA, Section 319(h)(11)]; and Financial Status Reports [40 CFR, part 31.41(b)].

The recipient agrees to use the Agency's Grants Reporting and Tracking System (GRTS) to provide all nationally mandated data elements listed in Appendix C of the nonpoint source program and grants guidelines.

Failure to comply with the above referenced reporting requirements may result in a disruption of grantee funding and/or early termination of the grant agreement in accordance with 40 CFR part 31.43.

Appendix C—Nationally Mandated Data Elements Under Section 319 Grants Reporting and Tracking System (GRTS)*

Following is a list of mandated reporting elements for State Section 319 Programs:

1. *Project Identification*

NPS Program or Project Title
NPS Category (choose from list)
a. Primary Category (*e.g.*, agriculture, silviculture, or hydrologic modification)
b. Secondary Category of Pollution (*e.g.*, non-irrigated crop production, road construction/maintenance, or riparian area degradation)
NPS Functional Category (choose from list)
NPS Waterbody Type (choose from list)
NPS Stream Reach Code (linked to WATERS for easy on-line identification; for estuaries, latitude/longitude are used in lieu of a stream reach code)
Pollutant Type (choose from list)
TMDL Check-off (identifying projects that consist of the development of a NPS TMDL; the development of a watershed-based plan to implement a TMDL; or the actual implementation of such a plan)
Clean Lakes check-off boxes (yes/no, and if yes, 3 follow-up questions)

2. Project Description

Best Management Practices (choose from list, or enter a new one if not listed)
Pollutant Type (choose from list)
Project Description (text field with template provided)

3. *Accounting for Results on the Ground*

a. Load Reductions for Projects Designed to Reduce Nutrients and/or Sediment
- Identify if project is a BMP implementation project for nutrients or sediment
- If so, provide an estimate of sediment and/or nutrient load reductions
- State whether estimate is based on monitoring or modeling
- Name of model

b. *Wetlands/Streambanks/Shorelines:* Account for feet of streambanks/shorelines restored or protected, and acres of wetlands restored or protected

4. *Accounting for Expenditures of Funds and Implementation of Programs and Projects*

NPS Budget 319(h) Funds
Number of State Employees (FTEs) supported by 319(h) Funds Under this Grant
Amount of 319(h) Funds Allocated to Sub-State Recipients Under this Grant
NPS Program or Project Start Code/Date
NPS Program or Project Completion Code/Date
Estimated expenditure breakdown for main source categories after project is completed

Appendix D

FACTORS IN PLANNING TARGET FORMULA

Factor	Data source	Weighting	Rationale
I. Statutory set-aside for Indian Tribes	§ 106 allocation formula	0.0033	§ 518(f).
II. Other:			
Minimum amount for the States and Territories.	N/A	0.2643	All States, D.C. and territories receive funds to institutionalize NPS control activities & program.
1988 Section 305(b) Report	1988 Draft–10/89	N.A	National data used to determine the weighting factors for ag, urban, mining, & forestry as indicated below.
Population	1980 Census 1987 Census (est.)	0.2861	Factors include State fraction of national population, population density, and population growth.
Cropland Acreage	1987 Ag Census 1987 NRI Data 1980 Census Data 1986 ASIWPCA NPS Report	0.1581	Cropland is used as a surrogate for sediment and nutrient problems, which account for about 85% of ag NPS problems. Modeling approach based partly on 1986 ASIWPCA national data.
Pasture & Rangeland Acreage	1987 Ag Census	0.0205	Animal units & animal units/farm acre used as surrogate for BOD & bacteria problems, which account for about 11% of the ag NPS problem.
Forest Harvest Acreage	EPA	0.0429	Acreage of private & Federal forest harvested annually.
Wellhead Protection Areas	Wellhead Protection Program Allotment Formula—EPA	0.1135	Factors include relative risk to ground water, number of people potentially impacted, number of wellheads to be protected & size of States.
Critical Aquatic Habitats	Dahl, T.E 1990. Wetland Losses in the United States 1970s 1980s. U.S. Dept. of the Interior, Fish & Wildlife Service, Washington, D.C.	0.0500	State share of total wetland acreage is a meaningful surrogate for critical aquatic habitat since it covers both fresh and saline waters.

FACTORS IN PLANNING TARGET FORMULA—Continued

Factor	Data source	Weighting	Rationale
Other Use Impact—319(a)	N/A	N/A	All NPS factors for ag, urban, forestry & mining are based upon land-based activities, therefore addressing impaired & threatened waters.
Mining	1987 NRI 1980 RCA Appraisal	0.0572	State's fraction of mined acres as surrogate for mining.
Pesticides	1987 NRI 1986 National Pesticide Usage Data Base, RFF & EPA	0.0074	Amount & rate of application of active ingredients for pesticides recommended for inclusion in EPA's National Pesticide Survey.

*The weighting for ''Other Factors'' is based on the allocation after National set-asides have been subtracted from the total appropriated funds. As a result, the sum of the weighting for ''Other Factors'' is unity.

Note: These factors are unchanged from EPA's current formula.

Appendix E

State-by-State Section 319 Allocation

This Appendix sets forth, for each State, its percentage of the total allocation of Section 319 dollars each year. To calculate the allocation provided to a particular State in a particular year, do the following:

1. Begin with the total 319 funding appropriated by Congress for the year in question.

2. Subtract at least 1/3% of the total 319 appropriation for distribution to Indian Tribes. (The Clean Water Act allows EPA to provide only up to one-third of one percent of the total 319 appropriation to Tribes. However, for each of the past several years, Congress has removed that limitation for the year in question, and EPA has provided that $6 million of the total 319 appropriation should be distributed to eligible Tribes. Since this depends on annual congressional appropriations language, the annual allocation of Section 319 funds to Indian Tribes cannot be reliably predicted.)

3. Multiply the funds remaining after step #2 by the applicable State percentage below.

	Percentage
Region 15	
Connecticut	0.98
Maine	1.17
Massachusetts	1.36
New Hampshire	0.76
Rhode Island	0.68
Vermont	0.74
Region 2	
New Jersey	1.67
New York	3.40
Puerto Rico	0.56
Virgin Islands	0.27
Region 3	
Delaware	0.72
Dist. Of Col.	0.63
Maryland	1.34
Pennsylvania	2.95
Virginia	1.97
West Virginia	1.10
Region 4	
Alabama	1.96
Florida	3.92
Georgia	2.34
Kentucky	1.71
Mississippi	1.92
N. Carolina	2.33
S. Carolina	1.56
Tennessee	1.59
Region 5	
Illinois	4.12
Indiana	2.25
Michigan	2.93
Minnesota	3.46
Ohio	3.04
Wisconsin	2.59
Region 6	
Arkansas	1.97
Louisiana	2.44
New Mexico	1.22
Oklahoma	1.58
Texas	4.75
Region 7	
Iowa	2.29
Kansas	1.85
Missouri	2.31
Nebraska	1.82
Region 8	
Colorado	1.27
Montana	1.33
N. Dakota	2.42
S. Dakota	1.64
Utah	0.92
Wyoming	0.98
Region 9	
Arizona	1.64
California	5.34
Hawaii	0.77
Nevada	0.85
Am. Samoa	0.27
Guam	0.27
Marianas	0.27
Region 10	
Alaska	1.22
Idaho	1.24
Oregon	1.39
Washington	1.92

Appendix F—Generic Grant Condition Regarding Watershed-Based Plans

The recipient [name of State lead nonpoint source agency] has received a grant to implement one or more watershed-based plans. The recipient shall complete the development of a watershed-based plan, including all of the information required by elements (a)—(i) in Section III. D of these guidelines (''Watershed-Based Plans''), prior to beginning to implement it with Section 319 funds.

Upon request by EPA, the recipient [name of State lead nonpoint source agency] shall provide a copy of any watershed-based plan funded under Section 319 as well as any available information regarding the status of implementation activities and results, including but not limited to any reports on BMP's implemented; 319 funds expended; contributions of funds by other sources to assist in implementation of the watershed-based plans (to the extent this information is readily available to the State); results achieved; and other relevant and appropriate information.

[FR Doc. 03–26755 Filed 10–22–03; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice 56]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Notice and request for comments.

SUMMARY: The Export-Import Bank, as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments should be received on or before November 24, 2003 to be assured of consideration.

ADDRESSES: Direct requests for additional information to Angela Beckman, Export-Import Bank of the U.S., 811 Vermont Avenue, NW., Washington, DC 20571, (202) 565–3418. Direct comments to David Rostker, Office of Management and Budget, Office of Information and Regulatory Affairs, NEOB Room 10202, Washington, DC 20503, (202) 395–3897.

SUPPLEMENTARY INFORMATION:

Titles and Form Numbers: Application for Medium-Term Insurance or Guarantee EIB Form 03–02.

OMB Number: New.

Type of Review: New collection.

Need and Use: The information requested enables the applicant to provide Ex-Im Bank with the information necessary to obtain legislatively required assurance of repayment and fulfills other statutory requirements. The form encompasses medium-term financial guarantees and insurance policies.

Affected Public: It affects all entitles involved in the export of U.S. goods and services, including exporters, banks, insurance brokers and non-profit or state and local governments acting facilitators.

Estimated Annual Respondents: 989.

Estimated Time Per Respondent: 1 hour.

Estimated Annual Burden: 989.

Frequency of Reporting or Use: Applications submitted one time.

Dated: October 17, 2003.

Solomon Bush,

Agency Clearance Officer.

BILLING CODE 6690–01–M

Export-Import Bank of the United States

APPLICATION FOR MEDIUM-TERM INSURANCE OR GUARANTEE

This application is to be used for insurance and guarantee transactions with financed amounts of $10 million or less (excluding financed premium) and repayment terms between eighteen months and seven years. Applications for other Ex-Im Bank products can be found on Ex-Im Bank's web site under the "Apply" section.

Additional information on how to apply for Ex-Im Bank Medium-Term Insurance or Guarantees can be found at Ex-Im Bank's web site **http://www.exim.gov/tools/how_to_apply.html.**

Send this application to Ex-Im Bank, 811 Vermont Avenue, NW, Washington, D.C. 20571. Ex-Im Bank will also accept e-mailed PDF and faxed applications. Ex-Im Bank will not require the originals of these applications to be mailed. Please note the applications must be PDF scans of original applications and all required application attachments. (Fax number 202.565.3380, e-mail **exim.applications@exim.gov**.)

APPLICATION FORM

1. FINANCING TYPE REQUESTED

A. Product ❑ Insurance
❑ Guarantee

B Conversion of a preliminary commitment or a Letter of Interest
❑ No ❑ Yes. The Ex-Im Bank reference number is: _____

C. Resubmission ❑ Check if this is a resubmission of an application that was previously deemed incomplete or was withdrawn for other reasons. The Ex-Im Bank reference number is: _____

D. Renewal ❑ CGF (Credit Guarantee Facility)
❑ MTR (Medium-term Repetitive Insurance Policy)

2. PARTICIPANTS:

Applicant

Applicant name:		Duns #:
Contact person:		Phone #:
Position title:		Fax #:
Street address:		E-mail:
City:	State/Province:	Nine-digit zip code:
Country:		Taxpayer ID #:
Number of employees:		

Applicant's role in the transaction: ❑ exporter ❑ buyer/ borrower ❑ lender

Primary contact point for Ex-Im Bank inquiries on this transaction: ❑ exporter ❑ broker (insurance only) ❑ lender

This application is a ❑ supplier credit or a ❑ buyer credit.

Broker (Insurance Only)

If none, insert "none." Ex-Im Bank Broker #:

Name of Broker: Phone #:

Contact person: Fax #: E-Mail:

Exporter. The exporter is the U.S. entity that contracts with the buyer for the sale of the U.S. goods and services.

❑ Check if the exporter is the applicant. Otherwise, complete the information below for each exporter, including ancillary service providers.

Exporter name: Duns #:

Contact person: Phone #:

Position title: Fax #:

Street address: E-mail:

City: State/Province: Nine digit zip code:

Taxpayer ID #:

Number of employees:

Supplier. The supplier is the U.S. company that manufactures the goods and/or performs the services to be exported.

❑ Check if the supplier is also the exporter. Otherwise, complete the information below for each supplier, including ancillary service providers.

Supplier name: Duns #:

Contact person: Phone #:

Position title: Fax #:

Street address: E-mail:

City: State/Province: Nine digit zip code:

Taxpayer ID #:

Number of employees:

Borrower. The borrower is the entity that agrees to repay the loan.

❑ Check if the borrower is the applicant. If not, complete the information below.

Borrower name: Duns #:

Contact person: Phone #:

Position title: Fax #:

Street address: E-mail:

City: State/Province: Postal code:

Taxpayer ID #:

Guarantor. The guarantor is the person or entity that agrees to repay the credit if the borrower does not. Refer to the medium-term credit standards (at **http://www.exim.gov/tools/medium-termcreditstandards.doc**) to determine in what situations personal or corporate guarantors are required for medium term transactions. Complete the information below for each guarantor if a guarantor is offered or required.

Guarantor name:		Duns #:
Contact person:		Phone #:
Position title:		Fax #:
Street address:		E-mail:
City:	State/Province:	Postal code:

Buyer. The buyer is the entity that contracts with the exporter for the purchase of the U.S. goods and services. Check if the buyer is also the ❑ borrower or ❑ guarantor. Otherwise, complete the information below.

Buyer name:		Duns #:
Contact person:		Phone #:
Position title:		Fax #:
Street address:		E-mail:
City:	State/Province:	Postal code:
Country:		

End-user. The end-user is the foreign entity that uses the U.S. goods and services. Check if end-user is also the ❑ borrower or ❑ guarantor or ❑ buyer. Otherwise, complete the information below.

End-user name:		Duns #:
Contact person:		Phone #:
Position title:		Fax #:
Street address:		E-mail:
City:	State/Province:	Postal code:
Country:		

Lender. The lender is the company that extends the Ex-Im Bank guaranteed or insured loan to the Borrower. Check if the lender is the ❑ applicant. Otherwise, complete the information below.

Lender name:	Duns #:	MGA# (Guarantees only)
Contact person:		Phone #:
Position title:		Fax #:
Street address:		E-mail:
City:	State/Province:	Nine digit zip code:
Country:		

3. DETAILS OF COVERAGE REQUESTED

A. Coverage Type ❑ Comprehensive Risk
❑ Political Risk Only

B. Special Features Requested

Check the boxes for the coverage that apply to the transaction. View the fact sheets describing the coverage on Ex-Im Bank's web site as noted below. Complete and attach the requested forms.

☐ Pre-shipment cover *Attachment II - Pre-shipment Questionnaire required*	☐ Used Equipment *Attachment E required* **http://www.exim.gov/proucts/policies/used_equip.html**	☐ Co-Financing with Foreign Export Credit Agency *Attachment H required* **http://www.exim.gov/pub/txt/95-10aph.doc**
☐ Local Cost Support **http://www.exim.gov/products/policies/local_cost.html**	☐ Foreign Currency Guarantee (specify currency) _____ **http://www.exim.gov/products/guarantee/foreign_curr.html**	☐ Environmental Exports Program **http://www.exim.gov/products/special/environment.html**
☐ Ancillary Service Fees **http://www.exim.gov/products/ebd-m-13.html**	☐ Credit Guarantee Facility **http://www.exim.gov/products/credit_guar.html**	☐ Military/ Security/ Police **http://www.exim.gov/products/policies/military.html**
☐ Nuclear **http://www.exim.gov/products/policies/nuclear/envnucp.html** In addition Nuclear-screening document must be submitted with application.	☐ Finance Lease Structure **http://www.exim.gov/products/insurance/leasing.html**	☐ Other _____

4. TRANSACTION DESCRIPTION

a) Ex-Im Bank requests that each exporter fill out and attach a Content Report detailing the goods and services being exported. The content report is located at **www.exim.gov/pub/txt/ebd-m-58.doc**. If the content report(s) are not being submitted at this time, fill out the following:

Describe the goods and services to be exported. Include a section for each exporter including the name, make, model, manufacturer/supplier, SIC or NAICS Code (if known), number of units, unit price and use for the goods:

b) Describe the purpose of the transaction. Include answers to the following: Will the goods be used to create or expand production capacity for an exportable product? Are the goods and services destined for an identifiable project? If so, provide information on the total estimated project costs in US dollars. Also provide information as to other sources of financing for the project including working capital.

c) Indicate whether an application for support of this export contract or a related project has been filed with the Agency for International Development, Maritime Administration, Overseas Private Investment Corporation, Trade Development Agency or a multilateral financing agency. If so include a brief description of the additional support.

5. REQUESTED FINANCING AMOUNTS AND STRUCTURE

Ex-Im Bank support is based on the value of the eligible goods and services in the exporter's supply contract(s) or purchase order(s). The total level of support will be the lesser of: 85% of the value of all eligible goods and services; or 100% of the U.S. content included in all eligible goods and services in the exporters' supply contracts. In addition, Ex-Im Bank may also finance certain local costs, ancillary services as approved, and the exposure fee/premium. Fill out the chart below to determine estimated eligible amounts.

		Definition	**US$**
A	Supply Contracts or Purchase Orders	The aggregate price of all goods and services in all the supply contract(s) or purchase order(s), including local costs, ancillary services, and excluded goods and services. Break out ancillary services in A ii.	Ai Aii
B	Excluded Goods and Services	The aggregate price of all goods and services that are not eligible for or are excluded from Ex-Im Bank support (e.g. goods not shipped from the U.S. and excluded ancillary services). Local costs should not be included in this line.	
C	Total Local Costs	The aggregate price of all goods manufactured in the end-user's country and all services provided by residents of the purchaser's country. Ex-Im Bank may be able to finance these amounts up to 15% of D below.	
D	Net Contract Price	A minus B minus C	
E	Eligible Foreign content	The aggregate cost of any goods produced or manufactured outside the U.S, or services provided by third country personnel or foreign freight costs and foreign insurance included in the net contract price (line D), (e.g. foreign items shipped from the US)	
F	U.S. Content	D minus E	
G	Cash Payment	This amount must be the greater of E or 15% of D	
H	Local Cost Financing Requested	This can be no more than 15% of D	
I	**Financed Amount Requested** (Excluding Exposure Fee)	D minus G plus H	

A. Exposure Fee (Guarantees)/ Premium (Insurance). Check one box.

- ❑ Ex-Im Bank to finance the fee/premium, which will be paid as the credit is drawn down.
- ❑ Ex-Im Bank to finance the fee/premium, which will be paid up front.
- ❑ Ex-Im Bank will not finance the fee/premium, and it will be paid as the credit is drawn down.
- ❑ Ex-Im Bank will not finance the fee/premium, and it will be paid up front.

B. Transaction Structure.

i. Principal Repayment Term. (years) _____. Unless otherwise requested, equal installments of principal will be repaid semi-annually beginning six months after the starting point.

ii Starting Point. The starting point is generally the event that marks the fulfillment of the exporter's contractual responsibility. See Ex-Im Bank's fact sheets on starting points and reach-back policies at **www.exim.gov**. (Check one box.)

- ❑ Shipment (single shipment)
- ❑ Final Shipment (multiple shipments)
- ❑ Mean Shipment (multiple shipments)
- ❑ Services Completion.
- ❑ Completion of Installation. Specify date:_____
- ❑ Project Completion. Specify date: _____

iii Shipment Period. Shipments will be completed and/or services will be performed from: [ ] (month/year) to [ ] (month/year) excluding any acceptance, retention, or warranty period. If shipment is planned for a certain number of days after Ex-Im Bank authorization, so note:

iv. Promissory Notes

For transactions with multiple shipments indicate:

- ❑ There will be one promissory note per shipment.
- ❑ Disbursements will be consolidated into one promissory note.

v. Interest rate

The interest rate to be charged on the guaranteed/insured loan is:

6. REASON FOR REQUESTING EX-IM BANK SUPPORT.

Ex-Im Bank will finance the export of U.S. goods and services if it can be demonstrated that Ex-Im Bank support is necessary for the transaction to proceed. Check one of the boxes below describing why support is necessary.

- ❑ The exporter is aware that foreign companies are competing, or are expected to compete for the sale. Provide company name, country, and (if known/applicable) the supporting export credit agency.

- ❑ The exporter is aware that foreign companies manufacture comparable goods and services that are sold in the buyer's market with export credit agency support available. Provide company name, country, and (if known/applicable) the supporting export credit agency.

❑ There is limited availability of private financing (from either external or domestic sources). Indicate how financing is constrained by checking the appropriate box.

❑ No availability of economically viable interest rates on terms over one to two years.
❑ Financial institution lending capacity limits reached for either borrower and/or country.
❑ Other (please describe). _____

7. CREDIT INFORMATION

❑ The information requested in *Attachment I: Credit Information* is attached.

8. OTHER INFORMATION AND CERTIFICATIONS

A. General Information - Provide the following:

❑ Credit Agency report(s) on the exporter(s). If exporter has a credit rating of BBB or better, this is not required.
❑ Annex A to the Master Guarantee Agreement (Guarantees only) at **http://www.exim.gov/pub/pdf/mt-anx-exec.pdf.**
❑ Lender's mandate letter (required when applicant is a financial institution).

B. Supply Contracts Between the Exporter and Buyer.

❑ Sales contract(s), pro forma invoice(s), or purchase order(s) are attached.
❑ This is a request for a repetitive sales insurance policy (MTR) or a credit guarantee facility (CGF) and no contract is attached.

C. Commitment Fee Agreement. (Guarantees Only)

For a guarantee, a commitment fee accrues starting 60 days after the authorization of a final commitment and is payable semiannually in arrears on a schedule determined at the time of authorization. The commitment fee is 1/8 of 1% per annum on the un-disbursed and un-cancelled balance of the guaranteed loan. Choose one of the options below regarding the payment of the commitment fee:

❑ The applicant is the borrower, and by signing the application, is irrevocably committing to pay the commitment fee.
❑ The applicant is the guaranteed lender, and is (check one):
  ❑ signing the application which irrevocably commits it to pay the fee, or
  ❑ signing the application and enclosing with it an Ex-Im Bank standard form fee letter from the borrower (at **http://www.exim.gov/pub/pdf/mt-anx-exec.pdf**). This letter irrevocably commits the borrower to pay the fee.
❑ The applicant is the exporter, and is signing the application and enclosing with it an Ex-Im Bank standard form fee letter from the ❑ borrower or ❑ guaranteed lender (at **http://www.exim.gov/pub/pdf/mt-anx exec.pdf**). This letter irrevocably commits the borrower or guaranteed lender to pay the fee.

D. Anti-Lobbying Disclosure Form

Please refer to the Anti-Lobbying Declaration/Disclosure forms (at **http://www.exim.gov/pub/pdf/95-10apd.pdf)** and include a signed copy of the appropriate form(s) with your application.

E. Certifications

The undersigned certifies that the facts stated and the representations made in this application and any attachments to this application are true, to the best of the applicant's knowledge and belief after due diligence, that the applicant has not omitted any material facts. The undersigned certifies that neither it, nor its principals, have within the past three years been a) debarred, suspended, declared ineligible from participating in, or voluntarily excluded from participation in, a covered transaction, b) formally proposed for debarment, with a final determination still pending,

c) indicted, convicted or had a civil judgment rendered against it for any of the offenses listed in the Regulations, d) delinquent on any substantial debts owed to the U.S. Government or its agencies or instrumentalities as of the date of execution of this application; or e) the undersigned has received a written statement of exception from Ex-Im Bank attached to this certification, permitting participation in this Covered Transaction despite an inability to make certifications a) through d) in this paragraph. We further certify that we have not and will not knowingly enter into any agreements in connection with the Goods and Services with any individual or entity that has been debarred, suspended, declared ineligible from participating in, or voluntarily excluded from participation in a Covered Transaction. All capitalized terms not defined herein shall have the meanings set forth in the Government-wide Non- procurement Suspension and Debarment Regulations - Common Rule (Regulations).

In addition, we further certify that we have not, and will not, engage in any activity in connection with this transaction that is a violation of a) the Foreign Corrupt Practices Act of 1977, 15 U.S.C. 78dd-1, et seq. (which provides for civil and criminal penalties against individuals who directly or indirectly make or facilitate corrupt payments to foreign officials to obtain or keep business), b) the Arms Export Control Act, 22 U.S.C. 2751 et seq., c) the International Emergency Economic Powers Act, 50 U.S.C. 1701 et seq., or d) the Export Administration Act of 1979, 50 U.S.C. 2401 et seq.; nor have we been found by a court of the United States to be in violation of any of these statutes within the preceding 12 months, and to the best of our knowledge, the performance by the parties to this transaction of their respective obligations does not violate any other applicable law.

The applicant certifies that the representations made and the facts stated in this application and its attachments are true, to the best of its knowledge and belief, and it has not misrepresented or omitted any material facts. It further understands that these certifications are subject to the penalties for fraud against the U.S. Government (18 USC 1001, et. seq.).

8. NOTICES

The applicant is hereby notified that information requested by this application is done so under authority of the Export-Import Bank Act of 1945, as amended (12 USC 635 et. seq.); provision of this information is mandatory and failure to provide the requested information may result in Ex-Im Bank being unable to determine eligibility for support. The information provided will be reviewed to determine the participants' ability to perform and pay under the transaction referenced in this application. Ex-Im Bank may not require the information and applicants are not required to provide information requested in this application unless a currently valid OMB control number is displayed on this form (see upper right of each page).

Public Burden Statement: Reporting for this collection of information is estimated to average 1 hour per response, including reviewing instructions, searching data sources, gathering information, completing, and reviewing the application. Send comments regarding the burden estimate, including suggestions for reducing it, to Office of Management and Budget, Paperwork Reduction Project OMB# 3048-0009, Washington, D.C. 20503.

The information provided will be held confidential subject to the Freedom of Information Act (5 USC 552) the Privacy Act of 1974 (5 USC 552a), and the Right to Financial Privacy Act of 1978 (12 USC 3401), except as otherwise required by law. Note that the Right to Financial Privacy Act of 1978 provides that Ex-Im Bank may transfer financial records included in an application for a loan or loan guarantee, or concerning a previously approved loan or loan guarantee, to another Government authority as necessary to process, service or foreclose on a loan or loan guarantee, or collect on a defaulted loan or loan guarantee.

Applicant (company) name: .....

Name and tittle of authorized officer: .....

Signature of authorized officer: .....

Date: .....

APPLICATION FOR MEDIUM-TERM INSURANCE OR GUARANTEE

Attachment I: Credit Information Requirements

Directions: Please check each box to indicate information submitted. For information not applicable to the transaction write N/A in the box. All boxes should either be checked or marked N/A. Parts 1 and 2 indicate information required to process a Medium-term Insurance or Guarantee transaction. Part 3 provides a list of items that are optional. Sending information contained in this section may expedite the processing of your application.

1. INFORMATION ON THE BORROWER:

- ❑ If the primary source of repayment for the transaction is a corporate guarantor provide only 1a), 1b) and 1 c) on the borrower;
- ❑ If current information (within the last six months) as described below is on file at Ex-Im Bank, indicate Guarantee or Policy # _____.
- ❑ If the primary source of repayment is the borrower provide the information noted in 1 a) – 1 g) below (note optional information described in part 3):

a) Company description and ownership.

- ❑ Provide a concise description of the company origin, legal status, facilities, business activities and primary markets.
- ❑ Provide the name of each owner of at least 10% of company shares and his/her ownership percent.

b) Related party information

- ❑ Provide names and a brief description of subsidiaries, parent company, and/or commonly owned companies ("related parties").
- ❑ Indicate which, if any, of the related parties account for more than 25% of the borrower's sales or purchases during the last fiscal year.
- ❑ Indicate which, if any, related parties extend loans to the borrower or to whom the borrower extends loans, if loans are material to the borrower. Materiality is defined as 10% of the borrower's total assets.
- ❑ Provide details of guarantees given on behalf of related parties by the borrower, if loans are material to the borrower.

c) Credit agency report

- ❑ Provide a credit agency report on the borrower not older than six months from date of application, or
- ❑ Check if credit agency report is not applicable because the borrower is a financial institution (bank), or a foreign government agency.

d) Creditor Bank or Supplier References

- ❑ Provide a creditor bank reference prepared within six months of the application date. Report should include bank name, address, and length of relationship, amount, currency, and terms of secured and unsecured credit and repayment experience.
- ❑ If the borrower does not have any financial institution creditors, provide two supplier references. Supplier references should be dated within six months of the application and include years of credit experience, annual sales, the terms of sale, the amount of the last sale, the recent high credit, the amount currently outstanding, details on any past due amounts, and repayment experience.

e) Financial Statements

There are certain requirements for all financial statements, regardless of the amount of the transaction. These are as follows:

i) ❑ Provide financial statements for the previous three fiscal years, as well as interim statements if the latest fiscal year end statements are dated more than nine months from the date of application. When interim state ments are provided, also provide interim statements for the same interim period for the previous year (for comparative purposes).

ii) ❑ A summary of significant accounting principles must accompany all financial statements. These should outline, at a minimum, the depreciation methods and rates, valuation methods for inventory, fixed assets and investments and the inflation accounting method used, if any. For construction companies, a descrip tion of the revenue recognition method should be included. Additionally, financial statements should break out depreciation expense, gross interest expense, tax expense and current maturities of long-term financial institution or supplier debt, if any.

iii) ❑ For all financial statements that present combined or consolidated results, provide the percentage of total assets, total liabilities, tangible net worth, sales, and net income represented by each entity that is participating in the transaction as the buyer, borrower, guarantor or end-user. A combining/consolidating worksheet would have all this information.

There are certain additional financial statement information requirements that depend on the amount of the financing request as follows:

iv) ❑ For financed amounts of up to and including $1 million: Audited financial statements are preferred but not required for non-financial institutions. Audited statements are required for financial institutions. While English language statements are preferred, Ex-Im Bank will accept Spanish language financials statements.

v) ❑ For financed amounts of greater than $1 million up to and including $5 million: While English language statements are preferred, Ex-Im Bank will accept Spanish language financial statements. Financial statements must be audited by an external independent auditor.

vi) ❑ For financed amounts of greater than $ 5 million: Financial statements must be audited by an external independent auditor. Statements must be in English.

f) Market indications, if available, are as follows:

Name of rating agency:_____ Rating:_____ Date:_____

Include the debt rating reports issued by the rating agency, and if applicable, the prospectus for a debt or equity offering during the two years prior to the application date.

g) Supplemental Credit Questions.

❑ Provide the answers to the questions listed in Attachment C to the Medium-term Credit Standards for transactions of greater than U.S. $5 million up to and including $10 million where the primary source of repayment is a non-financial institution that does not have market indications. These questions are located on Ex-Im Bank's web site at **www.exim.gov/tools/medium-termcreditstandards**.

2. INFORMATION ON THE CORPORATE GUARANTOR (S):

❑ Not applicable. Refer to the Medium-Term Credit Standards at (**http://www.exim.gov/tools/medium-termcreditstandards.doc**) to determine in what situations corporate guarantors are required for medium term transactions.

❑ If the corporate guarantor is not the primary source of repayment, provide 1 a), and 1 b) and 1 c) as described above.

❑ If the corporate guarantor is the primary source of repayment, provide the information noted in 1 a) – 1 g)

3. OPTIONAL items which the applicant may attach. These may expedite the processing of your application.

- ❑ Financial spreads on the borrower and/or guarantor designated as the primary source of repayment. See Ex-Im Bank's website for spreading conventions, which should be used as guidelines.
- ❑ Calculation of the financial performance criteria of Ex-Im Bank's Medium-Term Credit Standards on the borrower or guarantor designated as the primary source of repayment.
- ❑ Mitigating factors for any of the performance criteria that are not met.
- ❑ Supplemental credit questions as detailed in I g) for deals of less than $5 million.
- ❑ Translations of Spanish language financial statements, if applicable.
- ❑ Explanations of any adverse information contained in the credit report, references and/or financial statements, including interims.

APPLICATION FOR MEDIUM-TERM INSURANCE OR GUARANTEE

Attachment II: Pre-shipment Questionnaire

Complete this form only if you are requesting pre-shipment insurance coverage for your transaction. Details on pre-shipment coverage can be found at **http://www.exim.gov/pub/ins/pdf/eib01-04.pdf**.

Details of Coverage Requested:

a) Provide the reason pre-shipment coverage is being requested: .....

b) Indicate the date the contract was executed or the anticipated date of signing: .....

c) Indicate the estimated period between the contract date and the final shipment date of items: .....

d) Provide a schedule of any progress payments made or to be made by the borrower during the pre-shipment period, or indicate none: .....

APPLICATION FOR MEDIUM-TERM INSURANCE OR GUARANTEE

Attachment III: Leasing Questionnaire (Under Development)

[FR Doc. 03–26773 Filed 10–22–03; 8:45 am]
BILLING CODE 6690–01–C

FARM CREDIT ADMINISTRATION

Proposed Related Services; Farm Management and Agricultural Trust

AGENCY: Farm Credit Administration.

ACTION: Notice; reopening of comment period.

SUMMARY: The Farm Credit Administration (FCA or we) is reopening the comment period on our request for public comment on an inquiry by a Farm Credit System (System or FCS) institution for approval to offer farm management and agricultural trust services as authorized ''Related Services.'' We are reopening the comment period so all interested parties have more time to respond to our questions.

DATES: Please send your comments to the FCA by December 22, 2003.

ADDRESSES: You may send comments by electronic mail to *''reg-comm@fca.gov,''* through the Pending Regulations section of the FCA's interactive Web site at *''http://www.fca.gov,''* or through the government-wide *''http://www.regulations.gov''* portal. You may also send written comments to S. Robert Coleman, Director, Regulation and Policy Division, Office of Policy and Analysis, Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090 or by facsimile to (703) 734–5784. Copies of all comments we receive can be reviewed at FCA's office in McLean, Virginia.

FOR FURTHER INFORMATION CONTACT: Lori Markowitz, Policy Analyst, Office of Policy and Analysis, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4498, TTY (703) 883–4434; or Joy Strickland, Senior Counsel, Regulatory Enforcement Division, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–4020.

SUPPLEMENTARY INFORMATION: On August 19, 2003, FCA published a notice in the **Federal Register** seeking public comment on a request from a FCS institution to offer farm management and agricultural trust services as authorized ''Related Services.'' *See* 68 FR 49773, August 19, 2003. One member of the public requested that we reopen the comment period for an additional 60 days in consideration of the complex elements of the request. In response to this request, we are reopening the comment period until December 22, 2003 so all interested parties have more time to respond to our questions. The FCA supports public involvement and participation in its regulatory and policy process and invites all interested parties to review and provide comments on our notice.

Dated: October 17, 2003.

Jeanette C. Brinkley,

Secretary, Farm Credit Administration Board.

[FR Doc. 03–26728 Filed 10–22–03; 8:45 am]

BILLING CODE 6705–01–P

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Notice of New Exposure Draft Identifying and Reporting on Earmarked Funds

AGENCY: Federal Accounting Standards Advisory Board.

Board Action: Pursuant to the Federal Advisory Committee Act (Pub. L. No. 92–463), as amended, section 10(a)(2), and the FASAB Rules Of Procedure, as amended in October, 1999, notice is hereby given that the Federal Accounting Standards Advisory Board has published a new exposure draft, *Identifying and Reporting on Earmarked Funds.*

A summary of the proposed Statements follows: The proposed standard defines earmarked funds as being financed by statutorily dedicated revenues, often supplemented by other financing sources, which remain available over time. These dedicated revenues and other financing sources are required by statute to be used for designated activities, benefits or purposes, and must be accounted for separately from the Government's general revenues.

Respondents are encouraged to comment on any part of the exposure drafts. Written comments are requested by December 17, 2003, and should be sent to: Wendy M. Comes, Executive Director, Federal Accounting Standards Advisory Board, 441 G Street, NW, Suite 6814, Washington, DC 20548.

Copies of the Exposure Drafts can be obtained by contacting FASAB at 202–512–7350. Additionally, the Exposure Drafts will be available on FASAB's Home page *http://www.fasab.gov/.*

FOR FURTHER INFORMATION CONTACT: Wendy Comes, Executive Director, 441 G St., NW, Mail Stop 6K17V, Washington, DC 20548, or call (202) 512–7350.

Authority: Federal Advisory Committee Act. Pub. L. No. 92–463.

Dated: October 16, 2003.

Wendy M. Comes,

Executive Director.

[FR Doc. 03–26725 Filed 10–22–03; 8:45 am]

BILLING CODE 1610–01–M

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than November 6, 2003.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166–2034:

1. Bale South Central Family Limited Partnership, Horse Cave, Kentucky; Bale South Central Trust, Horse Cave, Kentucky; as general partner and Thomas M. Bale, Cave City, Kentucky; Lester D. Bale, Horse Cave, Kentucky; William O. Bale, LaFollette, Tennessee; Ellen L. Bale, Glasgow, Kentucky; and Ruth H. Bale, Bowling Green, Kentucky; to acquire control of South Central Bancshares of Kentucky, Inc., Horse Cave, Kentucky, and thereby control First Deposit Bancshares, Inc., Tompkinsville, Kentucky, which controls South Central Savings Bank, FSB, Elizabethtown, Kentucky, and South Central Bank of Monroe County, Tompkinsville, Kentucky; United Central Bancshares, Inc., Bowling Green, Kentucky; First United Bancshares, Inc., Glasgow, Kentucky, which controls Central Bank of Barren County, Inc., Glasgow, Kentucky; and South Central Bank of Daviess County, Inc., Ownesboro, Kentucky.

Board of Governors of the Federal Reserve System, October 17, 2003.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 03–26716 Filed 10–22–03; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at www.ffiec.gov/nic/.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 17, 2003.

A. Federal Reserve Bank of Atlanta (Sue Costello, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309–4470:

1. Crews Banking Corp., Wauchula, Florida; to acquire 100 percent of the voting shares of Englewood Acquisition Bank, Englewood, Florida.

2. Crews Banking Corp., Wauchula, Florida; to merge with Desoto Banking Corp., Arcadia, Florida, and thereby indirectly acquire The First State Bank of Arcadia, Arcadia, Florida.

Board of Governors of the Federal Reserve System, October 17, 2003.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 03–26717 Filed 10–22–03; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

TRANSACTION GRANTED EARLY TERMINATION

ET date	Trans num	ET req status	Party name
22–Sep–03	20030956	G	Helen of Troy Limited.
		G	Unilever N.V.
		G	Conopco, Inc.
	20030965	G	Lindsay Goldberg & Bessemer LP.
		G	Jonathan Frankel.
		G	Certified Merchant Services, Ltd.
24–Sept–03	20030947	G	Anheuser-Busch Companies, Inc.
		G	Robert and Beverly Lewis.
		G	FBC Industries.
	20030968	G	Informatica Corporation.
		G	Striva Corporation.
		G	Striva Corporation.
26–Sep–03	20030942	G	Telenor ASA.
		G	Golden Telecom, Inc.
		G	Golden Telecom, Inc.
	20030953	Y	The Seminole Group, L.P.
		Y	The Williams Companies, Inc.
		Y	Gas Supply, L.L.C.
		Y	Williams Midstream Marketing and Risk Management L.L.C.
		Y	Williams Power Company, Inc.
	20030960	Y	The Berwind Company LLC.
		Y	Whitehall Associates, L.P.
		Y	Elmer's Holdings, Inc.
	20030978	G	American Capital Strategies, Ltd.
		G	ICN Pharmaceuticals, Inc.
		G	ICN Biomedicals, Inc.
	20030980	G	Lone Star Fund IV (U.S.), L.P.
		G	Korea Exchange Bank.
		G	Korea Exchange Bank.
29–SEP–03	20030944	G	Fritz Gerber.
		G	IGEN International, Inc.
		G	IGEN International, Inc.
	20030951	G	Mayne Group Limited.

TRANSACTION GRANTED EARLY TERMINATION—Continued

ET date	Trans num	ET req status	Party name
		G	Abbott Laboratories.
		G	Abbott Laboratories.
	20030973	G	Mark Cuban.
		G	OCM Opportunities Fund II, L.P.
		G	Silver Holdco Inc.
	20030977	G	Todd Wagner.
		G	OCM Opportunities Fund II, L.P.
		G	Silver Holdco Inc.
	20030984	G	Hillenbrand Industries, Inc.
		G	Advanced Respiratory, Inc.
		G	Advanced Respiratory, Inc.
30–SEP–03	20030830	S	Cinram International Inc.
		S	AOL Time Warner Inc.
		S	WEA Manufacturing Inc.
		S	Ivy Hill Corporation.
		S	Warner Music Manufacturing Europe GmbH.
		S	Warner Music GM Merchandising Inc.
		S	Giant Merchandising.
	20030950	G	Applied Micro Circuits Corporation.
		G	JNI Corporation.
		G	JNI Corporation.
	20030976	G	Reservoir.
		G	Exelon Corporation.
		G	Exelon Corporation.
01–OCT–03	20030981	G	Health Management Associates, Inc.
		G	Tenet Healthcare Corporation.
		G	National Medical Hospital of Tullahoma, Inc.
		G	Three Rivers Healthcare, Inc.
		G	Tenet Lebanon Surgery Center, LLC.
		G	Health Point Physician Hospital Organization, Inc.
		G	S.C. Management, Inc.
		G	National Medical Hospital of Wilson County, Inc.
	20030987	G	Bain Capital Fund VII, L.P.
		G	Keystone Automotive Operations, Inc.
		G	Keystone Automotive Operations, Inc.
02–OCT–03	20030985	G	OGE Energy Corp.
		G	NRG Energy, Inc.
		G	NRG McLain LLC.
	20030989	G	Lennar Corporation.
		G	Newhall Land and Farming Company.
		G	Valencia Water Company.
	20030990	G	MFA Limited Partnership.
		G	Newhall Land and Farming Company.
		G	Valencia Water Company.
	20030993	G	Blackstone/Neptune Acquisition Company L.L.C.
		G	Suez.
		G	Ondeo Nalco Company.
03–OCT–03	20030936	G	Alcan Inc.
		G	Nevamar Holdings, LLC.
		G	Nevamar Holdings, LLC.
	20031009	G	Silver Lake Partners, L.P.
		G	Gartner, Inc.
		G	Garnter, Inc.

FOR FURTHER INFORMATION CONTACT: Sandra M. Peay, Contact Representative or Renee Hallman, Legal Technician, Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room H–303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 03–26751 Filed 10–22–03; 8:45 am]

BILLING CODE 6750–01–M

FEDERAL TRADE COMMISSION

[File No. 031 0152]

GenCorp Inc.; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before November 13, 2003.

ADDRESSES: Comments filed in paper form should be directed to: FTC/Office of the Secretary, Room 159–H, 600 Pennsylvania Avenue, NW.,

Washington, DC 20580. Comments filed in electronic form should be directed to: *consentagreement@ftc.gov,* as prescribed in the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Jonathan Klarfeld, FTC, Bureau of Competition, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–3187.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and Section 2.34 of the Commission's Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for October 15, 2003), on the World Wide Web, at ''*http://www.ftc.gov/os/2003/10/index.htm.*'' A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. Comments filed in paper form should be directed to: FTC/Office of the Secretary, Room 159–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. If a comment contains nonpublic information, it must be filed in paper form, and the first page of the document must be clearly labeled ''confidential.'' Comments that do not contain any nonpublic information may instead be filed in electronic form (in ASCII format, WordPerfect, or Microsoft Word) as part of or as an attachment to email messages directed to the following email box: *consentagreement@ftc.gov.* Such comments will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with section 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 CFR 4.9(b)(6)(ii)).

Analysis of Agreement Containing Consent Orders To Aid Public Comment

I. Introduction

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an Agreement Containing Consent Orders (''Consent Agreement'') from GenCorp Inc. (''GenCorp''), which is designed to remedy the anticompetitive effects resulting from GenCorp's acquisition of the propulsion business of Atlantic Research Corporation (''ARC''), a subsidiary of Sequa Corporation (''the Acquisition''). The Consent Agreement includes a proposed Decision and Order (''Order'') that would require GenCorp to divest ARC's in-space liquid propulsion business within six (6) months after the date the Acquisition is consummated. The Consent Agreement also includes an Order to Hold Separate and Maintain Assets that requires GenCorp to preserve the ARC in-space liquid propulsion business as a viable, competitive, and ongoing operation until the divestiture is achieved.

The proposed Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and the comments received and will decide whether it should withdraw from the Consent Agreement or make final the Consent Agreement's proposed Order.

On May 2, 2003, Aerojet-General Corporation (''Aerojet''), a subsidiary of GenCorp, entered into an asset purchase agreement with ARC (which was subsequently amended on August 29, 2003) to acquire substantially all of the assets of ARC, as well as the shares of ARC UK Limited, for $133 million in cash. The Commission's Complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening competition in the U.S. markets for the research, development, manufacture and sale of monopropellant thrusters, bipropellant apogee thrusters, dual mode apogee thrusters, and bipropellant attitude control thrusters—four different types of in-space propulsion thrusters.

II. The Parties

GenCorp is a technology-based manufacturing company headquartered in Rancho Cordova, California. Its businesses are concentrated in three areas: aerospace and defense, fine chemicals and automotive. Through its Aerojet subsidiary, GenCorp researches, develops, manufactures and sells propulsion products and systems for space and defense applications, as well as armament systems for precision tactical weapon systems. Aerojet produces a full range of in-space propulsion thrusters at its facility located in Redmond, Washington.

Sequa Corporation (''Sequa'') is a diversified industrial company that produces a broad range of products through operating units in five business segments: aerospace, propulsion, metal coating, specialty chemicals and other products. The propulsion segment of Sequa's business consists of the ARC business. ARC, headquartered in Gainesville, Virginia, is a leading supplier of liquid and solid fuel propulsion products and systems for military, commercial and civil applications. ARC produces a full range of in-space propulsion thrusters at its liquid propulsion facilities in Niagara, New York, and Westcott in the United Kingdom.

III. The In-Space Propulsion Markets

In-space propulsion thrusters (which are, essentially, engines) are used to maneuver spacecraft, such as satellites and interplanetary vehicles, through space after a launch vehicle delivers them to the upper atmosphere. In-space propulsion thrusters are essential components of in-space propulsion systems, which include valves, fuel tanks, fuel lines and other parts necessary to generate the thrust needed to move spacecraft in space.

In-space propulsion thrusters are used primarily to either place spacecraft into their intended orbits, or maintain their proper position while in orbit. The process of transferring a spacecraft to its intended orbit after it has been dropped off by a launch vehicle is referred to as ''apogee insertion,'' and the space propulsion thrusters that perform apogee insertion are known as ''apogee thrusters.'' Apogee thrusters typically generate between 90 pounds and 140 pounds of force.

Attitude control thrusters are used to provide gentle pushes that allow spacecraft to control their angular position while in orbit so that sensors, transponders or other hardware on the spacecraft are properly oriented with respect to the Earth (or other target) to perform their functions. Attitude control thrusters can also perform a function called ''station-keeping,'' which refers to a spacecraft's ability to maintain its position in an assigned orbital slot, in its proper orientation. Because attitude control and station-keeping functions require only small, short bursts of thrust to perform, attitude control thrusters typically produce five pounds of thrust or less.

There are two primary types of in-space propulsion thrusters: monopropellant thrusters and

bipropellant thrusters. The primary difference between these two types of thrusters is that monopropellant thrusters utilize a single liquid fuel source (typically hydrazine), whereas bipropellant thrusters operate using a combination of both a liquid fuel (typically monomethylhydrazine) and an oxidizer. Monopropellant thrusters are well-suited for pulsed operations of short duration, making them ideal for attitude control and station-keeping. As such, monopropellant thrusters typically produce less than a pound to about 5 pounds of thrust (although for particular applications, some monopropellant thrusters are designed to produce as much as 140 pounds of thrust).

A bipropellant in-space propulsion system typically consists of separate attitude control and apogee thrusters. As with other apogee thrusters, bipropellant apogee thrusters generally produce thrust that ranges between 90 to 140 pounds of force. Bipropellant attitude control thrusters provide thrusts comparable to monopropellant thrusters, which are usually 5 pounds of force or less. Bipropellant in-space propulsion systems are more fuel efficient, as well as more expensive, than monopropellant propulsion systems.

Dual mode apogee thrusters are specialized bipropellant apogee thrusters that operate using hydrazine, the same fuel used by monopropellant thrusters, in combination with an oxidizer. A dual mode propulsion system affords spacecraft manufacturers the option of using monopropellant thrusters and a bipropellant apogee thruster on a single spacecraft without having to use two separate fuel systems. As a result, a spacecraft can attain the benefit of using highly reliable and accurate monopropellant thrusters for attitude control while at the same time utilizing bipropellant apogee thrusters. Dual mode apogee thrusters are more fuel efficient, as well as more expensive, than traditional bipropellant apogee thrusters.

The determination by customers of the appropriate type of propulsion thruster to put on a satellite or spacecraft is based on the satellite's or spacecraft's mission and encompasses a variety of factors. Those factors can include the nature of the mission, the length of the mission, the orbit(s) in which the spacecraft will operate, the mass and volume of the spacecraft itself, the launch vehicle it will be placed on, other equipment that will be on the spacecraft, and the price of the thrusters. An engineering decision is made, based on all of these factors, as to which type of propulsion thruster(s) is best suited for a particular satellite or spacecraft. Although the price of an in-space propulsion thruster is a factor that customers take into consideration when selecting an in-space propulsion thruster, it is rarely the most important factor. For these reasons, customers for one type of in-space propulsion thruster—monopropellant, bipropellant apogee, dual mode apogee, or bipropellant attitude control—would not be likely to switch to any of the other types of thrusters for use on a particular satellite or spacecraft, if the price of the first type of thruster were to increase by five to ten percent.

The relevant geographic market for each in-space propulsion market is the United States. Although there are a handful of foreign suppliers of in-space propulsion thrusters, they are not effective competitors in the U.S. in-space propulsion markets. The principal reason for this is that U.S. export regulations, in particular the International Traffic in Arms Regulations, make it very burdensome and time consuming for U.S. commercial, civil and defense customers to procure foreign thrusters, making foreign suppliers an unattractive option. In addition, on many U.S. Department of Defense as well as other U.S. governmental spacecraft programs, foreign-supplied thrusters are not an option at all due to national security issues. Accordingly, for the vast majority of in-space propulsion applications, only U.S. manufacturers are effective competitors.

The U.S. markets for the research, development, manufacture and sale of monopropellant, bipropellant apogee, and dual mode apogee thrusters are all highly concentrated. Aerojet and ARC are the only viable suppliers of these thrusters to commercial, civil and defense customers in the United States for most programs. Even for customers where other suppliers (such as foreign manufacturers) are potential options, Aerojet and ARC are each other's closest competitors and the other suppliers are substantially less attractive options. Prior to the acquisition, Aerojet and ARC frequently competed against each other for U.S. monopropellant, bipropellant apogee, and dual mode apogee thruster business, and this competition benefitted customers of these products. By eliminating competition between the only two viable competitors for most customers and by far the two best options for other customers in these highly concentrated markets, the proposed acquisition would create a virtual monopoly in each of these markets. As a result, the combined firm would be able to exercise market power unilaterally. It is thus likely that as a result of the acquisition purchasers of monopropellant, bipropellant apogee and dual mode apogee thrusters would be forced to pay higher prices and that innovation, service levels, and product quality in these markets would decrease.

The U.S. market for the research, development, manufacture and sale of bipropellant attitude control thrusters is also highly concentrated. In fact, ARC is the only firm with recent sales of bipropellant attitude control thrusters to U.S. customers. For many customers, including the vast majority of U.S. governmental customers, ARC essentially has a monopoly position in the bipropellant attitude control thruster market. Although Aerojet does not currently produce bipropellant attitude control thrusters, it has substantial existing expertise and technology in this area, has produced these thrusters in the recent past, and is a likely potential entrant into the market. Aerojet's acquisition of the ARC in-space liquid propulsion business eliminates the most likely potential competitor in this market and for many customers, including the vast majority of U.S. governmental customers, leaves the market with a single supplier for the foreseeable future.

There are significant impediments to new entry into each in-space propulsion market. A new entrant into any one of these markets would need to undertake the difficult, expensive and time-consuming process of researching and developing a viable in-space propulsion thruster, acquiring the necessary production and testing assets, obtaining the appropriate environmental permits, and developing the expertise needed to successfully design, manufacture, and market these products. Finally, a new entrant would need to establish what is commonly referred to as ''heritage'' for each new thruster, which is a successful track record of use in space. It would take a new entrant over two years to accomplish these steps and achieve a significant market impact. Additionally, new entry into the in-space propulsion market is unlikely to occur because the sunk costs and economies of scale necessary to enter the market and effectively produce in-space propulsion thrusters are extremely high relative to the limited sales opportunities available to new entrants.

IV. The Consent Agreement

The Consent Agreement effectively remedies the acquisition's anticompetitive effects by requiring GenCorp to divest ARC's in-space liquid

propulsion business. This business consists of, among other things, ARC's Niagara and Westcott production facilities, specialized manufacturing and testing equipment, technical drawings, advertising and training materials, customer lists, intellectual property and other assets at the Niagara and Westcott facilities used in the research, development, manufacturing, testing, marketing, customer support and sale of monopropellant, bipropellant apogee, dual mode apogee, and bipropellant attitude control thrusters (collectively ''ARC In-Space Liquid Propulsion Assets''). Pursuant to the Consent Agreement, GenCorp is required to divest the ARC In-Space Liquid Propulsion Assets to a buyer, at no minimum price, within six (6) months from the date of the Acquisition. The acquirer of the ARC In-Space Liquid Propulsion Assets must receive the prior approval of the Commission.

If GenCorp has not divested the ARC In-Space Liquid Propulsion Assets within the time and in the manner required by the Consent Agreement, the Commission may appoint a trustee to divest these assets, subject to Commission approval. The trustee will have the exclusive power and authority to accomplish the divestiture within six (6) months, subject to any necessary extensions by the Commission. The Consent Agreement requires GenCorp to provide the trustee with access to information related to the ARC in-space liquid propulsion business as necessary to fulfill his or her obligations.

The proposed Order to Hold Separate and Maintain Assets that is also included in the Consent Agreement requires that GenCorp hold separate and maintain the viability of the ARC In-Space Liquid Propulsion Assets as a viable and competitive operation until the business is transferred to the Commission-approved acquirer. Furthermore, it contains measures designed to ensure that no material confidential information is exchanged between GenCorp and the ARC in-space liquid propulsion business (except as otherwise provided in the Order or in the Order to Hold Separate and Maintain Assets) and provisions designed to prevent interim harm to competition in each in-space propulsion market pending divestiture. The Order to Hold Separate and Maintain Assets provides for the Commission to appoint a Hold Separate Trustee who is charged with the duty of monitoring GenCorp's compliance with the Order to Hold Separate and Maintain Assets. Pursuant to that Order, the Commission has appointed Charles L. Wilkins of KPMG LLP as Hold Separate Trustee to oversee the In-Space Liquid Propulsion Assets prior to their divestiture and to ensure that GenCorp complies with its obligations under the Consent Agreement regarding the In-Space Liquid Propulsion Assets. Mr. Wilkins has more than 35 years of experience both inside the aerospace and defense industry and as a professional advisor. He has held several key management positions in the aerospace and defense industry, including senior corporate auditor, controller and chief financial officer, and during his professional consulting career has assisted most of the larger defense contractors in the United States in a wide array of services including litigation and dispute resolution, compliance matters and profit maximization.

The proposed Order requires GenCorp to provide the Commission, within thirty (30) days from the date the Order becomes final, a verified written report setting forth in detail the manner and form in which GenCorp intends to comply, is complying, and has complied with the provisions relating to the proposed Order and the Order to Hold Separate and Maintain Assets. The proposed Order further requires GenCorp to provide the Commission with a report of compliance with the Order every thirty (30) days after the date of that initial compliance report until the divestiture has been completed.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the Consent Agreement, the proposed Decision and Order, or the Order to Hold Separate and Maintain Assets, or to modify their terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 03–26750 Filed 10–22–03; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Statement of Organization, Functions, and Delegations of Authority

Part F, of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS), 49 FR 35247, dated September 6, 1984, is amended to include the following delegations of authority from the Secretary to the Administrator, CMS, with the authority to redelegate, to carry out the following administrative and enforcement activities vested in the Secretary of the Department of Health and Human Services under part C, of title XI of the Social Security Act, as amended.

• Section F.30., Delegations of Authority, is amended to include the following delegations of authority for certain provisions under part C, of title XI of the Social Security Act.

WW. 1. The authority under section 262 of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104–191, as amended, to administer and to make decisions regarding the interpretation, implementation and enforcement of the regulations adopting standards and general administrative requirements under 45 CFR, parts 160, 162 and 164 (except to the extent that these actions pertain to the ''Standards for Privacy of Individually Identifiable Health Information'').

2. The authority under section 262 of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as amended, except to the extent that these actions pertain to the Standards for Privacy of Individually Identifiable Health Information, to:

A. Impose civil monetary penalties, under section 1176 of the Social Security Act, including any settlement thereof, for a covered entity's failure to comply with certain requirements and standards.

B. Make exception determinations, under section 1178(a)(2)(A) of the Social Security Act, concerning when provisions of State laws that are contrary to the Federal standards are not preempted by the Federal provisions.

Exclusion to This Authority

All actions under Part C, of Title XI that pertain to Standards for Privacy of Individually Identifiable Health Information, were delegated by the Secretary to the Director, Office for Civil Rights, and are excluded from this delegation. This delegation to the Administrator also excludes the authority to issue regulations and to hold hearings and issue final determinations if the respondent has requested a hearing on the imposition of civil monetary penalties. This delegation should be exercised under the Department's existing delegation of authority and policy on issuance of regulations. In addition, I hereby affirm and ratify any actions taken by the Administrator, CMS, or any

subordinates, that involved the exercise of the authority delegated hereunder prior to the effective date of this delegation.

This delegation of authority is effective immediately (October 7, 2003).

Dated: October 7, 2003.

Tommy G. Thompson,

Secretary.

[FR Doc. 03–26629 Filed 10–22–03; 8:45 am]

BILLING CODE 4120–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) allow the proposed information collection project: ''Surveys of Employee Benefit Managers of Large National Employers Concerning Dissemination Effectiveness of Health Services Research Information (SEBM)''. In accordance with the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(a)), AHRQ invites the public to comment on this proposed information collection.

This proposed information collection was previously published in the **Federal Register** on August 20, 2003 and allowed 60 days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment.

DATES: Comments on this notice must be received by November 24, 2003.

ADDRESSES: Written comments should be submitted to: Allison Eydt, Human Resources and Housing Branch, Office of Information and Regulatory Affairs, OMB, New Executive Office Building, Room 10235, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Cynthia D. McMichael, AHRQ, Reports Clearance Officer, (301) 427–1651.

SUPPLEMENTARY INFORMATION:

Proposed Project

''Surveys of Employee Benefit Managers of Large National Employers Concerning Dissemination Effectiveness of Health Research Information (SEBM)''

The SEBM is a series of two questionnaires and one telephone interview to learn the extent of awareness, use of, and satisfaction with the content of health services research information by employee benefits managers of large national employers.

The surveys will also measure the effectiveness of the methods used to disseminate health services research information. The initial survey will serve as a benchmark against which the remaining two surveys in this study will be measured. Subsequent to the initial survey, AHRQ will initiate two interventions: (1) Placing AHRQ-sponsored information on a website and (2) making personal contact with employee benefits managers; a survey will follow each intervention to measure the extent to which each intervention makes employee benefit managers aware of AHRQ and its health research information. With this knowledge, AHRQ will be able to make changes to its information dissemination efforts to make them more effective and responsive to employee benefit managers.

Data Confidentiality Provisions

Data collected by the contractor and the contractor's draft analyses will be retained for one year after final acceptance of all contract deliverables, unless longer retention is requested by the agency for audit purposes. All agency documents pertaining to the contract will be archived after the contract is completed and retained in accordance with a Federal Records Act retention schedule.

Methods of Collection

The data will be collected using a combination of web-based and telephone surveys.

ESTIMATED ANNUAL RESPONDENT BURDEN

Survey	Number of respondents	Estimated time per respondent in minutes	Estimated total burden hours	Estimated annual cost to the government
Initial Benchmark Survey	240	10	40	$4000
Post Intervention Survey #1	45	10	7.5	750
Post Intervention Survey #2	240	10	40	4000
Total	525	10	87.5	8750

Request for Comments

In accordance with the above cited legislation, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of functions of AHRQ, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: September 29, 2003.

Carolyn M. Clancy,

Director.

[FR Doc. 03–26815 Filed 10–22–03; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[ATSDR–197]

Availability of Draft Toxicological Profiles

AGENCY: Agency for Toxic Substances and Disease Registry (ATSDR), Department of Health and Human Services (HHS).

ACTION: Notice of availability.

SUMMARY: The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), section 104(i)(3) [42 U.S.C. 9604(i)(3)] directs the Administrator of ATSDR to prepare toxicological profiles of priority hazardous substances and to revise and publish each updated toxicological profile as necessary. This notice announces the availability of the 17th set of toxicological profiles, which consists of one new draft and seven updated drafts, prepared by ATSDR for review and comment.

DATES: In order to be considered, comments on these draft toxicological profiles must be received on or before February 24, 2004. Comments received after the close of the public comment period will be considered at the discretion of ATSDR based upon what is deemed to be in the best interest of the general public.

ADDRESSES: Requests for printed copies of the draft toxicological profiles should be sent to the attention of Ms. Yulandia Jordan, Division of Toxicology, Agency for Toxic Substances and Disease Registry, Mailstop E–29, 1600 Clifton Road, NE., Atlanta, Georgia 30333. Electronic access to these documents is also available at the ATSDR Web site: *http://www.atsdr.cdc.gov/toxpro2.html.*

Comments regarding the draft toxicological profiles should be sent to the attention of Dr. Marie Socha, Division of Toxicology, Agency for Toxic Substances and Disease Registry, Mailstop E–29, 1600 Clifton Road, NE, Atlanta, Georgia 30333.

Requests for printed copies of the draft toxicological profiles must be in writing, and must specifically identify the hazardous substance(s) profile(s) that you wish to receive. ATSDR reserves the right to provide only one copy of each profile requested, free of charge. In case of extended distribution delays, requestors will be notified.

Written comments and other data submitted in response to this notice and the draft toxicological profiles should bear the docket control number ATSDR–197. Send one copy of all comments and three copies of all supporting documents to Dr. Marie Socha at the above stated address by the end of the comment period. Because all public comments regarding ATSDR toxicological profiles are available for public inspection, no confidential business information or other confidential information should be submitted in response to this notice.

FOR FURTHER INFORMATION CONTACT: Ms. Yulandia Jordon, Division of Toxicology, Agency for Toxic Substances and Disease Registry, Mailstop E–29, 1600 Clifton Road, NE., Atlanta, Georgia 30333, telephone 1–888–422–8737 or (404)498–0261.

SUPPLEMENTARY INFORMATION: The Superfund Amendments and Reauthorization Act (SARA) (Pub. L. 99–499) amends the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) (42 U.S.C. 9601 *et seq.*) by establishing certain responsibilities for the ATSDR and the U.S. Environmental Protection Agency (EPA) with regard to hazardous substances which are most commonly found at facilities on the CERCLA National Priorities List (NPL). Among these responsibilities is that the Administrator of ATSDR prepare toxicological profiles for substances included on the priority lists of hazardous substances. These lists identified 275 hazardous substances that ATSDR and EPA determined pose the most significant potential threat to human health. The availability of the revised priority list of 275 hazardous substances was announced in the **Federal Register** on October 25, 2001 (66 FR 54014). For prior versions of the list of substances *see* **Federal Register** notices dated April 17, 1987 (52 FR 12866); October 20, 1988 (53 FR 41280); October 26, 1989 (54 FR 43619); October 17, 1990 (55 FR 42067); October 17, 1991 (56 FR 52166); October 28, 1992 (57 FR 48801); February 28, 1994 (59 FR 9486); April 29, 1996 (61 FR 18744); November 17, 1997 (62 FR 61332) and October 21, 1999 (64 FR 56792). [CERCLA also requires ATSDR to assure the initiation of a research program to fill data needs associated with the substances.]

Section 104(i)(3) of CERCLA [42 U.S.C. 9604(i)(3)] outlines the content of these profiles. Each profile will include an examination, summary and interpretation of available toxicological information and epidemiologic evaluations. This information and these data are to be used to identify the levels of significant human exposure for the substance and the associated health effects. The profiles must also include a determination of whether adequate information on the health effects of each substance is available or in the process of development. When adequate information is not available, ATSDR, in cooperation with the National Toxicology Program (NTP), is required to assure the initiation of research to determine these health effects.

Although key studies for each of the substances were considered during the profile development process, this **Federal Register** notice seeks to solicit any additional studies, particularly unpublished data and ongoing studies, which will be evaluated for possible addition to the profiles now or in the future.

The following draft toxicological profiles will be made available to the public on or about October 17, 2003.

Document	Hazardous substance	CAS No.
1.	Bromoform	000075–25–2
	Dibromochloromethane	000124–48–1
2.	Carbon Tetrachloride	000056–23–5
3.	Hexachlorocyclohexane (gamma)	000058–89–9
	Hexachlorocyclohexane (beta)	000319–85–7
	Hexachlorocyclohexane (delta)	000319–86–8
	Hexachlorocyclohexane (alpha)	000319–84–6
	Hexachlorocyclohexane (technical)	000608–73–1
4.	Naphthalene	000091–20–3
	1-Methyl Naphthalene	000090–12–0
	2-Methyl Naphthalene	000091–57–6
5.	Nickel	007440–02–0
6.	Tin	007440–31–5
7.	Tungsten *	007440–33–7
8.	Zinc	007440–66–6

* Denotes new profile

All profiles issued as ''Drafts for Public Comment'' represent ATSDR's best efforts to provide important toxicological information on priority hazardous substances. We are seeking public comments and additional information which may be used to supplement these profiles. ATSDR remains committed to providing a public comment period for these documents as a means to best serve public health and our clients.

Dated: October 17, 2003.

Georgi Jones,

Director, Office of Policy and External Affairs, Agency for Toxic Substances and Disease Registry.

[FR Doc. 03–26724 Filed 10–22–03; 8:45 am]

BILLING CODE 4163–70–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration on Aging

Tribal Consultation (Listening Sessions) With American Indian/Alaskan Native/Native Hawaiian Representatives

SUMMARY: The Department of Health and Human Services policy on consultation with American Indian/Alaska Native (AI/AN) Governments and Organizations requires each Operating Division to meet with AI/AN Tribal Representatives. The Administration on Aging (AoA) will call three Tribal Listening Sessions that comply with the Department's tribal consultation policy and the Older Americans Act (OAA). The listening sessions will be held in conjunction with OAA Title VI training and technical assistance meetings in 2003 and 2004.

The Tribal Listening Sessions will give AI/AN Tribal representatives, Native Hawaiian representatives, Title VI Directors, and AI/AN elders an opportunity to discuss Native American elder issues. The Administration on Aging is interested in the following critical issues:

What can the Aging Services Network do to empower older people and their families to make the best decisions about their care options? How can tribes build on the early success of the Native American Family Caregiver Support Program and expand access to information, make services more consumer-friendly, and allow caregivers more choices? What innovations are occurring at the Tribe, State and local level related to access and service delivery that could serve as models for other Tribes and communities across the country?

Anyone interested in testifying must pre-register to obtain a time slot. To accommodate as many speakers and diverse opinions as possible, each person will have a maximum of 10 minutes. AoA will accept a copy of written remarks at the time of the Tribal Listening Session.

DATES: The Tribal Listening Sessions are from 1 to 4 pm on the following dates and locations:

- October 29, 2003—Reno/Sparks, Nevada
- Feb. 25, 2004—Phoenix, Arizona
- April 28, 2004—Rapid City, South Dakota

FOR FURTHER INFORMATION AND TO REGISTER CONTACT: Kaufmann and Associates at 425 West 1ST Avenue, Spokane, WA 99201, phone: (509) 747–4994, fax: (509) 747–5030. These are not toll-free numbers. Electronic mail address: *info@olderindians.org*

If you are unable to attend but wish to provide comments or Tribal Resolutions, these may be faxed to Kauffman & Associates, Inc at (509) 747–5030.

In accordance with the provisions of the Americans with Disabilities Act (ADA), it is requested that any special assistance requirements be requested when registering for a Tribal Listening Session.

Dated: October 20, 2003.

Josefina G. Carbonell,

Assistant Secretary for Aging.

[FR Doc. 03–26736 Filed 10–22–03; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0269]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Infectious Disease Issues in Xenotransplantation

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (the PRA).

DATES: Fax written comments on the collection of information by November 24, 2003.

ADDRESSES: OMB is still experiencing significant delays in the regular mail, including first class and express mail, and messenger deliveries are not being accepted. To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: Fumie Yokota, Desk Officer for FDA, FAX: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: JonnaLynn P. Capezzuto, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Infectious Disease Issues in Xenotransplantation—(OMB Control Number 0910–0456)—Extension

The statutory authority to collect this information is provided under sections 351 and 361 of the PHS Act (42 U.S.C. 262 and 264) and under the provisions of the Federal Food, Drug, and Cosmetic Act that apply to drugs (21 U.S.C. 301 *et seq.*). The PHS guideline recommends procedures to diminish the risk of transmission of infectious agents to the xenotransplantation product recipient and the general public. The PHS guideline is intended to address public health issues raised by xenotransplantation, through identification of general principles of prevention and control of infectious diseases associated with xenotransplantation that may pose a hazard to the public health. The collection of information described in this guideline is intended to provide general guidance to sponsors in: (1) The development of xenotransplantation clinical protocols, (2) the preparation of submissions to FDA, and (3) the conduct of xenotransplantation clinical trials. Also, the collection of information will help ensure that the sponsor maintains important information in a cross-referenced system that links the relevant records of the xenotransplantation product recipient, xenotransplantation product, source animal(s), animal procurement center, and significant nosocomial exposures. The PHS guideline describes an occupational health service program for the protection of health care workers involved in xenotransplantation procedures, caring for xenotransplantation product recipients, and performing associated laboratory

testing. The guideline also describes public health needs for: (1) A national xenotransplantation database, which is currently under development by the PHS; (2) a central PHS biologic specimen archive, also under consideration; and (3) the Secretary's Advisory Committee on Xenotransplantation, which was developed and has been implemented by the Department of Health and Human Services. These public health programs and the PHS guideline are intended to protect the public health and to help ensure the safety of using xenotransplantation products in humans by preventing the introduction, transmission, and spread of infectious diseases associated with xenotransplantation.

The PHS guideline also recommends that certain specimens and records be maintained for 50 years beyond the date of the xenotransplantation. These include: (1) Records linking each xenotransplantation product recipient with relevant health records of the source animal, herd or colony, and the specific organ, tissue, or cell type included in or used in the manufacture of the product (3.2.7.1); (2) aliquots of serum samples from randomly selected animal and specific disease investigations (3.4.3.1); (3) source animal biological specimens designated for PHS use (3.7.1); animal health records (3.7.2), including necropsy results (3.6.4); and (4) recipients' biological specimens (4.1.2).

The retention period is intended to assist health care practitioners and officials in surveillance and in tracking the source of an infection, disease, or illness that might emerge in the recipient, the source animal, or the animal herd or colony after a xenotransplantation.

The recommendation for maintaining records for 50 years is based on clinical experience with several human viruses that have presented problems in human to human transplantation and are therefore thought to share certain characteristics with viruses that may pose potential risks in xenotransplantation. These characteristics include long latency periods and the ability to establish persistent infections. Several also share the possibility of transmission among individuals through intimate contact with human body fluids. Human immunodeficiency virus (HIV) and Human T-lymphotropic virus are human retroviruses. Retroviruses contain ribonucleic acid that is reverse-transcribed into deoxyribonucleic acid (DNA) using an enzyme provided by the virus and the human cell machinery. That viral DNA can then be integrated into the human cellular DNA. Both viruses establish persistent infections and have long latency periods before the onset of disease, 10 years and 40 to 60 years, respectively. The human hepatitis viruses are not retroviruses, but several share with HIV the characteristic that they can be transmitted through body fluids, can establish persistent infections, and have long latency periods, e.g., approximately 30 years for Hepatitis C.

In addition, the PHS guideline recommends that a record system be developed that allows easy, accurate, and rapid linkage of information among the specimen archive, the recipient's medical records, and the records of the source animal for 50 years. The development of such a record system is a one-time burden. Such a system is intended to cross-reference and locate relevant records of recipients, products, source animals, animal procurement centers, and nosocomial exposures.

Respondents to this collection of information are the sponsors of clinical studies of investigational xenotransplantation products under investigational new drug applications (INDs) and xenotransplantation product procurement centers, referred to as source animal facilities. Currently, there are 12 respondents who are sponsors of INDs that include protocols for xenotransplantation in humans. Other respondents for this collection of information are 18 source animal facilities which provide source xenotransplantation product material to sponsors for use in human xenotransplantation procedures. These 18 source animal facilities keep medical records of the herds/colonies as well as the medical records of the individual source animal(s). The total annual reporting and recordkeeping burden is estimated to be approximately 156 hours. The burden estimates are based on FDA's records of xenotransplantation-related INDs and estimates of time required to complete the various reporting and recordkeeping tasks described in the guideline. FDA does not expect the level of clinical studies using xenotransplantation to increase significantly in the next few years.

FDA is requesting an extension of OMB approval for the following reporting and recordkeeping recommendations in the PHS guideline:

TABLE 1.—REPORTING RECOMMENDATIONS

PHS Guideline Section	Description
3.2.7.2	Notify sponsor or FDA of new archive site when the source animal facility or sponsor ceases operations.
3.4	Standard operating procedures (SOPs) of source animal facility should be available to review bodies.
3.5.1	Include increased infectious risk in informed consent if source animal quarantine period of 3 weeks is shortened.
3.5.4	Sponsor to make linked records described in section 3.2.7 available for review.
3.5.5	Source animal facility to notify clinical center when infectious agent is identified in source animal or herd after xenotransplantation product procurement.

TABLE 2.—RECORDKEEPING RECOMMENDATIONS

PHS Guideline Section	Description
3.2.7	Establish records linking each xenotransplantation product recipient with relevant records.
4.3	Sponsor to maintain cross-referenced system that links all relevant records (recipient, product, source animal, animal procurement center, and nosocomial exposures).
3.4.2	Document results of monitoring program used to detect introduction of infectious agents which may not be apparent clinically.
3.4.3.2	Document full necropsy investigations including evaluation for infectious etiologies.
3.5.1	Justify shortening a source animal's quarantine period of 3 weeks prior to xenotransplantation product procurement.

TABLE 2.—RECORDKEEPING RECOMMENDATIONS—Continued

PHS Guideline Section	Description
3.5.2	Document absence of infectious agent in xenotransplantation product if its presence elsewhere in source animal does not preclude using it.
3.5.4	Add summary of individual source animal record to permanent medical record of the xenotransplantation product recipient.
3.6.4	Document complete necropsy results on source animals (50-year record retention).

TABLE 2.—RECORDKEEPING RECOMMENDATIONS—Continued

PHS Guideline Section	Description
3.7	Link xenotransplantation product recipients to individual source animal records and archived biologic specimens.
4.2.3.2	Record base-line sera of xenotransplantation health care workers and specific nosocomial exposure.
4.2.3.3 and 4.3.2	Keep a log of health care workers' significant nosocomial exposure(s).
4.3.1	Document each xenotransplant procedure.

TABLE 2.—RECORDKEEPING RECOMMENDATIONS—Continued

PHS Guideline Section	Description
5.2	Document location and nature of archived PHS specimens in health care records of xenotransplantation product recipient and source animal.

In the **Federal Register** of July 10, 2003 (FR 68 41153), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

TABLE 3.—ESTIMATED ANNUAL REPORTING BURDEN[1]

PHS Guideline Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
3.2.7.2[2]	18	0	0	0.5	0
3.2.7.2[2]	2	1	2	0.5	1.0
3.4[3]	12	0.33	4	0.08	0.32
3.5.1[4]	12	0.08	(0–1) 1	0.25	0.25
3.5.4[5]	12	1	12	0.5	6.0
3.5.5[4]	18	0.06	(0–1) 1	0.2	0.2
Total					7.77

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.
[2]No animal facility and 2 sponsors have ceased operations in the last 3 years.
[3]FDA's records indicate that an average of 4 INDs are expected to be submitted per year.
[4]Has not occurred in the past 3 years and is expected to continue to be a rare occurrence.
[5]Based on 36 patients treated over a 3 year period, the average number of xenotransplantation product recipients per year is estimated to be 12.

TABLE 4.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

PHS Guideline Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Recordkeeper	Total Hours
3.2.7[2]	1	1	1	16	16.0
4.3[3]	12	1	12	0.83	9.96
3.4.2[4]	12	11	132	0.25	33.0
3.4.3.2[5]	18	4	72	0.3	21.6
3.5.1[6]	12	0.08	(0–1) 1	0.5	0.5
3.5.2[6]	12	0.08	(0–1) 1	0.25	0.25
3.5.4	12	1	12	0.17	2.04
3.6.4[7]	12	2	24	0.25	6.0
3.7[7]	18	1.33	24	0.08	1.92
4.2.3.2[8]	12	25	300	0.17	51.0

TABLE 4.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]—Continued

PHS Guideline Section	No. of Record-keepers	Annual Frequency per Record-keeping	Total Annual Records	Hours per Record-keeper	Total Hours
4.2.3.2[6]	12	0.08	(0–1) 1	0.17	0.17
4.2.3.3 and 4.3.2[6]	12	0.08	(0–1) 1	0.17	0.17
4.3.1	12	1	12	0.25	3.0
5.2[9]	12	3	36	0.08	2.88
Total					148.49

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.
[2]A one-time burden for new respondents to set up a recordkeeping system linking all relevant records. FDA estimates 1 new sponsor annually.
[3]FDA estimates there is minimal recordkeeping burden associated with maintaining the record system.
[4]Monitoring for sentinel animals (subset representative of herd) plus all source animals. There are approximately 6 sentinel animals per herd x 1 herd per facility x 18 facilities = 108 sentinel animals. There are approximately 24 source animals per year (see footnote 7 of this table 4); 108 + 24 = 132 monitoring records to document.
[5]Necropsy for animal deaths of unknown cause estimated to be approximately 4 per herd per year x 1 herd per facility x 18 facilities = 72.
[6]Has not occurred in the past 3 years and is expected to continue to be a rare occurrence.
[7]On average 2 source animals are used for preparing xenotransplantation product material for one recipient. The average number of source animals is 2 source animals per recipient x 12 recipients annually = 24 source animals per year. (See footnote 5 of table 3 of this document.)
[8]FDA estimates there are approximately 12 clinical centers doing xenotransplantation procedures x approximately 25 health care workers involved per center = 300 health care workers.
[9]Twenty-four source animal records + 12 recipient records = 36 total records.

Because of the potential risk for cross-species transmission of pathogenic persistent virus, the guideline recommends that health records be retained for 50 years. Since these records are medical records, the retention of such records for up to 50 years is not information subject to the PRA (5 CFR 1320.3(h)(5)). Also, because of the limited number of clinical studies with small patient populations, the number of records is expected to be insignificant at this time.

Information collections in this guideline, not included in tables 1 through 4 of this document, can be found under existing regulations and approved under the OMB control numbers as follows: (1) ''Current Good Manufacturing Practice for Finished Pharmaceuticals,'' 21 CFR 211.1 through 211.208, approved under OMB control number 0910–0139; (2) ''Investigational New Drug Application,'' 21 CFR 312.1 through 312.160, approved under OMB control number 0910–0014; and (3) information included in a license application, 21 CFR 601.2, approved under OMB control number 0910–0338. (Although it is possible that a xenotransplantation product may not be regulated as a biological product (e.g., it may be regulated as a medical device), FDA believes, based on its knowledge and experience with xenotransplantation, that any xenotransplantation product subject to FDA regulation within the next 3 years will most likely be regulated as a biological product.) However, FDA recognized that some of the information collections go beyond approved collections; assessments for these burdens are included in tables 1 through 4 of this document.

In table 5 of this document, FDA identifies those collection of information activities that are already encompassed by existing regulations or are consistent with voluntary standards which reflect industry's usual and customary business practice.

TABLE 5.—COLLECTION OF INFORMATION REQUIRED BY CURRENT REGULATIONS AND STANDARDS

21 CFR Section	Description of Collection of Information Activity	21 CFR Section (unless otherwise stated)
2.2.1	Document off-site collaborations	312.52
2.5	Sponsor ensure counseling patient + family + contacts	312.62(c)
3.1.1 and 3.1.6	Document well-characterized health history and lineage of source animals	312.23(a)(7)(a) and 211.84
3.1.8	Registration with and import permit from the Centers for Disease Control and Prevention	42 CFR 71.53
3.2.2	Document collaboration with accredited microbiology labs	312.52
3.2.3	Procedures to ensure the humane care of animals	9 CFR parts 1, 2, and 3 and PHS Policy[1]
3.2.4	Procedures consistent for accreditation by the Association for Assessment and Accreditation of Laboratory Animal Care International (AAALAC International) and consistent with the National Research Council's (NRC) Guide	AAALAC International Rules of Accreditation[2] and NRC Guide[3]

TABLE 5.—COLLECTION OF INFORMATION REQUIRED BY CURRENT REGULATIONS AND STANDARDS—Continued

21 CFR Section	Description of Collection of Information Activity	21 CFR Section (unless otherwise stated)
3.2.5, 3.4, and 3.4.1	Herd health maintenance and surveillance to be documented, available, and in accordance with documented procedures; record standard veterinary care	211.100 and 211.122
3.2.6	Animal facility SOPs	PHS Policy[1]
3.3.3	Validate assay methods	211.160(a)
3.6.1	Procurement and processing of xenografts using documented aseptic conditions	211.100 and 211.122
3.6.2	Develop, implement, and enforce SOPs for procurement and screening processes	211.84(d) and 211.122(c)
3.6.4	Communicate to FDA animal necropsy findings pertinent to health of recipient	312.32(c)
3.7.1	PHS specimens to be linked to health records; provide to FDA justification for types of tissues, cells, and plasma, and quantities of plasma and leukocytes collected	312.23(a)(6)
4.1.1	Surveillance of xenotransplant recipient; sponsor ensures documentation of surveillance program life-long (justify >2 yrs.); investigator case histories (2 yrs. after investigation is discontinued)	312.23(a)(6)(iii)(f) and (g), and 312.62(b) and (c)
4.1.2	Sponsor to justify amount and type of reserve samples	211.122
4.1.2.2	System for prompt retrieval of PHS specimens and linkage to medical records (recipient and source animal)	312.57(a)
4.1.2.3	Notify FDA of a clinical episode potentially representing a xenogeneic infection	312.32
4.2.2.1	Document collaborations (transfer of obligation)	312.52
4.2.3.1	Develop educational materials (sponsor provides investigators with information needed to conduct investigation properly)	312.50
4.3	Sponsor to keep records of receipt, shipment, and disposition of investigative drug; investigator to keep records of case histories	312.57 and 312.62(b)

[1]The ''Public Health Service Policy on Humane Care and Use of Laboratory Animals'' (*http://www.grants.nih.gov/grants/olaw/references/phspol.htm*). (FDA has verified the Web site address, but is not responsible for subsequent changes to the Web site after this document publishes in the *Federal Register*.)

[2]AAALAC International Rules of Accreditation (*http://www.aaalac.org*). (FDA has verified the Web site address, but is not responsible for subsequent changes to the Web site after this document publishes in the *Federal Register*.)

[3]The NRC's ''Guide for the Care and Use of Laboratory Animals'' (1996).

Dated: October 16, 2003.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 03–26739 Filed 10–22–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0455]

Training Program for Regulatory Project Managers; Information Available to Industry

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) Center for Drug Evaluation and Research (CDER) is announcing the continuation of the Regulatory Project Management Site Tours and Regulatory Interaction Program. This training program was initiated in 1999, and it is intended to give CDER regulatory project managers an opportunity to tour pharmaceutical facilities and to exchange regulatory experiences with their industry counterparts. The Site Tours Program is intended to enhance review efficiency and quality by providing CDER staff with a better understanding of the pharmaceutical industry and its operations. Further, this program is intended to improve communication and cooperation between CDER staff and industry. The purpose of this notice is to invite pharmaceutical companies interested in participating in these programs to contact CDER.

DATES: Pharmaceutical companies may submit proposed agendas to the agency on or before December 22, 2003.

FOR FURTHER INFORMATION CONTACT: Patricia A. Stewart, Center for Drug Evaluation and Research (HFD–160), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–7496, FAX 301–480–6036.

SUPPLEMENTARY INFORMATION:

I. Background

An important part of CDER's commitment to make safe and effective drugs available to all Americans is optimizing the efficiency and quality of the drug review process. To support this primary goal, the center has initiated

various training and development programs to promote high performance of its regulatory project management staff. CDER seeks to significantly enhance review efficiency and review quality by providing the staff with a better understanding of the pharmaceutical industry and its operations. To this end, CDER is continuing this training program to give regulatory project managers the opportunity to tour pharmaceutical facilities. The goals are to provide: (1) First hand exposure to industry's drug development processes, and (2) a venue for sharing information about project management procedures (but not drug-specific information) with industry representatives.

II. Regulatory Project Management Site Tours and Regulatory Interaction Program

In this program, over a 2- to 3-day period, small groups (five or less) of regulatory project managers, accompanied by a senior level regulatory project manager, may observe operations of pharmaceutical manufacturing, packaging facilities, pathology/toxicology laboratories, and regulatory affairs operations. Neither this tour nor any part of the program is intended as a mechanism to inspect, assess, judge, or perform a regulatory function, but is meant rather to improve mutual understanding and to provide an avenue for open dialogue. During the Site Tours Program, regulatory project managers will also participate in daily workshops with their industry counterparts, focusing on selective regulatory issues important to both CDER staff and industry. The primary objective of the daily workshops is to learn about the team approach to drug development, including drug discovery, preclinical evaluation, project tracking mechanisms, and regulatory submission operations.

The overall benefit to regulatory project managers will be exposure to project management team techniques and processes employed by the pharmaceutical industry. By participating in this program, the regulatory project manager will grow professionally by gaining a better understanding of industry processes and procedures.

III. Site Selection

All travel expenses associated with the site tours will be the responsibility of CDER, therefore, selection will be based on the availability of funds and resources for each fiscal year.

If your firm is interested in offering a site tour or learning more about this training opportunity, please respond within 60 days of this notice by submitting a proposed agenda to Patricia A. Stewart (see **FOR FURTHER INFORMATION CONTACT**).

Dated: October 14, 2003.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 03–26695 Filed 10–22–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

General and Plastic Surgery Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: General and Plastic Surgery Devices Panel of the Medical Devices Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on November 21, 2003, from 8 a.m. to 5 p.m.

Location: Gaithersburg Holiday Inn, Walker/Whetstone Rooms, Two Montgomery Village Ave., Gaithersburg, MD.

Contact Person: David Krause, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–3090, ext. 141, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 12519. Please call the Information Line or access the Internet address of *http://www.fda.gov/cdrh/panelmtg.html* for up-to-date information on this meeting.

Agenda: The committee will discuss, make recommendations, and vote on two premarket approval applications (PMAs) for injectable devices intended to restore soft tissue facial contours such as nasolabial folds. Background information for each PMA, including the agenda and questions for the committee, will be available to the public 1-business day before the meeting on the Internet at *http://www.fda.gov/cdrh/panelmtg.html*. The material for this meeting will be posted on November 20, 2003.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by November 7, 2003. Oral presentations from the public will be scheduled between approximately 8:15 a.m. and 8:30 a.m., 11:30 a.m. and 11:45 a.m., 1:15 p.m. and 1:30 p.m., and 4 p.m. and 4:15 p.m. Time allotted for oral public presentations may be limited. Those desiring to make formal oral presentations should notify the contact person before November 7, 2003, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact AnnMarie Williams, Conference Management Staff, at 301–594–1283, ext. 113, at least 7 days in advance of the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: October 16, 2003.

Peter J. Pitts,

Associate Commissioner for External Relations.

[FR Doc. 03–26696 Filed 10–22–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003D–0478]

Draft Guidance on Marketed Unapproved Drugs; Compliance Policy Guide; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance entitled ''Marketed Unapproved Drugs; Compliance Policy Guide.'' This draft guidance describes how FDA intends to exercise its enforcement discretion with

regard to drugs marketed in the United States that do not have required FDA approval for marketing. This document will, when finalized, supersede section 440.100 entitled ''Marketed New Drugs Without Approved NDAs or ANDAs'' (CPG 7132c.02) of the Compliance Policy Guide (CPG). It applies to any new drug required to have FDA approval for marketing, including new drugs covered by the over-the-counter (OTC) review.

DATES: Submit written or electronic comments on the draft guidance by December 22, 2003. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Division of Drug Information (HFD–240), Center for Drug Evaluation and Research (CDER), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Send one self addressed adhesive label to assist the office in processing your requests. Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Sakineh Walther, Center for Drug Evaluation and Research (HFD–316), Food and Drug Administration, 1451 Rockville Pike, Rockville, MD 20852, 301–827–8964.

SUPPLEMENTARY INFORMATION:

I. Background

In the United States, as many as several thousand drug products are marketed illegally without required FDA approval. The manufacturers of these drugs have neither received FDA approval to legally market their drugs, nor have the drugs been marketed in accordance with a final over-the-counter (OTC) monograph. The drug approval and OTC monograph processes play an essential role in ensuring that all drugs are both safe and effective. Manufacturers of new drugs that lack required approval, including those that are not marketed in accordance with an OTC monograph, have not provided FDA with evidence demonstrating that their products are safe and effective. Therefore, FDA has an interest in taking steps to either encourage the manufacturers of these products to obtain the required evidence and comply with the approval provisions of the Federal Food, Drug, and Cosmetic Act (the act), or to remove the products from the market. FDA recognizes that these goals need to be achieved without adversely affecting public health, imposing undue burdens on consumers, or unnecessarily disrupting the market.

In general, in recent years, FDA has employed a risk-based enforcement approach to marketed unapproved drugs that includes efforts to identify illegally marketed drugs, prioritization of those drugs according to potential public health concerns or other impacts on the public health, and subsequent regulatory followup. Some of the specific actions the agency has taken have been precipitated by evidence of safety or effectiveness problems that has either come to our attention during inspections or was brought to our attention by outside sources.

The goals of this draft guidance are to address the following issues: (1) Clarify for FDA personnel and the regulated industry how FDA intends to exercise its enforcement discretion regarding unapproved drugs and (2) emphasize that illegally marketed drugs must obtain FDA approval.

The draft guidance reflects the agency's desire to address this issue with policies that are predictable, reasonable, and supportive of the public health. The agency's approach encourages companies to comply with the drug approval process, but it also seeks to minimize disruption to the marketplace and to safeguard consumer health when there are potential safety risks. The draft guidance explains that FDA will continue to give priority to enforcement actions involving unapproved drugs: (1) with potential safety risks, (2) that lack evidence of effectiveness, and (3) that constitute health fraud. It also explains how the agency intends to address those situations in which a firm obtains FDA approval to sell a drug that other firms have long been selling without FDA approval.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments on the draft guidance. Two copies of mailed comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The draft guidance and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet can obtain the guidance at *http://www.fda.gov/cder/guidance/index.htm*.

Dated: October 15, 2003.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 03–26753 Filed 10–20–03; 3:00 pm]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003D–0466]

International Cooperation on Harmonization of Technical Requirements for Registration of Veterinary Medicinal Products; Draft Guidance for Industry on ''Studies to Evaluate the Safety of Residues of Veterinary Drugs in Human Food: Repeat-Dose (Chronic) Toxicity Testing;'' Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability for comments of a draft guidance document for industry (#160) entitled ''Studies to Evaluate the Safety of Residues of Veterinary Drugs in Human Food: Repeat-Dose (Chronic) Toxicity Testing'' (VICH GL–37). This draft guidance has been developed for veterinary use by the International Cooperation on Harmonization of Technical Requirements for Registration of Veterinary Medicinal Products (VICH). This draft VICH guidance document establishes recommendations for internationally harmonized repeat-dose chronic toxicity testing.

DATES: Submit written or electronic comments on the draft guidance by November 24, 2003 to ensure their adequate consideration in preparation of the guidance document. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Communications Staff (HFV–12), Center for Veterinary Medicine (CVM), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document. Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. Comments should be identified with the full title of the draft guidance and the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Louis T. Mulligan, Center for Veterinary Medicine (HFV–153), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–6984, e-mail: lmulliga@cvm.fda.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In recent years, many important initiatives have been undertaken by regulatory authorities, industry associations, and individual sponsors to promote the international harmonization of regulatory requirements. FDA has participated in efforts to enhance harmonization and has expressed its commitment to seek scientifically based harmonized technical procedures for the development of pharmaceutical products. One of the goals of harmonization is to identify and reduce the differences in technical requirements for drug development among regulatory agencies in different countries.

FDA has actively participated in the International Conference on Harmonization of Technical Requirements for Approval of Pharmaceuticals for Human Use for several years to develop harmonized technical requirements for the approval of human pharmaceutical and biological products among the European Union, Japan, and the United States. The VICH is a parallel initiative for veterinary medicinal products. The VICH is concerned with developing harmonized technical requirements for the approval of veterinary medicinal products in the European Union, Japan, and the United States, and includes input from both regulatory and industry representatives.

The VICH steering committee is composed of member representatives from the European Commission, European Medicines Evaluation Agency; European Federation of Animal Health, Committee on Veterinary Medicinal Products; the United States' FDA; the U.S. Department of Agriculture; the Animal Health Institute; the Japanese Veterinary Pharmaceutical Association; the Japanese Association of Veterinary Biologics; and the Japanese Ministry of Agriculture, Forestry and Fisheries.

Four observers are eligible to participate in the VICH steering committee: One representative from the Government of Australia/New Zealand, one representative from industry in Australia/New Zealand, one representative from the Government of Canada, and one representative from industry in Canada. The VICH Secretariat, which coordinates the preparation of documentation, is provided by the International Federation for Animal Health (IFAH). An IFAH representative also participates in the VICH steering committee meetings.

II. Draft Guidance on Microbiological Acceptable Daily Intakes

The VICH Steering Committee held a meeting on May 8, 2003, and agreed that the draft guidance document entitled ''Studies to Evaluate the Safety of Residues of Veterinary Drugs in Human Food: Repeat-Dose (Chronic) Toxicity Testing'' (VICH GL–37) should be made available for public comment. This draft VICH guidance is one of a series of guidances developed to facilitate the mutual acceptance of safety data necessary for the determination of acceptable daily intakes (ADIs) for veterinary drug residues in human food. This draft guidance was developed after consideration of the current practices for evaluating veterinary drug residues in human food in the European Union, Japan, United States, Australia, New Zealand, and Canada. It also took account of available data from subchronic and chronic toxicity studies.

FDA and the VICH Expert Working Group on Toxicity Safety will consider comments about the draft guidance document. Information collection is covered under Office of Management and Budget control number 0910–0032.

III. Significance of Guidance

This draft document, developed under the VICH process, has been revised to conform to FDA's good guidance practices regulation (21 CFR 10.115).

The draft VICH guidance (#160) represents the agency's current thinking on the general approach to establish a microbiological ADI. This guidance does not create or confer any rights for or on any person and does not operate to bind FDA or the public. You may use an alternative method as long as it satisfies the requirements of the applicable statutes and regulations.

IV. Comments

This draft guidance document is being distributed for comment purposes only and is not intended for implementation at this time. Interested persons may submit written or electronic comments regarding this draft guidance document. Written comments should be submitted to the Division of Dockets Management (see **ADDRESSES**). Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. A copy of the draft guidance and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

V. Electronic Access

Comments may be submitted electronically on the Internet at *http://www.fda.gov/dockets/ecomments* (select ''[docket number] entitled 'Studies to Evaluate the Safety of Residues of Veterinary Drugs in Human Food: Repeat-Dose (Chronic) Toxicity Testing' (VICH GL–37).''

Copies of the draft guidance may be obtained on the Internet from the CVM home page at *http://www.fda.gov/cvm*.

Dated: October 14, 2003.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 03–26697 Filed 10–22–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Health Professions Preparatory, Pregraduate and Indian Health Professions Scholarship Programs

AGENCY: Indian Health Service, HHS.

ACTION: Notice of Availability of Funds for Health Professions Preparatory, Pregraduate, and Indian Health Professions Scholarship Programs for Fiscal Year (FY) 2004.

SUMMARY: The Indian Health Service (IHS) is publishing a Notice of Availability of Funds for Health Professions Preparatory, Pregraduate,

and Indian Health Professions Scholarship Programs for Fiscal Year (FY) 2004.

The IHS announces the availability of approximately $3,733,332 to fund scholarships for the Health Professions Preparatory and Pregraduate Scholarship Programs for FY 2004 awards. These programs are authorized by section 103 of the Indian Health Care Improvement Act (IHCIA), Pub. L. 94–437, as amended by Pub. L. 100–713, Pub. L. 102–573, and Pub. L. 104–313.

The Indian Health Scholarship (Professions), authorized by section 104 of the IHCIA, Pub. L. 94–437, as amended by Pub. L. 100–713, by Pub. L. 102–573, and by Pub. L. 104–313 has approximately $8,177,245 available for FY 2004 awards.

Full-time and part-time scholarships will be funded for each of the three scholarship programs.

The Indian Health Professions Preparatory Scholarship is listed as No. 93.123 in the Office of Management and Budget *Catalog of Federal Domestic Assistance* (CFDA). The Health Professions Pregraduate Scholarship is listed as No. 93.971, and the Indian Health Scholarship (Professions) is listed as No. 93.972 in the CFDA.

The Public Health Service (PHS) is committed to achieving the health promotion and disease prevention objectives of *Healthy People 2010,* a PHS-led activity for setting priority areas. This program announcement is related to the priority area of Education and Community-Based Programs. Potential applicants may obtain a copy of *Health People 2020,* (Full Report; Stock No. 017–001–00474–0) or *Healthy People 2010* (Summary Report; Stock No. 017–001–00473–1) through the Superintendent of Documents, Government Printing Office, Washington, DC 20402–9325 (Telephone 202–783–3238).

DATES: The application deadline for both new and continuing applicants is February 28, 2004. If February 28, falls on the week-end, the application will be due on the following Monday. Applications shall be considered as meeting the deadline if they are received by the appropriate Scholarship Coordinator on the deadline date or postmarked on or before the deadline date. (Applicants should request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.) Applications received after the announced closing date will be returned to the applicant and will not be considered for funding.

ADDRESSES: Application packets may be obtained by calling or writing to the addresses listed below. The application form number is IHS 856, 856–2 through 856–8, 815, 816, 818 (approved under OMB No. 0917–0006 (expires 12/31/2004)).

IHS Area Office and States/Locality Served:	Scholarship Coordinator/Address
Aberdeen Area IHS: Iowa, Nebraska, North Dakota, South Dakota	Ms. Alice LaFontaine, Scholarship Coordinator, Aberdeen Area IHS. Federal Building, Room 309, 115 4th Avenue, SW, Aberdeen, SD 57401, Tele: 605–226–7553.
Alaska Area Native Health Service: Alaska	Ms. Evangelyn Dotomain, Scholarship Coordinator, Alaska Area ISH, 3925 Tudor Centre Drive, Anchorage, Alaska 9508, Tele: 907–729–1913.
Albuquerque Area IHS: Colorado, New Mexico	Ms. Alvina Waseta, Scholarship Coordinator, Albuquerque Area IHS, 5300 Homestead Road, NE, Albuquerque, NM 87110, Tele: 505–248–4513.
Bemidji Area IHS: Illinois, Indiana, Michigan, Minnesota, Wisconsin	Mr. Tony Buckanaga, Scholarship Coordinator, BEmidji Area IHS, 522 Minnesota Avenue, NW, Room 209, Bemidji, MN 56601, Tele: 218–759–3415.
Billings Area IHS: Montana, Wyoming	Mr. Sandy Macdonald, Scholarship Coordinator, Billings Area IHS, Area Personnel Office, P.O. Box 36600, 2900 4th Avenue, North, Billings, MT 59103, Tele: 406–247–7210.
California Area IHS: California, Hawaii	Ms. Mona Celli, Scholarship Coordinator, California Area IHS, 650 Capitol Mall, 6th Floor, Sacramento, CA 95814, Tele: 916–930–3981.
Nashville Area IHS: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, District of Columbia, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia.	Ms. Alvina Waseta, Scholarship Coordinator, Nashville Area IHS, 5300 Homestead Road, NE, Albuquerque, NM 87110, Tele: 505–248–4513.
Navajo Area IHS: Arizona, New Mexico, Utah	Ms. Roselinda Allison, Scholarship Coordinator, Navajo Area IHS, P.O. Box 9020, Window Rock, AZ 86515, Tele: 928–871–1358.
Oklahoma City Area IHS: Kansas, Missouri, Oklahoma	Mr. Jim Ingram, Scholarship Coordinator, Oklahoma City Area IHS, HC 67, Box 132, Marietta, OK 73448, Tele: 580–276–5983.
Phoenix Area IHS: Arizona, Nevada, Utah	Norm Cavanaugh, Scholarship Coordinator, Phoenix Area IHS, Two Renaissance Square, 40 North Central Avenue, Suite #600, Phoenix, AZ 85004, Tele: 602–364–5220.
Portland Area IHS: Idaho, Oregon, Washington	Ms. Darlene Marcellay-Hyland, Scholarship Coordinator, Portland Area IHS, 1220 SW Third Avenue, Rm. 440, Portland, OR 97204–2892, Tele: 503–326–2625.
Tucson Area IHS: Arizona, Texas	Ms. Malinda Paul, Scholarship Coordinator, Tucson Area IHS, 7900 South ''J.'' Stock Rd., Tucson, AZ 85746, Tele: 520–295–2441.

FOR FURTHER INFORMATION CONTACT: Please address application inquiries to the appropriate Indian Health Service Area Scholarship Coordinator. Other programmatic inquiries may be addressed to Mr. Jess Brien, Chief, Scholarship Branch, Indian Health Service, 801 Thompson Avenue, Suite 120, Rockville, Maryland, 20852; Telephone 301–443–6197. (This is not a toll free number.) For grants information, contact Mr. Bernard Covers Up, Grants Scholarship Coordinator, Grants Management Branch, Division of Acquisition and Grants Operations, Indian Health Service, 801 Thompson Avenue, Suite 120, Rockville, Maryland

20852; Telephone 301–443–5204. (This is not a toll-free number.)

A. General Program Purpose

These grants programs are intended to encourage American Indians and Alaska Natives to enter the health professions and to assure the availability of Indian health professionals to serve Indians.

B. Eligibility Requirements

1. The Health Professions Preparatory Scholarship awards are made to American Indians or Alaska Natives who meet the criteria in section 4(c) of the IHCIA, as amended, who have successfully completed high school education or high school equivalency and who have been accepted for enrollment in a compensatory, pre-professional general education course or curriculum. Support is limited to 2 years for full-time students and the part-time equivalent of 2 years not to exceed 4 years for part-time students.

2. The Health Professions Pregraduate Scholarship awards are made to American Indians or Alaska Natives who meet the criteria in section 4(c) of the IHCIA, as amended, who have successfully completed high school education or high school equivalency and who have been accepted for enrollment or are enrolled in an accredited pregraduate program leading to a baccalaureate degree in pre-medicine or pre-dentistry. Support is limited to 4 years for full-time students and the part-time equivalent of 4 years not to exceed 8 years for part-time students.

3. The Indian Health Scholarship (Professions) may be awarded only to an individual who is a member of a federally recognized tribe as provided by section 104, 4(c), and 4(d) of the IHCIA. Membership in a Tribe recognized only recognized only by a state does not meet this statutory requirement. To receive an Indian Health Scholarship (Professions) an otherwise eligible individual must be enrolled in an appropriately accredited school and pursuing course of study in a health profession as defined by section 4(n) of the IHCIA. Support is limited to 4 years for full-time students and the part-time equivalent of 4 years not to exceed 8 years for part-time students.

Awards for the Indian Health Scholarships (Professions) will be made in accordance with 42 CFR 36.330. Recipients shall incur a service obligation prescribed under section 338C of the Public Health Service Act (43 U.S.C. 244m) which shall be met by service:

(1) In Indian Health Service;

(2) In a program conducted under a contract or compact entered into under the Indian Self-Determination Act;

(3) In a program assisted under Title V of the Indian Health Care Improvement Act (Pub. L. 94–437) and its amendments; and

(4) In private practice of his or her profession, if the practice (a) is situated in a health professional shortage area, designated in regulations promulgated by the Secretary and (b) addresses the health care needs of a substantial number of Indians as determined by the Secretary in accordance with guidelines of the Service;

Pursuant to the Indian Health Amendments of 1992 (Pub. L. 104–313), a recipient of an Indian Health Professions Scholarship may, at the election of the recipient, meet his/her active duty service obligation prescribed under section 338c of the Public Health Service Act (42 U.S.C. 254m) by a program specified in options (1)–(4) above that:

(1) Is located on the reservation of the Tribe in which the recipient is entrolled; or

(ii) Serves the Tribe in which the recipient is entrolled.

In summary, all recipients of the Indian Health Scholarship (Professions) are reminded that recipients of this scholarship incur a service obligation. Moreover, this obligation shall be served at a facility determined by the Director, IHS, consistent with IHCIA, Pub. L. 94–437, as amended by Pub. L. 100–713, and Pub. L. 102–573.

C. Fund Availability

Both part-time and full-time scholarship awards will be made ina ccordance with regulations at 42 CFR part 36.320, incorporated in the application materials, for Health Professions Preparatory Scholarship Program for Indians and 42 CFR part 36.370, incorporated in the application materials, for Health Professions Pregraduate Scholarship Program for Indians. Approximately 200 awards, 100 of which are continuing, will be made under the Health Professions Preparatory and Pregraduate Scholarship Programs for Indians. The awards are for 10 months induration and the average award to a full-time student is approximately $20,000. In FY 2004, approximately $1,500,000 is available for continuation awards and approximately $2,233,000 is available for new awards.

Approximately 340 awards, 179 of which are continuing, will be made under the Indian Health Scholarship (Professions) Program. Awards will be made to both full-time and part-time students. The awards are for 12 months in duration and the average award to a full-time student is for approximately $23,500. In FY 2004, approximately $3,551,000 is available for continuation awards, and $4,626,000 is available for new awards.

No more than 5% of available funds will be used for part-time scholarships this fiscal year. Students are considered part-time if they are enrolled for a minimum of 6 hours of instruction and are not considered in full-time status by their college/university. Documentation must be received from part-time applicants that their school and course curriculum allows less than full-time status.

D. Criteria for Evaluation

Applications will be evaluated against the following criteria:

1. Needs of the IHS. Applicants are considered for scholarship awards based on their desired career goals and how these goals relate to current Indian health manpower needs. Applications for each health career category are reviewed and ranked separately.

2. Academic Performance. Applicants are rated according to their academic performance as evidenced by transcripts and faculty evaluations. In cases where a particular applicant's school has a policy not to rank students academically, faculty members are asked to provide a personal judgement of the applicant's achievement. Health Professions applicants with a cumulative GPA below 2.0 are not eligible to apply.

3. Faculty/Employer Recommendations. Applicants are rated according to evaluations by faculty members and current and/or former employers regarding the applicant's potential in the chosen health related professions.

4. Stated Reasons for Asking for the Scholarship and Stated Career Goals. Applicants must provide a brief written explanation of reasons for asking for the scholarship and of career goals. The applicant's narrative will be judged on how well it is written and content.

5. Applicants who are closest to graduation or completion are awarded first. For example, senior and junior applicants under the Health Professions Pregraduate Scholarship receive funding before freshmen and sophomores.

E. Priority Categories

Regulations at 42 CFR part 36.304 provide that the IHS shall, from time to time, publish a list of health professions eligible for consideration for the award of Indian Health Professions Preparatory and Pregraduate Scholarships and

Indian Health Scholarships (Professions). Section 104(b)(1) of the IHCIA, as amended by the Indian Health Care Amendment of 1988, Pub. L. 100–713, authorizes the IHS to determine specific health professions for which Indian Health Scholarships will be awarded. The list of priority health professions that follow, by scholarship program, and based upon the needs of the IHS as well as upon the needs of the American Indians and Alaska Natives for additional service by specific health profession.

1. Health Professions Preparatory Scholarship Scholarships. (Below is the list of disciplines to be supported and priority is based on academic level)

A. Pre-Dietetics.
B. Pre-Engineering.
C. Pre-Medical Technology.
D. Pre-Nursing.
E. Pre-Pharmacy.
F. Pre-Physical Therapy (Jr. and Sr. undergraduate years).
G. Pre-Social Work (Jr. and Sr. undergraduate years).

2. Health Professions Pregraduate Scholarships. (Below is the list of disciplines to be supported and priority is based on academic level: Senior, Junior, Sophomore, Freshman)

A. Pre-Dentistry.
B. Pre-Medicine.

3. Indian Health Scholarships (Professions). (Below is a list of disciplines to be supported and priority is based on academic level, unless specified: Graduate, Senior, Junior, Sophomore, Freshman)

A. Associate Degree Nurse.
B. Chemical Dependency Counseling: Baccalaureate and Masters level.
C. Clinical Psychology: Ph.D. only.
D. Coding Specialist: Certificate.
E. Counseling Psychology: Ph.D. only.
F. Dental Hygiene: B.S.
G. Dentistry: B.S. and M.S.
H. Diagnostic Radiology Technology: Certificate, Associate, and B.S.
I. Dietitian: B.S.
J. Engineering (Civil and Environmental): B.S.
K. Environmental Health (Sanitarian): B.S.
L. Health Care Administration: B.S. and M.S.
M. Health Education: B.S. and M.S.
N. Health Records: R.H.I.T and R.H.I.A.
O. Injury Prevention Specialist.
P. Medical Technology: B.S.
Q. Medicine: Allopathic and Osteopathic.
R. Nurse: B.S.*
S. Nurse: R.N.A.
* (Priority consideration will be given to Registered Nurses employed by the Indian Health Service; in a program assisted under a contract entered into under the Indian Self-Determination Act; or in a program assisted under Title V of the Indian Health Care Improvement Act.)
T. Optometry.
U. Pharmacy: B.S., Pharm D.
V. Physician Assistant.
W. Physical Therapy: M.S. and D.P.T.
X. Podiatry: D.P.M.
Y. Public Health: M.P.H. only (Applicants must be enrolled or accepted in a school of public health in specialty areas such as Dietetics and Community Development in heath).
Z. Public Health Nutrition: Masters level only.
AA. Respiratory Therapy: Associate.
BB. Social Work: Masters level only (Clinical, Community, and Gerontology).
CC. Ultrasonography (Prerequisite: Diagnostic Radiology Technology).

Interested individuals are reminded that the list of eligible health and allied health professions is effective for applicants for the 2004–2005 academic year. These priorities will remain in effect until superseded. Applicants for health and allied health professions not on the above priority list will be considered pending the availability of funds and dependent upon the availability of qualified applicants in the priority areas.

Dated: October 14, 2003.

Charles W. Grim,

Assistant Surgeon General, Director, Indian Health Service.

[FR Doc. 03–26698 Filed 10–22–03; 8:45 am]

BILLING CODE 4160–16–M

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Radiological Emergency Preparedness: Planning and Preparing for a Fast-Breaking Event; Notice of Extension of Comment Period

AGENCY: Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice of extension of comment period.

SUMMARY: On August 19, 2003, FEMA published a notice with request for comments on Radiological Emergency Preparedness: Planning and Preparing for a Fast-Breaking Event, 68 FR 49783. With this notice, FEMA extends the comment period until December 5, 2003.

DATES: This notice is effective October 23, 2003. FEMA must receive comments on or before December 5, 2003.

ADDRESSES: Please send your comments to the Rules Docket Clerk, Office of the General Counsel, FEMA, Room 840, 500 C Street, SW., Washington, DC 20472; or e-mail to *rules@fema.gov.* Please reference ''REP: Planning and Preparing for a Fast-Breaking Event'' in the subject line of your comment letter or e-mail.

FOR FURTHER INFORMATION CONTACT: Vanessa E. Quinn, Chief, Radiological Emergency Preparedness Section, Nuclear and Chemical Hazards Division, FEMA, 500 C Street, SW., Washington, DC 20472; (phone) 202–646–3664; or e-mail *vanessa.quinn@dhs.gov.*

SUPPLEMENTARY INFORMATION: On August 19, 2003, FEMA published a notice with request for comments on Radiological Emergency Preparedness: Planning and Preparing for a Fast-Breaking Event, 68 FR 49783. With this notice, FEMA extends the comment period until December 5, 2003.

Dated: October 20, 2003.

R. David Paulison,

Director of Preparedness Division, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 03–26775 Filed 10–20–03; 2:40 pm]

BILLING CODE 6718–06–P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 701–TA–430A and 430B and 731–TA–1019A and 1019B (Final)]

Durum and Hard Red Spring Wheat From Canada

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (Commission) determines, pursuant to sections 705(b) and 735(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b) and 1673d(b)) (the Act), that an industry in the United States is materially injured by reason of imports from Canada of hard red spring wheat, provided for in subheadings 1001.90.10 and 1001.90.20 of the Harmonized Tariff Schedule of the United States (HTS), that have been found by the Department of Commerce (Commerce) to be subsidized by the Government of Canada and sold in the United States at less than fair value

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

(LTFV).[2] The Commission also determines that an industry in the United States is not materially injured or threatened with material injury by reason of imports from Canada of durum wheat, provided for in subheading 1001.10.00 of the HTS, that have been found by Commerce to be subsidized by the Government of Canada and sold in the United States at LTFV.[3]

Background

The Commission instituted these investigations effective September 13, 2002, following receipt of a petition filed with the Commission and Commerce by the North Dakota Wheat Commission (hard red spring wheat), Bismarck, ND; the Durum Growers Trade Action Committee (durum wheat), Bismarck, ND; and the U.S. Durum Growers Association (durum wheat), Bismarck, ND. The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by Commerce that imports of durum and hard red spring wheat from Canada were being subsidized within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)) and were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of May 23, 2003 (68 FR 28253).[4] The hearing was held in Washington, DC, on September 4, 2003, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on October 16, 2003. The views of the Commission are contained in USITC Publication 3639 (October 2003), entitled *Durum and Hard Red Spring Wheat from Canada: Investigations Nos. 701–TA–430A and 430B and 731–TA–1019A and 1019B (Final).*

Issued: October 20, 2003.

By order of the Commission.

Marilyn R. Abbott,

Secretary.

[FR Doc. 03–26776 Filed 10–22–03; 8:45 am]

BILLING CODE 7020–02–P

[2] Chairman Deanna Tanner Okun and Commissioner Stephen Koplan dissenting. Commissioner Charlotte R. Lane not participating.

[3] Commissioner Charlotte R. Lane not participating.

[4] A notice of revised scheduling was published in the **Federal Register** of June 27, 2003 (68 FR 38384).

INTERNATIONAL TRADE COMMISSION

Public Input on Improving Agency Procedures

AGENCY: United States International Trade Commission.

ACTION: Notice and solicitation of written comments.

SUMMARY: The United States International Trade Commission invites public input on specific ways in which it could improve its document management and electronic filing system, EDIS.

DATES: To be assured of consideration, written comments must be received in the Office of the Secretary to the Commission no later than 5:15 p.m. on or before November 6, 2003.

ADDRESSES: A signed original and 8 copies of each set of comments, along with a cover letter, should be submitted by mail or hand delivery to the Secretary, United States International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by § 201.8 of the Commission's Rules (19 CFR 201.8) (*see* Handbook for Electronic Filing Procedures, *ftp://usitc.gov/pub/reports/electronic_filing_handbook.pdf.)*

FOR FURTHER INFORMATION CONTACT: Marilyn R. Abbott (202–205–2799), Secretary, or Ann Jones, Deputy Secretary (202–205–1801), United States International Trade Commission. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. The Commission's document management and electronic filing system, EDIS, may be viewed at *http://edis.usitc.gov.* General information concerning the Commission may also be obtained by accessing its World Wide Website (*http://www.usitc.gov*).

SUPPLEMENTARY INFORMATION: The Commission is an independent, quasi-judicial federal agency with a wide range of trade-related mandates. During the conduct of its work, the Commission collects, creates, and disseminates a large number of documents. These may include data from interested parties (such as domestic and foreign producers, U.S. importers, and purchasers); staff reports summarizing information collected concerning such indicators as imports, production, shipments, employment, profits and losses, and prices; hearings-related documents; and written opinions explaining the Commission's conclusions on factual and legal issues.

In 1996, the Commission established an electronic document imaging system to store and provide access to docket records in agency investigations. During FY 1999, the Commission made non-confidential official documents available online via the internally developed EDIS-Online (EOL) system as a pilot test of the feasibility of self-service access to its public records on the Web. In January 2003, the Commission implemented a new document management system (EDIS–II, *http://edis.usitc.gov*) with the capability to accept documents electronically. Consistent with the Government Paperwork Elimination Act (GPEA) (Div. C, Title XVII, Pub. L. 105–277), the Commission's Rules of Practice and Procedure currently provide for the filing of certain documents in electronic form.

Section 335 of the Tariff Act of 1930 (19 U.S.C. 1335) authorizes the Commission to adopt such reasonable procedures, rules, and regulations as it deems necessary to carry out its functions and duties. The Commission is interested in comments concerning all aspects of its EDIS document management and electronic filing initiative. To this end, the Commission is seeking input from the public, including persons and entities that appear before the agency, regarding (1) what features of the EDIS–II system have proven to be beneficial; (2) what technical difficulties have arisen in connection with use of the system; (3) how the agency can improve upon existing features; (4) what additional features may improve EDIS; and (5) how the agency might implement electronic filing and search/retrieval of confidential business and business proprietary information on EDIS.

With respect to documents containing confidential business information (CBI) or business proprietary information (BPI), the Commission is considering permitting parties and other persons to file these documents with the agency electronically. In addition to technical considerations, such as the implementation of encryption, the Commission is interested in whether or how to provide notice to parties of a filing, and business policy and procedures that may need to be addressed.

The Commission is also considering allowing the search/retrieval of CBI/BPI material by interested parties to investigations. Comments regarding such issues as who should be granted search/retrieval permissions, controls over user IDs and passwords, and when access should be terminated, are encouraged.

Comments on the usability and intuitiveness of the functional design of EDIS are of interest to the Commission. The agency encourages comments focusing on enhancing the search/retrieval process, to display and download documents, and generally, whether and how to make EDIS more user-friendly.

Written Submissions: Interested persons are invited to submit written statements concerning these or other matters related to the document management and electronic filing system. The Commission does not anticipate that any private sector party would need to include confidential business information in any submission filed in response to this notice. All comments received will be posted to EDIS as investigation number MISC–030.

Issued: October 16, 2003.

By order of the Commission.

Marilyn R. Abbott,

Secretary.

[FR Doc. 03–26693 Filed 10–22–03; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[ATF Notice No. 3; Docket No. ATF2003R–28T]

The Gang Resistance Education and Training Program: Availability of Financial Assistance, Criteria and Application Procedures

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice.

ACTION: Notice of availability of funds for the Gang Resistance Education and Training Program.

SUMMARY: Subject to the availability of appropriations, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) intends to enter into cooperative agreements with State and local law enforcement agencies to assist them in providing the Gang Resistance Education and Training (G.R.E.A.T.) Program to school students. This notice also sets forth the intended funding priorities and criteria, as well as the application procedures that ATF will use to select, and award Federal funds to, State and local law enforcement agencies to deliver the G.R.E.A.T. Program.

DATES: Applications must be received on or before November 30, 2003.

ADDRESSES: Send applications to the G.R.E.A.T. Branch; Bureau of Alcohol, Tobacco, Firearms and Explosives; Cooperative Agreement Section; 800 K Street, NW., Suite 735; Washington, DC 20001; *ATTN: ATF Notice No. 3.*

FOR FURTHER INFORMATION CONTACT: Charlene Lane, G.R.E.A.T. Branch; Bureau of Alcohol, Tobacco, Firearms and Explosives; 800 K Street, NW., Suite 735; Washington, DC 20001; telephone toll-free 1–800–726–7070, extension 7–3140. Or, send electronic mail (e-mail) to: *GREAT@atf.gov,* or visit the G.R.E.A.T. Web site at *http://www.atf.gov/great/index.htm.*

SUPPLEMENTARY INFORMATION:

Background

G.R.E.A.T. is a life-skills competency program designed to provide students with the skills they need to avoid gang pressure and youth violence. G.R.E.A.T.'s violence prevention curriculum helps students develop values and practice behaviors that will help them avoid destructive activities. G.R.E.A.T. functions as a cooperative program utilizing the skills of ATF, Federal, State, and local law enforcement personnel, as well as individuals from community and civic groups.

The G.R.E.A.T. Program trains law enforcement officers in a school-based curriculum in which the officers provide instruction to school-aged children in life skill competencies, gang awareness, and anti-violence techniques. Training will be provided to any State or local law enforcement agency to the extent allocated funds allow. G.R.E.A.T. consists of three major phases:

- Phase I—School-Based Education,
- Phase II—After School/Summer Education/Booster Classes, and
- Phase III—Family Component.

Other Pertinent Information

All funded agencies shall be subject to an audit of program expenditures and curriculum adherence. ATF will use the audit findings to alter funding levels if deemed necessary by ATF.

Applicants who receive over $100,000, and have been teaching the G.R.E.A.T. Program for over a year, will be required to develop programs tailored to their respective communities for phases II and III. Failure to develop and provide phases II and III by July 1st of the award year will result in a reduction in funding of up to 25% for the remainder of the year. In mid-year, funded agencies will be reviewed to ensure that funding requirements are being met. Agencies not meeting their funding obligations will have their monies reduced.

Agencies awarded $50,000 or more will be required to provide an officer (or officers) on a part-time basis to assist the G.R.E.A.T. Program as a National Training Team (NTT) member. NTT members serve as instructors for G.R.E.A.T. officer training sessions during the award period at the rate of two weeks per $50,000 of the award amount. Agencies in their first year of Federal funding are exempt from this requirement. However, the funded agency will be required to designate an officer to complete the NTT G.R.E.A.T. Management Training course.

Application Procedures

Application for financial assistance must be made on ATF Form 6410.1 (Gang Resistance Education And Training Funding Application). Application forms may be obtained by contacting the Cooperative Agreement Section, G.R.E.A.T. Branch; Bureau of Alcohol, Tobacco, Firearms and Explosives; 800 K Street, NW., Suite 735; Washington, DC 20001; telephone toll-free1–800–726–7070. Or visit the G.R.E.A.T. Web site at *http://www.atf.gov/great/index.htm.*

If your agency was funded during the last award period (1/16/2003 to 1/15/2004), you can have application forms sent or questions answered by your current G.R.E.A.T. Program Branch cooperative agreement point of contact.

Funding Categories and Funding Distributions

In order to provide funding to a range of community sizes and locations, applicants will be divided into five categories based on population. The population categories are: (a) 1,000,000 and over; (b) 999,999–500,000; (c) 499,999–100,000; (d) 99,999–25,000; and (e) 24,999 or less. Each applicant is required to report its population figures using the Bureau of Census 2000 Population Report for its entire service area. Population figures may be obtained from the Bureau's Web site at: *http://www.census.gov/population/www/estimates,* or by contacting the Census Bureau at 301–457–4608.

Criteria and Points

Each application will be evaluated and scored on the basis of the following criteria:

(1) Juvenile crime statistics (25%);

(2) Percentage of eligible 6th, 7th, and 8th grade students the applicant proposes to teach, and the percentage of eligible students previously taught the G.R.E.A.T. core curriculum (35%);

(3) Presence of curriculum reinforcement programs (25%) (such as Elementary, After School/Summer Education/Booster Classes, and Family Component/Parent Involvement programs); and

(4) Support of National G.R.E.A.T. Program Training (15%).

Criterion 1. This criterion measures the magnitude of an applicant's youth crime problem using the number of Part I and II offenses reported in the Uniform Crime Reports (UCR) published annually by the Federal Bureau of Investigation (FBI). Part I and II offenses are defined and listed in Appendix II of the UCR. Please note that the most current UCR is usually two years in arrears. ATF will obtain the required juvenile crime figures directly from the FBI. Applicants must indicate which service area (*i.e.*, city, county, etc.) that ATF should use to obtain their most recent UCR juvenile crime figures.

In the event that an applicant does not provide annual data to the FBI for the UCR, the applicant should contact the G.R.E.A.T. Branch to determine how it can best submit information to measure its youth crime statistics.

Criterion 2. This criterion will measure middle school participation and consists of two sections:

- *Section A.* An applicant will receive points based on the percentage of middle school students proposed to be taught G.R.E.A.T. compared to the total population of middle school students in the jurisdiction.
- *Section B.* An applicant will receive points based on the percentage of middle school students who were taught G.R.E.A.T. during the last school year compared to last year's total population of eligible middle school students that could have been taught.

Criterion 3. This criterion is used to identify applicants who currently have life skills programs in place that reinforce the effectiveness of the G.R.E.A.T. middle school core curriculum. Life skill programs are those programs that instruct students in skills such as communication, active listening, empathy, avoiding peer pressure, conflict resolution, decision making, responsibility, citizenship, goal setting, cultural sensitivity, and behavior/anger management. Applicants will be asked to identify elementary, middle, and high school programs, as well as other summer, parent/family, and after school programs, in their service area.

Criterion 4. The G.R.E.A.T. Program depends on G.R.E.A.T. Officers to act as National Training Team (NTT) instructors at ATF's G.R.E.A.T. Officer Trainings sessions. Without this support, the program could not function. This criterion will recognize and reward applicants who provide NTT members for G.R.E.A.T. Officer training as delineated in the cooperative agreement.

Other Considerations

ATF will consider past year awardees previous spending of G.R.E.A.T. funds when determining their future funding levels. Unless sufficient documentation and support is supplied, applicants will not be funded at higher levels if past year spending indicates funds were underutilized. In order to assure that G.R.E.A.T. funds are spent in a fiscally responsible manner, ATF will also consider the cost per child for an applicant to conduct the program when awarding funds. ATF defines an agency's cost-per-child as the number of children to be taught divided by the eligible awarded funds.

Catalog of Federal Domestic Assistance (CFDA)

For the purpose of tracking Federal funds used in grants and cooperative agreements, the G.R.E.A.T. Program has been assigned CFDA number 21.053.

Paperwork Reduction Act

The collection of information contained in this notice has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (44 U.S.C. 3507(d)) under control number 1140–0048. 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.

Authority and Issuance

This notice is issued pursuant to Office of Management and Budget Circular No. A–102 (Grants and Cooperative Agreements with State and Local Governments).

Approved: October 15, 2003.

Bradley A. Buckles,

Director.

[FR Doc. 03–26774 Filed 10–22–03; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. National Council on Problem Gambling, Inc.; Public Comment and Plaintiff's Supplemental Response

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. Sections 16(b) and (d), the United States hereby publishes below an additional written comment received on the proposed Final Judgment in *United States of America* v. *National Council on Problem Gambling, Inc.,* Civil Action No. 1:03CF01278 filed in the United States District Court for the District of Columbia, together with the United States' supplemental response to the comment. Copies of the comment and the United States' supplemental response are available for inspection at the United States Department of Justice, Antitrust Division, 325 Seventh Street, NW., Suite 200, Washington, DC 20530, and at the Office of the Clerk for the United States District Court for the District of Columbia, E. Barrett Prettyman Building, 333 Constitution Ave., NW., Washington, DC 20001.

Dorothy B. Fountain,

Deputy Director of Operations.

United States District Court, District of Columbia

United States of America, 209 S. LaSalle Street, Suite 600, Chicago, IL 60604, Plaintiff, versus National Council on Problem Gambling, Inc., 208 G Street, NE., Washington, DC 20002, Defendant. Civil Action No. *1:03CF01278.* Judge: Henry H. Kennedy.

Supplemental Response to Public Comments

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (''APPA'' or ''Tunney Act''), the United States hereby responds to one additional public comment received regarding the Proposed Final Judgment in this case. This response supplements the Response to Public Comments filed by the United States on September 17, 2003.

I. Background

On June 13, 2003, the United States filed a Complaint alleging that the National Council on Problem Gambling, Inc. (''NCPG'') had orchestrated an unlawful territorial allocation of problem gambling products and services along state lines in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Simultaneously with the filing of the Complaint, the United States filed a Proposed Final Judgment. A Competitive Impact Statement (''CIS'') was also filed with the Court at that time, and published in the **Federal Register**, along with the Proposed Final Judgment, on June 26, 2003 (*see* FR 38,093). Pursuant to 15 U.S.C. 16(c), a

summary of the terms of the Proposed Final Judgment and CIS was published in *The Washington Post,* a newspaper of general circulation in the District of Columbia, during the period of June 24 through 30, 2003.

Under the consent order, NCPG is prohibited from directly or indirectly initiating, adopting, or pursuing any agreement, program, or policy that has the purpose or effect of prohibiting or restraining any Problem Gambling Service Provider (''PGSP'') from: (1) Selling problem gambling services in any state or territory or to any customer; or (2) submitting competitive bids in any state or territory or to any customer. The NCPG is also prohibited from directly or indirectly adopting, disseminating, publishing, seeking adherence to or facilitating any agreement, code of ethics, rule, bylaw, resolution, policy, guideline, standard, certification, or statement made or ratified by an official that has the purpose or effect of prohibiting or restraining any PGSP from engaging in any of the above practices, or that states or implies that any of these practices are, in themselves, unethical, unprofessional, or contrary to the policy of the NCPG.

The consent order further provides that the NCPG is prohibited from adopting or enforcing any standard or policy that has the purpose or effect of: (1) Requiring that any PGSP obtain permission from, inform, or otherwise consult with another PGSP before selling problem gambling services or submitting bids for the provision of problem gambling services in any state or territory or to any customer; or (2) requiring that any PGSP contract with, provide a fee or a portion of revenues to, or otherwise remunerate any other PGSP as a result of selling problem gambling services in any state or territory or to any customer. Finally, the NCPG is prohibited from adopting or enforcing any standard or policy or taking any action that has the purpose or effect of: (1) Sanctioning, penalizing or otherwise retaliating against any PGSP for competing with any other PGSP; or (2) creating or facilitating an agreement not to compete between two or more PGSPs.

The sixty-day period for public comments expired on August 29, 2003. During the period for public comments, the United States was sent one additional comment which was not noted in its original Response to Public Comments filed on September 17, 2003. That comment was from Messrs. Nicholas Provenzo, Chairman, and S.M. Olivia, Senior Fellow, The Center for the Advancement of Capitalism (''CAC''). The United States has carefully considered the views expressed in that comment, but nothing in the comment has altered the United States' conclusion that the Proposed Final Judgment is in the public interest. Pursuant to Section 16(d) of the Tunney Act, the United States is now filing with this Court its response to the comment submitted by the CAC. Once this comment and this response are published in the **Federal Register,** the United States will have fully complied with the Tunney Act and will file a motion for entry of the Proposed Final Judgment.

II. Supplemental Response to Public Comments

The Center for the Advancement of Capitalism

Among the issues the CAC has raised in its comment are: NCPG's status as a nonprofit corporation; the relationship of the antitrust laws to the First Amendment; and the Court's public interest determination. The CAC also noted the absence of a barrier to entry analysis. A copy of the CAC comment is attached as Exhibit A.

The CAC argues that, as a nonprofit organization, the NCPG is exempt from the authority of the antitrust laws. Section 1 of the Sherman Act specifically states that ''[e]very person'' who acts in restraint of trade or commerce falls within its scope. 15 U.S.C. 1. The Supreme Court has consistently held that nonprofit organizations are not exempt from Section 1 of the Sherman Act. *See NCAA* v. *Board of Regents,* 468 U.S. 85, 100 n. 22 (1984) (''There is no doubt that the sweeping language of § 1 applies to nonprofit entities, and in the past we have imposed antitrust liability on nonprofit entities which have engaged in anticompetitive conduct.'' (citations omitted)); *American Soc'y of Mechanical Eng'rs, Inc.* v. *Hydrolevel Corp.,* 456 U.S. 556, 576 (1982) (''[I]t is beyond debate that nonprofit organizations can be held liable under the antitrust laws.''); see also *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975).

The CAC also argues that the Proposed Final Judgment violates the First Amendment by ''the shackling of NCPG's future speech and assembly'' and that this amounts to ''overt censorship by the United States.'' A horizontal agreement to allocate territories, whether by spoken or written word, is conduct within the reach of the Sherman Act.

> . . . [I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed . . . Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

California Motor Transport Co. v. *Trucking Unlimited,* 404 U.S. 508, 514 (1972), quoting *Giboney* v. *Empire Storage Co.,* 336 U.S. 490, 502 (1949). The California Motor Transport Court went on to say that ''First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' [citation omitted], which the legislature has the power to control.'' *Id.* at 515. *See also Associated press* v. *United States,* 404 U.S. 1 (1945).

With respect to the public interest determination, the CAC suggests the availability of other remedies in lieu of the Proposed Final Judgment. The territorial allocation alleged in the Complaint was a horizontal agreement among state affiliates, effectuated by the NCPG, the sole purpose and effect of which was to reduce competition for the sale of problem gambling products and services between and among state affiliates. The Proposed Final Judgment addresses the violation alleged in the Complaint—an unlawful territorial allocation of problem gambling products and services along state lines in violation of Section One of the Sherman Act. Nothing in the CAC's comment changes the view of the United States that the Proposed Final Judgment is in the public interest. In making its determination whether the Proposed Final Judgment is ''in the public interest,'' the ''court is without authority to 'reach beyond the complaint to evaluate claims that the government did not make and to inquire as to why they were not made'" *United States* v. *Microsoft Corp.,* 231 F. Supp 2d 144, 154 (D.D.C. 2002) (quoting *United States* v. *Microsoft Corp.,* 56 F. 3d 1448, 1459 (D.D.C. 1995)).

Finally, the CAC also expressed concern about the absence of a barrier to entry analysis. However, the Division took into account all relevant economic and legal factors in its investigation of NCPG's practices.

III. Conclusion

After careful consideration of this public comment, the United States has concluded that entry of the Proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint, and is therefore in the public interest. Pursuant to Section 16(d) of the APPA, the United States is submitting this public comment and this response to the **Federal Register** for publication. After this comment and this response are published in the **Federal Register**, the United States will move this Court to enter the Proposed Final Judgment.

Dated:_____Washington, DC.

Respectfully submitted,

Rosemary Simota Thompson, IL Bar # 6204990, United States Department of Justice, Antitrust Division, 209 South LaSalle Street, Suite 600, Chicago, Illinois 60604, (312) 353–7530 (telephone), (312) 353–4136 (facsimile), *Rosemary.Thompson@usdoj.gov.*

Certificate of Service

I hereby certify that I served a copy of the foregoing Supplemental Response to Public Comments via First Class United States Mail, this _____ day of _____, 2003, on:

Sanford M. Saunders, Jr., Esq., Greenberg Traurig, LP, 800 Connecticut Avenue, NW., Suite 500, Washington, DC 20006.

Rosemary Simota Thompson, Attorney, Chicago Field Office, U.S. Department of Justice, Antitrust Division, 209 South LaSalle Street, Suite 600, Chicago, Illinois 60604, (312) 353–7530 (telephone).

United States District Court for the District of Columbia

United States of America, Plaintiff, v. National Council on Problem Gambling, Inc., Defendant. Civil Action No. 1:03CV01278. Before: Judge Henry H. Kennedy.

Public Comments of The Center for the Advancement of Capitalism

Pursuant to the United States' publication of a Proposed Final Judgment (PFJ) in the above-captioned action,[1] the Center for the Advancement of Capitalism (CAC)[2] files the following comments.

1. Material Facts

On June 13, 2003, the United States filed a complaint against the National Council on Problem Gambling, Inc. (NCPG), a nonprofit corporation headquartered in Washington, DC. According to NCPG, its mission is to ''public awareness of pathological gambling, ensure the widespread availability of treatment for problem gamblers and their families, and to encourage research and programs for prevention and education.''[3] NCPG only provides limited services through its national office, and instead relies on 34 state affiliates to produce and provide ''problem gambling services'' to customers. NCPG's customers include state governments.[4] NCPG's members adopted, through its board of directors, a series of internal agreements to coordinate the affiliates' work. Among these agreements, according to the United States, was a ''territorial allocation'' scheme that the Government considered a violation of section one of the Sherman Act, 15 U.S.C. 1.

The United States alleges that from 1995 to 2001, NCPG enforced a policy restricting individual state affiliates from offering problem gambling services—such as counseling and educational programs—in a state served by another NCPG affiliate. For example, the United States alleges NCPG ''asked'' its Minnesota affiliate to cease efforts to contract with the State of Nebraska, and instead support that the state's NCPG affiliate.[5] The Government charges acts such as this violate the Sherman Act violation because customers are denied the ''benefits of free and open competition'' and that ''innovations in problem gambling products and services [are] stifled.''[6]

The United States further claims NCPG maintained ethical guidelines designed to support the organization's illegal anticompetitive conduct. In 1996 and 1999, for instance, NCPG's directors and affiliates adopted an ''ethics resolution'' which codified the non-competition policy. According to the Government, NCPG could sanction a member internally, with ''fines or revocation of NCPG membership,'' for offering services in a state served by another affiliate without the incumbent affiliate's permission.[7]

The PFJ now before the Court resolves the Government's concerns by restricting NCPG's future conduct. The PFJ prevents NCPG from ''prohibiting or restraining'' any state affiliate from selling problem gambling services to any customer in any state. The PFJ further prohibits NCPG from declaring such competition ''unethical, unprofessional, or contrary to the policy of the NCPG.'' The PFJ will expire 10 years from the date of entry by the Court.

2. NCPG's Actions and Barriers to Entry

The major flaw in the Government's case is their complete failure to demonstrate, or even allege, that NCPG's actions created a barrier to competition in the market for ''problem gambling services.'' The United States typically alleges in antitrust cases that the defendant's actions create a de facto barrier to entry because of the relative difficulty in entering the marketplace. Here there is no such allegation. All the United States argues is that NCPG restrained competition among its own membership. This is not a sufficient basis to find entry of the PFJ is in the public interest.

In the first place, the ''problem gambling services'' market does not possess any substantial natural barriers to entry. The United States itself defines the market in very general terms:

> ''Problem gambling services'' means all services relating to the treatment or prevention of problem or compulsive gambling, including dissemination of information regarding problem gambling, telephonic hot-line or help-line services, training of problem gambling counselors, certification of various problem gambling training programs, and provision of any product or service aimed at assisting problem gamblers.[8]

It is unclear from the Government's definition how many or much of these services one must offer to be considered part of the market, but it is fairly clear that entry itself is not difficult. Any individual or organization could disseminate information on compulsive gambling and operate a hotline for gambling addicts. NCPG is not a monopolist in this market, but rather a successful group of experienced problem gambling service providers.

The United States presents no evidence that NCPG created, or attempted to create, any barriers to prevent any interested party from entering the market. From all accounts, NCPG's policies and actions were limited to governing the voluntary association among its own affiliates. Furthermore, NCPG and its affiliates are all nonprofit organizations. They are not organized to compete with each other, but rather to provide beneficial services to the public without regard for maximizing profit or paying dividends to stockholders. For the United States to hold NCPG to the same antitrust standards as a for-profit corporation or association both misconstrues the intent of antitrust laws, and imposes an unreasonable burden on NCPG's operations.[9]

3. Free Speech and Free Assembly

The most disturbing aspect of the PFJ is the shackling of NCPG's future speech and assembly. Section IV(B) of the PFJ prohibits NCPG from adopting or making any statement that ''states or implies'' intrastate competition of the type at issue in this case is ''unethical, unprofrofessional, or contrary to the policy of NCPG.'' This requirement does nothing to enhance competition, and in fact is overt censorship by the United States. The Government is not content to simply restrict NCPG's commercial conduct; they also seek to prevent NCPG from expressing, or even holding, ethical views that contrast those of the United States.

The First Amendment forbids the federal government from ''abridging the freedom of speech.'' The PFJ's restrictions on NCPG's future speech plainly violate this constitutional commandment. The United States possesses no authority, under either the Constitution or the Sherman Act, to prevent private associations from declaring conduct ''unethical'' or ''unprofessional''. Indeed, if the Government had such power, it could easily prohibit individuals, under color of antitrust enforcement, from making

[1] 68 FR 38,090–38,098 (June 23, 2003).

[2] CAC is a District of Columbia nonprofit corporation which regularly files public comments in Tunney Act proceedings. *See, i.e., United States* v. *Mountain Health Care,* 68 FR at 44,591 (July 29, 2003), *United States* v. *The MathWorks, Inc., et al.,* 68 FR at 3,270–3,272 (January 23, 2003).

[3] *http://www.ncpgambling.org/about.htm.*

[4] *See* Competitive Impact Statement at 8–9 (NCPG affiliates contracted with the State of Nebraska and the Arizona lottery.)

[5] Id.

[6] Complaint at 5.

[7] Competitive Impact Statement at 7.

[8] Proposed Final judgment at 3.

[9] The United States argues that NCPG's policies did not ''enhance economic efficiency'' (Complaint at 5). Once again, nonprofit organizations are not generally designed to maximize economically efficiently. And even if this were the case, there's no evidence that lack of ''efficiency'' is itself anticompetitive. Under this standard, for example, one could hold an amateur sports association in violation of the Sherman Act for limiting the number of games member teams may schedule in a season.

such statements as well. Had the United States chosen to name NCPG's officers individually, they could have extended the Section IV(B) speech restrictions to them.

The First Amendment also protects the right of individuals to ''peaceably'' assemble and ''petition the Government for a redress of grievances''. The PFJ imposes restraints on these rights. By forbidding NCPG from expressing views that disagree with the United States' position on competition, NCPG is arguably prohibited from lobbying other branches of the government, such as Congress, to alter or abolish the policy set forth by the Department of Justice in this matter. The United States is trying to prevent any future dissent or discussion of the merits of NCPG's policies with respect to competition among its affiliates. This not only violates the plain meaning of the First Amendment, but it usurps the potential role of Congress and the judiciary in making future assessmens arising from this case. Such drastic measures bear no relation to the stated objectives of the PFJ, namely to prevent allegedly anticompetitive conduct. The Constitution makes a clear distinction between punishing speech and punishing actual illegal conduct. The United States failed to make this distinction in formulating the PFJ.

Finally, the entire PFJ unreasonably interferes with the free association and assembly rights of NCPG and its members. For all the Government's complaining over alleged restraints of trade, this case arises solely from the voluntary actions of NCPG's members. The state affiliates agreed to participate in, and abide by, NCPG's collective decision-making process. They agreed to restrict their competitive conduct, as was their right. A key element of contract law is that a party may agree not to do something in exchange for consideration, which in this case was continued membership in NCPG. These rights should not be impugned upon by the United States for no better reason than certain consumers might be temporarily inconvenienced. Consumers, in this context, have no right to demand NCPG act a certain way or promulgate certain rules. There is a right to contract; there is no corresponding right to demand a service from certain producers, as the United States erroneously argues.

4. Availability of Other Remedies

The United States does not identify any specific ''private'' customers that were allegedly injured by NCPG's policies, only a few state governments. It is odd for the United States to contend state governments are powerless to direct the procurement of particular services as the result of a private association's ''anticompetitive'' actions. For instance, the United States contends Nebraska was denied the benefits of competition when the Minnesota NCPG affiliate was barred under the organization's rules from bidding for Nebraska's business. If this were the case, and Nebraska was unhappy with the options presented, why then didn't Nebraska simply create another option? If NCPG is getting in the way, a state could easily create its own agency to provide problem gambling services. Alternatively, the state could impose licensing or other professional requirements to ensure problem gambling services are provided on terms deemed acceptable to the state's interests.[10] In any case, there appears to be little practical justification for wielding a blunt federal remedy like this PFJ to dispose of a matter that could be dealt with better by the states.

5. Conclusion

For the numerous independent grounds discussed above, the Court should reject the PFJ as inconsistent with the public interest under the Tunney Act. The Government has not alleged facts sufficient to warrant any antitrust relief, and the remedies contained in the PFJ unreasonably restrain NCPG's First Amendment rights, as well as the right of NCPG members to voluntarily contract.

Respectfully Submitted, The Center for the Advancement of Capitalism

Nicholas P. Provenzo V, Chairman & CEO, P.O. Box 16325, Alexandria, VA 22302–8325, Telephone: (703) 625–3296, Facsimile: (703) 997–6521, *E-mail: info@capitalismcenter.org.*

S.M. Oliva, Senior Fellow, 2000 F Street, NW., Suite 315, Washington, DC 20006, Telephone: (202) 223–0071.

Dated: August 25, 2003.

[FR Doc. 03–26660 Filed 10–22–03; 8:45 am]

BILLING CODE 4410–11–M

[10] CAC does not support any governmental use of force to affect economic outcomes. Nor do we consider ''problem gambling services'' the proper domain of the state. This case, however, involves only the alleged restraint of competition in the marketplace, and to that end, our suggestion is merely that state customers can remedy their situation without resorting to federal antitrust intervention.

DEPARTMENT OF JUSTICE

Office of Justice Programs

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day emergency notice of information collection under review: reinstatement, with change, of a previously approved collection for which approval has expired; claim for death benefits.

The U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with emergency review procedures of the Paperwork Reduction Act of 1995. OMB approval has been requested by October 30, 2003. The proposed information collection is published to obtain comments from the public and affected agencies. If granted, the emergency approval is only valid for 180 days. Comments should be directed to OMB, Office of Information and Regulation Affairs, Attention: Department of Justice Desk Officer (202) 395–5806, Washington, DC 20503. Comments are encouraged and will be accepted for 60 days until December 22, 2003.

During the first 60 days of this same review period, a regular review of this information collection is also being undertaken. All comments, suggestions, or questions regarding additional information, including requests for copies of the proposed information collection instrument with instructions, should be directed to Sharon Williams via e-mail at *SharonW@ojp.usdoj.gov* or via facsimile at (202) 307–0036.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who

are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

Overview of this information:

(1) *Type of information collection:* Reinstatement, with Change, of a Previously Approved Collection for which Approval has Expired.

(2) *The title of the form/collection:* Claim for Death Benefits.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* Form Number: None. Bureau of Justice Assistance, Office of Justice Programs, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: individuals or households. Other: None. The Public Safety Officers' Benefits (PSOB) Program provides a one-time benefit of $250,000 (adjusted for cost-of-living) to the eligible survivors of local, state, and federal public safety officers whose deaths result from traumatic injuries sustained in the line of duty. The agency requires the information requested on this form to identify survivors and determine their eligibility for the PSOB benefit in accordance with the statutory requirements found in 42 U.S.C. 3796. Respondents will include surviving spouses, children, and/or parents of deceased public safety officers.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that each of the 320 respondents will complete the application in approximately 90 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated total public burden associated with this application is 480 hours.

If additional information is required contact: Brenda E. Dyer, Deputy Clearance Officer, Planning and Policy Staff, Justice Management Division, U.S. Department of Justice, Patrick Henry Building, 601 D Street NW., Suite 1600, Washington, DC 20530.

Dated: October 16, 2003.

Brenda E. Dyer,

Deputy Clearance Officer, U.S. Department of Justice.

[FR Doc. 03–26690 Filed 10–22–03; 8:45 am]

BILLING CODE 4410–18–M

DEPARTMENT OF JUSTICE

Office of Justice Programs

Agency Information Collection Activities: Proposed Collection; Comments Requested

Action: 60-day emergency notice of information collection under review: reinstatement, with change, of a previously approved collection for which approval has expired, report of public safety officer's death.

The U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with emergency review procedures of the Paperwork Reduction Act of 1995. OMB approval has been requested by October 30, 2003. The proposed information collection is published to obtain comments from the public and affected agencies. If granted, the emergency approval is only valid for 180 days. Comments should be directed to OMB, Office of Information and Regulation Affairs, Attention: Department of Justice Desk Officer (202) 395–5806, Washington, DC 20503. Comments are encouraged and will be accepted for 60 days until December 22, 2003.

During the first 60 days of this same review period, a regular review of this information collection is also being undertaken. All comments, suggestions, or questions, or questions regarding additional information, including requests for copies of the proposed information collection instrument with instructions, should be directed to Sharon Williams at *SharonW@ojp.usdoj.gov* or via facsimile at (202) 307–0036.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used

(3) Enhance the quality, utility, and clarity of the information to be collected

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses)

Overview of this information:

(1) *Type of information collection:* Reinstatement, with Change, of a Previously Approved Collection for which Approval has Expired.

(2) *The title of the form/collection:* Report of Public Safety Officer's Death.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* From Number: None. Bureau of Justice Assistance, Office of Justice Programs, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as brief abstract:* Primary: State, Local, or Tribal Government. Other: Federal Government. This information collection is required to carry out the functions of the PSOB Program. The program provides a one-time benefit of $250,000 (adjusted for cost-of-living) to the eligible survivors of local, state, and federal public safety officers whose deaths result from injuries sustained in the line of duty. The Report of Public Safety Officer's Death form is completed by the employing agency. Supporting documentation is filed with the Bureau of Justice Assistance to assist in determining eligibility of spouses, children, and/or parents of deceased public safety officers in obtaining benefits. The form includes information necessary to determine that the circumstances of death meet the requirements prescribed in 42 U.S.C. 3796.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply: It is estimated that each of the 320 respondents will complete the application in approximately 2.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimate total public burden associated with this application is 800 hours.

If additional information is required contact: Brenda E. Dyer, Deputy Clearance Officer, Planning and Policy Staff, Justice Management Division, U.S. Department of Justice, Patrick Henry Building, 601 D Street, NW, Suite 1600, Washington, DC 20530.

Dated: October 16, 2003.

Brenda E. Dyer,

Deputy Clearance Officer, Department of Justice.

[FR Doc. 03–26691 Filed 10–22–03; 8:45 am]

BILLING CODE 4410–18–M

DEPARTMENT OF JUSTICE

Office of Justice Programs

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-day emergency notice of information collection under review: reinstatement, with change, of a previously approved collection for which approval has expired, report of public safety officer's permanent and total disability.

The U.S Department of Justice, Office of Justice Programs, Bureau of Justice Assistance has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with emergency review procedures of the Paperwork Reduction Act of 1995. OMB approval has been requested by October 31, 2003. The proposed information collection is published to obtain comments from the public and affected agencies. If granted, the emergency approval is only valid for 180 days. Comments should be directed to OMB, Office of Information and Regulation Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20503. Comments are encouraged and will be accepted for 60 days until December 22, 2003.

During the first 60 days of this same review period, a regular review of this information collection is also being undertaken. All comments, suggestions, or questions regarding additional information, including requests for copies of the proposed information collection instrument with instructions, should be directed to Sharon Williams at *SharonW@ojp.usdoj.gov* or via facsimile at (202) 307–0036.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.

(3) Enhance the quality, utility, and clarity of the information to be collected.

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

Overview of this information:

(1) Type of information collection: Reinstatement, with Change, of a Previously Approved Collection for which Approval has Expired.

(2) The title of the form/collection: Report of Public Safety Officer's Permanent and Total Disability.

(3) The agency form number, if any, and the applicable component of the department sponsoring the collection: Form Number: OJP ADMIN FORM 3650/7. Bureau of Justice Assistance, Office of Justice Programs, Department of Justice.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or Households. Other: Federal, State, Local, or Tribal Government. The Report of Public Safety Officer's Permanent and Total Disability form is required to carry out the functions of the Public Safety Officers' Benefits Program. The information collected is pursuant to the Public Safety Officers' Benefits Act of 1976. Benefits are provided to claimant public safety officers found to have been permanently and totally disabled as the direct result of a catastrophic line of duty injury sustained on or after November 29, 1990. The form includes information necessary to determine that the circumstances that lead to the disability meet the requirements prescribed in 42 U.S.C. 3796.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply: It is estimated that each of the 45 respondents will complete the application in approximately 2 hours.

(6) An estimate of the total public burden (in hours) associated with the collection: The estimated total public burden associated with this application is 90 hours.

If additional information is required contact: Brenda E. Dyer, Deputy Clearance Officer, Planning and Policy Staff, Justice Management Division, U.S. Department of Justice, Patrick Henry Building, 601 D Street, NW., Suite 1600, Washington, DC 20530.

Dated: October 16, 2003.

Brenda E. Dyer,

Deputy Clearance Officer, Department of Justice.

[FR Doc. 03–26692 Filed 10–22–03; 8:45 am]

BILLING CODE 4410–18–M

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application Nos. D–08295 and D–10365]

Proposed Class Exemption To Permit Certain Loans of Securities by Employee Benefit Plans

AGENCY: Department of Labor.

ACTION: Notice of proposed amendment to PTE 81–6 and proposed restatement and redesignation of PTE 82–63.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed amendment to PTE 81–6 and a proposed restatement of PTE 82–63. If granted, the proposed exemption would amend and replace Prohibited Transaction Exemption (PTE) 81–6 (46 FR 7527, January 23, 1981) which exempts the lending of securities by employee benefit plans to certain banks and broker-dealers, and would replace PTE 82–63 (47 FR 14804, April 6, 1982), which exempts certain compensation arrangements for the provision of securities lending services by a plan fiduciary to an employee benefit plan. The class exemption proposed in this notice, if granted, would incorporate PTEs 81–6 and 82–63 and expand those class exemptions to additional parties, subject to modified conditions. If granted, the proposed exemption would affect participants and beneficiaries of employee benefit plans, persons who lend securities on behalf of such plans, and parties in interest who engage in securities lending transactions with such plans.

DATES: Written comments and requests for a public hearing must be received by the Department on or before December 8, 2003. The replacement exemption and the revocation of PTEs 81–6 and 82–63 would be effective 60 days following publication of the final grant.

ADDRESSES: All written comments and requests for a public hearing (preferable three copies) should be addressed to: U.S. Department of Labor, Office of Exemption Determinations, Employee Benefits Security Administration, Room N–5649, 200 Constitution Avenue, NW., Washington, DC 20210 (Attention: Application No. D–10365.) Interested

persons are also invited to submit comments and/or hearing requests to EBSA by email to: *moffitt.betty@dol.gov* or by fax at (202) 219–0204 by the end of the scheduled comment period. All comments received will be available for public inspection in the Public Disclosure Room, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Allison Padams Lavigne, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, (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 class exemption that would amend and incorporate PTEs 81–6 and 82–63 into a new class exemption and would expand the existing relief from the restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) of ERISA and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (E) of the Code to additional parties under modified conditions.[1] Notice is also hereby given of the pendency before the Department of a proposed revocation of PTEs 81–6 and 82–63.

The proposed exemption was requested in two applications. One was submitted by the American Bankers Association (ABA) (D–08295)[2] and the second application was submitted by the Robert Morris Associates, now known as the Risk Management Association (RMA) (D–10365). The applications were filed pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR 2570, subpart B (55 FR 32836, August 10, 1990.)

Background

PTE 81–6 provides relief from section 406(a)(1)(A) through (D) of ERISA and Code section 4975(c)(1)(A) through (D) for the lending of securities by employee benefit plans to banks and broker-dealers registered under the Securities Exchange Act of 1934, who are parties in interest with respect to such plans. The exemption was amended in 1987 to include broker-dealers exempted from registration as dealers in exempted government securities, provided that all other conditions of the exemption are met.

Securities lending transactions generally operate in the following manner. An institutional investor, such as a plan, lends securities from its portfolio to a broker-dealer or bank in order to augment the return on those securities while continuing to enjoy the benefits of owning the securities (*e.g.*, from the receipt of any interest, dividends, or other distributions made on the loaned securities and from any appreciation in the value of the securities). The lender generally requires that the securities loaned be fully collateralized, and the collateral usually is in the form of cash or high quality liquid securities, such as U.S. Government or Federal Agency obligations or irrevocable bank letters of credit. If the borrower deposits cash collateral, the lender invests the collateral, and the borrowing agreement may provide that the lender pays the borrower a previously-agreed upon rebate and keeps the earnings on the collateral. If the borrower deposits government securities, the borrower is entitled to the earnings on its deposited securities and pays the lender a lending fee. If the borrower deposits bank letters of credit as collateral, the borrower pays the lender a fee as compensation for the loan of its securities.

PTE 82–63 exempts certain compensation arrangements for the provision of securities lending services by a plan fiduciary to an employee benefit plan, provided that: the loan of securities is not prohibited by section 406(a); the lending fiduciary is authorized to engage in lending transactions on behalf of the plan; the compensation is reasonable and is paid in accordance with terms of a written instrument; the compensation arrangement is approved by an independent fiduciary; and the authorization is provided only after the independent fiduciary has received all information necessary to approve the arrangement with the lending fiduciary.

Currently, relief under PTE 81–6 is limited to securities lending transactions in which a plan loans securities to a U.S. broker-dealer or U.S. bank which is a party in interest to the plan. Moreover, only collateral consisting of cash, securities issued or guaranteed by the United States Government or its agencies or instrumentalities, or irrevocable bank letters of credit may be accepted by the plan. As discussed more fully below, the applicant(s) have asked the Department to extend relief to foreign broker-dealers and banks and to allow plans to accept additional forms of collateral.

Discussion of the Application

The application contains facts and representations with regard to the requested exemption which are summarized below. Interested persons are referred to the application on file with the Department for the complete representations of the applicant.

1. The Applicant

The RMA is the primary association of securities lending professionals. RMA's membership is composed of approximately 2800 member institutions consisting of banks and regulatory agencies. RMA states that its purpose as an association is to foster standards and performance in the practice and management of lending and credit activities in its members and other institutions which comprise the financial service industry.

According to RMA, securities lending activities in the international business context have increased greatly. Securities commonly loaned now include U.S. and foreign corporate and government securities. Lenders are continuing to expand their global securities lending networks by becoming familiar with and lending securities located in new markets and by lending to borrowers located in new jurisdictions. The applicant represents that plans are effectively prevented from participating in securities lending transactions in foreign markets because of the limitations contained in PTE 81–6.

2. Summary of RMA's Application

Eligible Borrowers

In its original submission, RMA requested an exemption to permit employee benefit plans to lend securities to U.S. banks and broker-dealers and ''exempted foreign banks and broker-dealers.'' RMA proposed to define ''exempted foreign banks and broker-dealers'' as either those subject to the laws and regulations of a country which is a member of the Organization for Economic Cooperation and Development or those which are rated with respect to their long-term creditworthiness as at least ''A'' by Standard & Poors or ''A3'' by Moody's Investors Services, Inc. RMA also requested that the permissible collateral

[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) to the Secretary of Labor.

[2] The ABA requested broad relief to permit employee benefit plans to lend securities to any foreign bank or broker-dealer. In this regard, the ABA did not continue to pursue their exemption request by responding to issues raised by the Department relating to the definition of eligible borrowers and providing information on how securities markets in other countries operate as compared to those in the United States. However, the ABA's request is being addressed, in part, by this Notice which is based on exemption application D–10365.

under the exemption be expanded to include foreign currency, securities issued or guaranteed by the government of an ''exempted country'' or one of its instrumentalities, or irrevocable letters of credit issued by a bank which is organized and regulated under the laws of an exempted country and which is a person other than the borrower or an affiliate thereof.

The Department requested additional information relating to the operation and regulatory environment of these foreign countries. The Department notes that the relief provided in PTE 81–6 was based, in part, on the regulatory oversight of banks and broker-dealers located in the United States. This regulatory framework and the conditions contained in PTE 81–6 were integral to the Department's determination that the exemption was administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of the participants and beneficiaries of such plan.

In response to the Department's questions, RMA amended its request to narrow the definition of exempted foreign bank or broker-dealer to include those entities regulated under the laws of the United Kingdom (the UK). Banks and broker-dealers in the UK which engage in securities lending activities of the type contemplated by the proposed exemption are subject to extensive regulation under the Financial Services and Markets Act 2000 (FSMA) which governs ''the conduct of investment business'' [3] in the UK. The Financial Services Authority (FSA) is an independent non-government body which exercises statutory powers under the FSMA. The FSA is accountable to the Treasury [4] of the UK, and, through them, to Parliament. The FSA must report annually on the achievement of its statutory objectives to the Treasury which presents this report to the Parliament.

The duties of the FSA fall into the following categories: (1) Authorization of firms; (2) establishing standards for firms; (3) oversight of firms; (4) enforcement of [investment] laws and rules in the UK; (5) reducing financial crime; and (6) providing consumer service. Before a firm may conduct investment business, it must be authorized by the FSA. Only those firms which demonstrate to the FSA that they satisfy threshold criteria (which relate to the firms' honesty, competence and financial soundness) are authorized to engage in investment. The FSA ensures that financial business is not being carried out by unauthorized firms. In addition, the FSA collects and maintains information about the authorized firms. Any investment agreement entered into without such authorization is unenforceable, and the counterparty to such agreement is entitled to restitution and compensation for any loss incurred.

The FSA also establishes ''prudence'' standards for the firms it regulates. These standards include capital requirements which are designed to ensure that firms are able to meet financial obligations. Firms are also required to meet FSA standards relating to management, accounting and auditing practices. Further, the FSA sets the conduct of business standards relating to the firms' relationships with consumers. This involves overseeing a firm's dealings with investors to ensure, for example, that information is understandable, fair and not misleading.

The FSA has responsibility for overseeing the integrity of the UK investment markets. Specifically, it oversees the exchanges, clearing and settlement houses, and conducts market surveillance and transaction monitoring. The FSA also supervises the soundness of banks. In so doing, the aim is, among other things, to protect depositors.

In its enforcement capacity, the FSA investigates and, if appropriate, disciplines and prosecutes those responsible for conducting financial business outside of the rules. Under the FSMA, the FSA has the statutory authority to revoke a firm's authorization, discipline firms and individuals by public statements and financial penalties, seek injunctions, prosecute for offenses and require money to be returned as compensation for consumers.

According to RMA, the FSA's oversight of the securities markets in the UK provides a sufficient level of safeguards to protect the interests of the plans that would be lending securities to UK banks and broker-dealers under this exemption, if granted.

Collateral Offered to the Plan

The RMA requested that the Department expand the types of collateral permitted to be used in securities lending arrangements to include currency denominated in UK pounds or Euros, securities issued or guaranteed by the government of the UK or one of its agencies or instrumentalities, the sovereign debt of the member countries of the European Monetary Union denominated in UK pounds or in Euros, or irrevocable letters of credit denominated in UK pounds or Euros and issued by a bank which is regulated under the laws of the UK.

With respect to the Euro, RMA represents that, although it is a relatively new form of currency, it is closely monitored and regulated in connection with the implementation of the European Monetary Union (EMU). The EMU [5] consists of the following nations: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain and Sweden. In order to be admitted as members, these nations were required to meet five criteria: (1) Exchange rates must not fluctuate beyond certain predetermined fluctuation limits for a period of two years; (2) a government deficit must not exceed 3% of gross domestic product (GDP); (3) a government debt to GDP ratio is 60% or less; (4) an inflation rate must not be more than 1.5% above that of the average rate of the three best performing participating nations; and (5) an average long-term interest rate is no more than 2% above that of the three best performing participating nations. The primary goal of the introduction of the Euro is to establish and maintain price stability throughout the EMU region. The European Central Bank (ECB) and the European System of Central Banks (ESCB) provide a comprehensive management and regulatory infrastructure designed to support this objective. The responsibility of the ESCB is to maintain price stability and to define and implement the monetary policy of the EMU nations and promote the smooth operation of payment systems.

The RMA proposed that, if letters of credit are used as collateral, they must be issued by a bank whose long-term deposit rating is investment grade or higher, as determined by a nationally recognized independent statistical rating organization. Upon further consideration of this issue, RMA suggested that the ''counterparty credit rating'' of a bank is a more appropriate measure with respect to these transactions. Counterparty credit ratings take into account factors that focus on the bank's capacity to meets its financial

[3] The conduct of investment business in the UK includes: (1) Buying, selling, subscribing for or underwriting investments; (2) arranging transactions in the field of investment and (3) giving investment advice.

[4] The Treasury is the department of the government in the UK responsible for formulating and putting into effect the UK's financial and economic policy.

[5] Although the UK did not initially participate in the EMU, it is anticipated that a significant amount of business in the financial sector of the UK will be transacted in Euros.

obligations as they come due. RMA states that rating agencies, such as Standard & Poor's, look to the credit of the bank when examining transactions that rely on lines of credit for credit enhancements.

RMA has also requested that plans be allowed to accept collateral that is denominated in a different currency than the securities lent. RMA notes that, because plans are currently not permitted under PTE 81–6 to accept foreign government debt as collateral for borrowed securities, plans are not able to fully participate in the overseas securities lending markets and are prevented from enjoying revenue opportunities that are available to other lenders. RMA further states that most broker-dealers who are active in the international securities lending area are active in several markets. Thus, a broker-dealer may have a relatively large position in the currency of one country (*e.g.,* Euro), but may have a need to borrow securities denominated in the currency of a another country (*e.g.,* UK pounds). In these circumstances, the borrower would want to deliver Euros as collateral for a loan of UK pound denominated securities. RMA believes that plans would be at a competitive disadvantage if the proposed exemption did not permit plans to accept collateral that is denominated in a different currency than the securities that are lent.

Another request of RMA relates to the level of collateral that must be provided to a lender. RMA suggests that the market value of the collateral offered to the plan be not less than 100 percent of the then market value of the securities lent, if the collateral is denominated in the same currency as the securities, and 102 percent of the then market value of the securities lent if the collateral is denominated in a different currency. However, after consideration of the issue, the Department believes that it would be more protective of the plan to require that the market value of the collateral be 105 percent of the then market value of the securities lent where the collateral offered by a borrower is denominated in a different currency than that of the securities.

Plan's Rights With Respect to the Collateral Under the Law of the UK Upon a Borrower's Default

RMA states in its application that under standard securities lending practices in the UK, title to the collateral given to the lender in exchange for borrowed securities, passes to the lender. According to RMA, this practice is reflected in the standard lending agreements used in the UK RMA represents that the securities lending transactions contemplated by the proposed exemption would be carried out in accordance with standard securities lending practices in the United Kingdom. Because the lending plan will have title to the collateral in these transactions, such plans will not be restricted in their ability to apply the collateral towards the cost of replacing the borrowed securities or to replace the collateral with cash in the event the borrower were to default.

To further protect the plan's interests in the event of a borrower's default, RMA proposes that, in the securities lending agreement, the borrower will agree to submit to the jurisdiction of the courts of the United States. Once a plan receives a judgment against a borrower in a U.S. court, the plan would then enforce the judgment in a UK court. RMA states that the enforcement of U.S. judgments in the UK courts is governed by common law. A basic principle of such common law is that any judgment of a court of a foreign country which is for a debt or a definite sum of money which is final and conclusive on the merits, and as to which the foreign court had jurisdiction over the defendant, is enforceable at common law in the absence of fraud. Under UK common law, a foreign court is considered to have jurisdiction over the defendant if the defendant agreed to submit to the jurisdiction of the foreign court prior to the commencement of the proceedings.

To enforce a U.S. judgment under common law, a claimant must commence an action in a UK court by writ. If a claimant obtains a favorable judgment in a U.S. court following a summary judgment action or a trial, the judgment is enforceable in the UK like any other UK judgment.

As an alternative to submission to the jurisdiction of the United States courts, if the lending agent is domiciled in the United States, the lending agent may agree to indemnify and hold harmless each plan against any shortfall in the value of the collateral as compared to the value of the loaned securities.

Indicia of Collateral and Location of Collateral Offered to the Plan

In dealing with the indicia of ownership of the collateral offered to the plan in return for the securities lent to Foreign Banks and Foreign Broker-Dealers, RMA has represented that the indicia of ownership of the collateral for the borrowed securities will be maintained within the jurisdiction of the district courts of the United States as required by section 404(b) of ERISA, or if held outside the U.S., in a central clearing facility.[6] RMA represents that the requirements of section 404(b) and the Department's regulation thereunder will be satisfied.

Thus, if a Foreign Bank or Foreign Broker-Dealer offers Foreign Collateral to the plan, under regulation 29 CFR 2550.404b–1, the indicia of ownership of the collateral must be held within the jurisdiction of the district courts of the United States[7], or the assets must be under the management and control of a fiduciary which is a corporation or partnership organized under the laws of the United States or a State which has its principal place of business within the United States and which is a bank, an insurance company or an investment advisor (as described in the regulations.) In the alternative, the regulations require that the indicia of ownership of the collateral be in the physical possession of a person which is organized under the laws of the United States which is a bank, as defined under section 202(a)(2) of the Investment Advisers Act of 1940, a broker-dealer registered under the Securities Exchange Act of 1934 with a net worth exceeding $750,000, or has its obligations and liabilities guaranteed by individuals listed in the regulation; be maintained by a broker-dealer in the custody of an entity designated as a ''satisfactory control location'' under Rule 15c3–3 under the Securities Exchange Act of 1934; or be maintained by a bank, in the custody of an entity that is a foreign securities depository, foreign clearing agency acting as a securities depository or a foreign bank, which entity is supervised or regulated by a government agency or regulatory authority in the foreign jurisdiction having authority over such depositories, clearing agencies or banks.[8]

Discussion of Proposed Exemption

Section I of the proposal describes the transactions which are covered by the exemption. Section I(a) tracks the language of PTE 81–6 by permitting the lending of securities that are assets of an employee benefit plan to a U.S. Broker-Dealer or U.S. Bank, if the general conditions set forth in section II are met. However, the conditions contained in

[6] In this regard, RMA represents that in the UK, the indicia of ownership for the foreign collateral is typically held in a central clearing facility in accordance with customary procedures in the UK

[7] The indicia of ownership of bank letters of credit (foreign or U.S.) must always be maintained within the jurisdiction of the district courts of the United States since they fall outside the exception provided in regulation 29 CFR 2550.404b–1.

[8] Regulation 29 CFR 2550.404b–1 has been summarized in part. Interested persons should consult the complete regulation to ensure compliance.

PTE 81–6 have been amended to permit additional types of collateral to be used for the loan.[9] Section I(b) of the proposal expands PTE 81–6 by permitting the lending of securities that are assets of an employee benefit plan to a Foreign Broker-Dealer or a Foreign Bank. A Foreign Broker-Dealer or a Foreign Bank must meet both the general conditions set forth in section II of the proposed exemption, as well as the specific conditions described in section III. Section I(c) permits the payment to a lending fiduciary of compensation for services rendered in connection with loans of plan assets that are securities, provided that the conditions set forth in section IV are met. The conditions found in section IV mirror the conditions currently found in PTE 82–63. Although the relief provided by section I(c) would apply to a broader range of lending activities, no changes are being proposed with respect to any of the conditions that are contained in PTE 82–63.

Under the proposal, U.S. Banks and U.S. Broker-Dealers would now be permitted to give plans Foreign Collateral for securities loans. Section V(f) defines Foreign Collateral as the currency of the United Kingdom or Euros, securities issued or guaranteed by the government of the United Kingdom or one of its agencies or instrumentalities, sovereign debt of the member countries of the EMU denominated in Euros or irrevocable letters of credit issued by a Foreign Bank, other than the borrower, which has a counter-party rating of investment grade or better as determined by a nationally recognized statistical rating organization. Further, section II(b) requires that the plan receive from the borrower: (a) U.S. Collateral having, as of the close of business on the preceding business day, a market value or, in the case of letters of credit, a stated amount, equal to not less than 100 percent of the then market value of the securities lent, or (b) Foreign Collateral having, as of the close of the preceding business day, a market value or, in the case of letters of credit, a stated amount, equal to not less than: (1) 102 percent of the then market value of the securities lent on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in section V(k)) on which the securities are primarily traded if the collateral posted is denominated in the same currency as the securities lent; or (2) 105 percent of the then market value of the securities lent on a recognized securities exchange or an automated trading system on which the securities are primarily traded if the collateral posted is denominated in a different currency than the securities lent. The Department notes that, after consideration of the applicant's suggestion for an appropriate level of Foreign Collateral, it was determined that the plan's interests will be better protected if the amount of collateral is increased when Foreign Collateral is offered to the plan.

The securities lending agreement also must describe any fees to be received by a plan in connection with the lending of securities, whether the payment will be made in the same currency as the collateral, in the currency of the securities lent or in U.S. dollars. Lastly, the securities lending agreement must give the plan a continuing security interest in, title to, or the rights of a secured creditor with respect to the collateral received by the plan.

As an additional safeguard, the Department is requiring that when the plan receives Foreign Collateral or U.S. Collateral from a foreign bank or broker-dealer, the collateral itself must be maintained on behalf of the plan at an ''Eligible Securities Depository'' as defined in Rule 17f–7 of the Investment Company Act of 1940 [15 U.S.C. 80a]. Rule 17f–7 governs the custody of assets of registered management investment companies with custodians outside the United States. Rule 17f–7 permits a fund to maintain assets with a foreign securities depository if, among other things, the depository is an eligible securities depository. The term ''Eligible Securities Depository'' is defined in section [17 CFR Part 270] 2710.17f–7(b)(1) as a system for the central handling of securities that:

(i) Acts as or operates a system for the central handling of securities or equivalent book-entries in the country where it is incorporated, or a transnational system for the central handling of securities or equivalent book-entries;

(ii) Is regulated by a foreign financial regulatory authority as defined under section 2(a)(50) of the Act (15 U.S.C. 80a–2(a)(50)) [10];

(iii) Holds assets for the custodian that participates in the system on behalf of the Fund under safekeeping conditions no less favorable than the conditions that apply to other participants;

(iv) Maintains records that identify the assets of each participant and segregates the system's own assets from the assets of participants;

(v) Provides periodic reports to its participants with respect to its safekeeping of assets, including notices of transfers to or from any participant's account; and

(vi) Is subject to periodic examination by regulatory authorities or independent accountants.

The Department notes that the proposed exemption also permits collateral to be physically delivered to the Plan. In addition, where the borrower is a U.S. Bank or Broker-Dealer, the current requirements (with respect to where the collateral must be held on behalf of the plan) of PTE 81–6 have been incorporated into the proposal.

The Department also notes that section II(c) requires that, in the case of a Foreign Broker-Dealer or Foreign Bank, the borrower shall have furnished the Lending Fiduciary with its most recent available audited statement of its financial condition as audited by a firm which is eligible for appointment as a company auditor under the laws of the United Kingdom.

For purposes of this proposed class exemption, section V(c) defines the term ''Foreign Broker-Dealer'' as a broker-dealer registered and regulated under the laws of the Financial Services Authority in the United Kingdom that has as of the last day of its most recent fiscal year, equity capital which is equivalent of no less than $200 million. Section V(d) defines the term ''Foreign Bank'' as an institution having substantially similar powers to a bank which is described in section 202(a)(2) of the Investment Advisers Act, is subject to authorization by the Financial Services Authority in the United Kingdom and has as of the last day of its most recent fiscal year, equity capital which is equivalent of no less than $200 million.

The Department notes that, the proposed relief for Foreign Broker-Dealers and Foreign Banks is limited to UK Broker-Dealers and UK Banks as RMA has requested. Nevertheless, this proposal does not foreclose consideration by the Department of extending relief to broker-dealers and

[9] The following discussion of proposed conditions is limited to conditions which are new or have been modified from the conditions of PTE 81–6.

[10] 15 U.S.C. 80a–2(a)(50) states that ''foreign financial regulatory authority'' means any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts or sale of a commodity for future delivery, or other instrument traded on or subject to the rules of a contract market, board of trade or foreign equivalent or other financial activities, or (C) membership organization, a function of which is to regulate the participation of its members in activities listed above.

banks that are subject to regulation in other countries. In this regard, we note that a sufficient showing must be made that collateral offered to plans will be held in a manner that will ensure that the plan's interest in such collateral will be adequately protected. In addition, information is needed on whether broker-dealers and banks in countries other than the UK are subject to a scheme of regulatory oversight comparable to that found in the United States. The Department invites interested persons to comment on these issues. Specifically, we request comments on the following: (1) The regulatory oversight of broker-dealers and banks in countries other than the UK; (2) the entities that are used in these countries to hold collateral on behalf of the plan while the securities loan is outstanding, and (3) whether these entities' have practices and policies designed to protect the plan's interest in the collateral and are subject to government supervision and oversight.

Section III of the proposed exemption contains additional conditions that are applicable to securities lending transactions with Foreign Broker-Dealers and Foreign Banks. Section III(a) requires that the lending fiduciary maintain the situs of the loan agreement in accordance with the indicia of ownership requirements under section 404(b) of ERISA and the regulations promulgated under 29 CFR 2550.404(b)–1. Further, section III(b) requires that a foreign borrower agree to submit to the jurisdiction of the district courts or the United States, and agree that the plan may in its sole discretion enforce the agreement in a U.S. court. It is the Department's understanding, that in the event the borrower were to default, the plan generally would be able to secure a judgment in the United States which would be enforceable in a UK court.

As an alternative to the Foreign Broker-Dealer or Foreign Bank agreeing to submit to the jurisdiction of the United States courts, the lending fiduciary may, if domiciled in the United States, agree to indemnify and hold harmless each plan against any shortfall in the collateral or losses incurred by the plan arising from a borrower's default.

Miscellaneous Issues

The Department has received an inquiry regarding whether the relief provided by the proposed exemption would apply to securities loaned by plans pursuant to ''exclusive securities lending arrangements.'' Under these exclusive arrangements, a lender (in this case, a plan) agrees to make a specific portfolio of securities (that are owned by the plan) available exclusively to a specific borrower for a specific period of time. The borrower is given exclusive access to all of the securities in the portfolio and can borrow such securities as and when the borrower determines that it wishes to do so. The securities may not be lent to another person. However, the existence of an exclusive arrangement will not have any impact on the investment management decisions of the portfolio. Thus, the securities in the portfolio may continue to be purchased and sold without regard to the exclusive arrangement. Neither the borrower nor any of its affiliates has any discretionary authority or control with respect to the management of the portfolio, or with respect to the decision to cause the plan to enter into an exclusive arrangement or to negotiate the terms of such arrangement on behalf of the plan. The exclusive arrangement will be negotiated on behalf of the lending plan by a fiduciary who is independent of the borrower. However, under the terms of an exclusive arrangement, the borrower has a contractual right to borrow any of the securities included in the portfolio at any time during the agreed upon period. In exercising this right, the borrower is acting as a counterparty pursuant to the written loan agreement and not as a fiduciary.

Under these exclusive arrangements, compensation is paid by the borrower to the plan and may consist of one or more components. The first component generally is a fee paid by the borrower to the plan for the exclusive right to borrow the securities in the portfolio and may consist of either a flat fee (which may be equal to a percentage of the value of the total securities in the portfolio), or a periodic payment that is equal to a percentage of the value of the total balance of outstanding borrowed securities or a combination of both. A second component of the fees may include the plan's right to (a) retain a portion of the investment earnings generated by its investment of cash collateral received from the borrower and rebate the remaining earnings to the borrower, (b) retain all the investment earnings generated by its investment of the cash collateral and pay a rebate fee to the borrower; or (c) receive a lending fee paid by the borrower with respect to securities loans collateralized with non-cash collateral (based on the value of the borrowed securities and the duration of the particular loan.) The fees may be different for different securities or different groups of securities subject to the exclusive arrangement. These two types of fees may be both paid to the plan, or offset against amounts due to the lender.

The Department is of the view that such exclusive securities lending arrangements would be covered by the relief provided in the proposed exemption, and, accordingly, has clarified section II(e)(1) of the proposal to more explicitly encompass a variety of compensation methods.[11]

The Department notes that ERISA's general standards of fiduciary conduct also would apply to any proposed securities lending arrangements. Section 404 requires a fiduciary, among other things, to discharge his or her duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion. Accordingly, the plan's fiduciary, in deciding to approve the lending of securities to a Foreign Bank or Foreign Broker-Dealer, should fully understand the risks involved in this particular type of securities lending. The fiduciary should understand, for example, the additional risks involved in lending securities which are plan assets to a foreign financial institution, as well as, the risk associated with the receipt of collateral consisting of foreign currency or securities issued by a foreign country. In connection with the foregoing, the plan fiduciary should take into account any additional expenses and legal issues that may arise if a foreign borrower defaults and the plan fiduciary has to enforce and collect on a judgement in a foreign court.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This 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.

[11] In this regard, the Department notes that the proposed exemption does not provide relief from section 406(b) with respect to exclusive securities lending agreements. Accordingly, fees under an exclusive lending arrangement must be agreed to by the plan's independent fiduciary in advance of the implementation of the arrangement, or be determined pursuant to an objective formula.

Currently, the Department is soliciting comments concerning the proposed revision of the information collection request (ICR) included in this Notice of Proposed Amendment to PTE 81–6 and Proposed Restatement and Redesignation of PTE 82–63. A copy of the ICR may be obtained by contacting Gerald B. Lindrew, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW, Room N–5647, Washington, DC 20210. Telephone (202) 693–8410; Fax: (202) 219–4745. These are not toll-free numbers.

The Department has submitted a copy of the proposed information collection to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- 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 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 submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. Although comments may be submitted through December 22, 2003 OMB requests that comments be received within 30 days of publication of the Notice of Proposed Rulemaking to ensure their consideration.

The proposed amendment and restatement of existing exemptions was requested in two applications, one submitted by the ABA and a second submitted by RMA. The applicants requested that PTE 81–6, which currently provides exemptive relief from section 406(a)(1)(A) through (D) of ERISA and Code section 4975(c)(1)(A) through (D) for the lending of securities by employee benefit plans to banks and broker-dealers registered under the Securities Exchange Act of 1934, or broker-dealers exempted from registration under section 15(a)(1) of the 1934 Act as a dealer in exempted government securities that are parties in interest with respect to such plans, be broadened to exempt certain foreign banks and broker-dealers and to permit additional forms of collateral. In response to the applications, and provided that certain conditions outlined in the proposed exemption are met, the Department proposes to amend PTE 81–6 to also exempt the lending of securities by employee benefit plans to foreign banks and broker dealers and to provide for the receipt of additional forms of collateral.

PTE 82–63, used in conjunction with PTE 81–6, exempts certain compensation arrangements for the provision of securities lending services by a plan fiduciary to an employee benefit plan provided that the lending fiduciary is authorized to engage in lending transactions on behalf of the plan and the other conditions of the exemption are met. The Department has amended PTE 81–6 and incorporated PTE 82–63 in this proposed exemption. The Department also gives notice of its revocation of PTE 81–6 and PTE 82–63. The ICR for the proposed exemption re-states and combines existing ICRs previously approved [12] in PTE 81–6 (1210–0065) and PTE–82–63 (1210–0062) but with a program change to reflect both the addition of foreign broker-dealers and banks as potential borrowers and the related changes in conditions applicable to these borrowers, and an adjustment in the burden estimates of the number of respondents based on updated and corrected information. This ICR constitutes a revision of both PTE 81–6 and PTE 82–63, in that the two exemptions are combined and revised. Continued approval has been requested under control number 1210–0065; the control number 1210–0062 will be removed from OMB inventory when OMB approval of the information collection provision of this revised exemption is received.

The Department estimates that there are approximately 13,913 borrowers that might take advantage of the class exemption. Generally, a plan is authorized to lend securities to two groups of broker dealers and banks as these are defined in the proposed amended and restated exemption—U.S. Broker-Dealers and reporting dealers [13] and U.S. Banks, and Foreign Broker-Dealers and Foreign Banks regulated under the laws of the United Kingdom (UK). According to the Securities and Exchange Commission, 7,900 broker-dealers were registered as members at the close of FY 2001. Not all member broker-dealers perform services for employee benefit plans, and, among those broker-dealers that perform services for employee benefit plans, only those that borrow plans securities will make use of the exemption. Although fewer broker-dealers than are registered with the SEC may actually make use of the proposed exemption, the Department has conservatively based its burden analysis on the total number of broker-dealers that could borrow securities. There are also about 6,000 U.S. banks that might choose to take advantage of the restated exemption; the Department has conservatively assumed that all U.S. banks with trust powers will engage in borrowing securities. The applicants have indicated that 5 UK broker-dealers and 8 UK banks are also likely to borrow securities. Therefore, approximately 13,913 broker-dealers and banks might borrow securities under the proposed exemption.

The proposed exemption provides that before a plan can lend securities: the borrower must provide the plan with a financial statement; the transaction or series of transactions must be described in a written agreement; and, the compensation for the Lending Fiduciary must be described in a written agreement.

Furnishing a financial statement to the plan. The Department has not accounted for an hour or cost burden for preparing financial statements because borrowers of securities will have already prepared the statements required under the exemption in order to comply with SEC and FSA rules. It is assumed that borrowers will incur costs of $1 per mailing and 2 minutes of administrative time to distribute financial statements quarterly in order to comply with the conditions of the proposed exemption. This provision is expected to require 1,855 hours and $56,000 annually.

Providing a written agreement covering the transaction or series of transactions. The Department understands that it is customary business practice for agreements related to the lending of securities to be set

[12] Approval for the ICR included in PTE 81–6 expires on July 31, 2004; approval for the ICR included in PTE 82–63 expires on June 30, 2004.

[13] Reporting dealers covered by the exemption are not accounted for separately because they are bond and security brokerages that trade in U.S. Government Securities; thus, reporting dealers are already accounted for in the number of broker-dealer firms and banks.

forth in writing. The burden estimate allows for one half hour per year to review written lending agreements for compliance with this proposed exemption, and two minutes per agreement for distribution.[14]

Compensation. The proposed exemption provides that the compensation paid to a Lending Fiduciary must be reasonable and must be in accordance with the terms of a written agreement. As permitted under section IV(c) of the proposed exemption, the compensation agreement will most likely be written in the form of a master agreement covering a series of securities lending transactions at the time the Lending Fiduciary's services are engaged. Entering into such an agreement is also customary business practice; however, the Department has allowed in its estimates for one half hour per compensation agreement for review of compliance with this proposed exemption and two minutes per agreement for distribution.

For both the lending and compensation agreements, the hour burden for U.S. broker-dealers and U.S. banks, at 32 minutes per agreement, is 14,827 hours; for UK broker-dealers and UK banks, at 122 minutes per agreement, the hour burden is 53 hours. The total hour burden for the lending and compensation agreements is 14,880 hours.

Type of Review: Revision of a currently approved collection. Agency: Employee Benefits Security Administration, Department of Labor.

Title: Securities Lending Prohibited Transaction Exemption.

OMB Number: 1210–0065.

Affected Public: Business or other for-profit, Not-for-profit institutions, Individuals.

Total Respondents: 13,913.

Frequency: On occasion.

Total Responses: 83,478.

Estimated Total Burden Hours: 16,735.

Estimated Burden Cost: $56,000.

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 ERISA and the Code. These provisions include any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of ERISA 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 ERISA; 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 any exemption may be granted under section 408(a) of ERISA and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan(s) and of its participants and beneficiaries, and protective of the rights of the 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 ERISA and 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) If granted, the pending class exemption will be applicable to a particular ransaction only if the transaction satisfies the conditions specified in the class exemption.

Written Comments

All interested persons are invited to submit written comments or requests for a hearing on the proposed exemption to the address and within the time period set forth above. All comments and requests for a hearing will be made a part of the record. Comments and requests for a hearing should state the reasons for the writer's interest in the proposed exemption. Comments received will be available for public inspection with the application for exemption at the address set forth above.

Proposed Exemption

On the basis of the facts and representations set forth in the application, the Department proposes to grant the following exemption under the authority of section 408(a) of ERISA 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).

I. Transactions

(a) Effective (60-days after the date of publication of the final class exemption in the **Federal Register**), the restrictions of section 406(a)(1)(A) through (D) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the lending of securities that are assets of an employee benefit plan to a ''U.S. Broker-Dealer'' or to a ''U.S. Bank'', provided that the conditions set forth in section II below are met.

(b) Effective (60-days after the date of publication of the final class exemption in the **Federal Register**), the restrictions of section 406(a)(1)(A) through (D) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the lending of securities that are assets of an employee benefit plan to a ''Foreign Broker-Dealer'' or ''Foreign Bank'', provided that the conditions set forth in sections II and III below are met.

(c) Effective (60-days after the date of publication of the final class exemption in the **Federal Register**), the restrictions of section 406(b)(1) of ERISA and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code shall not apply to the payment to a fiduciary (the Lending Fiduciary) of compensation for services rendered in connection with loans of plan assets that are securities, provided that the conditions set forth in section IV below are met.

II. General Conditions

(a) Neither the borrower nor any affiliate of the borrower has or exercises 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;

(b)(1) The plan receives from the borrower by the close of the Lending Fiduciary's business on the day in which the securities lent are delivered to the borrower:

(A) ''U.S. Collateral'' having, as of the close of business on the preceding business day, a market value or, in the case of bank letters of credit, a stated amount, equal to not less than 100 percent of the then market value of the securities lent, or

(B) ''Foreign Collateral'' having as of the close of business on the preceding business day, a market value or, in the case of bank letters of credit, a stated amount, equal to not less than:

(i) 102 percent of the then market value of the securities lent as valued on

[14] Estimates of 2 hours rather than 30 minutes are used for both lending and compensation agreements involving UK banks and UK broker-dealers.

a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in V(k)) on which the securities are primarily traded if the collateral posted is denominated in the same currency as the securities lent; or

(ii) 105 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in V(k)) on which the securities are primarily traded if the collateral posted is denominated in a different currency than the securities lent;

(2) If the borrower is a U.S. Bank or U.S. Broker-Dealer, the Plan receives such U.S. Collateral or Foreign Collateral from the borrower by the close of the Lending Fiduciary's business on the day in which the securities are delivered to the borrower. Such collateral is received by the plan either by physical delivery, wire transfer or by book entry in a securities depository located in the United States;

(3) If the borrower is a Foreign Bank or Foreign Broker-Dealer, the plan receives U.S. Collateral or Foreign Collateral from the borrower by the close of the Lending Fiduciary's business on the day in which the securities are delivered to the borrower. Such collateral is received by the plan either by physical delivery, wire transfer or by book entry in a securities depository located in the United States or held on behalf of the plan at an Eligible Securities Depository. The indicia of ownership of such collateral shall be maintained in accordance with ERISA section 404(b) and regulation 29 CFR 2550.404b–1.

(c) Prior to making of any such loan, the borrower shall have furnished the Lending Fiduciary with:

(1) The most recent available audited statement of the borrower's financial condition, as audited by a United States certified public accounting firm or in the case of a Foreign Broker-Dealer or Foreign Bank, a firm which is eligible for appointment as a company auditor under the laws of the United Kingdom;

(2) The most recent available unaudited statement of its financial condition (if the unaudited statement is more recent than such audited financial statement); and

(3) A representation that, at the time the loan is negotiated, there has been no material adverse change in its financial condition since the date of the most recent financial statement furnished to the plan that has not been disclosed to the Lending Fiduciary. Such representations may be made by the borrower's agreeing that each such loan shall constitute a representation by the borrower that there has been no such material adverse change;

(d) The loan is made pursuant to a written loan agreement, the terms of which are at least as favorable to the plan as an arm's-length transaction with an unrelated party would be. Such loan agreement identifies the currency in which the payment of any fees described in section II(e) below, will be made to the plan, and states that the plan has a continuing security interest in, title to, or the rights of a secured creditor with respect to the collateral. Such agreement may be in the form of a master agreement covering a series of securities lending transactions;

(e) In return for lending securities, the plan:

(1) receives a reasonable fee (in connection with the securities lending transaction) and/or

(2) Has the opportunity to derive compensation through the investment of the currency collateral. Where the plan has that opportunity, the plan may pay a loan rebate or similar fee to the borrower, if such fee is not greater than the plan would pay in a comparable transaction with an unrelated party.

The combined total of all fees and other consideration received by the plan in connection with securities lending transactions is reasonable.

(f) The plan receives the equivalent of all distributions made to holders of the borrowed securities during the term of the loan including, but not limited to, dividends, interest payments, shares of stock as a result of stock splits and rights to purchase additional securities;

(g) If the market value of the collateral at the close of trading on a business day is less than the applicable percentage (described in section II b(1) of the exemption) of the market value of the borrowed securities at the close of trading on that day, the borrower shall deliver, by the close of business on the following business day, an additional amount of U.S. Collateral or Foreign Collateral the market value of which, together with the market value of all previously delivered collateral, equals at least the applicable percentage of the market value of all the borrowed securities as of such preceding day.

Notwithstanding the foregoing, part of the U.S. Collateral or Foreign Collateral may be returned to the borrower if the market value of the collateral exceeds the applicable percentage (described in section II(b)(1) of the exemption) of the market value of the borrowed securities, as long as the market value of the remaining U.S. Collateral or Foreign Collateral equals at least the applicable percentage of the market value of the borrowed securities;

(h) The loan may be terminated by the plan at any time, 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 plan within the lesser of:

(1) The customary delivery period for such securities,

(2) Five business days, or

(3) The time negotiated for such delivery by the plan and the borrower.

(i) In the event that the loan is terminated, and the borrower fails to return the borrowed securities or the equivalent thereof within the applicable time described in section II(h) above, the plan may, under the terms of the loan agreement:

(1) Purchase securities identical to the borrowed securities (or their equivalent as described 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, and

(2) The borrower is obligated, under the terms of the loan agreement, to pay, and does pay to the plan the amount of any remaining obligations and expenses not covered by the collateral, including reasonable attorney's fees incurred by the plan for legal action arising out of default on the loans, plus interest at a reasonable rate.

Notwithstanding the foregoing, the borrower may, in the event the borrower fails to return borrowed securities as described above, replace collateral, other than U.S. currency, with an amount of U.S. currency that is not less than the then current market value of the collateral, provided such replacement is approved by the Lending Fiduciary.

If the borrower fails to comply with any provision of a loan agreement which requires compliance with this exemption, the plan fiduciary who caused the plan to engage in such transaction shall not be deemed to have caused the plan to engage in a transaction prohibited by section 406(a)(1)(A) through (D) of the Act solely by reason of the borrower's failure to comply with the conditions of the exemption.

III. Specific Conditions For Transactions Described in Section I(b)

(a) The Lending Fiduciary maintains the written documentation for the loan agreement at a site within the

jurisdiction of the courts of the United States.

(b) Prior to entering into a transaction involving a Foreign Broker-Dealer or Foreign Bank either:

(1) The Foreign Broker-Dealer or Foreign Bank agrees to submit to the jurisdiction of the United States; agrees to appoint an agent for service of process in the United States, which may be an affiliate (the Process Agent); consents to service of process on the Process Agent; and agrees that any enforcement by a plan of its rights under the securities lending agreement will, at the option of the plan, occur exclusively in the United States courts; or

(2) The Lending Fiduciary, if domiciled in the United States, agrees to indemnify and hold harmless each plan against any shortfall in the collateral, (as clearly set forth in the applicable lending agreement), plus interest and any transaction costs incurred (including attorney's fees of the plan arising out of the default on the loans or the failure to indemnify properly under this provision) which the plan may incur or suffer directly arising out of the lending of securities of such plan to a Foreign Broker-Dealer or Foreign Bank.

IV. Specific Conditions for Transactions Described in Section I(c)

(a) The loan of securities is not prohibited by section 406(a) of ERISA or otherwise satisfies the conditions of this exemption.

(b) The Lending Fiduciary is authorized to engage in securities lending transactions on behalf of the plan.

(c) The compensation is reasonable and is paid in accordance with the terms of a written instrument, which may be in the form of a master agreement covering a series of securities lending transactions.

(d) Except as otherwise provided in section IV(f), the arrangement under which the compensation is paid: (1) is subject to the prior written authorization of a plan fiduciary (the ''authorizing fiduciary''), who is (other than in the case of a plan covering only employees of the Lending Fiduciary or any affiliates of such fiduciary) independent of the Lending Fiduciary and of any affiliate thereof, and (2) may be terminated by the authorizing fiduciary within (A) the time negotiated for such notice of termination by the plan and the Lending Fiduciary, or (B) five business days, whichever is less, in either case without penalty to the plan.

(e) No such authorization is made or renewed unless the Lending Fiduciary shall have furnished the authorizing fiduciary with any reasonably available information which the Lending Fiduciary reasonably believes to be necessary to determine whether such authorization should be made or renewed, and any other reasonably available information regarding the matter that the authorizing fiduciary may reasonably request; and

(f) (Special Rule for Commingled Investment Funds) In the case of a pooled separate account maintained by an insurance company qualified to do business in a state or a common or collective trust fund maintained by a bank or trust company supervised by a state or federal agency, the requirements of section IV(d) of this exemption shall not apply, provided that:

(1) The information described in section IV(e) (including information with respect to any material change in the arrangement) shall be furnished by the Lending Fiduciary to the authorizing fiduciary described in section IV(d) with respect to each plan whose assets are invested in the account or fund, not less than 30 days prior to implementation of the arrangement or material change thereto, and, where requested, upon the reasonable request of the authorizing fiduciary;

(2) In the event any such authorizing fiduciary submits a notice in writing to the Lending Fiduciary objecting to the implementation of, material change in, or continuation of the arrangement, the plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the account or fund, without penalty to the plan, within such time as may be necessary to effect such withdrawal in an orderly manner that is equitable to all withdrawing plans and to the non-withdrawing plans. In the case of a plan that elects to withdraw pursuant to the foregoing, such withdrawal shall be effected prior to the implementation of, or material change in, the arrangement; but an existing arrangement need not be discontinued by reason of a plan electing to withdraw; and

(3) In the case of a plan whose assets are proposed to be invested in the account or fund subsequent to the implementation of the compensation arrangement and which has not authorized the arrangement in the manner described in sections IV(f)(1) and IV(f)(2), the plan's investment in the account or fund shall be authorized in the manner described in section IV(d)(1).

V. Definitions

For purposes of this exemption:

(a) The term ''U.S. Broker-Dealer'' means a broker-dealer registered under the Securities Exchange Act of 1934 (the 1934 Act) or exempted from registration under section 15(a)(1) of the 1934 Act as a dealer in exempted government securities (as defined in section 3(a)(12) of the 1934 Act).

(b) The term ''U.S. Bank'' means a bank as defined in section 202(a)(2) of the Investment Advisers Act.

(c) The term ''Foreign Broker-Dealer'' means a broker-dealer registered and regulated under the laws of the Financial Services Authority in the United Kingdom that has as of the last day of its most recent fiscal year, equity capital which is equivalent of no less than $200 million.

(d) The term ''Foreign Bank'' means an institution having substantially similar powers to a bank as defined in section 202(a)(2) of the Investment Advisers Act, is subject to regulation by the Financial Services Authority in the United Kingdom and has as of the last day of its most recent fiscal year, equity capital which is equivalent of no less than $200 million.

(e) The term ''U.S. Collateral'' means U.S. currency, securities issued or guaranteed by the United States government or its agencies or instrumentalities, or irrevocable letters of credit issued by a U.S. Bank other than the borrower or an affiliate thereof, or any combination, thereof.

(f) The term ''Foreign Collateral'' means the currency of the United Kingdom, Euros, securities issued or guaranteed by the government of the United Kingdom or one of its agencies or instrumentalities, sovereign debt of a member country of the EMU that is denominated in Euros, or irrevocable letters of credit issued by a Foreign Bank, other than the borrower or an affiliate thereof, which has a counter-party rating of investment grade or better as determined by a nationally recognized statistical rating organization.

(g) The term ''affiliate'' of another person means: (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, partner, employee, or relative (as defined in section 3(15) of ERISA) of such other person; and (3) any corporation or partnership of which such other person is an officer, director, partner or employee.

(h) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(i) The term ''Eligible Securities Depository'' means an eligible securities depository as that term is defined under

Rule 17f–7 of the Investment Company Act of 1940 [15 U.S.C. 80a], as such definition may be amended from time to time.

(j) The term ''recognized securities exchange'' means a U.S. securities exchange that is registered as a ''national securities exchange'' under section 6 of the Securities and Exchange Act of 1934 (15 U.S.C. 78f) or a designated offshore securities market as defined in Regulation S of the Securities Act of 1933 [17 CFR part 230.902(B)], as such definition may be amended from time to time, which performs with respect to securities, the functions commonly performed by a stock exchange within the meaning of the definitions under the applicable securities laws (*e.g.,* 17 CFR part 240.3b–16).

(k) The term ''automated trading system'' means an electronic trading system that functions in a manner intended to simulate a securities exchange by electronically matching orders on an agency basis from multiple buyers and sellers such as an ''alternative trading system'' within the meaning of SEC's Reg. ATS [17 CFR part 242.300] as such definition may be amended from time to time, or an ''automated quotation system'' as described in section 3(a)(51)(A)(ii) of the Securities and Exchange Act of 1934 [15 U.S.C. 78c(a)(51)(A)(ii)].

Signed at Washington, DC, this 17th day of October, 2003.

Ivan L. Strasfeld,

Director, Office of Exemption Determinations, Employee Plan Benefits Administration, U.S. Department of Labor.

[FR Doc. 03–26694 Filed 10–22–03; 8:45 am]

BILLING CODE 4520–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Working Group on Health Care Security; Advisory Council on Employee Welfare and Pension Benefits Plans; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, an open public meeting will be held Thursday, November 6, 2003, of the Advisory Council on Employee Welfare and Pension Benefit Plans Working Group assigned to study the issue of health care security, including consumer-directed health plans and self-insured plans.

The session will take place in Room N–4437 C–D, U.S. Department of Labor Building, 200 Constitution Avenue, NW., Washington, DC 20210. The purpose of the open meeting, which will run from 9:30 a.m. to approximately 12 p.m., is for Working Group members to conclude their report/recommendations for the Secretary of Labor.

Organizations or members of the public wishing to submit a written statement pertaining to the topic may do so by submitting 20 copies to Sharon Morrissey, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Room N–5677, 200 Constitution Avenue, NW., Washington, DC 20210. Statements received on or before November 1, 2003 will be included in the record of the meeting. Individuals or representatives of organizations wishing to address the Working Group should forward their request to the Executive Secretary at the above address or via telephone at (202) 693–8668. Oral presentations will be limited to 20 minutes, but an extended statement may be submitted for the record. Individuals with disabilities who need special accommodations should contact Sharon Morrissey by November 1 at the address indicated in this notice.

Signed at Washington, DC, this 17th day of October, 2003.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 03–26730 Filed 10–22–03; 8:45 am]

BILLING CODE 4510–29–M

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Working Group on Optional Professional Management in Defined Contribution Plans; Advisory Council on Employee Welfare and Pension Benefits Plans; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, an open public meeting will be held Thursday, November 6, 2003, of the Advisory Council on Employee Welfare and Pension Benefit Plans Working Group assigned to study optional professional management for defined contribution plans.

The session will take place in Room N–4437 C–D, U.S. Department of Labor Building, 200 Constitution Avenue, NW., Washington, DC 20210. The purpose of the open meeting, which will run from 1:30 p.m. to approximately 4 p.m., is for Working Group members to conclude their report/recommendations for the Secretary of Labor.

Organizations or members of the public wishing to submit a written statement pertaining to the topic may do so by submitting 20 copies to Sharon Morrissey, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Room N–5677, 200 Constitution Avenue, NW, Washington, DC 20210. Statements received on or before November 1, 2003 will be included in the record of the meeting. Individuals or representatives of organizations wishing to address the Working Group should forward their request to the Executive Secretary at the above address or via telephone at (202) 693–8668. Oral presentations will be limited to 20 minutes, but an extended statement may be submitted for the record. Individuals with disabilities who need special accommodations should contact Sharon Morrissey by November 1 at the address indicated in this notice.

Signed at Washington, DC, this 17th day of October, 2003.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 03–26731 Filed 10–22–03; 8:45 am]

BILLING CODE 4510–29–M

DEPARTMENT OF LABOR

Employee Benefits Security Administration

124th Full Meeting; Advisory Council on Employee Welfare and Pension Benefits Plans; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, the 124th open meeting of the full Advisory Council on Employee Welfare and Pension Benefit Plans will be held on Friday, November 7, 2003.

The session will take place in Room S–2508, U.S. Department of Labor Building, 200 Constitution Avenue, NW., Washington, DC 20210. The purpose of the meeting, which will begin at 1:30 p.m. and end at approximately 3 p.m., is for the chairpersons of the three Advisory Council Working Groups to submit their reports on their individual study topics for the full Advisory Council's review and acceptance, following which the reports will be forwarded to the Secretary of Labor.

Organizations or members of the public wishing to submit a written statement pertaining to any topics under consideration by the Advisory Council may do so by submitting 20 copies to Sharon Morrissey, Executive Secretary, ERISA Advisory Council, U.S.

Department of Labor, Room N–5677, 200 Constitution Avenue, NW., Washington, DC 20210. Statements received on or before November 1, 2003 will be included in the record of the meeting. Individuals or representatives of organizations wishing to address the Advisory Council should forward their request to the Executive Secretary at the above address or via telephone at (202) 693–8668. Oral presentations will be limited to 10 minutes, but an extended statement may be submitted for the record. Individuals with disabilities who need special accommodations should contact Sharon Morrissey by November 1 at the address indicated in this notice.

Signed at Washington, DC this 17th day of October, 2003.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 03–26732 Filed 10–22–03; 8:45 am]

BILLING CODE 4510–29–M

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Working Group on Defined Benefit Funding and Discount Rate Issues; Advisory Council on Employee Welfare and Pension Benefits Plans; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, an open public meeting will be held Friday, November 7, 2003, of the Advisory Council on Employee Welfare and Pension Benefit Plans Working Group assigned to study defined benefit plan funding and discount rate issues.

The session will take place in Room N–4437 C–D, U.S. Department of Labor Building, 200 Constitution Avenue, NW., Washington, DC 20210. The purpose of the open meeting, which will run from 9:30 a.m. to approximately 12 p.m., is for Working Group members to conclude their report/recommendations for the Secretary of Labor.

Organizations or members of the public wishing to submit a written statement pertaining to the topic may do so by submitting 20 copies to Sharon Morrissey, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Room N–5677, 200 Constitution Avenue, NW., Washington, DC 20210. Statements received on or before November 1, 2003 will be included in the record of the meeting. Individuals or representatives of organizations wishing to address the Working Group should forward their request to the Executive Secretary at the above address or via telephone at (202) 693–8668. Oral presentations will be limited to 20 minutes, but an extended statement may be submitted for the record. Individuals with disabilities who need special accommodations should contact Sharon Morrissey by November 1 at the address indicated in this notice.

Signed at Washington, DC this 17th day of October, 2003.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 03–26733 Filed 10–22–03; 8:45 am]

BILLING CODE 4510–29–M

LEGAL SERVICES CORPORATION

Sunshine Act Meeting of the Board of Directors Search Committee for LSC President and Inspector General

TIME AND DATE: The Board of Directors' Search Committee for LSC President and Inspector General will meet on October 28, 2003. The meeting will begin at 9 a.m. and continue until conclusion of the Committee's agenda.

LOCATION: Strickland Brockington Lewis, LLP, Midtown Proscenium—Suite 2000, 1170 Peachtree Street NE, Atlanta, GA 30309.

STATUS OF MEETING: Open, except that a portion of the meeting may be closed pursuant to a vote of the Board of Directors authorizing the Committee to hold an executive session. The closing is authorized by the relevant provisions of the Government in the Sunshine Act [5 U.S.C. 552b(c)(2), (4) & (6)] and the corresponding provisions of the Legal Services Corporation's implementing regulation [45 CFR 1622.5(a), (c) & (e)]. A copy of the General Counsel's Certification that the closing is authorized by law will be available upon request.

MATTERS TO BE CONSIDERED:

Open Session

1. Approval of agenda.
2. Approval of the minutes of the *Committee's* meeting of September 15, 2003.
3. Consider and act on other business.

Closed Session

4. Review of resumes and other materials submitted by applicants for the position of LSC President.
5. Consider and act on the selection of applicants for personal interviews by the Committee.

Open Session

6. Consider and act on adjournment of meeting.

FOR FURTHER INFORMATION CONTACT: Victor M. Fortuno, Vice President for Legal Affairs, General Counsel and Corporate Secretary, at (202) 295–1500.

Special Needs: Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Elizabeth Cushing at (202) 295–1500.

Dated: October 20, 2003.

Victor M. Fortuno,

Vice President for Legal Affairs, General Counsel and Corporate Secretary.

[FR Doc. 03–26820 Filed 10–20–03; 4:39 pm]

BILLING CODE 7050–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 40–8027–MLA–7 and ASLBP No. 04–817–02–MLA]

Sequoyah Fuels Corporation; Designation of Presiding Officer

Pursuant to delegation by the Commission, *see* 37 FR 28,710 (Dec. 29, 1972), and the Commission's regulations, *see* 10 CFR 2.1201, 2.1207, notice is hereby given that (1) a single member of the Atomic Safety and Licensing Board Panel is designated as Presiding Officer to rule on petitions for leave to intervene and/or requests for hearing; and (2) upon making the requisite findings in accordance with 10 CFR 2.1205(h), the Presiding Officer will conduct an adjudicatory hearing in the following proceeding: Sequoyah Fuels Corporation, Gore, Oklahoma (Materials License Amendment).

The hearing will be conducted pursuant to 10 CFR part 2, subpart L, of the Commission's Regulations, ''Informal Hearing Procedures for Adjudications in Materials and Operator Licensing Proceedings.'' This proceeding concerns requests for hearing submitted (1) on September 29, 2003, by the State of Oklahoma; and (2) on October 2, 2003, by the Cherokee Nation and represented citizens. The requests were filed in response to an August 15, 2003 notice of receipt of a June 16, 2003 amendment request from Sequoyah Fuels Corporation (SFC) to approve a ground water corrective action plan at its Gore, Oklahoma facility site, and of opportunity for a hearing, which was published in the

Federal Register on August 25, 2003 (68 FR 51,033).[1]

The Presiding Officer in this proceeding is Administrative Judge Alan S. Rosenthal. Pursuant to the provisions of 10 CFR 2.722, 2.1209, Administrative Judge Anthony J. Baratta has been appointed to assist the Presiding Officer in taking evidence and in preparing a suitable record for review.

All correspondence, documents, and other materials shall be filed with Judges Rosenthal and Baratta in accordance with 10 CFR 2.1203. Their addresses are:

Alan S. Rosenthal, Administrative Judge, Presiding Officer, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Dr. Anthony J. Baratta, Administrative Judge, Special Assistant, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Issued at Rockville, Maryland, this 17th day of October 2003.

G. Paul Bollwerk,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 03–26726 Filed 10–22–03; 8:45 am]

BILLING CODE 7590–01–P

[1] The petitioners' hearing requests also reference another SFC license amendment request regarding a groundwater monitoring plan for the Gore facility, which likewise is the subject of a Presiding Officer designation issued this date.

NUCLEAR REGULATORY COMMISSION

[Docket No. 40–8027–MLA–8 and ASLBP No. 04–818–03–MLA]

Sequoyah Fuels Corporation; Designation of Presiding Officer

Pursuant to delegation by the Commission, *see* 37 FR 28,710 (Dec. 29, 1972), and the Commission's regulations, *see* 10 CFR 2.1201, 2.1207, notice is hereby given that (1) a single member of the Atomic Safety and Licensing Board Panel is designated as Presiding Officer to rule on petitions for leave to intervene and/or requests for hearing; and (2) upon making the requisite findings in accordance with 10 CFR 2.1205(h), the Presiding Officer will conduct an adjudicatory hearing in the following proceeding: Sequoyah Fuels Corporation, Gore, Oklahoma (Materials License Amendment).

The hearing will be conducted pursuant to 10 CFR part 2, subpart L, of the Commission's Regulations, ''Informal Hearing Procedures for Adjudications in Materials and Operator Licensing Proceedings.'' This proceeding concerns requests for hearing submitted (1) on September 29, 2003, by the State of Oklahoma; and (2) on October 2, 2003, by the Cherokee Nation and represented citizens. The requests were filed in response to an August 15, 2003 notice of receipt of a June 12, 2003 amendment request from Sequoyah Fuels Corporation (SFC) to approve a ground water monitoring plan at its Gore, Oklahoma facility site, and of opportunity for a hearing, which was published in the **Federal Register** on August 25, 2003 (68 FR 51,034).[1]

The Presiding Officer in this proceeding is Administrative Judge Alan S. Rosenthal. Pursuant to the provisions of 10 CFR 2.722, 2.1209, Administrative Judge Anthony J. Baratta has been appointed to assist the Presiding Officer in taking evidence and in preparing a suitable record for review.

All correspondence, documents, and other materials shall be filed with Judges Rosenthal and Baratta in accordance with 10 CFR 2.1203. Their addresses are:

Alan S. Rosenthal, Administrative Judge, Presiding Officer, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Dr. Anthony J. Baratta, Administrative Judge, Special Assistant, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Issued at Rockville, Maryland, this 17th day of October 2003.

G. Paul Bollwerk,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 03–26727 Filed 10–22–03; 8:45 am]

BILLING CODE 7590–01–P

[1] The petitioners' hearing requests also reference another SFC license amendment request regarding a ground water corrective action plan for the Gore facility, which likewise is the subject of a Presiding Officer designation issued this date.

PEACE CORPS

Proposed Information Collection Requests

AGENCY: Peace Corps.

ACTION: Notice of public use form review request to the Office of Management and Budget (OMB Control Number 0420–0510).

SUMMARY: Pursuant to the Paperwork Reduction Act of 1981 (44 U.S.C. Chapter 35), the Peace Corps has submitted to the Office of Management and Budget (OMB) a request for approval of an information collection, OMB Control Number 0420–0510, the Peace Corps Health Status Review form (PC–1789) and the Report of Medical and Dental Exam forms (PC–1790 S and PC–1790 Dental). This is a renewal of an active information collection and a revision. The current active renewal covers the Peace Corps Health Status Review form (PC–1789) and the Report of Medical Exam (PC–1790 S). The revision is to add an HIV Aids question to the PC–1789 form and to add the Report of Dental Exam form (PC–1790) to this collection for a total of three forms to make up the health applications for Peace Corps Volunteers. The purpose of this information collection is necessary to ensure that Volunteers meet this medical eligibility requirement, all applicants for service must undergo physical and dental examination prior to Volunteer service to provide the information needed for clearance, and to serve as a reference for any future Volunteer medical clearance, and to serve as a reference for any future Volunteer disability claims. The Health Status Review is used to review the medical history of individual applicants; the Report of Medical Exam and the Report of Dental Exam are used by the examining physician and dentist both for applicants and for currently serving Volunteers. The results of these examinations are used to ensure that applicants for Volunteer service will, with reasonable accommodation, be able to serve in the Peace Corps without jeopardizing their health.

The purpose of this notice is to allow for public comment on whether the proposed collection of information is necessary for the proper performance of the functions of the Peace Corps, including whether their information will have practical use; 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; ways to enhance the quality, utility and the clarity of the information to be collected; and, ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

A copy of the information collection may be obtained from Ms. Susan Bourse, Peace Corps, Office of Volunteer Support, 1111 20th Street, NW., Room 5106, Washington, DC 20526. Ms. Boorse may be contacted by telephone at 202–692–140. Ms. Boorse may be e-mailed at *sboorse@peacecorps.gov.*

Comments on the form should also be addressed to the attention of Ms. Boorse and should be received on or before December 22, 2003.

Information Collection Abstract

Title: The Peace Corps Health Status Review form (PC–1789) and the Report of Medical and Dental Exam forms (PC–1790 S and PC–1790 Dental).

Need for and Use of This Information: The Health Status Review is used to review the medical history of individual applicants; the Report of Medical Exam and the Report of Dental Exam are used by the examining physician and dentist both for applicants and for currently serving Volunteers. The results of these examinations are used to ensure that applicants for Volunteer service will, with reasonable accommodation, be able to serve in the Peace Corps without jeopardizing their health.

Respondents: Potential and current Volunteers.

Respondent's Obligation to Reply: Voluntary.

Burden on the Public:

	PC–1789 Health status review	PC–1790 S Report of medical exam	PC–1790 Dental report of dental exam
a. Estimated number of respondents	9,700	6,000	6,000.
b. Estimated average burden per response	45 minutes	30 minutes	30 minutes.
c. Frequency of response	one time	one time	one time.
d. Annual reporting burden	7,275 hours	3,000 hours	3,000 hours.
e. Estimated annual cost to respondents	$138,298	$57,030	$57,030.

This notice is issued in Washington, DC on October 8, 2003.

Gopal Khanna,

Chief Information Officer.

[FR Doc. 03–26793 Filed 10–22–03; 8:45 am]

BILLING CODE 6051–01–M

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Rule 62, SEC File No. 270–166, OMB Control No. 3235–0152; Form U–R–1, SEC File No. 270–166, OMB Control No. 3235–0152.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collections of information discussed below.

Form U–R–1 is filed under Rule 62 (17 CFR 250.62), which implements Sections 12(e) and 11(g) of the Public Utility Holding Company Act of 1935 (''Act'') 15 U.S.C. 79 *et seq.* Section 12(e) of the Act , 15 U.S.C. 791(e), makes it unlawful to solicit ''any proxy, power of attorney, consent, or authorization regarding any security of a registered holding company or a subsidiary company thereof in contravention of such rules and regulations or orders as the Commission deems necessary.'' Section 11(g) of the Act (15 U.S.C. 79k(g)) prohibits, in pertinent part, the solicitation of proxy, consent, authorization, power of attorney, deposit, or dissent in respect of any reorganization plan or any plan under Section 11 for the divestment of control, securities or other assets or for the dissolution of a registered holding company or any subsidiary thereof, unless the plan has been proposed or submitted to the Commission and is not made in contravention of any Commission rule and regulations or order.

Rule 62 prohibits the solicitation of authorization regarding any security of a registered holding company or any of its subsidiaries, in connection with any reorganization subject to Commission approval. Rule 62 also prohibits such solicitation regarding any transaction, which is the subject of an application or declaration filed with the Commission, except with respect to a solicitation, which has become effective pursuant to a declaration filed with the Commission. Every declaration under Rule 62, if in connection with any reorganization, is to be filed on Form U–R–1. Rule 62 exempts from the filing requirements solicitations to not more than 25 owners of securities or claims, and actions taken as a depositary or custodian of securities solicited by order.

Due primarily to subsequent enlargement of the scope of the Securities Exchange Act of 1934 (''34 Act''), the solicitations under the provisions of Rule 62 are now governed, as to both form and substance, by the provisions of the 34 Act. The filings specified by Rule 62 now consist merely of incorporating by reference the company's filing under Section 14 of the 34 Act as an exhibit to the application or declaration under the Act seeking authorization for the transaction to which the solicitation is ancillary. Rule 62 does govern the date of the commencement of the solicitation.

Form U–R–1 and Rule 62 allow the Commission to adequately enforce Sections 12(e) and 11(g) of the Act. Not requiring the information collection would seriously interfere with the Commission's efforts in this regard.

Respondents to the request for information in Form U–R–1 are registered public utility holding companies and their subsidiaries. We estimate the average time to prepare the information required by Form U–R–1 at 5 hours per response based on our informal questioning selected respondents. Since there are approximately 7 respondents who file each year, the total annual respondent reporting burden is 35 hours at $115 per hour. Every declaration under Rule 62, if in connection with any reorganization, must be filed on Form U–R–1. There is no possibility of unwarranted disclosure because these are public documents and there are no questions of a sensitive nature.

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.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget Room 10102, New Executive Office Building, Washington, DC 20503; and (ii) Kenneth A. Fogash, Acting Associate Executive Director/CIO, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: October 13, 2003.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–26706 Filed 10–22–03; 8:45 am]

BILLING CODE 8010–01–U

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, 450 5th Street, NW., Washington, DC 20549.

Extension:

Rule 26, SEC File No.270–78, OMB Control No. 3235–0183.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the matters relating to the previously approved collections of information discussed below.

Rule 26, part 250.26 [17 CFR 250.26] under the Public Utility Holding Company Act of 1935, as amended (''Act''), 15 U.S.C. 79, *et seq.,* establishes financial statement and recordkeeping requirements for public utility holding companies registered under the Act and all their subsidiary companies.

The Commission estimates that the total annual reporting burden of Rule 26 is approximately one (1) hour.

The estimate of average burden hours is made for purposes of the Paperwork Reduction Act and is not derived from a comprehensive or representative survey or study of the costs of complying with the requirements of Commission rules and forms.

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.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, room 10102, New Executive Office Building, Washington, DC 20503; and (ii) Kenneth A. Fogash, Acting Associate Executive Director/CIO, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: October 13, 2003.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–26707 Filed 10–22–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Form U–7D, SEC File No. 270–75, OMB Control No. 3235–0165.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget request for extension of the previously approved collections of information discussed below.

Form U–7D is used to file the certificate required by rule 7(D)(5) (17 CFR 250.7), under the Public Utility Holding Company Act of 1935 (''Act'') 15 U.S.C. 79 *et seq.,* to establish the exempt status of financing entities which own assets leased to electric or gas utility companies for the use in the lessee's utility business. Unless it claims the exemption authorized by those sections and provides sufficient information to meet the statutory tests for the exemption, such financing company would meet the statutory definition of electric or gas utility company, under section 2(a)(3) (''electric'') or section 2(a)(4) (''gas'') of the Act, and such financing company would consequently be subject to regulation under the Act. Without the information provided on Form U–7D, the Commission would not have adequate access to the data used to establish that the filing company meets the requirements for exemption.

Respondents to the request for information in Form U–7D are registered public utility holding companies and their financing subsidiaries. Respondents must file a Form U–7D in order to receive exempt status. We estimate the average time to prepare the information required by Form U–7D at 3 hours per response based on our informal questioning selected respondents. Since there are approximately 8 respondents who file each year, the total annual respondent reporting burden is 24 hours at $115 per hour. There is no possibility of unwarranted disclosure because these are public documents and there are no questions of a sensitive nature.

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.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, room 10102, New Executive Office Building, Washington, DC 20503; and (ii) Kenneth A. Fogash, Acting Associate Executive Director/CIO, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: October 13, 2003.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–26708 Filed 10–22–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48652; File No. SR–Amex–2003–81]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC Relating to Reporting of ''At-the-Close'' Orders in Nasdaq Securities

October 17, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 8, 2003, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The proposed rule change has been filed by the Amex as a ''non-controversial'' rule change under Rule 19b–4(f)(6) under the Act.[3] The Commission is publishing this notice to solicit

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to amend Rule 109(d) Commentary .02 to accommodate reporting of ''at the close'' orders in securities listed on the Nasdaq Stock Market, Inc. (''Nasdaq'') as ''stopped stock'' pursuant to Amex Rule 109(d). The text of the proposed rule change is set forth below. Proposed new language is in *italics;* proposed deletions are in [brackets].

* * * * *

Rule 109 Stopping Stock

(a) through (d) No change.

Commentary

.01 No change.

.02 Paragraph (d) of this rule shall apply to at-the-close orders entered on the Exchange in Nasdaq National Market securities to which the Exchange has extended unlisted trading privileges, except that the Exchange shall [not] disseminate information regarding ''pair off'' transactions reported pursuant to paragraph (d) *as stopped stock* [, pending implementation of systems changes by] to the Nasdaq Unlisted Trading Privileges Plan Processor [to permit dissemination of ''pair off'' transactions as ''stopped stock'']. *

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange 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. The Exchange 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

Amex Rule 109(d) requires that a member holding both buy and sell market on close (''MOC'') orders simultaneously must execute any imbalance against the prevailing Exchange bid or offer at the close, and then must ''pair off'' remaining buy and sell orders at the price of the immediately preceding sale. Amex Rule 109(d)(1) provides that the ''pair off'' transaction must be reported to the consolidated last sale reporting system as ''stopped stock,'' to inform the public that limit and limit on close (''LOC'') orders entered before the close may remain unexecuted.

The Commission previously approved the Exchange's proposal to exempt reporting ''pair off'' transactions as ''stopped stock'' on a pilot basis until the Nasdaq Unlisted Trading Privileges (''UTP'') Plan Securities Information Processor (''SIP'') could accommodate Amex's request to print a transaction in Nasdaq security as ''stopped stock.''[4] Nasdaq has stated that, as of September 15, 2003, the Nasdaq UTP SIP will be able to accommodate Amex's reporting of transactions as ''stopped stock,'' which would include ''pair off'' transactions under Rule 109(d).[5]

The Exchange, therefore, is proposing to amend Commentary .02 to Rule 109 (''Stopping Stock'') to delete the reference to the exemption from disseminating information regarding ''pair off'' transactions as ''stopped stock'' pursuant to Rule 109(d). Following the enhancement to the Nasdaq UTP SIP on September 15, 2003, a ''pair off'' transaction would be printed as ''stopped stock'' for dissemination by the Nasdaq UTP SIP, in compliance with Rule 109(d).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(5),[7] in particular, in that it 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.[8]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the 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

[4] *See* Securities Exchange Act Release No. 47658 (April 10, 2003), 68 FR 19041 (April 17, 2003).

[5] *See* UTP Vendor Alert #2003–42, July 18, 2003.

[6] 15 U.S.C. 78(b).

[7] 15 U.S.C. 78f(b)(5).

[8] At the request of the Exchange, Commission staff has revised the statutory basis for the proposed rule change to cite to Section 6(b)(5) of the Act, 15 U.S.C. 78f(b)(5). Telephone conversation among Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, Marija Willen, Associate General Counsel, Amex, Christopher Stone, Special Counsel, Division, Commission, and Ann E. Leddy, Attorney, Division, Commission (October 7, 2003).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–Amex–2003–81 and should be submitted by November 7, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–26745 Filed 10–22–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48650; File No. SR–BSE–2003–19]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to the LLC Operating Agreement of the Proposed New Exchange Facility To Be Operated by the Boston Options Exchange Group LLC

October 17, 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 October 16, 2003, the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

As discussed in detail in the BOX Proposing Release,[3] the BSE proposes to establish rules for BOX,[4] a new Exchange facility, as that term is defined in Section 3(a)(2) of the Act.[5] BOX would be operated by Boston Options Exchange Group LLC (''BOX LLC''), a Delaware limited liability company (''LLC''). The BSE is filing the Operating Agreement of BOX LLC (''Operating Agreement'' or ''Agreement'') to establish BOX LLC's governance and operating authority for the facility. The Operating Agreement functions as the source of the company's governance and operating authority and, therefore, functions in a similar manner as by-laws or articles of incorporation function for a corporation. The BSE is requesting confidential treatment of the sections of the Operating Agreement which are confidential business information and which do not relate to the control and governance of BOX LLC. The redacted text of the Operating Agreement appears below; redacted portions are noted in brackets.

* * * * *

Boston Options Exchange Group LLC

Second Amended and Restated Operating Agreement

This AMENDED AND RESTATED OPERATING AGREEMENT is made as of July 25, 2003, by and among Bourse de Montreal Inc., a company incorporated in Quebec, Canada (the ''*Bourse*''), Boston Stock Exchange, Inc., a company incorporated in Delaware, USA (''*BSE*''), Interactive Brokers Group LLC, a limited liability company organized under the laws of Connecticut (''*IB*''), Boston Options Exchange Group LLC, a limited liability company organized under the laws of Delaware (''*BOX*'') and all other Persons who become a party hereto as Members of BOX in accordance with the terms hereof, for the purpose of recording their agreement regarding the affairs of BOX and the conduct of its business.

WHEREAS, on January 16, 2002 the Bourse, BSE and IB caused a Certificate of Formation (the ''*Certificate*'') in the form of *Exhibit 1* hereto to be filed with the Office of the Secretary of State of the State of Delaware for the purpose of commencing the existence of BOX pursuant to the Act (as defined below);

WHEREAS, the Bourse, BSE, and IB formed BOX for the purpose of developing and operating an electronic market as a facility of the BSE for trading (i) options on Individual U.S. Equities, U.S. equity indices and U.S. Exchange traded funds and (ii) single stock futures; and

WHEREAS, subsequent to the execution of this Agreement, it is anticipated that BOX will enter into each of the Related Agreements;

WHEREAS, the Bourse, BSE, IB and BOX are parties to that certain Operating Agreement of BOX, dated as of January 17, 2002 (the ''*Original Operating Agreement*''), as amended by an Amended and Restated Operating Agreement dated as of June 21, 2002 (the ''Amended Operating Agreement''); and

WHEREAS, the Members desire to amend and restate the Amended Operating Agreement upon the terms and conditions hereinafter set forth.

Accordingly, the parties hereby agree to amend and restate the Amended Operating Agreement as follows:

Article 1—Definitions

1.1 *Certain Defined Terms:* As used in this Agreement, the following capitalized terms have the following meanings.

''*Act*'' means the Delaware Limited Liability Company Act, 6 Del. G.L. § 18–101, *et seq.*, as amended and in effect from time to time, and any successor statute.

''*Additional Capital Contribution*'' means any Capital Contribution effected after completion of the Initial Capital Contributions pursuant to Section 7.3 hereof.

''*Advisors*'' means, with respect to any Person, any of such Person's attorneys, accountants or consultants.

''*Affiliate*'' means, with respect to any Person, any other Person controlling, controlled by or under common control with, such Person. As used in this definition, the term ''control'' means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise with respect to such Person. A Person is presumed to control any other Person, if that Person: (i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); (ii) directly or indirectly has the right to vote 25 percent or more of a class of voting security or has the power to sell or direct the sale of 25 percent or more of a class of voting securities of the Person; or (iii) in the case of a partnership, has contributed, or has the right to receive upon dissolution, 25 percent or more of the capital of the partnership.

''*Agreement*'' means this Operating Agreement, including all exhibits and schedules hereto, as amended, restated or supplemented from time to time.

''*Bankruptcy*'' has the meaning ascribed thereto in Section 18–304 of the Act.

''*Board*'' has the meaning set forth in Section 4.1 hereof.

''*Bourse*'' has the meaning set forth in the preamble.

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 47186 (January 14, 2003), 68 FR 3062 (January 22, 2003) (SR–BSE–2002–15) (''BOX Proposing Release'').

[4] The term ''BOX'' means the Boston Options Exchange or Boston Stock Exchange Options Exchange, an options trading facility of the Exchange under Section 3(a)(2) of the Act. *See* proposed BOX Rules, Chapter I, *General Provisions,* § 1(a)(6) (definition of ''BOX'').

[5] 15 U.S.C. 78c(a)(2).

''*Bourse License*'' means the license, to be entered into between the Bourse and BOX, from the Bourse to BOX of the right to use the name ''Bourse de Montreal'' in connection with the business of BOX.

''*BOX*'' has the meaning set forth in the preamble.

''*BOX Confidential Information*'' means any confidential or proprietary information of BOX, including any confidential or proprietary information conveyed to BOX pursuant to this Agreement or any Related Agreements.

''*BOX Market*'' means the market that will be developed and operated by BOX pursuant to Section 3.1 hereof.

''*BOX Products*'' means (i) option contracts on Individual U.S. Equities, (ii) option contracts on U.S. Equity indices, (iii) option contracts on U.S. Exchange traded funds, (iv) single stock futures on Individual U.S. Equities and (v) such other products as the Board may from time to time approve for Trading on the BOX Market.

''*BSE*'' has the meaning set forth in the preamble.

[Business confidential]

''*BSE License*'' means the license, to be entered into between BSE and BOX, from BSE to BOX of the right to use the name ''Boston Stock Exchange'' in connection with the name and business of BOX.

[Business confidential]

''*Capital Contribution*'' means the amount of cash and the fair market value of all property and/or services contributed to BOX by a Member in its capacity as such at any point in time, including any Additional Capital Contributions. All such amounts contributed shall be reflected on the books and records of BOX. Any reference in this Agreement to the Capital Contribution of a Member shall include the Capital Contribution of any prior Member in respect of the same Unit or Units.

''*Certificate*'' has the meaning set forth in the recitals hereto.

''*Code*'' means the United States Internal Revenue Code of 1986, as amended and in effect from time to time.

''*Company Minimum Gain*'' means partnership minimum gain with respect to BOX, as determined under Treasury Regulations § 1.704–2(d).

''*Competing Business*'' means any electronic market for the Trading of any of the BOX Products.

''*DGCL*'' has the meaning set forth in Section 4.2(b) hereof.

''*Directors*'' has the meaning set forth in Section 4.1(a) hereof.

''*Disclosing Member*'' has the meaning set forth in Section 16.6 hereof.

''*Distributable Cash*'' has the meaning set forth in Section 9.1 hereof.

''*Effective Date*'' means the date hereof.

''*Fiscal Year*'' has the meaning set forth in Section 12.3 hereof.

''*Government Authority*'' means any federal, national, state, municipal, local, foreign, territorial, provincial or other governmental department, commission, board, bureau, agency, regulatory authority, instrumentality, judicial or administrative body, domestic or foreign.

''*IB*'' has the meaning set forth in the preamble.

''*IB License*'' means the license, to be entered into by IB and BOX, from IB to BOX of the right to use the name IB in connection with the business of BOX.

''*IB Offer Period*'' has the meaning set forth in Section 8.5(b)(ii) hereof.

''*IB Transfer*'' has the meaning set forth in Section 8.5(b)(i) hereof.

''*IB Transfer Notice*'' has the meaning set forth in Section 8.5(b)(i) hereof.

''*Indemnitees*'' has the meaning set forth in Section 14.1 hereof.

''*Individual U.S. Equities*'' means (i) U.S. ordinary shares, (ii) foreign shares trading as U.S. dollar-denominated, U.S. registered American depository receipts, (iii) single stock futures and (iv) foreign ordinary shares trading in the U.S. as foreign ordinary shares whether or not these also trade as U.S. dollar denominated U.S. registered American Depository Receipts.

''*Initial BSE Asset Contribution*'' has the meaning set forth in Section 7.1(b) hereof.

''*Initial Capital Contributions*'' has the meaning set forth in Section 7.1(d).

''*Initial Chairman*'' has the meaning set forth in Section 4.5 hereof.

''*Initial IB Asset Contribution*'' has the meaning set forth in Section 7.1(a) hereof.

''*Initial Operating Budget*'' has the meaning set forth in Article 6 hereof.

''*Launch Date*'' means the date on which Trading on the BOX Market shall have commenced.

''*Liquidator*'' has the meaning set forth in Section 11.1(b) hereof.

''*Major Action*'' has the meaning set forth in Section 4.4(b) hereof.

''*Member*'' means each Person named as a Member on *Schedules* hereto, their successors and assigns, and any additional members admitted as provided by this Agreement.

''*Member Entities*'' has the meaning set forth in Section 5.6 hereof.

''*Member Information*'' has the meaning set forth in Section 16.6 hereof.

''*Member Nonrecourse Deductions*'' means partner nonrecourse deductions with respect to a Member, as determined under Treasury Regulations § 1.704–2(i)(2).

''*Member Nonrecourse Debt Minimum Gain*'' means partner nonrecourse debt minimum gain with respect to a Member, within the meaning of Treasury Regulations § 1.704–2(i)(2).

''*Neutral Arbitrators*'' has the meaning set forth in Section 13.1(a) hereof.

''*New Issuance*'' has the meaning set forth in Section 8.5(c)(i) hereof.

''*New Issuance Notice*'' has the meaning set forth in Section 8.5(c)(i) hereof.

''*New Issuance Period*'' has the meaning set forth in Section 8.5(c)(ii) hereof.

[Business confidential]

[Business confidential]

''*Non-Transferring Member*'' has the meaning set forth in Section 8.2 hereof.

''*Percentage Interest*'' with respect to a Member means the ratio of the number of Units held by the Member to the total of all of the issued Units, expressed as a percentage.

''*Person*'' means any individual, partnership, corporation, association, trust, limited liability company, joint venture, unincorporated organization and any government, governmental department or agency or political subdivision thereof.

''*Proposed IB Transferee*'' has the meaning set forth in Section 8.5(b)(i) hereof.

''*Proposed New Member*'' has the meaning set forth in Section 8.5(c) hereof.

''*Regulatory Services Agreement*'' means the Regulatory Services Agreement to be entered into between BSE or an Affiliate of BSE and BOX, or its duly adopted and executed replacement between a Regulatory Services Provider and BOX, as in effect from time to time.

''*Regulatory Services Provider*'' shall initially mean BSE or an Affiliate of BSE and thereafter the provider of regulatory services contemplated by the Regulatory Services Agreement.

''*Related Agreements*'' means the Technical and Operational Services Agreement, the Regulatory Services Agreement, the Bourse License, the BSE License, the IB License and any other agreement among or between any of the Members and BOX, or to which the Members or BOX are otherwise parties, in all cases necessary for the conduct of the business of BOX.

''*SEC*'' means the United States Securities Exchange Commission.

''*Senior Executive*'' has the meaning set forth in Section 4.7 hereof.

''*System*'' means the technology, know-how, software, equipment,

communication lines or services, services and other deliverables or materials of any kind to be provided by Bourse (or any applicable third party) as may be necessary or desirable for the operation of the BOX Market.

''*Tax Amount*'' of a Member for a fiscal year or other period shall mean the product of (a) the Member's Tax Rate for such fiscal year or other period, and (b) the Member's Tax Amount Base for such fiscal year or other period, and shall be reduced by (c) any United States federal, state or local income tax credits allocated to the Member by BOX for such Fiscal Year or other period, all as estimated in good faith by the Board.

''*Tax Amount Base*'' of a Member for a fiscal year or other period shall mean the taxable income (for U.S. federal income tax purposes) allocated to the Member by BOX for such fiscal year or other period; *provided* that such taxable income shall be computed (i) without regard to the application of Code § 704(c) with respect to any variation between the fair market value and tax basis of any assets at the time such assets were contributed to BOX and (ii) without regard to any taxable income or loss recognized by a Member in connection with the dissolution, initial public offering, sale of substantially all equity or assets of BOX or any similar event.

''*Tax Rate*'' of a Member for a fiscal year or other period shall mean the highest effective marginal combined United States federal, state and local income tax rate applicable during such fiscal year to business entities of the same type as the Member that do business exclusively in the Commonwealth of Massachusetts, giving proper effect to the federal deduction for state and local income taxes and taking into account any special tax rates (such as special capital gains tax rates) applicable to any portion or portions of the Member's Tax Amount Base.

''*Technical and Operational Services Agreement*'' means that agreement or agreements to be entered into by the Bourse or an Affiliate of the Bourse and BOX, or its or their duly adopted and executed replacement agreement or agreements, as in effect from time to time relating to the System.

''*Total Votes*'' has the meaning set forth in Section 4.3.

''*Trading*'' means the availability of the System to authorized users for entering, modifying, and canceling orders concerning the BOX products.

''*Transferee*'' has the meaning set forth in Section 8.2 hereof.

''*Transfer Notice*'' has the meaning set forth in Section 8.2(a) hereof.

''*Transferring Member*'' has the meaning set forth in Section 8.2 hereof.

''*Treasury Regulations*'' means the regulations promulgated under the Code, as amended and in effect from time to time.

''*Units*'' shall mean the units of interest in the ownership and profits and losses of BOX and such Member's right to receive distributions in its capacity as a Member.

''*Unpermitted Deficit*'' has the meaning set forth in Section 10.3 hereof.

1.2. *Other Definitions*

The words ''include,'' ''includes,'' and ''including'' where used in this agreement are deemed to be followed by the words ''without limitation.''

Any reference to ''Dollars'' or ''$'' in this Agreement refers to U.S. Dollars.

Except as otherwise provided in this Agreement or unless the context otherwise clearly requires, (a) terms used in this Agreement that are defined in the Act will have the meaning set forth in the Act; (b) all references in this Agreement to one gender also include, where appropriate, the other gender, the singular includes the plural and the plural includes the singular; and (c) references in this Agreement to the preamble, Sections, Schedules, and Exhibits shall be deemed to mean the preamble and sections of, and schedules and exhibits to, this Agreement.

Article 2—Organization

2.1. *Formation of BOX.* Each of the Bourse, BSE and IB hereby (a) authorizes and ratifies the formation of BOX as a limited liability company under the Act, the execution of the Certificate and the filing of the Certificate in the Office of the Secretary of State of the State of Delaware and (b) agrees that the rights, duties and liabilities of the Members shall be as provided in the Act, except as otherwise provided herein. The name of BOX shall be Boston Options Exchange Group LLC. The principal place of business of BOX shall be located at 100 Franklin Street, Boston, MA 02110. The Board may, at any time, change the name or the principal place of business of BOX and shall give notice thereof to the Members.

2.2. *Registered Agent and Office.* The registered agent for service of process on BOX in the State of Delaware required to be maintained by § 18–104 of the Act shall be Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, New Castle County, Delaware 19808 and the registered office of BOX in the State of Delaware shall be c/o Corporation Service Company at the same address. The Board may at any time change the registered agent of BOX or the location of such registered office and shall give notice thereof to the Members.

2.3. *Term.* The legal existence of BOX shall be perpetual, unless BOX is sooner dissolved as a result of an event specified in the Act or pursuant to a provision of this Agreement.

2.4. *Interest of Members; Property of Company.* Units held by a Member shall be personal property for all purposes. All real and other property owned by BOX shall be deemed BOX property owned by BOX as an entity, and no Member, individually, shall own any such property. The name and mailing address of each initial Member and the number of Units held by each and the Percentage Interest represented thereby shall be as listed on *Schedule A* attached hereto. The Board shall be required to update said *Schedule A* from time to time as necessary to accurately reflect the information contained therein upon (i) the withdrawal of a Member, (ii) the admission of a new Member or (iii) any change in the number of Units owned by a Member, in each case pursuant to the terms and conditions specified in this Agreement.

2.5. *The Units.*

(a) Except as otherwise provided in this Agreement, all Units are identical to each other and accord the holders thereof the same obligations, rights and privileges as are accorded to each other holder thereof. Except as otherwise provided in this Agreement, BOX will not subdivide or combine any Units, or make or pay any distribution on any Units, or accord any other payment, benefit or preference to any Units, except by extending such subdivision, combination, distribution, payment, benefit or preference equally to all Units.

(b) Units have no par value. To the extent that any Units must be cancelled or any Units shall be issued, the amount of such Units shall be rounded to the nearest whole number, to the extent feasible, as determined by the Board.

2.6. *Intent.* It is the intent of the Members that BOX (a) shall always be operated in a manner consistent with its treatment as a partnership for United States federal income tax purposes (and, to the extent possible, for state income tax purposes within the United States), and (b) to the extent not inconsistent with the foregoing clause (a) shall not be operated or treated as a partnership for purposes of § 303 of the Federal Bankruptcy Code (11 U.S.C. § 303). Neither BOX nor any Member shall take any action inconsistent with the express intent of the parties hereto as set forth in the immediately preceding sentence.

Article 3—Purpose

3.1. *Purpose.* The purpose of BOX is to develop an electronic market for Trading BOX Products and to engage in all related activities arising therefrom or relating thereto or necessary, desirable, advisable, convenient, or appropriate in connection therewith as the Members may determine. BOX shall not engage in any other business or activity except as approved in accordance with Section 4.4(b)(ii) hereof.

3.2. *Roles of Founding Members.* It is the intention of the Bourse, BSE, IB and BOX that the Bourse, BSE and IB will initially provide the following products and services to BOX:

(a) Pursuant to the Regulatory Services Agreement, BSE will provide U.S. Securities and Exchange Commission approved self-regulatory organization (''*SRO*'') services and status as the regulatory framework for the BOX Market. As the Regulatory Services Provider, BSE will have the sole regulatory responsibility for the activities of BOX. BSE will also provide certain administrative services.

(b) [Business confidential]

(c) [Business confidential]

Article 4—Governance

4.1. *Board of Directors.*

(a) The Members shall establish a Board of Directors of BOX (the ''*Board*'' or ''*Directors*'') to implement this Agreement. The Board shall be comprised of from six (6) to thirteen (13) Directors. The Board will manage the development, operations, business and affairs of BOX.

(b) IB, Bourse and the BSE shall initially be entitled to designate two (2) Directors each. Thereafter, if IB, Bourse or BSE maintains a Percentage Interest of [business confidential] or greater, it shall have the right to designate two (2) Directors. If IB, Bourse or BSE maintains a Percentage Interest of from [business confidential], it shall have the right to designate one (1) Director. Additionally, as long as BOX remains a facility of the BSE pursuant to Section 3(a)(2) of the Exchange Act of 1934, the BSE shall have the right to designate one (1) Director, whether or not the BSE maintains any Percentage Interest.

(c) Transferee Members [business confidential] who purchase and hold a Percentage Interest of [business confidential] or greater shall have the right to designate one (1) Director each.

(d) Each Director shall serve at the pleasure of the Member which designated such Director and may from time to time be replaced by such Member. Any such replacement must be a member of senior management or Board of Directors of the designating party or an Affiliate of such designating party or of its principal owner or owners. Each Member shall notify the other Members in writing of any person designated by it to serve as a Director and any replacement for such person promptly following such designation or replacement. A Director shall be terminated by the Board: (i) in the event such Director has violated any provision of this Agreement, or (ii) if the Board determines that such action is necessary or appropriate in the public interest or for the protection of investors.

(e) Subject to the provisions of paragraph (c) above, in the event of the addition of any New Members or the transfer of interest from a Member to a Transferee Member, the Board shall determine the number of Board seats, if any, to be held by the New or Transferee Member and will determine the disposition of the Board seats held by any Transferring Member.

[Business confidential]

4.2. *Authority and Duties of Board; Committees.*

(a) *Authority and Conduct.* The Board shall have the specific authority delegated to it pursuant to this Agreement. Each Director agrees to comply with the federal securities laws and the rules and regulations thereunder and to cooperate with the U.S. Securities and Exchange Commission and the BSE pursuant to their regulatory authority and the provisions of this Agreement. Furthermore, each Director shall take into consideration whether his or her actions as a Director would cause BOX to engage in conduct that fosters and does not interfere with BOX's ability to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest.

(b) *Duties of Board.* Without limiting the general duties and authority of the Board as set forth in this Article 4, the Board shall have all of the powers of the Board of Directors of a corporation organized under the General Corporation Law of the State of Delaware, as from time to time in effect (the ''*DGCL*''), including the power and responsibility to manage the business of BOX, select, and evaluate the performance of, the Senior Executive, and establish and monitor capital and operating budgets.

(c) *Executive Committee.* There may be an executive committee of the Board consisting of at least one or more Directors designated by each of IB, BSE and the Bourse, as long as such Person is still a Member, such executive committee to be formed by resolution passed by the Board. The act of a majority of the members of such committee shall be the act of the committee. Said committee may meet at stated times or on notice to all by any of their own number, and, subject to Section 4.2(g) below, shall have and may exercise those powers of the Board in the management of the business affairs of the Company as are provided by this Agreement. Vacancies in the membership of the committee shall be filled by the Board in accordance with this Section 4.2(c) at a regular meeting or at a special meeting of the Board called for that purpose.

(d) [deleted]

(e) *Other Committees.* The Board may also designate one or more committees in addition to the executive committee, by resolution or resolutions passed by a majority of the whole Board; such committee or committees shall consist of one or more Directors of BOX, and, subject to Section 4.2(g) below, to the extent provided in the resolution or resolutions designating them, shall have and may exercise specific powers of the Board in the management of the business and affairs of BOX to the extent permitted by this Agreement. Such committee or committees shall have such name or names as may be determined from time to time by resolution adopted by the Board.

(f) *Powers Denied to Committees.* Committees of the Board shall not, in any event, have any power or authority to transact any Major Action or an action specifically covered by Section 4.4(c) or 4.4(d).

(g) *Substitute Committee Member; Minutes.* In the absence or on the disqualification of a member of a committee, the Member or members thereof present at any meeting and not disqualified from voting, whether or not he or they constitute a quorum, may unanimously appoint, in accordance with the provisions of this Section 4.2, another individual to act at the meeting in the place of such absent or disqualified member. All committees shall keep regular minutes of its proceedings and report the same to the Board as may be required by the Board.

4.3 (a) *Meetings.* The Board will meet as often as the members thereof deem necessary, but not less frequently than every three (3) months. Meetings may be

conducted in person or by telephone or in any other manner agreed to by the Board. Any of the Members may call a meeting of the Board upon reasonable prior written notice. No notice of a meeting shall be necessary when all members of the Board are present. In the event that the Board consists of less than eight (8) Directors, the attendance of at least four (4) Directors shall constitute a quorum for purposes of any meeting of the Board. In the event that the Board consists of eight (8) or more Directors, the attendance of at least a majority of all the Directors shall constitute a quorum for purposes of any meeting of the Board. Except as may otherwise be provided by this Agreement, each of the Directors will be entitled to vote on any action to be taken by the Board, except that the Senior Executive (if a Director) shall not be entitled to vote on matters relating to his or her powers, compensation or performance. There shall be a total of 100 votes (the ''*Total Votes*'') available to be voted on any action to be taken by the Board. Each Director, except as limited by the provisions of Section 8.4(h), below, shall be entitled to vote that percentage of the Total Votes equal to the quotient obtained by dividing (i) the quotient of (A) the number of Units held by the Member that designated such Director (if applicable, rounded down to the nearest whole Unit) divided by (B) the aggregate number of Units held by all Members that designated Directors by (ii) the number of Directors designated by such Member. All quorum and voting requirements shall be adjusted accordingly for the suspension of any Member made pursuant to Section 5.9, 8.4(g) or 8.4(h). Any Director shall be entitled to vote the votes allocated to another Director after having received such Director's proxy in writing. Any action to be taken by the Board shall be considered effective only if approved by at least a majority of the votes entitled to be voted on such action. Meetings of the Board may be attended by other representatives of the Members and other persons related to BOX as agreed to from time to time by the Board. The Board will set up procedures relating to the recording of minutes of its meetings. Actions of the Board may also be taken without a meeting by written consent of the Board.

(b) *Voting Trusts.* Members are prohibited from entering into voting trust agreements with respect to their Units.

4.4. *Special Voting Requirements.* (a) Notwithstanding the provisions of Section 4.3 regarding voting requirements, no action with respect to any Major Action (as defined in paragraph (b) below), shall be effective unless (i) at all times when IB, BSE and the Bourse are the only Members of BOX, approved by unanimous consent of the Board, or (ii) at all times when IB, BSE and the Bourse are *not* the only Members of BOX, approved by a majority of the Board including the affirmative vote of all of the votes of Directors designated by each of IB, BSE and the Bourse, in each case acting at a meeting or by unanimous written consent as provided in Section 4.3. In addition, unless unanimously approved by the Board as provided above, none of the Members on behalf of BOX shall enter into or permit BOX to enter into any Major Action.

(b) For purposes of this Agreement, ''*Major Action*'' means any of the following:

(i) Merger or consolidation of BOX with any other entity or the sale by BOX of any material portion of its assets;

(ii) Entry by BOX into any line of business other than the business described in Article 3;

(iii) Conversion of BOX from a Delaware limited liability company into any other type of entity;

(iv) Except as expressly contemplated by this Agreement and the Related Agreement, entering into any agreement, commitment, or transaction with the Bourse or any of its Affiliates, BSE or any of its Affiliates, or IB or any of its Affiliates or any other Member or any of its Affiliates other than transactions or agreements upon commercially reasonable terms that are no less favorable to BOX than BOX would obtain in a comparable transaction or agreement with a third party;

(v) Taking any action to effect the voluntary, or which would precipitate an involuntary, dissolution or winding-up of BOX;

(vi) Except as otherwise provided in the Technical and Operational Services Agreement, operating the BOX Market utilizing any other software system other than the System;

(vii) Except as otherwise provided in the Regulatory Services Agreement, operating the BOX Market utilizing any other Regulatory Services Provider other than BSE or an Affiliate of BSE;

(viii) Entering into any partnership, joint venture or other similar joint business undertaking;

(ix) Making any fundamental change in the market structure of BOX from that contemplated by the Members as of the date hereof;

(x) Subject to Article 8, the acquisition of any Percentage Interest by any Member that results in such Member, alone or together with any Affiliate of such Member, newly holding an aggregate Percentage Interest equal to or greater than twenty percent (20%);

(xi) [Business confidential]

(xii) Altering the provisions for Board membership for IB, BSE or Bourse, specified in Section 4.1(b); or

(xiii) Purchasing Units pursuant to Section 8.2.

(c) [Business confidential]

(d) [Business confidential]

4.5. *Officers.* One of the Bourse designees to the Board of Directors shall initially be the Chairman of the Board of BOX (the ''*Initial Chairman*''), subject to the approval of BSE and IB, which approval shall not be unreasonably withheld. The Board will appoint such other officers and agents of BOX, including a Senior Executive, as it shall from time to time deem necessary. Such officers and agents shall have such terms of employment, shall receive such compensation and shall exercise such powers and perform such duties as the Board shall from time to time determine.

4.6. *Duties of the Chairman of the Board.* The Chairman of the Board shall preside at all meetings of the Members and at all meetings of the Board. The Chairman of the Board shall have the general powers and duties of management usually vested in the office of Chairman of the Board, and shall have such other duties and responsibilities related to the development of BOX as the Board shall from time to time direct. The Initial Chairman of the Board shall be designated by the Bourse and will serve until the commencement of Trading on the BOX Market and thereafter until his or her successor is duly elected by the Board.

4.7. *Duties of the Senior Executive.* Subject to the supervision and direction of the Board, a senior executive (referred to herein as the ''*Senior Executive*'') shall have general supervision, direction and control of the business and the officers of BOX. The Senior Executive shall have the general powers and duties of management usually vested in the office of Chief Executive Officer, and shall have such other duties and responsibilities related to BOX as the Board shall from time to time direct. The Senior Executive shall be responsible for advising the Board on the status of BOX on a regular basis or more frequently as requested by the Board.

4.8. *No Management by Members.* Except as otherwise expressly provided herein or as requested by the Board, no Member shall take part in the day-to-day management or operation of the business and affairs of BOX. Except and

only to the extent expressly provided for in this Agreement and the Related Agreements and as delegated by the Board to duly appointed officers or agents of BOX, no Member or other Person other than the Board shall be an agent of BOX or have any right, power or authority to transact any business in the name of BOX or to act for or on behalf of or to bind BOX.

4.9. *Reliance by Third Parties.* Any Person dealing with BOX or the Board may rely upon a certificate signed by the Chairman of the Board, or such other officer of BOX designated by the Board of the Company, as to:

(a) The identity of the members of the Board, any officer or agent of BOX or any Member hereof;

(b) The existence or non-existence of any fact or facts which constitute a condition precedent to acts by the Board or in any other manner germane to the affairs of BOX;

(c) The Persons who are authorized to execute and deliver any agreement, instrument or document of or on behalf of BOX; or

(d) Any act or failure to act by BOX or any other matter whatsoever involving BOX or any Member.

Article 5—Powers, Duties, and Restrictions of BOX and the Members

5.1. *Powers of BOX.* In furtherance of the purposes set forth in Section 3, and subject to the provisions of Section 4, BOX, acting through the Board, will possess the power to do anything not prohibited by the Act, by other applicable law, or by this Agreement, including but not limited to the following powers: (i) To undertake any of the activities described in Section 3; (ii) to make, perform, and enter into any contract, commitment, activity, or agreement relating thereto; (iii) to open, maintain, and close bank and money market accounts, to endorse, for deposit to any such account or otherwise, checks payable or belonging to BOX from any other Person, and to draw checks or other orders for the payment of money on any such account; (iv) to hold, distribute, and exercise all rights (including voting rights), powers, and privileges and other incidents of ownership with respect to assets of BOX; (v) to borrow funds, issue evidences of indebtedness, and refinance any such indebtedness in furtherance of any or all of the purposes of BOX, to guarantee the obligations of others, and to secure any such indebtedness or guarantee by mortgage, security interest, pledge, or other lien on any property or other assets of BOX, (vi) to employ or retain such agents, employees, managers, accountants, attorneys, consultants and other Persons necessary or appropriate to carry out the business and affairs of BOX, and to pay such fees, expenses, salaries, wages and other compensation to such Persons as the Board shall determine, (vii) to bring, defend, and compromise actions, in its own name, at law or in equity, and (viii) to take all actions and do all things necessary or advisable or incident to the carrying out of the purposes of BOX, so far as such powers and privileges are necessary or convenient to the conduct, promotion, or attainment of BOX's business, purpose, or activities.

5.2. *Powers of Members.* Except as otherwise specifically provided by this Agreement or required by the Act or by the U.S. Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934, no Member shall have the power to act for or on behalf of, or to bind, BOX, and unless otherwise determined by the Board, all Members shall constitute one class or group of members of BOX for all purposes of the Act.

5.3. *Member Conduct.* Each Member agrees to comply with the federal securities laws and the rules and regulations thereunder; to cooperate with the U.S. Securities and Exchange Commission and the BSE pursuant to their regulatory authority and the provisions of this Agreement; and to engage in conduct that fosters and does not interfere with BOX's ability 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 of a free and open market and a national market system, and, in general, to protect investors and the public interest.

5.4. *Member's Compensation.* Except as otherwise specifically provided in this Agreement or in any of the Related Agreements, the Members shall not be entitled to any compensation for their services hereunder.

5.5. *Withdrawal.* Except as contemplated by Section 8, no Member shall withdraw from BOX unless and until such Member's required Initial Capital Contribution has been satisfied or specifically assumed by another Person and such Person has become a Member.

5.6. *Cessation of Status as a Member.* A Member will cease to be a member of BOX upon the Bankruptcy or the involuntary dissolution of such Member.

5.7. *Claims Against or By Members.* Except as set forth in the Related Agreements or required by the U.S. Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934, as amended, any and all matters relating to claims (i) by BOX against a Member or a former Member or any Affiliate of a Member or a former Member (collectively the ''*Member Entities*'') or (ii) by a Member Entity against BOX shall be controlled by the Member or Members that are not affiliated with such Member Entity. No Director shall be entitled to vote on (A) whether to initiate a claim by BOX against the Member that appointed such Director or an Affiliate of such Member, (B) any matter concerning a claim initiated by BOX against the Member that appointed such Director or a Member Entity affiliated with such Member, or (C) any matter concerning a claim initiated against BOX by the Member that appointed such Director or a Member Entity affiliated with such Member. Any action to be taken by the Board with respect to any such claim shall be considered effective only if approved by at least a majority of the Directors that are not affiliated with such Member Entity.

5.8. *Purchased Services.* Except as set forth in the Related Agreements, all products and services to be obtained by BOX will be evaluated by BOX's management with a view to best practices and all such products and services will be obtained from Members, their Affiliates or third-parties based upon arms-length negotiations, including obtaining quotes for such products or services from third-parties, as appropriate. Notwithstanding the forgoing, Members and their Affiliates will be given preference over third-parties if such Members or Affiliates are willing and able to provide services and terms at least as favorable to BOX as those offered by the third parties.

5.9. *Suspension of Voting Privileges and Termination of Membership.* After appropriate notice and opportunity for hearing, the Board, by a two-thirds vote, including the affirmative vote of the BSE and excluding the vote of such Member subject to sanction, may suspend or terminate a Member's voting privileges or membership: (i) in the event such Member has violated any provision of this Agreement, or (ii) if the Board determines that such action is necessary or appropriate in the public interest or for the protection of investors.

Section 6—Initial Operating Budget

The Members have agreed on an initial budget (the ''*Initial Operating*

Budget'') for the estimated costs and expenses anticipated to be incurred from initial startup activities, document and rule preparation, acquisition of rights to software, preparation of modifications to same, equipment acquisition, other steps relating to preparation for the commencement of operations through the point at which profitability will be achieved. *Exhibit 2* hereto sets forth (i) the Initial Operating Budget and (ii) the aggregate anticipated capital contributions of the Members (in kind and in cash) which the Members do hereby agree to make.

Section 7—Members; Financing BOX

7.1. [Business confidential]
7.2. [Business confidential]
7.3. [Business confidential]
7.4. [Business confidential]
7.5. [Business confidential]
7.6. *Liability of the Members and Directors.* Except as otherwise provided by the Act, the debts, obligations and liabilities of BOX, whether arising in contract, tort or otherwise, will be solely the debts, obligations and liabilities of BOX and not that of any Member or Director.

Article 8—Transferability of Units

8.1. *Restrictions on Transfer*

(a) Except for (i) transfers among Members; (ii) transfers by IB permitted under Section 8.5 hereof; or (iii) transfers to Affiliates of a Member, including officers of a Member or such Member's Affiliates, no Member shall have the right to dispose of, sell, alienate, assign, participate, subparticipate, encumber, or otherwise transfer all or any portion of its Units (other than assignments by operation of law) unless prior to such transfer the transferee is approved by the Board. To be eligible for such Board approval, the proposed transferee must (i) be of high professional and financial standing, (ii) be able to carry out their duties as a Member hereunder, and (iii) be under no regulatory or governmental bar or disqualification. Notwithstanding the foregoing, registration as a broker-dealer or self-regulatory organization is not required to be eligible for such Board approval.

(b) In addition to the foregoing requirements, the admission of a transferee Member shall be conditioned upon the transferee's written acceptance of the terms and provisions of this Agreement and its written assumption of the obligations hereunder of its assignor. Whether or not a transferee who acquired any Units has accepted in writing the terms and provisions of this Agreement and assumed in writing the obligations hereunder of its predecessor in interest, such transferee shall be deemed, by the acquisition of such Units, to have agreed to be subject to and bound by all the obligations of this Agreement with the same effect and to the same extent as any predecessor in interest of such transferee.

(c) All costs incurred by BOX in connection with the admission to BOX of a substituted Member pursuant to this Article 8 shall be borne by the transferor Member (and if not timely paid, by the substituted Member), including, without limitation, costs of any necessary amendment hereof, filing fees, if any, and reasonable attorneys' fees.

(d) [Business confidential]

8.2. [Business confidential]

8.3 [Business confidential]

8.4. *Additional Restrictions.* Anything contained in the foregoing provisions of this Article 8 expressed or implied to the contrary notwithstanding:

(a) In no event shall a sale, transfer, assignment, exchange, or other disposition of any Member's Units take place if such sale, transfer, assignment, exchange, or other disposition is: (i) In the opinion of tax counsel to BOX, cause a termination of BOX within the meaning of Section 708 of the Code or, (ii) in the opinion of the Board, based on advice of tax counsel, that such transaction could cause a termination of BOX's status as a partnership or cause BOX to be treated as a publicly traded partnership for federal income tax purposes, (iii) prohibited by any state, federal or provincial securities laws, or (iv) prohibited by this Agreement.

(b) In no event shall all or any part of a Member's Units be assigned or transferred to a minor or incompetent.

(c) The Members may, in addition to any other requirement that the Members may impose, require as a condition of any sale, transfer, assignment, exchange, or other disposition of any Units that the transferor furnish to BOX an opinion of counsel satisfactory (both as to such opinion and as to such counsel) to counsel to BOX that such sale, transfer, assignment, exchange, or other disposition complies with applicable federal and state securities laws.

(d) Any sale, transfer, assignment, exchange, or other disposition in contravention of any of the provisions of this Article 8 shall be void and ineffectual and shall not bind or be recognized by BOX.

(e) Beginning after SEC approval of BOX, BOX shall provide the U.S. Securities and Exchange Commission with written notice ten (10) days prior to the Closing Date of any acquisition that results in a Member's Percentage Interest, alone or together with any Affiliate of such Member, meeting or crossing the threshold level of 5% or the successive 5% Percentage Interest levels of 10% and 15%.

(f) Beginning after SEC approval of BOX, in addition to the notice requirement in subsection (e), the following transfers are subject to the rule filing process pursuant to Section 19 of the Securities Exchange Act of 1934: (i) any transfer that results in the acquisition and holding by any Member, alone or together with any Affiliate of such Member, of an aggregate Percentage Interest level which meets or crosses the threshold level of 20% or any successive 5% Percentage Interest level (*i.e.* 25%, 30%, etc.); (ii) any transfer that results in a reduction of the BSE's aggregate Percentage Interest to below the 20% threshold.

(g) For purposes of this subsection (g): (i) a ''controlling interest'' shall be defined as the ownership by any Person, alone or together with any Affiliate of such Person, of a 25% or greater interest in a Member, and (ii) an ''Acquirer'' shall be defined as a Person who, alone or together with any Affiliate of such Person, acquires a controlling interest in a Member. An Acquirer shall be required to execute an amendment to this Agreement upon establishing a controlling interest in any Member who, alone or together with any Affiliate of such Member, holds a Percentage Interest in BOX equal to or greater than 20%. In such amendment the Acquirer shall agree to become a new party to this Agreement and shall agree to abide by all the provisions of this Agreement. Beginning after SEC approval of this Agreement, any amendment to this Agreement executed pursuant to this subsection (g) is subject to the rule filing process pursuant to Section 19 of the Securities Exchange Act of 1934. The rights and privileges of the Member under this Agreement shall be suspended until such time as the amendment executed pursuant to this subsection (g) has become effective pursuant to Section 19 of the Securities Exchange Act of 1934 or the Acquirer no longer holds a controlling interest in the Member.

(h) In the event that a Member, or any Affiliate of such Member, is approved by the BSE as an Options Participant on the BOX Market pursuant to the rules of the BSE, and such Member owns more than 20% of the Units, alone or together with any Affiliate of such Member, (Units owned in excess of 20% being referred to as ''Excess Units''), the Member shall have no voting rights nor give any proxy in relation to a vote of the Members with respect to the Excess Units held by such Member; provided, however, that whether or not such

Member otherwise participates in a meeting in person or by proxy, such Member's Excess Units shall be counted for quorum purposes and shall be voted by the person presiding over quorum and vote matters in the same proportion as the Units held by the other Members are voted (including any abstentions from voting).

IB shall have a temporary exemption, not to extend past January 1, 2014, from the voting limitation on Excess Units contained in this subsection, but only with respect to any vote regarding any merger, consolidation or dissolution of BOX or any sale of all or substantially all of the assets of BOX.

8.5. *Continuation of LLC.* The liquidation, dissolution, bankruptcy, insolvency, death, or incompetency of any Member shall not terminate the business of BOX or dissolve BOX, which shall continue to be conducted upon the terms of this Agreement by the other Members and by the personal representatives and successors in interest of such Member.

8.6. [Business confidential]

8.7. *New Membership Interests.* Upon the issuance of any new Units in BOX or the valid transfer of all or any portion of a Member's Units, the Board shall amend this Agreement and *Schedule* A hereto so as to specify the class of any new Members, the rights of such class and its or their Capital Contributions and make such further adjustments to *Schedule* A as may be necessary to reflect the admission of new Members.

8.8. *No Retroactive Effect.* No new Members shall be entitled to any retroactive allocation of losses, income or expense deductions incurred by BOX. The Board may, at the time an additional Member is admitted, close the Company books (as though BOX's Fiscal Year has ended) or make *pro-rata* allocations of loss, income and expense deductions to an additional Member for that portion of the BOX's Fiscal Year in which an additional Member was admitted in accordance with the provisions of § 706(d) of the Code.

Article 9—Distributions

9.1. *Current Distributions.* If at any time and from time to time the Board determines that BOX has cash that is not required for the operations of BOX, the payment of liabilities or expenses of BOX, or the setting aside of reserves to meet the anticipated cash needs of BOX (''*Distributable Cash*''), then:

(a) Within 10 days after the end of each fiscal quarter, BOX shall make distributions (''Tax Distributions'') to the Members of their respective Tax Amounts for such fiscal quarter (or, in the event that Distributable Cash is less than the total of all such Tax Amounts, BOX shall distribute the Distributable Cash in proportion to such Tax Amounts). If after the end of any fiscal year it is determined that a Member's Tax Amount for the fiscal year exceeds the sum of the Tax Distributions made to the Member hereunder and the distributions made to such member under Section 9.1(b) for such fiscal year (any such excess, a ''Shortfall Amount''), then BOX shall, on or before the 75th day of the next fiscal year, make an additional Tax Distribution to the members of their respective Shortfall Amounts (or, in the event that Distributable Cash is less than the total of all such Shortfall Amounts, BOX shall distribute the Distributable Cash in proportion to such Shortfall Amounts). If the aggregate Tax Distributions to any Member pursuant to this subsection for a fiscal year exceed the Member's Tax Amount for such fiscal year, such excess shall be deducted from the Member's Tax Amount when calculating the Tax Distributions to be made to such Member for each subsequent fiscal year until the excess has been fully accounted for. All Tax Distributions to a Member shall be treated as advances against any subsequent distributions to be made to such Member under Section 9.1(b) or Section 11.2. Subsequent distributions made to the Member pursuant to Sections 9.1(b) and 11.2 shall be adjusted so that when aggregated with all prior distributions to the Member pursuant to those provisions, and with all prior Tax Distributions to the Member, the amount distributed shall be equal, as nearly as possible, to the aggregate amount that would have been distributable to such member pursuant to Section 9.1(b) and Section 11.2 if this Agreement contained no provision for Tax Distributions.

(b) After making the Tax Distributions described in subsection (a) hereof, the Board may distribute all or any portion of remaining Distributable Cash to the Members in proportion to their Percentage Interests, unless the distribution is a liquidating distribution, which shall be made in the manner set out in Section 11.1(b).

9.2. *Limitation.* BOX, and the Board on behalf of BOX, shall not make a distribution to any Member on account of its interest in BOX if and to the extent such distribution would violate the Act or other applicable law.

9.3. *Withholdings Treated as Distributions.* Any amount that BOX is required to withhold and pay over to any governmental authority on behalf of a Member shall be treated as a distribution made to such Member pursuant to Section 9.1(a), 9.1(b) or 11.2, and shall be deducted from the amounts next distributable to such Member pursuant to any of those provisions until the withholding has been fully accounted for. To the extent that such an amount is treated, pursuant to the previous sentence, as a distribution under Section 9.1(a), it shall also be treated as a Tax Distribution, with the consequences described in Section 9.1(a).

Article 10—Allocations of Profits and Losses

10.1. *Allocations of Profits; General.* Except as provided in Sections 10.3 through 10.9 below, all net profits and credits of BOX (for both accounting and tax purposes) for each fiscal year shall be allocated to the Members from time to time (but no less often than once annually and before making any distribution to the Members) first, in proportion to any prior allocations of losses under Section 10.2 not previously taken into account pursuant to this clause first, to the extent of such losses, and second, in proportion to their Percentage Interest.

10.2. *Allocations of Losses; General.* Except as provided in Sections 10.3 through 10.9 below, all net losses of BOX for each fiscal year (for both accounting and tax purposes), and all Nonrecourse Deductions, shall be allocated to the Members from time to time (but no less often than once annually and before making any distribution to the Members) first, in proportion to any prior allocations of profits under Section 10.1 not previously taken into account pursuant to this clause first, to the extent of such profits, second, in proportion to the Members' Capital Contributions, to the extent thereof, and third, in proportion to their Percentage Interest.

10.3. *Limitation.* Notwithstanding anything otherwise provided in Section 10.2, no Member will be allocated any losses not attributable to Nonrecourse Debt to the extent such allocation (without regard to any allocations based on Nonrecourse Debt), and after taking into account any reductions to the Member's Capital Account required by Treasury Regulations § 1.704–1(b)(2)(ii)(d) (4), (5), or (6) results in a deficit in such Member's Capital Account in excess of such Member's actual or deemed obligation, if any, to restore deficits on the dissolution of BOX (any such excess, an ''*Unpermitted Deficit*''). Any losses not allocable to a Member under this sentence shall be allocated to the other Members. In the event any Member's Capital Account is adjusted (by way of distribution,

allocation or otherwise) to create an Unpermitted Deficit, BOX shall allocate to such Member, as soon as possible thereafter, items of income or gain sufficient to eliminate the Unpermitted Deficit.

10.4. *Qualified Income Offset.* In the event any Member unexpectedly receives adjustments, allocations, or distributions described in Treasury Regulations § 1.704–1(b)(2)(ii)(d) (4), (5) or (6), items of income and gain of BOX shall be specially allocated to such Member in an amount and manner sufficient to eliminate the deficit balance in such Member's Capital Account created by such adjustments, allocations or distributions as promptly as possible. The preceding sentence is intended to comply with the ''qualified income offset'' requirement in Treasury Regulations § 1.704–1(b)(2)(ii)(d), and shall be interpreted consistently therewith.

10.5. *Nonrecourse Debt and Chargebacks.* If at the end of any fiscal year of BOX, after taking into account all distributions made and to be made in respect of such year but prior to any allocation of profits and losses for such year except the allocations required by Section 10.3, any Member shall have a negative Capital Account by reason (and to the extent) of allocations of items of loss or deduction attributable in whole or part to Nonrecourse Debt secured by any of the assets of BOX, such Member shall be allocated (or if more than one Member has such a negative Capital Account, all such Members shall be allocated ratably among them in accordance with the respective proportions of such negative balances as are attributable to such deductions or losses) that portion of any items of income and gain for such year as may be equal to the amount by which the negative balance of such Member's Capital Account exceeds the sum of (A) such Member's allocable share of the aggregate Minimum Gain with respect to all of BOX's assets securing such Nonrecourse Debt plus (B) such Member's allocable share of aggregate BOX debt which is not Nonrecourse Debt, such allocable share to be determined in accordance with the provisions of Section 752 of the Code and the Treasury Regulations thereunder. In addition, if there is a net decrease in BOX's aggregate Minimum Gain with respect to all of its assets for a taxable year, each Member shall be allocated items of income and gain ratably in an amount equal to that Member's share of such net decrease in the manner and to the extent required by Treasury Regulations Section 1.704–2(f) or any successor regulation. The preceding sentence is intended to comply with the minimum gain chargeback requirement of Treasury Regulations § 1.704–2(f), and shall be interpreted and applied in a manner consistent therewith.

10.6. *Member Nonrecourse Deductions.* Any Member Nonrecourse Deductions for any fiscal year or other period shall be allocated to the Member that (in its capacity, directly or indirectly, as lender, guarantor, or otherwise) bears the economic risk of loss with respect to the loan to which such Member Nonrecourse Deductions are attributable in accordance with Treasury Regulations § 1.704–2(i). If, during any fiscal year or other period, there is a net decrease in Member Nonrecourse Debt Minimum Gain, that decrease shall be charged back among the Members in accordance with Treasury Regulations § 1.704–2(i)(4). The preceding sentence is intended to comply with the partner nonrecourse debt minimum gain chargeback requirement of Treasury Regulations § 1.704–2(i)(4), and shall be interpreted and applied in a manner consistent herewith.

10.7. *Calculation of Profits and Losses.* For all purposes hereof, BOX's profits and losses shall be determined by taking into account all of BOX's items of income and gain (including items not subject to federal income tax) and all items of loss, expense, and deduction, in each case determined under federal income tax principles.

10.8. *Section 704(c) and Capital Account Revaluation Allocations.* The Members agree that to the fullest extent possible with respect to the allocation of depreciation and gain for U.S. federal income tax purposes, Section 704(c) of the Code shall apply with respect to non-cash property contributed to BOX by any Member. For purposes hereof, any allocation of income, loss, gain or any item thereof to a Member pursuant to Section 704(c) of the Code shall affect only its tax basis in its Percentage Interest and shall not affect its Capital Account. In addition to the foregoing, if BOX assets are reflected in the Capital Accounts of the Members at a book value that differs from the adjusted tax basis of the assets (*e.g.*, because of a revaluation of the Members' Capital Accounts under Treasury Regulations § 1.704–1(b)(2)(iv)(f)), allocations of depreciation, amortization, income, gain or loss with respect to such property shall be made among the Members in a manner consistent with the principles of Section 704(c) of the Code and this Section 10.8.

10.9. *Offset of Regulatory Allocations.* The allocations required by Sections 10.3 through 10.6 and Section 10.8 are intended to comply with certain requirements of the Treasury Regulations. The Board may, in its discretion and to the extent not inconsistent with Section 704 of the Code, offset any or all such regulatory allocations either with other regulatory allocations or with special allocations of income, gain, loss or deductions pursuant to this section in whatever manner it determines appropriate so that, after such offsetting allocations are made, each Member's Capital Account balance is, to the extent possible, equal to the Capital Account balance such Member would have had if the regulatory allocations were not part of this Agreement.

10.10. *Terminating and Special Allocations.* Notwithstanding the foregoing allocation provisions, any profits or losses resulting from a liquidation, merger or consolidation of BOX, the sale of substantially all the assets of BOX in one or a series of related transactions, or any similar event (and, if necessary, specific items of gross income, gain, loss, or deduction incurred by BOX in the fiscal year of such transaction(s)) shall be allocated among the Members so that after such allocations and the allocations required by Section 11.3, and immediately before the making of any liquidating distributions to the Members under Section 11.2, the Members' Capital Accounts equal, as nearly as possible, the amounts of the respective distributions to which they are entitled under Section 11.2.

Article 11—Dissolution and Winding Up

11.1. (a) BOX shall be dissolved and its affairs shall be wound up upon:

(i) The election to dissolve BOX made by the Board pursuant to Section 4.4(b)(v); or

(ii) The entry of a decree of judicial dissolution under § 18–802 of the Act; or

(iii) The resignation, expulsion, Bankruptcy or dissolution of a member, or the occurrence of any other event which terminates the continued membership of a Member in BOX, unless the business of BOX is continued by the consent of remaining Members holding a majority of the issued and outstanding Units given within ninety (90) days following the occurrence of any such event; or

(iv) The occurrence of any other event that causes the dissolution of a limited liability company under the Act.

The legal representatives, if any, of any Member shall succeed as assignee to such Member's interest in BOX upon the Bankruptcy, insolvency or

dissolution of such Member, but shall be admitted as a substitute Member only with the written consent of the Board (such consent to be in the Board's sole discretion); unless and until such consent is given, any Percentage Interest in BOX held by such legal representatives of a Member shall not be included in calculating the Percentage Interests of the Members required to take any action under this Agreement.

(b) Upon dissolution of BOX, the business of BOX shall continue for the sole purpose of winding up its affairs. The winding up process shall be carried out by all of the Members unless the dissolution is caused by an event of withdrawal by the sole remaining Member, in which case a liquidating trustee may be appointed for BOX by vote of a majority in Percentage Interest of the Members (the Members or such liquidating trustee is referred to herein as the ''*Liquidator*''). In winding up BOX's affairs, every effort shall then be made to dispose of the assets of BOX in an orderly manner, having regard to the liquidity, divisibility and marketability of BOX's assets. If the Liquidator determines that it would be imprudent to dispose of any non-cash assets of BOX, such assets may be distributed in kind to the Members, in lieu of cash, proportionately to their rights to receive cash distributions hereunder; *provided,* that the Liquidator shall in its sole discretion determine the relative shares of the Members of each kind of those assets that are to be distributed in kind. The Liquidator shall not be entitled to be paid by BOX any fee for services rendered in connection with the liquidation of BOX, but the Liquidator (whether one or more Members or a liquidating trustee) shall be reimbursed by BOX for all third-party costs and expenses incurred by it in connection therewith and shall be indemnified by BOX with respect to any action brought against it in connection therewith by applying, mutatis mutandis, the provisions of Article 14.

11.2. *Application and Distribution of Assets.*

(a) [Business confidential]

(b) [Business confidential]

(c) *Reserve.* A reasonable reserve for contingent, conditional and unmatured liabilities in connection with the winding up of the business of BOX shall be retained by BOX until such winding up is completed or such reserve is otherwise deemed no longer necessary by the Liquidator.

11.3. *Capital Account Adjustments.* For purposes of determining a Member's Capital Account, if, on liquidation and dissolution, some or all of the assets of BOX are distributed in kind, BOX profits (or losses) shall be increased by the profits (or losses) that would have been realized had such assets been sold for their fair market value on the date of dissolution of BOX, as determined by the Liquidator. Such increase (i) shall be allocated to the Members in accordance with Article 10 hereof and (ii) shall increase (or decrease) the Members' Capital Account balances accordingly, it being the general intent that the adjustments contemplated by this subsection shall have the effect, as nearly as possible, of causing the Members' Capital Account balances to be in proportion to their Percentage Interests.

11.4. *Termination of the LLC.*

Subject to Section 19.1 of this Agreement, the separate legal existence of BOX shall terminate when all assets of BOX, after payment of or due provision for all debts, liabilities and obligations of BOX, shall have been distributed to the Members in the manner provided for in this Article 11, and a Certificate of Cancellation shall have been filed in the manner required by Section 18–203 of the Act.

Article 12—Books, Records and Accounting

12.1. *Books of Account.* The Board shall cause to be entered in appropriate books, kept at BOX's principal place of business, all transactions of or relating to BOX. Each Member shall have access to and the right, at such Member's sole cost and expense, to inspect and copy such books and all other BOX records during normal business hours; *provided that* the inspecting Member shall be responsible for any out-of-pocket costs or expenses incurred by BOX in making such books and records available for inspection. Notwithstanding the foregoing, the books and records of BOX shall be subject at all times to inspection and copying by the Regulatory Services Provider and the SEC at no additional cost to the Regulatory Services Provider or the SEC. The books, records, premises, officers, directors, agents, and employees of BOX shall be deemed to be the books, records, premises, officers, directors, agents, and employees of the Regulatory Services Provider and its Affiliates for the purpose of and subject to oversight pursuant to the Securities Exchange Act of 1934, as amended. The Board shall not have the right to keep confidential from the Members any information that the Board would otherwise be permitted to keep confidential pursuant to § 18–305(c) of the Act.

12.2. *Deposits of Funds.* All funds of BOX shall be deposited in its name in such checking, money market, or other account or accounts as the Board may from time to time designate; withdrawals shall be made therefrom on such signature or signatures as the Board shall determine.

12.3. *Fiscal Year.* The fiscal year of BOX shall be the calendar year (the ''*Fiscal Year*'').

12.4. *Financial Statements; Reports to Members.* BOX, at its cost and expense, shall prepare and furnish to each of the Members, within ninety (90) days after the close of each taxable year, financial statements of BOX, and all other information necessary to enable such Member to prepare its tax returns, including without limitation a statement showing the balance in such Member's Capital Account.

12.5. Tax Elections. The Members may, by unanimous agreement and in their absolute discretion, make all tax elections (including, but not limited to, elections relating to depreciation and elections pursuant to Section 754 of the Code) as they deem appropriate. Notwithstanding anything contained in Article 10 of this Agreement, any adjustments made pursuant to Section 754 of the Code shall affect only the successor in interest to the transferring Member. Each Member will furnish BOX with all information necessary to give effect to any such election and will pay the costs of any election applicable as to it.

12.6. *Tax Matters Member.* BSE shall be the tax matters Member of BOX for purposes of the Code, and shall be entitled to take such actions on behalf of BOX in any and all proceedings with the Internal Revenue Service as it, in its absolute discretion, deems appropriate without regard to whether such actions result in a settlement of tax matters favorable to some Members and adverse to other Members. Notwithstanding the foregoing, BSE shall (a) promptly deliver to the Bourse and IB copies of any notices, letters or other documents received by BSE as the tax matters Member of BOX, (b) keep the Bourse and IB informed with respect to all matters involving BSE as the tax matters Member of BOX, and (c) consult with the Bourse and IB and obtain the approval of the Bourse and IB prior to taking any actions as tax matters Member of BOX. The tax matters Member shall not be entitled to be paid by BOX any fee for services rendered in connection with any tax proceeding, but shall be reimbursed by BOX for all third-party costs and expenses incurred by it in connection with any such proceeding and shall be indemnified by BOX with respect to any action brought against it in connection with the settlement of any such proceeding by

applying, *mutatis mutandis,* the provisions of Article 14.

Article 13—Arbitration

13.1. (a) All disputes, claims, or controversies between Members or between BOX and any Member(s) arising under or in any way relating to this Agreement shall be (x) settled by arbitration before a panel of three neutral arbitrators (the ''*Neutral Arbitrators*'') appointed in accordance with the Commercial Arbitration Rules of the American Arbitration Association, each having experience with and knowledge of the general field related to the dispute, claim or controversy (with at least one being an attorney), and (y) administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules as in effect at the time a request for arbitration is made. For the purposes of this Section 13.1, the following persons shall be deemed not to be a Neutral Arbitrator (i) a director, officer, employee, agent, partner or shareholder of any party to the dispute or BOX, (ii) a consultant to BOX or any party to the dispute, (iii) a person with a direct or indirect financial interest in any contract with any party to the dispute, (iv) a director, officer or key employee of a company at a time when such company was party to a contract with any party to the dispute, or (v) a relative of any person referred to in clauses (i), (ii), (iii) or (iv) above. Arbitration may be commenced at any time by any party to the dispute giving written notice to the other party or parties to the dispute that such dispute has been referred to arbitration under this Section 13.1. Any determination or award rendered by the Neutral Arbitrators shall be conclusive and binding upon the parties to such dispute and judgment on the award rendered by the Neutral Arbitrators may be entered and enforced in any court having jurisdiction thereof; *provided, however,* that any such determination or award shall be accompanied by a reasoned award of the Neutral Arbitrators giving the reasons for the determination or award. The parties hereby consent to the non-exclusive jurisdiction of the courts of the Commonwealth of Massachusetts or to any federal court located within the Commonwealth of Massachusetts for any action (i) to compel arbitration, (ii) to enforce the award of the Neutral Arbitrators or (iii) prior to the appointment and confirmation of the Neutral Arbitrators, for temporary, interim or provisional equitable remedies, and to service of process in any such action by registered mail, return receipt requested, or by any other means provided by law. Any provisional or equitable remedy which would be available from a court of law shall be available from the arbitrators to the parties. In making any determination or award, the Neutral Arbitrators shall be authorized to award interest on any amount awarded. This provision for arbitration shall be specifically enforceable by the parties to the disputes and the determination or award of the Neutral Arbitrators in accordance herewith shall be final and binding and there shall be no right of appeal therefrom. Each of the parties to the dispute shall pay its own expenses of arbitration and the expenses of the Neutral Arbitrators shall be equally shared; *provided, however,* that if in the opinion of the Neutral Arbitrators any claim was frivolous or in bad faith, the Neutral Arbitrators may assess, as part of the determination or award, all or any part of the arbitration expenses of the other party or parties (including reasonable attorneys' fees) and of the Neutral Arbitrators against any party so acting in bad faith or raising such frivolous claim.

(b) The place of arbitration shall be Boston, Massachusetts and the language of the arbitral proceedings shall be English.

Article 14—Exculpation and Indemnification

14.1. *Members Generally.* Except as set forth in the second sentence of this Section 14.1, no Member nor any of its shareholders, directors, employees, Advisors or other agents, nor any Directors, officers, agents, Advisors or employees of BOX (collectively, the ''*Indemnitees*''), shall have any liability to BOX, to any other Member, or to any third party for any loss suffered by BOX, such other Member or such third party that arises out of any action or inaction of such Member (or any other Indemnitee), (a) with respect to its activities under this Agreement or the Related Agreements, unless otherwise specified in the Technical and Operational Services Agreement or the Regulatory Services Agreement or (b) otherwise in its capacity as a Member, if such Member or such other Indemnitee, in good faith, determined that such course of conduct was in the best interests of BOX and such course of conduct did not constitute gross negligence or willful misconduct of such Member (or other Indemnitees) or a material breach by such Member of this Agreement. To the fullest extent permitted by law, each Member (and such other Indemnitees) shall be indemnified by BOX against any losses, judgments, liabilities, expenses (including, without limitation, reasonable attorneys' fees and court costs) and amounts paid in settlement of any claims sustained by it in connection with BOX, provided that the same were not the result of gross negligence or willful misconduct of such Member (or such other Indemnitee) or a breach by such Member of this Agreement or any Related Agreement. Any Person claiming reimbursement of expenses under this Article 14 shall be paid amounts to which he or it would be entitled hereunder as such expenses are incurred upon presentation of appropriate documentation to BOX, subject to providing a written undertaking to repay any such amounts to which such Person ultimately turns out not to be entitled under the standards herein set forth. The indemnification and advancement of expenses provided by this Article shall continue as to an Indemnitee who has ceased to be a Member (or otherwise an Indemnitee), and shall inure to the benefit of the heirs, executors, administrators, and successors of such Member (and the other Indemnitees). Any indemnification pursuant to this Section 14.1 shall be solely out of the assets of BOX and shall not be a personal obligation of any Member.

14.2. *Duties of Indemnitee.* To the extent that, at law or in equity, an Indemnitee has duties (including fiduciary duties) and liabilities relating thereto to BOX or to the Members, the Members and any other Indemnitee acting in connection with BOX's business or affairs shall not be liable to BOX or to any Member for its good faith reliance on the provisions of this Agreement and any Related Agreement. The provisions of this Agreement and any Related Agreement, to the extent that they restrict the duties and liabilities of an Indemnitee otherwise existing at law or in equity, are agreed by the Members to replace such other duties and liabilities of such Indemnitee.

14.3. *BOX Market Participant Indemnity.* The rules and regulations of BOX shall contain procedures whereby BOX shall require all BOX Market participants to execute an agreement before becoming participants in the BOX Market concerning such Person's participation in the BOX Market, which agreement shall include, among other things, the agreement of such Person to waive liability of BOX, its Members and their respective Affiliates with respect to such Person's participation in the BOX Market.

Article 15—Maintenance of Separate Business

BOX shall at all times (a) to the extent that any of BOX's offices are located in the offices of an Affiliate, pay fair market rent for its office space located therein, (b) maintain BOX's books, financial statements, accounting records and other partnership documents and records separate from those of any Affiliate or any other Person, (c) not commingle BOX's assets with those of any Affiliate or any other Person, (d) maintain BOX's books of account, bank accounts and payroll separate from those of any Affiliate, (e) act solely in its name and through its own authorized agents, and in all respects hold itself out as a legal entity separate and distinct from any other Person, (f) make investments directly or by brokers engaged and paid by BOX or its agents (provided that if any agent is an Affiliate of BOX it shall be compensated at a fair market rate for its services), (g) manage BOX's liabilities separately from those of any Affiliate and pay its own liabilities, including all administrative expenses and compensation to employees, consultants or agents, and all operating expenses, from its own separate assets, except that an Affiliate may pay the organizational expenses of BOX, and (h) pay from BOX's assets all obligations and indebtedness of any kind incurred by BOX. Notwithstanding the foregoing, the books, records, premises, officers, directors, agents and employees of BOX shall be deemed to be those of the Regulatory Services Provider and its Affiliates for purpose of and subject to oversight pursuant to the Securities Exchange Act of 1934, as amended. In addition, the books and records of BOX shall be subject at all times to inspection and copying by the Regulatory Services Provider and its Affiliates and the SEC without charge to such Persons. BOX shall abide by all Act formalities, including the maintenance of current records of BOX affairs, and BOX shall cause its financial statements to be prepared in accordance with generally accepted accounting principles in a manner that indicates the separate existence of BOX. BOX shall (i) pay all its liabilities, (ii) not assume the liabilities of any Affiliate unless approved by unanimous consent of the Board and (iii) not guarantee the liabilities of any Affiliate unless approved by unanimous consent of the Board. The Board shall make decisions with respect to the business and daily operations of BOX independent of and not dictated by any Affiliate.

Article 16—Confidentiality and Related Matters

16.1. *Disclosure and Publicity.* The parties hereto agree that the initial public disclosures concerning the transactions contemplated by this Agreement and the Related Agreements shall require prior approval of all Members.

16.2. *Confidentiality Obligations of Members.*

(a) Each Member agrees that it will use BOX Confidential Information only in connection with the activities contemplated by this Agreement and the Related Agreements, and it will not disclose any BOX Confidential Information to any Person except as expressly permitted by this Section 16.2 and the Related Agreements.

(b) The Members may disclose BOX Confidential Information:

(i) To its directors, officers and employees who have a reasonable need to know the contents thereof;

(ii) On a confidential basis to those Advisors of the Member who have a reasonable need to know the contents thereof, so long as such disclosure is made pursuant to the procedures referred to in Section 16.4(b);

(iii) To the extent required by applicable statute, rule or regulation including, without limitation, any rules promulgated under the Securities Exchange Act of 1934, as amended; or in response to a valid request from the U.S. Securities and Exchange Commission pursuant to the Securities and Exchange Act of 1934 and the rules thereunder or the BSE (or Boston Options Exchange Regulation through delegated authority); or any court of competent jurisdiction; *provided* that the Member has made reasonable efforts to conduct its relevant business activities in a manner such that the disclosure requirements of such statute, rule or regulation or court of competent jurisdiction do not apply, and *provided further* that BOX is given notice and an adequate opportunity to contest such disclosure or to use any means available to minimize such disclosure (*e.g.,* the ''confidential treatment'' provisions of Rule 24b–2 promulgated under the Securities Exchange Act of 1934, as amended); and

(iv) To the extent such BOX Confidential Information has become generally available publicly through no fault of the Bourse or its directors, officers, employees or Advisors.

16.3. *Member Information Confidentiality Obligation.* Each Member shall hold, and shall cause its respective Affiliates and their directors, officers, employees, agents, consultants and Advisors to hold, in strict confidence, unless disclosure to an applicable regulatory authority is necessary or appropriate or unless compelled to disclose by judicial or administrative process or, in the written opinion of its counsel, by other requirement of law or the applicable requirements of any regulatory agency or relevant stock exchange, all non-public records, books, contracts, reports, instruments, computer data and other data and information (collectively, ''*Member Information*'') concerning the other Members (or, if required under a contract with a third party, such third party) furnished it by such other Member or its representatives pursuant to this Agreement or any other Related Agreement, except to the extent that such Member Information can be shown to have been (a) previously known by such Member on a non-confidential basis, (b) available to such Member on a non-confidential basis from a source other than the disclosing Member, (c) in the public domain through no fault of such Members or (d) later lawfully acquired from other sources by the Member to which it was furnished, and none of the Members shall release or disclose such Member Information to any other person, except its auditors, attorneys, financial advisors, bankers, other consultants and Advisors and, to the extent permitted above, to regulatory authorities. In the event that a Member becomes compelled to disclose any Member Information in connection with any necessary regulatory approval or by judicial or administrative process, such party shall provide the Member who provided such Member Information (the ''*Disclosing Member*'') with prompt prior written notice of such requirement so that the Disclosing Member may seek a protective order or other appropriate remedy and/or waive the terms of any applicable confidentiality arrangements. In the event that such protective order, other remedy or waiver is not obtained, only that portion of the Member Information which is legally required to be disclosed shall be so disclosed.

16.4. *Ongoing Confidentiality Program.*

(a) In order to ensure that the parties hereto comply with their obligations in Article 16, representatives designated by the Members and BOX shall meet from time to time as required to discuss issues relating to confidentiality and disclosure and other matters addressed by this Article 16.

(b) With respect to any disclosure by any of the parties hereto to any of their Advisors pursuant to Article 16, the representatives referred to in paragraph (a) above will institute procedures

designed to maintain the confidentiality of BOX Confidential Information while facilitating the business activities contemplated by this Agreement and the Related Agreements.

Article 17—Non-Competition

17.1. [Business confidential]

17.2. *Referrals.* Each of the Members shall, and shall cause each of their Affiliates to, refer all inquiries about the businesses conducted by BOX to BOX.

Article 18—Intellectual Property

Except as provided otherwise in the Related Agreements each of the Members shall retain all rights, title, and interests to all of its intellectual property. In addition to the Bourse License, the BSE License and the IB License, the parties shall enter into such other licenses involving the System and such other intellectual property of the Members as shall permit the use of such property by BOX in the manner intended by the Members.

Article 19—General

19.1. *Entire Agreement; Integration, Amendments.* This Agreement and the Related Agreements contain the sole and entire agreement of the parties with respect to the subject matter hereof and supersede all prior agreements and understandings, including, without limitation, the Original Operating Agreement, relating to such subject matter. This Agreement may only be changed or terminated by a written agreement signed by all of the parties hereto. Each of the Members further acknowledges and agrees that, in entering into this Agreement, such Member has not in any way relied upon any oral or written agreements, statements, promises, information, arrangements, understandings, representations or warranties, express or implied, not specifically set forth in this Agreement or the exhibits and schedules hereto.

19.2. *Binding Agreement.* The covenants and agreements herein contained shall inure to the benefit of and be binding upon the parties hereto and their respective representatives, successors in interest and permitted assigns.

19.3. *Notices.* Any and all notices contemplated by this Agreement shall be deemed adequately given if in writing and delivered in hand, or upon receipt when sent by telecopy confirmed by one of the other methods for providing notice set forth herein, or one (1) business day after being sent, postage prepaid, by nationally recognized overnight courier (*e.g.,* Federal Express), or five (5) days after being sent by certified or registered mail, return receipt requested, postage prepaid, to the party or parties for whom such notices are intended. All such notices to Members shall be addressed to the last address of record on the books of BOX; all such notices to BOX shall be addressed to BOX at the address set forth in Section 2.1 or at such other address as BOX may have designated by notice given in accordance with the terms of this subsection.

19.4. *Captions.* Captions contained in this Agreement are inserted only as a matter of convenience and in no way define, limit, extend or describe the scope of this agreement or the intent of any provisions hereof.

19.5. *Governing Law, Etc.* This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Delaware, all rights and remedies being governed by such laws, without regard to its conflict of laws rules. All disputes, claims, or controversies between Members or between BOX and any Member(s) arising under or in any way relating to this Agreement shall be settled pursuant to Article 13 hereof.

19.6. *Member Books, Records, and Jurisdiction.*

(a) The Member acknowledges that to the extent they are directly related to BOX activities, the books, records, premises, officers, directors, agents, and employees of Members shall be deemed to be the books, records, premises, officers, directors, agents, and employees of the Regulatory Services Provider and its Affiliates for the purpose of and subject to oversight pursuant to the Securities Exchange Act of 1934, as amended.

(b) The Members, officers, directors, agents, and employees of Members irrevocably submit to the exclusive jurisdiction of the U.S. federal courts, U.S. Securities and Exchange Commission, and the Boston Stock Exchange, for the purposes of any suit, action or proceeding pursuant to U.S. federal securities laws, the rules or regulations thereunder, directly arising out of, or directly relating to, BOX activities or Section 19.6(a), and hereby waives, and agrees not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that it is not personally subject to the jurisdiction of the U.S. Securities and Exchange Commission, that the suit, action or proceeding is an inconvenient forum or that the venue of the suit, action or proceeding is improper, or that the subject matter hereof may not be enforced in or by such courts or agency.

19.7. *Waiver of Certain Damages.* EACH OF THE MEMBERS, TO THE FULLEST EXTENT PERMITTED BY LAW, IRREVOCABLY WAIVES ANY RIGHTS THAT THEY MAY HAVE TO PUNITIVE, SPECIAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES IN RESPECT OF ANY LITIGATION BASED UPON, OR ARISING OUT OF, THIS AGREEMENT OR ANY RELATED AGREEMENT OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS OR ACTIONS OF ANY OF THEM RELATING THERETO.

19.8. *Construction.* The language used in this Agreement will be deemed to be the language chosen by the parties to express their mutual intent, and no rule of strict construction will be applied against any party.

19.9. *Severability.* The invalidity or unenforceability of any particular provision of this Agreement or any Related Agreement shall not affect the other provisions hereof or thereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provision was omitted.

19.10. *Counterparts.* This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

19.11. *Survival.* The provisions of Article 13, 14, 16, 17, and 19 shall survive the termination of this Agreement for any reason. All other rights and obligations of the Members shall cease upon the termination of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of July __, 2003.

Boston Options Exchange Group LLC.

By: Bourse de Montreal Inc., an authorized person

By: Boston Stock Exchange, Inc., an authorized person

By: Interactive Brokers Group LLC, an authorized person

[All attachments and exhibits deemed Business confidential, except below.]

SCHEDULED—MEMBERS NUMBER OF UNITS AND PERCENTAGE INTERESTS

[As of August 6, 2003]

Name and address	Number of units	Percentage interest
Interactive Brokers Group LLC, One Pickwick Plaza, Greenwich, CT 06830	2,375	22.41
Bourse de Montréal Inc., Tour de la Bourse, P.O. Box 61, 800 Victoria Square, Montréal, Quebec H4Z 1A9	3,325	31.37
Boston Stock Exchange, Inc., 100 Franklin Street, Boston, Massachusetts 02110	2,850	26.89

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the BSE 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. The BSE 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

As discussed in detail in the BOX Proposing Release, the BSE proposes to establish rules for BOX, a new Exchange facility, as that term is defined in Section 3(a)(2) of the Act. BOX would be operated by BOX LLC. BOX would administer a fully automated trading system for standardized equity options intended for the use of Options Participants.[6]

The BSE is a founding and controlling member of BOX LLC. In addition to its ownership stake in BOX LLC, the BSE has entered into various agreements with BOX LLC under which BOX LLC would operate BOX as a facility of the BSE. As discussed in detail in the BOX Delegation Plan Proposal,[7] pursuant to these agreements, the BSE, through Boston Options Exchange Regulation, LLC (''BOXR''), would maintain responsibility for all regulatory functions related to the facility, and BOX LLC would be responsible for the business operations of the facility to the extent those activities are not inconsistent with the regulatory and oversight functions of the BSE and BOXR. This means that BOX LLC would not interfere with the BSE's self-regulatory responsibilities or those delegated to BOXR.

In this filing, the BSE is submitting those provisions of the Operating Agreement specifically relating to the control and governance of BOX LLC that would ensure that the BSE has the authority within BOX LLC to maintain its responsibility for all regulatory functions related to the BOX facility. These sections of the BOX Operating Agreement would ensure that the Commission and the BSE would have regulatory authority over the owners and Directors of BOX LLC. The sections of the BOX Operating Agreement the Exchange deems relevant to its authority for all regulatory functions of its proposed BOX facility are set forth below, as well as a majority of the other provisions of the Agreement. Moreover, due to the fact that the purpose of this filing is to focus on only those provisions of the Operating Agreement which are directly related to the BSE's authority for all regulatory functions of its proposed BOX facility, the Exchange will herein likewise focus its discussion on only those provisions.

Operating Agreement, Article 4

Under Section 4.1(b), as long as BOX remains a facility of the BSE pursuant to Section 3(a)(2) of the Act, the BSE would have the right to designate at least one (1) Director on the BOX Board, whether or not the BSE maintains any ownership interest in BOX LLC. The BSE currently owns an interest in BOX LLC of over 26%. Nevertheless, the BSE believes that this provision, in conjunction with other provisions discussed herein (*e.g.*, Section 4.4(b), which guarantees the right of the BSE to have veto power over all Major Actions of the BOX Board) would ensure that the Exchange exercises control on the BOX Board in matters related to the BSE's regulatory responsibilities, regardless of its level of ownership interest in BOX LLC.

Under Section 4.1(d)(i) and (ii), a BOX LLC Director would be removed from the BOX Board in the event such Director (i) has violated any provision of the Operating Agreement, or (ii) if the BOX Board determines that such action is necessary or appropriate in the public interest or for the protection of investors. In addition, under Section 4.2(a), each Director must comply with the federal securities laws and the rules and regulations thereunder and cooperate with the Commission and the BSE pursuant to their regulatory authority, and shall take into consideration whether his or her actions as a Director would cause BOX to engage in conduct that fosters and does not interfere with BOX's ability to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest.

The BSE believes that these rules would require all BOX LLC Directors, regardless of the nature of their association with the BSE, to adhere to regulatory responsibilities in that they must comply with federal securities laws and the rules and regulations thereunder, and cooperate with the Commission and the BSE pursuant to their regulatory authority. In addition, all Directors would be required to take into consideration and facilitate the BSE's and BOX's responsibility to comply with the requirements under Section 6(b)(5) of the Act. Directors that do not adhere to these requirements face termination from the BOX Board and possible sanctions by regulatory authorities.

Moreover, under Section 4.3(b), the owners of BOX LLC (''Members'') are prohibited from entering into voting trust agreements with respect to their ownership interest. The BSE believes that this rule protects the ability of the BSE, as well as other Members, to exercise its full ownership rights. In addition, as set forth in Section 4.4(a), no action with respect to any Major

[6] The term ''Options Participant'' or ''Participant'' means a firm or organization that is registered with the Exchange pursuant to Chapter II of the BOX Rules for purposes of participating in options trading on BOX as an ''Order Flow Provider'' or ''Market Maker.'' *See* proposed BOX Rules, Chapter I, *General Provisions*, § 1(a)(39) (definition of ''Options Participant'').

[7] *See* Securities Exchange Act Release No. 48229 (July 25, 2003), 68 FR 45284 (August 1, 2003) (SR–BSE–2003–04) (''BOX Delegation Plan Proposal'').

Action (as defined in Section 4.4(b)), shall be effective unless approved by a majority of the BOX Board, including the affirmative vote of all of the Directors designated by BSE. Thus, the BSE would have the authority to control the Major Actions of BOX LLC, especially as they relate to the regulatory responsibilities of the Exchange.

Article 5

Each Member shall comply with the federal securities laws and the rules and regulations thereunder; cooperate with the Commission and the BSE pursuant to their regulatory authority and the provisions of these BOX Rules; and engage in conduct that fosters and does not interfere with BOX's ability to prevent fraudulent and manipulative acts and practices; promote just and equitable principles of trade; foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, protect investors and the public interest.

Under Section 5.9, after appropriate notice and opportunity for hearing, the BOX Board, by a two-thirds vote, including the affirmative vote of the BSE Directors and excluding the vote of the Directors of such Member subject to sanction, may suspend or terminate a Member's voting privileges or ownership in the event such Member: (i) has violated any provision of the Agreement, or (ii) if the BOX Board determines that such action is necessary or appropriate in the public interest or for the protection of investors. The BSE believes that these provisions would require Members, regardless of the nature of their association with the BSE, to adhere to regulatory responsibilities in that they must comply with federal securities laws and the rules and regulations thereunder, and cooperate with the Commission and the BSE pursuant to their regulatory authority or face severe consequences such as termination of voting rights or ownership. In addition, the Members would be required to take into consideration and facilitate the BSE's and BOX's ability to comply with the requirements under Section 6(b)(5) of the Act.

Section 8.4(e)–(h)

BOX LLC shall provide the Commission with written notice ten (10) days prior to the closing date of any acquisition that results in a Member of BOX LLC's percentage ownership interest, alone or together with any Affiliate [8] of such Member, meeting or crossing the threshold level of 5% or the successive 5% percentage ownership interest levels of 10% and 15%. Under Section 8.4(f), any transfer of ownership interest that results in the acquisition and holding by any Member of BOX LLC, alone or together with any Affiliate of such Member, of an aggregate percentage ownership interest level which meets or crosses the threshold level of 20% or any successive 5% percentage ownership interest level (*i.e.*, 25%, 30%, etc.), is subject to the rule filing process pursuant to Section 19 of the Act. Further, any transfer of ownership interest that results in a reduction of the BSE's aggregate percentage ownership interest below the 20% threshold is also subject to the rule filing process pursuant to Section 19 of the Act.

Under this Section, whenever a Person [9] seeks to acquire an ownership interest in BOX LLC of 20% or greater, or a current Member seeks to increase its ownership interest to the 20% threshold or greater, such an acquisition must be subject to the rule filing process pursuant to Section 19 of the Act. In addition, when a Member who already holds over a 20% interest increases its ownership interest to the 25% threshold or any successive 5% percentage ownership interest level, such an acquisition must also be subject to the rule filing process pursuant to Section 19 of the Act. For example, if an entity owned a 28% interest in BOX LLC and bought an additional interest of 3%, then the acquisition would be subject to the rule filing process pursuant to Section 19 of the Act because the entity would hold a 31% interest after the transaction, thereby crossing the 30% ownership threshold. The BSE believes that this rule provides the Commission with the authority to review and subject to public comment any substantial transfer of ownership which the Commission may deem to have the potential to impact the Exchange's self-regulatory responsibilities regarding its proposed BOX facility.

Under Section 8.4(g), a ''controlling interest'' would be defined as the ownership by any Person, alone or together with any Affiliate of such Person, of a 25% or greater interest in a Member, and an ''Acquirer'' would be defined as a Person who, alone or together with any Affiliate of such Person, acquires a controlling interest in a Member. An Acquirer would be required to execute an amendment to the Agreement upon establishing a controlling interest in any Member who, alone or together with any Affiliate of such Member, holds a Percentage Interest in BOX equal to or greater than 20%. In such amendment, the Acquirer would agree to become a new party to the Operating Agreement and would agree to abide by all the provisions of the Agreement. Beginning after Commission approval of this filing, any amendment to the Agreement executed pursuant to this Section 8.4(g) would be subject to the rule filing process pursuant to Section 19 of the Act. The rights and privileges of the Member under the Agreement would be suspended until such time as the amendment has become effective pursuant to Section 19 of the Act or the Person no longer holds a controlling interest in the Member. For example, if Company XYZ owned a 20% interest in BOX LLC and Firm ABC acquired 25% of the shares of Company XYZ, then Firm ABC must sign an amendment to the Agreement whereby Firm ABC agrees to become a new party to the Agreement and abide by all the provisions of the Agreement. The amendment would be subject to the rule filing process pursuant to Section 19 of the Act.

The BSE believes that this provision provides the Commission with the authority to review and subject to public comment any substantial transfer of ownership that may effect the indirect control of BOX LLC and which the Commission may deem to have the potential to impact the Exchange's self-regulatory responsibilities regarding its proposed BOX facility.

Under Section 8.4(h) the BSE is specifically imposing a limit on voting rights (''voting collar'') on any Member who, alone or together with an Affiliate,

[8] ''*Affiliate*'' means, with respect to any Person, any other Person controlling, controlled by or under common control with, such Person. As used in this definition, the term ''control'' means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise with respect to such Person. A Person is presumed to control any other Person, if that Person: (i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); (ii) directly or indirectly has the right to vote 25 percent or more of a class of voting security or has the power to sell or direct the sale of 25 percent or more of a class of voting securities of the Person; or (iii) in the case of a partnership, has contributed, or has the right to receive upon dissolution, 25 percent or more of the capital of the partnership. *See* Operating Agreement, § 1.1, ''Definitions.''

[9] The term ''*Person*'' means any individual, partnership, corporation, association, trust, limited liability company, joint venture, unincorporated organization and any government, governmental department or agency or political subdivision thereof. *See* Operating Agreement, § 1.1, ''Definitions.''

owns in excess of 20% of the ownership units (''Units'') of BOX LLC and is approved by the BSE as an Options Participant on the BOX Market pursuant to the rules of the BSE. The Units owned by a Member in excess of 20% of the Units are referred to as ''Excess Units.'' No Member who is also an Options Participant would be permitted to vote or give proxy rights to vote with respect to the Excess Units. However, the Excess Units may be considered for quorum purposes of any meeting of the BOX Board, and shall be voted in the same proportion as the Units held by other Members are voted.

The BSE believes that this provision would specifically prevent any Member from exercising undue control over BOX LLC. By specifically imposing a voting collar on any Member who owns more than 20% of the Units of BOX LLC and who is also an Options Participant, the Exchange is ensuring that it is, in all cases, able to maintain proper control over the exercise of its regulatory functions in relation to BOX, and is not subject to influence that may be adverse to its regulatory responsibilities from a Member who may own a substantial number of the outstanding Units of BOX LLC. This provision, along with other related provisions relating to notice and rule filing requirements for any Member who acquires certain Percentage Interests in BOX LLC (*e.g.*, Section 8.4(g)) will serve to protect the sanctity of the Exchange's self-regulatory responsibilities and will allow the Commission to periodically review the ownership of BOX LLC.

Additionally, the BSE is proposing to extend a temporary exemption, until January 1, 2014, for Interactive Brokers, a Founding Member who is also an Options Participant of BOX, from the voting limitation on Excess Units, but only with respect to any vote regarding any merger, consolidation or dissolution of BOX or any sale of all or substantially all of the assets of BOX. This exemption is substantially similar to an exemption permitted for holders of Class A Common Stock on the International Securities Exchange when that organization restructured from an LLC to a Corporation.[10] The BSE believes that such an exemption provides IB with reasonable voting participation in Board matters concerning any merger, consolidation, or dissolution of BOX or any sale of all or substantially all of the assets of BOX, in light of IB's ownership interest in BOX LLC. Regardless of this exemption, however, as previously discussed, the BSE has the ultimate authority to veto any actions of the Board which conflict with its regulatory responsibilities.

Section 19.6(b)

The Members of BOX LLC, officers, directors, agents, and employees of such Members, including non-U.S. entities, irrevocably submit to the exclusive jurisdiction of the U.S. federal courts, the Commission, and the BSE, for the purposes of any suit, action or proceeding pursuant to U.S. federal securities laws, the rules or regulations thereunder, directly arising out of, or directly relating to, BOX activities or this proposed Chapter XIV of the BOX Rules, and hereby waives, and agrees not to assert by way of motion, as a defense or otherwise in any such suit, action, or proceeding, any claims that it is not personally subject to the jurisdiction of the Commission, that the suit, action, or proceeding is an inconvenient forum or that the venue of the suit, action, or proceeding is improper, or that the subject matter hereof may not be enforced in or by such courts or agency.

The Exchange believes that this provision would serve as notice to Members that they will be subject to the jurisdiction of the U.S. courts, the Commission, and the BSE. While Members may represent a diverse group of business interests, the BSE believes that it is imperative that regulatory cooperation is assured from all Members, regardless of each Member's business location, country of domicile, or other circumstance which the Commission may deem to have the potential to be adverse to the regulatory responsibilities and interests of the Exchange, the Commission, or the U.S. courts. Accordingly, this proposed provision, as also set forth in the Operating Agreement and ratified by each Member, ensures that, should an occasion arise which requires regulatory cooperation or jurisdictional submission from a Member, it would be forthcoming and uncontested.

2. Statutory Basis

The Exchange believes that this filing is consistent with Section 6(b) of the Act, in general, and furthers the objectives of Section 6(b)(1),[11] in particular, in that it enables the Exchange to be organized so as to have the capacity to be able to carry out the purposes of the Act and to comply, and (subject to any rule or order of the Commission pursuant to Section 17(d) or 19(g)(2) of the Act) to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange. The Exchange also believes that this filing furthers the objectives of Section 6(b)(5),[12] in particular, in that it is designed to facilitate transactions in securities; 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 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

The Exchange does not believe that the proposed rule change would 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

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exhange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of

[10] *See* Securities Exchange Act Release No. 45529 (March 8, 2002), 67 FR 11732 (March 15, 2002) (SR–ISE–2002–01).

[11] 15 U.S.C. 78f(b)(1).

[12] 15 U.S.C. 78f(b)(5).

the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filings will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–BSE–2003–19 and should be submitted by November 13, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–26746 Filed 10–22–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48646; File No. SR–NASD–2003–23]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. To Clarify the Applicability of the Nasdaq Corporate Governance Requirements During the Listing Review Process

October 16, 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 February 26, 2003, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On October 10, 2003, NASD, through Nasdaq, submitted Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to clarify the applicability of its corporate governance requirements during the listing review process.

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

4800. Procedures for Review of Nasdaq Listing Determinations

4810. Purpose and General Provisions

(a)–(d) No change.

(e) At each level of a proceeding under the Rule 4800 Series, the Listing Qualifications Panel, Listing Council, or NASD Board, as part of its respective review, may consider any failure to meet any quantitative standard or qualitative consideration set forth in the Rule 4000 Series, including failures previously not considered in the proceeding. *The Listing Council or the NASD Board, as part of its respective review, may also consider any action by an issuer during the review process that would have constituted a violation of Nasdaq's corporate governance requirements had the issuer's securities been listed on Nasdaq at the time.* The issuer will be afforded notice of such consideration and an opportunity to respond. [In this regard,] *Furthermore,* the issuer may be subject to additional or more stringent criteria for the initial or continued inclusion of particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued inclusion of the securities inadvisable or unwarranted in the opinion of the Association, even though the securities meet all enumerated criteria for initial or continued inclusion in The Nasdaq Stock Market.

* * * * *

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

The NASD Rule 4800 Series sets forth the procedures for the independent review of a staff determination prohibiting the listing of an issuer's securities. These rules provide that an issuer may appeal a staff determination to the Listing Qualifications Panel (''Panel''). Following a hearing, the Panel will issue a written decision that the issuer may appeal to the Listing and Hearing Review Council (''Listing Council''). Following its deliberations, the Listing Council will also issue a written decision. Although an issuer may not appeal a Listing Council decision to the NASD Board of Governors (''NASD Board''), the NASD Board may call a Listing Council decision for review.

Nasdaq rules further provide that while an appeal to the Panel will stay the delisting of an issuer's securities until a written decision is issued by the Panel, an appeal of a Panel decision to the Listing Council generally does not stay a delisting. Therefore, an issuer's securities generally will not be listed on Nasdaq during the time of the Listing Council's or the NASD Board's review of an appeal. Although NASD Rule 4810 currently provides that an issuer's failure to meet any quantitative standard or qualitative consideration may be considered at each level of the review process, Nasdaq proposes to clarify this rule by explicitly stating that the Listing Council and the NASD Board have the authority to consider any action undertaken by an issuer during the review process that would have constituted a violation of Nasdaq's corporate governance requirements if the issuer had been listed on Nasdaq at that time.[4] Nasdaq believes that this clarification is important so that issuers in the review process are aware of the necessity of their continued compliance with Nasdaq's corporate governance requirements.[5]

[13] 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 Mary M. Dunbar, Vice President and Deputy General Counsel, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated October 9, 2003 (''Amendment No. 1''). Amendment No. 1 replaces the original filing in its entirety.

[4] Nasdaq represents that before the Listing Council or the NASD Board considers any action by an issuer that would have constituted a violation of Nasdaq's corporate governance rules had it been listed, the issuer will be provided notice of such consideration and an opportunity to respond.

[5] Nasdaq represents that, of course, an issuer in the review process would also need to be in compliance with Nasdaq's quantitative requirements before it could be relisted as public investors rely on Nasdaq's listing standards and are

Continued

In order to assist issuers that are in the listing review process comply with Nasdaq's corporate governance requirements, such issuers may contact Nasdaq staff to request any necessary corporate governance interpretations or financial viability waivers.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,[6] in general and with section 15A(b)(6) of the Act,[7] in particular, in that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and, in general, to protect investors and the public interest. In particular, Nasdaq believes the proposed rule change will provide greater clarity and transparency for investors, issuers, and their counsel.

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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such 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–2003–23 and should be submitted by November 13, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–26709 Filed 10–22–03; 8:45 am]

BILLING CODE 8010–01–P

entitled to assume that listed securities meet its minimum listing requirements. See KLH Engineering Group, Inc., 52 S.E.C. 460 (1995); ORS Automation, Inc., 48 S.E.C. 490 (1986).

[6] 15 U.S.C. 78*o*–3.

[7] 15 U.S.C. 78*o*–3(b)(6).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48641; File No. SR–NASD–2003–148]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the NASD's Minor Rule Violation Plan and Late Fee Provision

October 16, 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 October 3, 2003, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD is proposing to amend Interpretative Material 9216 (IM–9216) and Schedule A of the NASD By-Laws (''Schedule A'') to clarify that a failure to timely file Schedule I, pursuant to Rule 17a–10 of the Act,[3] is eligible for disposition under the NASD's Minor Rule Violation Plan (''MRVP'' or ''the Plan'') and for assessment of a late fee. Below is the text of the proposed rule change. Proposed new language is *italicized;* proposed deletions are in brackets.

* * * * *

Schedule A to the NASD By-Laws

* * * * *

Section 4—Fees

(a)–(k) No Change.

(l) (1) Unless a specific temporary extension of time has been granted, there shall be imposed upon each member required to file reports, as designated by this paragraph, a fee of $100 for each day that such report is not timely filed. The fee will be assessed for a period not to exceed 10 business days. Requests for such extension of time must be submitted to NASD at least three business days prior to the due date; and

(2) Any report filed pursuant to this Rule containing material inaccuracies or filed incompletely shall be deemed not to have been filed until a corrected copy of the report has been resubmitted.

(3) List of Designated Reports:

(A) SEC Rule 17a–5—Monthly and quarterly FOCUS reports and annual audit reports[.]*; and*

(B) SEC Rule 17a–10–Schedule I.

* * * * *

9200. Disciplinary Proceedings

* * * * *

IM–9216. Violations Appropriate for Disposition Under Plan Pursuant to SEC Rule 19d–1(c)(2)

—Rules 2210(b) and (c) and Rules 2220(b) and (c)—Failure to have advertisements and sales literature approved by a principal prior to use, failure to maintain separate files of advertisements and sales literature containing required information, and failure to file communications with NASD within the required time limits.

—Rule 3360—Failure to timely file reports of short positions on Form NS–1.

—Rule 3110—Failure to keep and preserve books, accounts, records,

[3] 17 CFR 240.17a–10.

memoranda, and correspondence in conformance with applicable laws, rules, regulations and statements of policy promulgated thereunder, and with NASD Rules.

—Rule 8211, Rule 8212, and Rule 8213—Failure to submit trading data as requested.

—Article IV—Failure to timely submit amendments to Form BD.

—Article V—Failure to timely submit amendments to Form U–4.

—Rule 1120—Failure to comply with continuing education requirements (Firm Element).

—Rule 3010(b)(2)(vii)—Failure to timely file reports pursuant to the Taping Rule.

—Rule 3070—Failure to timely file reports.

—Rule 4619(d)—Failure to timely file notifications pursuant to SEC Regulation M.

—Rules 4632, 4642, 4652, 6240, 6420, 6620, 6650, and 6720—Transaction reporting in equity, convertible debt, and high yield securities.

—Rules 6130 and 6170—Transaction reporting to ACT.

—Rules 6954 and 6955—Failure to submit data in accordance with OATS.

—Rule 11870—Failure to abide by customer account transfer contracts.

—SEC Rule 11Ac1–4—Failure to properly display limit orders.

—SEC Rule 11Ac1–1(c)(5)—Failure to properly update published quotes in certain ECNs.

—SEC Exchange Act Rule 17a–5—Failure to timely file FOCUS reports and annual audit reports.

—*SEC Exchange Act Rule 17a–10—Failure to timely file Schedule I.*

—MSRB Rule A–14—Failure to pay annual fee.

—MSRB Rule G–12—Failure to abide by uniform practice rules.

—MSRB Rule G–14—Failure to submit reports.

—MSRB Rule G–36—Failure to timely submit reports.

—MSRB Rule G–37—Failure to timely submit reports for political contributions.

—MSRB Rule G–38—Failure to timely submit reports detailing consultant activities.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD 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

The purpose of this proposed rule change is to clarify that a member's failure to timely file Schedule I, pursuant to Rule 17a–10 of the Act,[4] is appropriate for disposition under the NASD's MRVP and that such member may be assessed a late fee under Schedule A. As described in more detail herein, the NASD believes that the current rule language in IM–9216 and Schedule A referring to Rule 17a–5 of the Act—FOCUS Report, does not clearly reflect that a failure to timely file Schedule I is included in the NASD's MRVP and late fee provision.

NASD's Minor Rule Violation Plan

In 1984, the Commission adopted amendments to Rule 19d–1(c) of the Act[5] to allow self-regulatory organizations to adopt, with Commission approval, plans for the disposition of minor violations of rules.[6] In 1993, pursuant to Rule 19d–1(c) of the Act,[7] the NASD established a MRVP.[8] *See* NASD Rule 9216(b). In 2001, the Commission approved amendments to the NASD's MRVP.[9]

NASD Rule 9216(b) authorizes the NASD to impose a fine of $2,500 or less on any member or associated person of a member for a violation of any of the rules specified in NASD IM–9216. NASD staff reviews the number and seriousness of the violations, as well as the previous disciplinary history of the respondent to determine if a matter is appropriate for disposition under the Plan and to determine the amount of the fine. Once the NASD has brought a minor violation of a rule against an individual or member firm, the NASD may, at its discretion, issue progressively higher fines for all subsequent minor violations of rules within the next 24-month period or initiate more formal disciplinary proceedings.

The purpose of the MRVP is to provide for a meaningful sanction for the minor or technical violation of a rule when the initiation of a disciplinary proceeding through the formal complaint process would be more costly and time-consuming than would be warranted. Inclusion of a rule in the NASD's MRVP does not mean it is an unimportant rule; rather, a minor or technical violation of the rule may be appropriate for disposition under the MRVP. The NASD retains the discretion to bring full disciplinary proceedings.

One violation eligible for disposition under the MRVP is listed in IM–9216 as ''SEC Exchange Act Rule 17a–5—failure to timely file FOCUS reports and annual audit reports.'' Even though Schedule I is part of the FOCUS report, it is technically filed pursuant to Rule 17a–10 of the Act,[10] not Rule 17a–5 of the Act.[11] As a result, some members may conclude that the failure to file Schedule I does not qualify for the NASD's MRVP. This is incorrect. The NASD believes that there is ample evidence to suggest that Schedule I, which is part of the FOCUS report, ought to be included in the MRVP.[12] In its 2001 rule filing expanding the MRVP (and late fee provision) to include late FOCUS reports, the NASD did not intend to exempt portions of the FOCUS report, such as Schedule I. To hold otherwise would allow the NASD to impose minor rule violations for only parts of the FOCUS report. Nevertheless, for purposes of clarity, the proposed rule change amends IM–9216 to make clear that a failure to timely file Schedule I is eligible for disposition under the MRVP.

Late Fees

In 2001, the Commission also approved amendments to Schedule A of the NASD By-laws that provide for the

[4] 17 CFR 240.17a–10.

[5] 17 CFR 240.19d–1(c).

[6] *See* Securities Exchange Act Release No. 21013 (June 1, 1984), 49 FR 23833 (June 8, 1994).

[7] 17 CFR 240.19d–1(c).

[8] *See* Securities Exchange Act Release No. 32076 (March 31, 1993), 58 FR 18291 (April 8, 1993)(SR–NASD–93–6); see also Notice to Members 93–42 (July 1993).

[9] *See* Securities Exchange Act Release No. 44512 (July 3, 2001), 68 FR 36812 (July 13, 2001)(SR–NASD–00–39).

[10] 17 CFR 240.17a–10.

[11] 17 CFR 240.17a–5.

[12] The rule text of Rule 17a–10 under the Act specifically refers to Schedule I as being part of Form X–17A–5, the FOCUS Report. *See, e.g.*, Rule 17a–10(a)(1) of the Act (''Every broker or dealer exempted from the filing requirements of paragraph (a) of Rule 17a–5 shall, not later than 17 business days after the close of each calendar year, file * * * Schedule I of Form X–17A–5 for such calendar year.''); *see also* Rule 17a–10(a)(2) under the Act. In addition, the Commission characterizes Schedule I as being a supplement to the FOCUS report. *See* FOCUS Reporting System, Securities Exchange Act Release No. 13462 (Apr. 22, 1977), 12 S.E.C. Docket 156; Securities Exchange Act Release No. 13100 (Dec. 22, 1976), 42 FR 782 (January 4, 1977) (approving proposed Commission rule amendments).

mandatory assessment of late fees for a failure to timely file certain documents.[13] The late fees are automatically imposed and assessed on a per-day basis for a period of not more than 10 business days. Late fees are administrative rather than disciplinary in nature. NASD staff, however, may institute disciplinary proceedings concerning late filings if the circumstances so warrant. Currently, Schedule A, Section 4, Paragraph (l)(3) designates FOCUS reports and annual audit reports as documents that are eligible for the late fee provision.[14] Specifically, this late fee provision applies to ''SEC Rule 17a–5—monthly and quarterly FOCUS reports and annual audit reports.'' For the same reasons stated above, the NASD proposes to amend Schedule A to make clear that a member may be assessed a late fee for failing to timely file Schedule I of the FOCUS report.

2. Statutory Basis

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[15] which requires, among other things, that the NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The NASD believes that this proposed rule change is necessary to clarify that a failure to timely file Schedule I is included in the NASD's MRVP and late fee provision under Schedule A.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD 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.

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.

[13] *See* Securities Exchange Act Release No. 44512 (July 3, 2001), 68 FR 36812 (July 13, 2001).

[14] Schedule A, Section 4, Paragraph (b)(2) contains a separate late fee provision for late filings of the Uniform Termination Notice for Security Industry Registration (''Form U–5''). Unlike the late fee provision in paragraph (l), the Form U–5 late fee provision provides for a one-time assessment of a late fee.

[15] 15 U.S.C. 78*o*–3(b)(6).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is effective pursuant to Section 19(b)(3)(A)(i) of the Act[16] and subparagraph (f)(1) of Rule 19b–4 thereunder,[17] in that the foregoing proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization. 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–2003–148 and should be submitted by November 13, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[18]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–26711 Filed 10–22–03; 8:45 am]

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[16] 15 U.S.C. 78s(b)(3)(A)(i).

[17] 17 CFR 240.19b–4(f)(1).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48651; File No. SR–NASD–2003–07]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Amend Rules 1011, 1014 and 1017

October 17, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 17, 2003, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD.[3] On September 17, 2003, NASD filed Amendment No. 1 to the proposed rule change.[4] On October 16, 2003, NASD filed Amendment No. 2 to the proposed rule change.[5] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Below is the text of the proposed rule change. Proposed new language is in *italics*; proposed deletions are in [brackets].

* * * * *

1010. Membership Proceedings

1011. Definitions

(a) No Change.

(b) ''Associated Person''

[The term ''Associated Person'' means: (1) A natural person registered under the Rules of the Association; or (2) a sole proprietor, partner, officer, director, branch manager, or other natural person occupying a similar status or performing similar functions who will be or is anticipated to be

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Commission staff made certain typographical changes to this Notice with the consent of NASD. Telephone conversation between Kosha K. Dalal, Assistant General Counsel, NASD, and Andrew Shipe, Special Counsel, Division of Market Regulation (''Division''), Commission, September 23, 2003.

[4] *See* letter from Kosha K. Dalal, Assistant General Counsel, NASD, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated September 16, 2003.

[5] *See* letter from Kosha K. Dalal, Assistant General Counsel, NASD, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated October 15, 2003.

associated with the Applicant, or a natural person engaged in the investment banking or securities business who will be or is anticipated to be directly or indirectly controlling or controlled by the Applicant, whether or not any such person is registered or exempt from registration under the NASD By-Laws or the Rules of the Association.]

The term ''Associated Person'' means: (1) A natural person registered under NASD Rules; or (2) a sole proprietor, or any partner, officer, director, branch manager of the Applicant, or any person occupying a similar status or performing similar functions; (3) any company, government or political subdivision or agency or instrumentality of a government controlled by or controlling the Applicant; (4) any employee of the Applicant, except any person whose functions are solely clerical or ministerial; (5) any person directly or indirectly controlling the Applicant whether or not such person is registered or exempt from registration under NASD By-Laws or NASD Rules; (6) any person engaged in investment banking or securities business controlled directly or indirectly by the Applicant whether such person is registered or exempt from registration under NASD By-Laws or NASD Rules; or (7) any person who will be or is anticipated to be a person described in (1) through (6) above.

(c) through (n)—No Change.

* * * * *

1014. Department Decision

(a) Standards for Admission

After considering the application, the membership interview, other information and documents provided by the Applicant, other information and documents obtained by the Department, and the public interest and the protection of investors, the Department shall determine whether the Applicant meets each of the following standards:

(1) through (2)—No Change.

(3) The Applicant and its Associated Persons are capable of complying with the federal securities laws, the rules and regulations thereunder, and [the] *NASD* Rules [of the Association], including observing high standards of commercial honor and just and equitable principles of trade. In determining whether this standard is met, the Department [may] *shall* take into consideration whether:

(A) a state or federal authority or self-regulatory organization has taken permanent or temporary adverse action with respect to a registration or licensing determination regarding the Applicant or an Associated Person;

(B) an Applicant's or Associated Person's record reflects a sales practice event, *a pending arbitration, or a pending private civil action;*

(C) an Applicant or Associated Person is the subject of a pending, adjudicated, or settled regulatory action or investigation by the Commission, the Commodity Futures Trading Commission, a federal, state, or foreign regulatory agency, or a self-regulatory organization; [a pending,] *an* adjudicated, or settled investment-related *private* civil action for damages or an injunction; or a criminal action (other than a minor traffic violation) that is pending, adjudicated, or that has resulted in a guilty or no contest plea; *or an Applicant, its control persons, principals, registered representatives, other Associated Persons, any lender of 5% or more of the Applicant's net capital, and any other member with respect to which these persons were a control person or a 5% lender of its net capital is subject to unpaid arbitration awards, other adjudicated customer awards, or unpaid arbitration settlements;*

(D) an Associated Person was terminated for cause or permitted to resign after an investigation of an alleged violation of a federal or state securities law, a rule or regulation thereunder, a self-regulatory organization rule, or industry standard of conduct;

(E) a state or federal authority or self-regulatory organization has imposed remedial action, such as special training, continuing education requirements, or heightened supervision, on an Associated Person; and

(F) a state or federal authority or self-regulatory organization has provided information indicating that the Applicant or an Associated Person otherwise poses a threat to public investors.

(4) The Applicant has established all contractual or other arrangements and business relationships with banks, clearing corporations, service bureaus, or others necessary to:

(A) initiate the operations described in the Applicant's business plan, considering the nature and scope of operations and the number of personnel; and

(B) comply with the federal securities laws, the rules and regulations thereunder, and [the] *NASD* Rules [of the Association].

(5) The Applicant has or has adequate plans to obtain facilities that are sufficient to:

(A) initiate the operations described in the Applicant's business plan, considering the nature and scope of operations and the number of personnel; and

(B) comply with the federal securities laws, the rules and regulations thereunder, and [the] *NASD* Rules [of the Association].

(6)–(7) No Change.

(8) The applicant has financial controls to ensure compliance with the federal securities laws, the rules and regulations thereunder, and [the] *NASD* Rules [of the Association].

(9) No Change.

(10) The Applicant has a supervisory system, including written supervisory procedures, internal operating procedures (including operational and internal controls), and compliance procedures designed to prevent and detect, to the extent practicable, violations of the federal securities laws, the rules and regulations thereunder, and [the] NASD Rules [of the Association]. In evaluating the adequacy of a supervisory system, the Department shall consider the overall nature and scope of the Applicant's intended business operations and shall consider whether:

(A) the number, location, experience, and qualifications of supervisory personnel are adequate in light of the number, location, experience, and qualifications of persons to be supervised; the Central Registration Depository record or other disciplinary history of supervisory personnel and persons to be supervised; and the number and locations of the offices that the Applicant intends to open and the nature and scope of business to the conducted at each office;

(B) the Applicant has identified specific Associated Persons to supervise and discharge each of the functions in *the* Applicant's business plan, and to supervise each of the Applicant's intended offices, whether or not such offices are required to be registered under [the] *NASD* Rules [of the Association];

(C) the Applicant has identified the functions to be performed by each Associated Person and has adopted procedures to assure the registration with *NASD* [the Association] and applicable states of all persons whose functions are subject to such registration requirements[.]*;*

(D) each Associated Person identified in the business plan to discharge a supervisory function has at least one year of direct experience or two years of related experience in the subject area to be supervised;

(E) the Applicant will solicit retail or institutional business;

(F) the Applicant will recommend securities to customers;

(G) the location or part-time status of a supervisor or principal will affect such person's ability to be an effective supervisor;

(H) the Applicant should be required to place one or more Associated Persons under heightened supervision pursuant to Notice to Members 97–19;

(I) any remedial action, such as special training or continuing education requirements or heightened supervision, has been imposed on an Associated Person by a state or federal authority or self-regulatory organization; and

(J) any other condition that will have material impact on the Applicant's ability to detect and prevent violations of the federal securities laws, the rules and regulations thereunder, and [the] *NASD* Rules [of the Association].

(11) No Change.

(12) The Applicant has completed a training needs assessment and has a written training plan that complies with the continuing education requirements imposed by the federal securities laws, the rules and regulations thereunder, and [the] *NASD* Rules [of the Association].

(13) *NASD* [The Association] does not possess any information indicating that the Applicant may circumvent, evade, or otherwise avoid compliance with the federal securities laws, the rules and regulations thereunder, or [the] *NASD* Rules [of the Association].

(14) The application and all supporting documents otherwise are consistent with the federal securities laws, the rules and regulations thereunder, and [the] *NASD* Rules [of the Association].

(b) Granting or Denying Application

(1) In reviewing an application for membership, the Department shall consider whether the Applicant and its Associated Persons meet each of the standards in paragraph (a). Where the Department determines that the Applicant or its Associated Persons are the subject of any of the events set forth in Rule 1014(a)(3)(A) and (C) through (E), a presumption exists that the application should be denied. The Applicant may overcome the presumption by demonstrating that it can meet each of the standards in paragraph (a), notwithstanding the existence of any of the events set forth in Rule 1014(a)(3)(A) and (C) through (E).

(2) [(1)] If the Department determines that the Applicant meets each of the standards in paragraph (a), the Department shall grant the application for membership.

(3) [(2)] If the Department determines that the Applicant does not meet one or more of the standards in paragraph (a) in whole or in part, the Department shall:

(A) grant the application subject to one or more restrictions reasonably designed to address a specific financial, operational, supervisory, disciplinary, investor protection, or other regulatory concern based on the standards for admission in Rule 1014(a); or

(B) deny the application.

(c)–(d) No Change.

(e) Service and Effectiveness of Decision

The Department shall serve its decision and the membership agreement on the Applicant in accordance with Rule 1012. The decision shall become effective upon service and shall remain in effect during the pendency of any review until a decision constituting final action of *NASD* [the Association] is issued under Rule 1015 or 1016, unless otherwise directed by the National Adjudicatory Council, the NASD Board, or the Commission.

(f) No Change.

(g) Final Action

Unless the Applicant files a written request for a review under Rule 1015, the Department's decision shall constitute final action by *NASD* [the Association].

* * * * *

1017. Applications for Approval of Change in Ownership, Control, or Business Operations

(a) Events Requiring Application

A member shall file an application for approval of any of the following changes to its ownership, control, or business operations:

(1) a merger of the member with another member, unless both are members of the New York Stock Exchange, Inc. or the surviving entity will continue to be a member of the New York Stock Exchange, Inc.;

(2) a direct or indirect acquisition by the member of another member, unless the acquiring member is a member of the New York Stock Exchange, Inc.;

(3)[a] direct or indirect acquisition*s or transfers* of *25% or more in the aggregate* [substantially all] of the member's assets *or any asset, business or line of operation that generates revenues comprising 25% or more in the aggregate of the member's earnings measured on a rolling 36-month basis,* unless *both the seller and acquirer are members* [the acquirer is a member] of the New York Stock Exchange, Inc.;

(4) a change in the equity ownership or partnership capital of the member that results in one person or entity directly or indirectly owning or controlling 25 percent or more of the equity or partnership capital; or

(5) a material change in business operations as defined in Rule 1011(i).

(b)–(f) No Change.

(g) Department Decision

(1) The Department shall consider the application, the membership interview, other information and documents provided by the Applicant or obtained by the Department, the public interest, and the protection of investors. *In rendering a decision on an application submitted under Rule 1017(a), the Department shall consider whether the Applicant and its Associated Persons meet each of the standards in Rule 1014(a). Where the Department determines that the Applicant or its Associated Persons are the subject of any of the events set forth in Rule 1014(a)(3)(A) and (C) through (E), a presumption exists that the application should be denied. The Applicant may overcome the presumption by demonstrating that it can meet each of the standards in Rule 1014(a), notwithstanding the existence of any of the events set forth in Rule 1014(a)(3)(A) and (C) through (E).*

(A) In rendering a decision on an application for approval of a change in ownership or control, or an application for approval of a material change in business operations that does not involve modification or removal of a membership agreement restriction, the Department shall determine if the Applicant would continue to meet the standards in Rule 1014(a) upon approval of the application.

(B) In rendering a decision on an application requesting the modification or removal of a membership agreement restriction, the Department shall consider whether the maintenance of the restriction is appropriate in light of:

(i) the standards set forth in Rule 1014;

(ii) the circumstances that gave rise to the imposition of the restriction;

(iii) the Applicant's operations since the restriction was imposed;

(iv) any change in ownership or control or supervisors and principals; and

(v) any new evidence submitted in connection with the application.

(2)–(4) No Change.

(h) Service and Effectiveness of Decision

The Department shall serve its decision on the Applicant in accordance with Rule 1012. The decision shall become effective upon service and shall remain in effect during the pendency of any review until a decision constituting final action of *NASD* [the Association] is [served] *issued* under Rule 1015 or 1016, unless otherwise directed by the

National Adjudicatory Council, the NASD Board, or the Commission.

(i) Request for Review; Final Action

An Applicant may file a written request for review of the Department's decision with the National Adjudicatory Council pursuant to Rule 1015. The procedures set forth in Rule 1015 shall apply to such review, and the National Adjudicatory Council's decision shall be subject to discretionary review by the NASD Board pursuant to Rule 1016. If the Applicant does not file a request for review, the Department's decision shall constitute final action by *NASD* [the Association].

(j)–(k) No Change.

* * * * *

I. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The membership application and membership continuation processes have played an important role in investor protection by helping to ensure that new members and members that make a material change to their business comply or continue to comply with rigorous standards. Rule 1014, which sets forth the standards used when reviewing new member and continuing member applications, specifically requires NASD to consider the public interest and protection of investors when reviewing applications.

Recently, there has been an increase in company restructurings, including the selling of company assets. Asset transfer applications filed pursuant to Rule 1017 are often time-sensitive and may be the first step in a member's withdrawal from the securities business. While asset transfers often serve legitimate business purposes, they also can raise customer protection issues. NASD has encountered several instances where the effect of a member attempting to restructure by transferring assets is to insulate the member and its owners from responsibility for payment of pending or unpaid arbitrations. Some firms may choose to transfer their assets without a corresponding transfer of their liabilities. Because the corporate format used by many firms insulates the owners from liabilities of the firm, a customer with an award or judgment against the firm may only be able to be paid from the firm's assets. Thus an asset transfer may transform the firm from an operating business that can generate value over time to a shell holding the firm's liquidated value, leaving behind customers with arbitration claims pending against, or arbitration awards unsatisfied by, a firm.

In light of the customer protection concerns raised in the application process, NASD is proposing a rule change that would clarify and expand NASD's authority to identify and respond to changes in a firm that may not account for pending arbitrations and customer claims.

1. Review of Material Transfer of Member's Assets

Applications submitted pursuant to Rule 1017 provide NASD with the opportunity to review member transactions that can materially adversely affect current and former customers. Rule 1017(a)(3) requires a member to submit an application upon the acquisition of substantially all of the member's assets. However, this may potentially eliminate from NASD's review a member's piecemeal sale of its assets that, while not ''substantially all'' in amount, may nevertheless have a material impact on the operations or profitability of the selling member.

The proposed rule change would clarify that Rule 1017(a)(3) applies to transfers as well as to sales of a firm's assets, including sales and transfers of assets to an affiliated entity. The proposed rule change also would broaden the scope of Rule 1017(a)(3). In Notice to Members 02–54 (August 2002), which NASD issued to solicit comment on the proposed membership application rules, the proposal set forth in the Notice required members to submit applications prior to the transfer of a material amount of the member's assets or prior to the transfer of any asset, business or line of operation that generates revenues comprising a material portion of the selling member's earnings. Based on the comments received in response to the Notice, as discussed further in Item II C, below, NASD has revised the proposed rule change to include a more objective standard based on the percentage of assets transferred. The revised proposed rule change would require members to submit applications prior to the sale or transfer of 25% or more of the member's assets or any asset, business or line of operation that generates revenues of 25% or greater of the selling member's earnings over a rolling 36-month period. The 36-month period would be measured backwards from the date that the member initially notifies NASD of its intent to sell or transfer assets by submitting an application pursuant to Rule 1017.[6]

2. Clarification of Members Required to Submit Applications

Because of concerns that a selling member's customers may be left unprotected following an asset transfer, the seller's situation should be reviewed in connection with all such transactions. Rule 1017(a) currently exempts selling members from the requirement to submit applications if the acquiring firm is a member of the NYSE. The proposed rule change would require all non-NYSE selling members to submit an application regardless of whether the acquiring firm is a NYSE member. The proposed rule change is not intended to put applicants through duplicative approval processes where the transaction is otherwise subject to adequate customer protection safeguards. Rather, in requiring an application regardless of whether the acquirer is a member of the NYSE, NASD will be assured of receiving notice and will be in a position to target particular aspects of the transaction for additional review, if necessary.

3. Consideration of Arbitrations in Application Process

To encourage compliance with the terms of arbitration and other adjudicated customer awards, the proposed rule change would amend Rule 1014(a)(3) to include as specific factors in the consideration of both new and continuing member applications unpaid arbitration awards, other adjudicated customer awards against an applicant and other persons that may have significant control or influence over the applicant, including its controlling persons, principals, registered representatives, other Associated Persons, any lender of 5% or more of the applicant's net capital, and any other member with respect to which these persons were a controlling person or a 5% lender of its net capital. Currently, NASD Rule 2110 would apply to efforts by a firm and its owners to unfairly prejudice customers seeking

[6] In situations where NASD does not receive notice, the 36-month period will be measured from the date when notice was due. *See* Rule 1017(c)(1).

relief in arbitration proceedings and thus this is a cognizable factor in membership decisions. The proposed rule change would more explicitly make this part of the membership decisional criteria.

4. Burden of Proof

NASD has seen instances where an applicant (both new member and change of ownership/control) has a disciplinary history of some concern that falls short of a statutory disqualification. Many of these cases involve applications from closely held firms where, even if the broker/dealer establishes heightened supervisory procedures, the influence of the control person on the small broker/dealer may overcome the supervisory structures. Rule 1014(a)(3) requires NASD to determine whether an applicant and its associated persons ''are capable of complying with'' federal securities laws and the rules of NASD. A variety of specific events, including past and current disciplinary actions and customer claims, are among the considerations referenced in the rule.

To further enhance NASD's authority under Rule 1014(a) to consider the impact of an applicant's past behavior, the proposed rule change would create a rebuttable presumption that the application should be denied when any of the events enumerated in Rule 1014(a)(3)(A) and (C) through (E) are present. An Applicant may overcome the presumption by demonstrating to the Department that it can meet each of the standards in Rule 1014(a). In determining whether an Applicant has overcome the presumption, NASD staff will consider the Applicant's submission in light of the specific standards of Rule 1014(a), the public interest, protection of investors, and NASD's responsibility to provide a fair procedure in accordance with its membership rules. The rebuttable presumption would not create new standards for admission, but would merely clarify that applicants with certain regulatory history must affirmatively demonstrate that they should be allowed admission.

5. Applicability of Rule to Non-Natural Persons

The proposed rule change would amend Rule 1011 to amend the definition of ''Associated Person'' to, among other things, include a reference to non-natural controlling persons in light of the fact that NASD's current definition of ''associated persons'' does not encompass non-natural persons. The amended definition would apply to the entire Rule 1010 Series and provide for consistency in the membership application process. NASD may consider in the future whether to expand the definition of ''associated persons'' more generally to include non-natural persons.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[7] which require, among other things, that NASD's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change will improve its ability to detect and prevent conduct that can be harmful to public investors.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD 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

The proposed rule change was published for comment in NASD Notice to Members 02–54 (August 2002). Seven comments were received in response to the Notice.[8] Of the seven comment letters received, six were in favor of the proposed rule change and the seventh, while not opposed to the proposed rule change, expressed concerns that the proposed rule change would not be able to accomplish its objectives. The commenter expressed doubts about NASD's ability to monitor asset transfers and further believed that the amendments may be unnecessary as a plaintiff's attorney often had other means to recover judgments.[9] A summary of the comments received is set forth below.

Review of Material Transfer of Member's Assets

Five of the commenters supported the proposal to require firms to submit an application prior to the transfer of a material amount of the member's assets or prior to the transfer of any asset, business or line of operation that generates revenues comprising a material portion of the selling member's earnings.[10] While supporting the proposal, one commenter noted that the proposed rule change should only apply to full service firms with specified minimum revenues, and not to advisory firms that do not handle customer accounts, cash or have retail customers.[11] While not opposing the proposal, another commenter questioned whether NASD would be able to monitor these types of asset transfers and noted that requiring reviews of these types of transactions might force a firm into liquidation.[12]

All six commenters who responded to the question of whether materiality should be more clearly defined agreed that the Rules should include a more specific definition of materiality.[13] One commenter stated that a more specific plain English standard would help prevent confusion and errors.[14] A second commenter suggested a minimum of 15% and a maximum of 25% standard.[15] A third commenter noted that while a more specific standard would help ensure compliance, a standard that is too specific might make it easier for people to circumvent the rule. This same commenter also suggested that the definition of materiality include a time component as well as a percentage component to address concerns of ''piecemeal'' transfers (*e.g.*, X% or greater if no other transfer has occurred within the last Y years or X/Y% if any such transfer has occurred within the last Y years).[16] As described in Item II A of this Notice, in response to the comments received, NASD has revised

[7] 15 U.S.C. 78o–3(b)(6).

[8] *See* comment letters from Anonymous, dated September 13, 2002; Anonymous, dated September 18, 2002; Anderson Corporate Finance, LLC, dated August 28, 2002; Associated Securities Corp., dated September 11, 2002; Canaccord Capital Corporation, USA, dated September 20, 2002; Kirk Securities Corporation, dated September 17, 2002; and Rhodes Securities, Inc. dated September 16, 2002.

[9] *See* comment letter from Associated Securities Corp., dated September 11, 2002.

[10] *See* comment letters from Anonymous, dated September 18, 2002; Anderson Corporate Finance, LLC, dated August 28, 2002; Canaccord Capital Corporation, USA, dated September 20, 2002; Kirk Securities Corporation, dated September 17, 2002; and Rhodes Securities, Inc., dated September 16, 2002.

[11] *See* comment letter from Anonymous, dated September 13, 2002.

[12] *See* comment letter from Associated Securities Corp., dated September 11, 2002.

[13] *See* comment letters from Anonymous, dated September 13, 2002; Anonymous, dated September 18, 2002; Anderson Corporate Finance, LLC, dated August 28, 2002; Canaccord Capital Corporation, USA, dated September 20, 2002; Kirk Securities Corporation, dated September 17, 2002; and Rhodes Securities, Inc., dated September 16, 2002.

[14] *See* comment letter from Canaccord Capital Corporation, USA, dated September 20, 2002.

[15] *See* comment letter from Kirk Securities Corporation, dated September 17, 2002.

[16] *See* comment letter from Anderson Corporate Finance, LLC, dated August 28, 2002.

its proposed rule change to include a more specific definition of materiality.

Of the six commenters who responded, five commenters thought that NASD should review other types of transactions not currently included in Rule 1014 or the rule proposal.[17] One commenter believed that NASD should review all types of transactions commonly used to avoid liability and regulation,[18] and a second commenter thought that the rule should be broad enough to allow NASD to review any transaction that could have an adverse effect on the payment of arbitration awards and other customer claims.[19] One commenter did not think NASD should review other types of transactions.[20] NASD has determined not to expand its review to other types of transactions. Not only does the proposed rule change capture a much broader range of identifiable transactions that can cause potential customer harm, but there are also other means to capture violations outside of the membership application process. However, NASD may consider reviewing other types of transactions if it determines that any such transactions particularly raise investor protection issues.

A. Clarification of Members Required To Submit Applications

With respect to the proposal to require all non-NYSE selling members to submit an application to NASD regardless of whether the buyer is an NYSE member, a slight majority of the commenters supported the proposal. Of the six commenters who responded, four commenters supported the proposal.[21] One commenter believed this type of review would help regulators better coordinate among themselves.[22] Two commenters opposed this proposal.[23] One commenter believed that an NASD review should depend upon the types of assets and scope of the transactions.[24]

B. Burden of Proof

All the commenters supported the proposal that applicants bear the burden of proof to demonstrate that they should be approved for membership despite the presence of a regulatory history. Six of the commenters also responded to whether it is appropriate to impose the burden of proof for pending matters such as pending investigations and arbitrations.[25] Of the six who responded, five thought it was appropriate to extend the language to pending investigations and arbitrations.[26] One commenter thought it was inappropriate.[27]

Expansion of Scope of Rule 1014 To Include Non-Natural Persons

All six commenters who responded to the proposal to expand Rule 1014 to include non-natural persons supported the proposal.[28] One commenter noted that the proposed rule change would clarify any confusion.[29]

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–2003–07 and should be submitted by November 13, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[30]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–26743 Filed 10–22–03; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48656; File No. SR–NASD–2003–139]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Relating to Technical Amendments to Rule 2710

October 17, 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 September 12, 2003, the National Association of Securities Dealers, Inc. (''NASD'') submitted to 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 NASD. On October 16, 2003, NASD

[17] *See* comment letters from Anonymous, dated September 18, 2002; Anderson Corporate Finance, LLC, dated August 28, 2002; Canaccord Capital Corporation, USA, dated September 20, 2002; Kirk Securities Corporation, dated September 17, 2002; and Rhodes Securities, Inc., dated September 16, 2002.

[18] *See* comment letter from Kirk Securities Corporation, dated September 17, 2002.

[19] *See* comment letter from Anderson Corporate Finance, LLC, dated August 28, 2002.

[20] *See* comment letter from Anonymous, dated September 13, 2002.

[21] *See* comment letters from Anonymous, dated September 18, 2002; Anderson Corporate Finance, LLC, dated August 28, 2002; Kirk Securities Corporation, dated September 17, 2002; and Rhodes Securities, Inc., dated September 16, 2002.

[22] *See* comment letter from Kirk Securities Corporation, dated September 17, 2002.

[23] *See* comment letters from Anonymous, dated September 13, 2002; and Canaccord Capital Corporation, USA, dated September 20, 2002.

[24] *See* comment letter from Canaccord Capital Corporation, USA, dated September 20, 2002.

[25] *See* comment letters from Anonymous, dated September 13, 2002; Anonymous, dated September 18, 2002; Anderson Corporate Finance, LLC, dated August 28, 2002; Canaccord Capital Corporation, USA, dated September 20, 2002; Kirk Securities Corporation, dated September 17, 2002; and Rhodes Securities, Inc., dated September 16, 2002.

[26] *See* comment letters from Anonymous, dated September 13, 2002; Anonymous, dated September 18, 2002; Anderson Corporate Finance, LLC, dated August 28, 2002; Canaccord Capital Corporation, USA, dated September 20, 2002; and Kirk Securities Corporation, dated September 17, 2002.

[27] *See* comment letter from Anderson Corporate Finance, LLC, dated August 28, 2002.

[28] *See* comment letters from Anonymous, dated September 13, 2002; and Canaccord Capital Corporation, USA, dated September 20, 2002.

[29] *See* comment letter from Anderson Corporate Finance, LLC, dated August 28, 2002.

[30] 17 CFR 200.30–3(a)(12)

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

filed Amendment No. 1 to the proposed rule change.[3] NASD has designated the proposed rule change as ''non-controversial'' under section 19(b)(3)(A) of the Act[4] and Rule 19b–4(f)(6) thereunder,[5] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD is proposing to amend NASD Rule 2710 to delete certain unnecessary rule language that was mistakenly proposed in amendments to Rule 2710 for which the Commission recently published notice of immediate effectiveness. The text of the proposed rule change, as amended, is set forth below. Proposed deletions are in [brackets].

* * * * *

2710. Corporate Financing Rule—Underwriting Terms and Arrangements

(a) No Change.

(b) Filing Requirements

(1) through (5) No Change.

(6) Information Required to be Filed

(A) Any person filing documents that are required to be filed under paragraph (b)(4) above shall provide the following information with respect to the offering through NASD's electronic filing system:

(i) through (vi) No Change.

(vii) any other information required to be filed under this Rule[by NASD's electronic filing system].

(B) No Change.

(7) through (11) No Change.

(c) through (d) 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, NASD 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. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On July 30, 2003, the Commission published notice of the filing and immediate effectiveness of amendments by NASD to NASD Rules 2710 and 6540, both of which address the submission of requests for Underwriting Activity Reports (''UARs'').[6] This rule filing, however, inadvertently omitted the current language for NASD Rule 2710(b)(6)(A)(vii) because the rule text had not been properly updated by NASD to reflect a rule change previously approved by the Commission.[7] NASD represents that under the current rule language, the change to that provision proposed in File No. SR–NASD–2003–75 was unnecessary, and therefore, the purpose of the proposed rule change, as amended, is to delete the unnecessary rule language from NASD Rule 2710(b)(6)(A)(vii) that was mistakenly proposed in File No. SR–NASD–2003–75.

2. Statutory Basis

NASD believes that the proposed rule change, as amended, is consistent with the provisions of section 15A(b)(6) of the Act,[8] which requires, among other things, that NASD's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general to protect investors and the public interest. NASD believes that deleting the language inserted into NASD Rule 2710(b)(6)(A)(vii) by File No. SR–NASD–2003–75 is consistent with the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD believes that the proposed rule change, as amended, would not result in 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. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change, as amended, does not:

(i) significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[11]

NASD has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The proposed rule change, as amended, is technical in nature and acceleration of the operative date will allow NASD to make the technical correction to NASD Rule 2710 with immediate effect. For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.[12]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities

[3] *See* letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated October 15, 2003 (''Amendment No. 1''). In Amendment No. 1, NASD amended the proposed rule change to correct the proposed rule text and to revise the discussion of the purpose of the proposed rule change.

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6).

[6] *See* Securities Exchange Act Release No. 48215 (July 23, 2003), 68 FR 44826 (July 30, 2003) (File No. SR–NASD–2003–75).

[7] *See* Securities Exchange Act Release No. 45709 (Apr. 9, 2002), 67 FR 18282 (Apr. 15, 2002) (File No. SR–NASD–2001–46).

[8] 15 U.S.C. 78*o*–3(b)(6).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[11] For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change, as amended, under section 19(b)(3)(C) of the Act, the Commission considers the period to commence on October 16, 2003, the date NASD filed Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

[12] For purposes only of accelerating the operative date of the proposed rule change, as amended, the Commission considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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 No. SR–NASD–2003–139 and should be submitted by November 13, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–26744 Filed 10–22–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48640; File No. SR–PCX–2003–47]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the Pacific Exchange, Inc. Relating to the Manner in Which a Contrary Exercise Advice Is Submitted and To Extend by One Hour the Time for Members To Submit Contrary Exercise Advices

October 16, 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 September 11, 2003, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') submitted to the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared by the PCX. The Exchange amended its proposal on September 22, 2003.[3] The proposal was also amended by the Exchange on October 10, 2003.[4] The Exchange filed the proposed rule change, as amended, under paragraph (f)(6) of Rule 19b–4 under the Act.[5] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend PCX Rule 6.24 regarding the manner in which a contrary exercise advice (''CEA'') is submitted to the Exchange and to extend by one hour the time for Members and Member Organizations to submit CEAs to the Exchange. Below is the text of the proposed rule change, as amended. Proposed new language is *italicized;* proposed deleted text is [bracketed].

* * * * *

Rule 6.24. (a) [Subject to the restrictions set forth in Rule 6.9 and to such restrictions as may be imposed pursuant to Rule 6.11 or pursuant to the Rules of the Options Clearing Corporation (''OCC''), an outstanding option contract may be exercised during the time period specified in the Rules of the OCC by the tender to the OCC of an exercise notice in accordance with the Rules of the OCC.] *An outstanding option contract may be exercised by the tender to the Options Clearing Corporation (''OCC'') of an exercise notice made during the periods, and using the procedures, specified in OCC rules.* An exercise notice may be tendered to the OCC only by the clearing member in whose account such option contract is carried with the OCC. *Option exercises are also subject to restrictions that are established by or may be imposed by the Exchange in Rules 6.9, 6.11 and in this rule. Members and Member Organizations may establish fixed procedures as to the latest time they will accept exercise instructions from customers.*

(b) [The exercise cut-off time for all non-cash settled options shall be such hour on the business day immediately prior to the expiration date as may be fixed from time to time by the Exchange. The exercise cut-off time, as so fixed by a member organization or as established pursuant to the preceding sentence, shall also apply in respect of option contracts carried in any proprietary account of such member organization as the latest time at which such member organization, if it is a clearing member, shall tender exercise notices to the OCC, or if it is not a clearing member, shall issue exercise instructions to its clearing member. Notwithstanding the foregoing, member organizations may receive and members may submit exercise instructions and tender exercise notices after the exercise cut-off time but prior to expiration (i) in the case of option contracts carried in an account maintained for another member organization in which only positions of customers of such other member organization are carried, (ii) in order to remedy mistakes or errors made in good faith, (iii) to take appropriate action as the result of a failure to reconcile unmatched Exchange transactions, or (iv) where exceptional circumstances relating to a customer's ability to communicate exercise instructions to the member organization (or the member organization's ability to receive exercise instructions) prior to such cut-off time warrant such action. This subparagraph (b) is intended as a means of providing for relatively uniform procedures in respect of exercise instructions and not to alter or affect in any way the expiration times for an option contract which are fixed in accordance with the Rules of the OCC or any other provision of an option contract, and the exercise prior to expiration of an option contract in contravention of this subparagraph (b) shall neither affect the validity of such exercise nor modify or otherwise affect any right or obligation of any holder or writer of any option contract of such series of options. As used herein with respect to any member organization, the word ''customer'' shall mean every person other than the member organization.] *Special procedures apply to the exercise of equity options on the last business day before their expiration (''expiring options''). Unless waived by OCC, expiring options are subject to the Exercise by Exception (''Ex-by-Ex'') procedure under OCC Rule 805. This rule provides that, unless contrary instructions are given, option contracts that are in-the-money by specified amounts shall be automatically exercised. In addition to OCC rules, the following Exchange requirements apply with respect to expiring options. Option holders desiring to exercise or not exercise expiring options must either: (i) take no action and allow exercise*

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 217 CFR 240.19b–4.

[3] *See* letter from Mai Sharif Shiver, Senior Attorney, PCX, to Nancy Sanow, Assistant Director, Division of Market Regulation (''Division''), Commission, dated September 17, 2003 (''Amendment No. 1''). In Amendment No. 1, the PCX requested that the Commission waive the thirty-day operative date specified in Rule 19b–4(f)(6) of the Act and changed rule language in proposed PCX Rule 6.24(f) and proposed Commentary .06.

[4] *See* letter from Mai Sharif Shiver, Senior Attorney, PCX, to Nancy Sanow, Assistant Director, Division, Commission, dated October 9, 2003 (''Amendment No. 2''). In Amendment No. 2, the PCX added language to the rule text that was inadvertently deleted from its original filing.

[5] 17 CFR 240.19b–4(f)(6).

determinations to be made in accordance with OCC's Ex-by-Ex procedures where applicable; or (ii) submit a ''Contrary Exercise Advice'' to the Exchange by the deadline specified in paragraph (c) below. A Contrary Exercise Advice is a communication either (A) to not exercise an option that would be automatically exercised under OCC's Ex-by-Ex procedure, or (B) to exercise an option that would not be automatically exercised under OCC's Ex-by-Ex procedure. A Contrary Exercise Advice may be submitted by a Member or Member Organization by using the Exchange's Contrary Exercise Advice Form, OCC's ENCORE System, a Contrary Exercise Advice form of any other national securities exchange of which the firm is a Member and where the option is listed, or such other method as the Exchange may prescribe. A Contrary Exercise Advice may be canceled by filing an ''Advice Cancel'' with the Exchange or resubmitted at any time up to the submission cut-off times specified below.

(c) Exercise cut-off time. Option holders have until 2:30 p.m. (PST) on the business day immediately prior to the expiration date to make a final decision to exercise or not exercise an expiring option. For customer accounts, Members and Member Organizations may not accept exercise instructions after 2:30 p.m. (PST) but have until 3:30 p.m. (PST) to submit a Contrary Exercise Advice. For non-customer accounts, Members and Member Organizations may not accept exercise instructions after 2:30 p.m. (PST) but have until 3:30 p.m. (PST) to submit a Contrary Exercise Advice if such Member or Member Organization employs an electronic submission procedure with time stamp for the submission of exercise instructions by option holders. Consistent with Commentary .04, Members and Member Organizations are required to submit a Contrary Exercise Advice by 2:30 p.m. (PST) for non-customer accounts if such Members and/or Member Organization do not employ an electronic submission procedure with time stamp for the submission of exercise instructions by option holders.

(d) If OCC has waived the Ex-by-Ex procedure for an options class, Members and Member Organizations must either:

(i) submit to the Exchange, a Contrary Exercise Advice, in a manner specified by the Exchange, within the time limits specified in paragraph (c) above if the holder intends to exercise the option, or

(ii) take no action and allow the option to expire without being exercised. The applicable underlying security price in such instances will be as described in OCC Rule 805(j). In cases where the Ex-by-Ex procedure has been waived, OCC rules require that Members and Member Organizations wishing to exercise such options must submit an affirmative Exercise Notice to OCC, whether or not a Contrary Exercise Advice has been filed with the Exchange.

(e) An Exchange Member Organization that has accepted the responsibility to indicate final exercise decisions on behalf of another Member or non-Member firm shall take the necessary steps to ensure that such decisions are properly indicated to the Exchange. Such Member Organization may establish a processing cut-off time prior to the Exchange's exercise cut-off time at which it will no longer accept final exercise decisions in expiring options from option holders for whom it indicates final exercise decisions. Each Member or Member Organization that indicates final exercise decisions through another broker-dealer is responsible for ensuring that final exercise decisions for all of its proprietary (including market maker) and public customer account positions are indicated in a timely manner to such broker-dealer.

(f) Members and Member Organizations may receive and submit final exercise decisions after the exercise cut-off time but prior to expiration without having submitted a Contrary Exercise Advice: (i) In order to remedy mistakes made in good faith; (ii) to take appropriate action as the result of a failure to reconcile unmatched Exchange option transactions; or (iii) where exceptional circumstances have restricted an option holder's ability to inform a Member organization of a decision regarding exercise, or a Member organization's ability to receive an option holder's decision by the cut-off time. The burden of establishing any of the above exceptions rests solely on the Member or Member Organization seeking to rely on such exceptions.

(g) In the event the Exchange provides advance notice on or before 2:30 p.m. (PST) on the business day immediately prior to the last business day before the expiration date indicating that a modified time for the close of trading in equity options on such last business day before expiration will occur, then the deadline to make a final decision to exercise or not exercise an expiring option shall be 1 hour 28 minutes following the time announced for the close of trading on that day instead of the 2:30 p.m. (PST) deadline found in Rule 6.24(c). However, Members and Member Organizations may deliver a Contrary Exercise Advice or Advice Cancel to the Exchange within 2 hours 28 minutes following the time announced for the close of trading in equity options on that day instead of the 3:30 p.m. (PST) deadline found in Rule 6.24(c) for customer accounts and non-customer accounts where such Member firm employs an electronic submission procedure with time stamp for the submission of exercise instructions. For non-customer accounts, Members and Member Organizations that do not employ an electronic procedure with time stamp for the submission of exercise instructions are required to deliver a Contrary Exercise Advice or Advice Cancel within 1 hour and 28 minutes following the time announced for the close of trading on that day instead of the 2:30 p.m. (PST) deadline found in Rule 6.24(c).

(h)(1) The Exchange may establish extended cut-off times for decision to exercise or not exercise an expiring option and for the submission of Contrary Exercise Advices on a case by case basis due to unusual circumstances.

(2) The Exchange with at least one (1) business day prior advance notice, by 9 a.m. (PST) on such day, may establish a reduced cut-off time for the decision to exercise or not exercise an expiring option and for the submission of Contrary Exercise Advices on a case-by-case basis due to unusual circumstances; provided, however, that under no circumstances should the exercise cut-off time and the time for submission of a Contrary Exercise Advice be before the close of trading.

Commentary

[.01 The exercise cut-off time pursuant to Rule 6.24(b) for option contracts shall be 2:30 P.M. (PT) on the business day immediately prior to the expiration date. In the event a member organization does not carry accounts for customers, it shall nevertheless be subject to such exercise cut-off time for the purposes of the third and fourth sentences of Rule 6.24(b).

.02 Each member organization shall prepare a memorandum of every exercise instruction received from a customer showing the time when such instruction was so received. Such memoranda shall be subject to the requirements of SEC Rules 17a–3(a)(6) and 17a–4(b).

.03 In the event a member submits an exercise instruction or tenders an exercise notice pursuant to an exception set forth in clause (ii), (iii) or (iv) of Rule 6.24(b), the member shall maintain a memorandum setting forth the circumstances giving rise to such

exception. If the member is relying on clause (ii) or clause (iv) as the basis of an exception, it shall promptly file a copy of the memorandum with the Exchange.

.04 Clearing Members must follow the procedures of the OCC when exercising expiring non-cash settled equity option contracts. Members must also follow the procedures set forth below with respect to the exercising of non-cash settled equity option contracts that would otherwise not be exercised, or the non-exercising of option contracts that otherwise would be exercised by operation of the OCC Rule 805.

(a) For all such contracts exercised or not exercised, a ''contrary exercise advice'' must be delivered by the member in such form or manner prescribed by the Exchange to a place designated by the Exchange no later than 2:30 p.m. (PT) on the business day immediately prior to the expiration date;

(b) Subsequent to the delivery of a ''contrary exercise advice,'' should the Market Maker, Floor Broker, customer or firm determine to act other than as reflected on the original advice form, the Member must also deliver an ''advice cancel'' in such form or manner prescribed by the Exchange to a place designated by the Exchange no later than 2:30 p.m. (PT) on the business day immediately prior to the expiration date;

(c) The preparation, time stamping or submission of a ''contrary exercise advice'' prior to the purchase of the contracts to be exercised or not exercised shall be deemed a violation of this Rule.

(d) All of the foregoing provisions of this Commentary .04 are in full force and effect whether or not the OCC waives the exercise-by-exception provisions of its Rule 805; in the event of such waiver, the procedures of this Commentary shall be followed as if such provisions of OCC Rule 805 were in full force and effect; and OCC rules may require the submission of an affirmative exercise notice even in circumstances where a contrary exercise advice is not required; and

(e) The failure of any Member to follow the provisions in this Commentary .04 may be referred to the Ethics and Business Conduct Committee and result in the assessment of a fine, which may include but is not limited to disgorgement of potential economic gain obtained or loss avoided by the subject exercise, as determined by the Committee.

.05 Members and member organizations shall properly communicate final exercise decisions to the Exchange in respect of positions for which they are responsible. Member organizations may establish a processing cut-off tune prior to the Exchange's exercise cut-off time at which it will no longer accept final exercise decisions in expiring options for customers.

.06 Submitting or preparing an exercise instruction after the exercise cut-off time in any expiring option on the basis of material information released after the cut-off time is actively inconsistent with just and equitable principals of trade.]

.01 For purposes of this Rule 6.24, the terms ''customer account'' and ''non-customer account'' have the same meaning as defined in OCC By-Laws Article I(C)(28) and Article I (N)(2), respectively.

.02 Each Member Organization shall prepare a memorandum of every exercise instruction received showing the time when such instruction was received. Such memoranda shall be subject to the requirements of SEC Rule 17a–4(b).

.03 In the event of an ''unusual circumstance,'' Rule 6.24(h)(1) provides that the Exchange may extend the cut-off times for exercise instructions and the submission of a Contrary Exercise Advice beyond the normal time frames specified in Rule 6.24(c). For purposes of subparagraph (h)(1), an ''unusual circumstance'' includes, but is not limited to, increased market volatility; significant order imbalances; significant volume surges and/or systems capacity constraints; significant spreads between the bid and offer in underlying securities; internal system malfunctions affecting the ability to disseminate or update market quotes and/or deliver orders; or other similar occurrences. Rule 6.24(h)(2) specifies that the Exchange may also reduce such cut-off times for ''unusual circumstances.'' For purposes of subparagraph (h)(2), an ''unusual circumstance'' includes, but is not limited to, a significant news announcement concerning the underlying security of an option contract that is scheduled to be released just after the close on the business day immediately prior to expiration.

.04 Although the deadline for all option holders to make a final decision to exercise or not exercise is 2:30 p.m. (PST), the deadline for the submission of the Contrary Exercise Advice in the case of non-customer accounts will depend on the manner of the decision to exercise or not exercise.

(i) For electronic timestamp submissions of the exercise decision by non-customer option holders, a Contrary Exercise Advice submitted by Members and Member Organizations must be received by the Exchange by 3:30 p.m. (PST).

(ii) For manual submissions of the exercise decision by non-customer option holders, Members and Member Organizations must submit a Contrary Exercise Advice at the Exchange via the Contrary Exercise Advice Box by 2:30 p.m. (PST).

.05 Each Member Organization shall establish fixed procedures to insure secure time stamps in connection with their electronic systems employed for the recording of submissions to exercise or not exercise expiring options.

.06 In the event a Member or Member Organization receives and submits a final exercise decision after the exercise cut-off time pursuant to an exception set forth in clauses (i), (ii) or (iii) of paragraph (f) of Rule 6.24, the Member or Member Organization shall maintain a memorandum setting forth the circumstances regarding such exception and shall file a copy of the memorandum with the Exchange's Market Surveillance Department no later than 9 a.m. on the first business day following the respective expiration.

.07 The filing of a Contrary Exercise Advice required by this rule does not serve to substitute as the effective notice to OCC for the exercise or non-exercise of expiring options.

.08 The failure of any Member to follow the provisions in this Rule may be referred to the Ethics and Business Conduct Committee and result in the assessment of a fine, which may include but is not limited to disgorgement of potential economic gain obtained or loss avoided by the subject exercise, as determined by the Committee.

.09 Submitting or preparing an exercise instruction after the exercise cut-off time in any expiring option on the basis of material information released after the cut-off time is actively inconsistent with just and equitable principals of trade.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the PCX included statements concerning the purpose of and basis for the proposed rule change 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 IV below and is 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

The Options Clearing Corporation (''OCC''), the issuer of all PCX-traded options contracts, has an established procedure for options holders wishing to automatically exercise in-the-money options [6] before they expire. Known as Exercise by Exception or ''Ex-by-Ex'', the procedure provides for the automatic exercise at expiration of any equity option contract that is ¾ of a point or more in-the-money for customer accounts or ¼ point or more in-the-money for any other accounts.[7] Option holders who wish to have their contracts exercised in accordance with the Ex-by-Ex procedure do not need to take any further action; the contracts that are in-the-money by the appropriate amount will be automatically exercised. Option holders who do not wish to have their options automatically exercised, or who wish their options to be exercised under different parameters than the Ex-by-Ex procedure, must file a CEA with the Exchange pursuant to PCX Rule 6.24, and instruct OCC of their ''contrary intention''.[8] The Exchange believes that PCX Rule 6.24 is designed to deter individuals from taking improper advantage of late-breaking news by requiring evidence of an option holder's intention regarding whether to exercise an expiring equity option via the submission of a CEA. Members and Member Organizations satisfy the filing requirement by manually submitting a CEA or by electronically submitting the CEA through OCC's ENCORE system.

The Exchange states that the principal goal of PCX Rule 6.24 is to maintain a level playing field between persons holding long and short positions in expiring equity options. The PCX believes that after trading has ended on the final trading day before expiration, persons who are short in the option have no way to close out their short position. To put option holders on equal footing, PCX Rule 6.24 attempts to minimize the time period in which a holder can exercise the equity option after the close of trading on the last business day prior to expiration, generally known as ''Expiration Friday.'' [9]

The current exercise cut-off time for an option holder to decide whether to exercise an equity option is 2:30 p.m. (PST) on the business day immediately prior to the expiration date.[10] Under the proposal, the exercise cut-off time set forth in amended PCX Rule 6.24(c) will not change except in cases of a modified trading session or due to ''unusual circumstances.'' Current PCX Rule 6.24 imposes a uniform 2:30 p.m. cut-off time for the submission of CEAs for all accounts without differentiating between customer and non-customer accounts.

The Exchange states that the proposed rule change was prompted by concerns expressed by clearing firms that the deadline for submitting CEAs is problematic for customer accounts,[11] due to the logistical difficulties of receiving customer exercise instructions and processing them through their retail branch systems and back office areas before submitting them to the Exchange. Therefore, the Exchange proposes to adopt a cut-off time of 3:30 p.m. (PST) for Members and Member Organizations to submit CEAs for customer accounts. The Exchange also proposes to allow Members and Member Organizations to submit CEAs for non-customer accounts [12] by 3:30 p.m. (PST) provided such Member or Member Organization employs an electronic procedure with time stamp recording for the submission of exercise instructions by options holders. In those cases where Members or Member Organizations do not employ an electronic submission procedure for the submission of exercise instructions, CEAs for non-customer accounts must be submitted to the Exchange by 2:30 p.m. (PST). The different CEA submission deadlines are set forth in amended PCX Rule 6.24(c) and new Commentary .04.

Although many Members and Member Organizations have electronic submission procedures, the Exchange is concerned that those firms that manually submit CEAs could have an opportunity to improperly extend the 2:30 p.m. (PST) deadline for option holders to submit their exercise instructions. This concern on the part of the Exchange is based on the difficulty in monitoring a manual procedure that has different times for deciding whether to exercise an option and to submit a CEA.

Accordingly, in the case of non-customer accounts, the Exchange has proposed to limit the 3:30 p.m. (PST) deadline for submitting CEAs to those Members and Member Organizations that have an electronic submission procedure for option holders communicating their decisions whether to exercise an option. In connection with the use of an electronic submission procedure by Members and Member Organizations, the Exchange proposes the addition of new Commentary .05 to PCX Rule 6.24 to require Members and Member Organizations employing electronic submissions to establish procedures to secure time stamps in connection with their electronic systems.

OCC on occasion will suspend the use of its Ex-by-Ex procedure, such as when trading in the underlying stock has been halted or if accurate price data is unavailable for the determination of closing prices. When this occurs and there is no automatic exercise, all options contract holders must send an exercise notice to OCC if they wish to exercise an option, regardless of whether the option is in or out-of-the-money. Currently, when OCC suspends its Ex-by-Ex procedure for an option class, PCX Rule 6.24 requires the submission of a CEA. Thus, when OCC has waived the Ex-by-Ex procedure, option holders must determine what price would have been used, even though the only available price might be a stale last sale price (a price OCC did not feel comfortable using). Option holders then must determine whether a CEA needs to be submitted to the Exchange evidencing the intention to exercise or not exercise.

In the PCX's view, the options exchanges have long viewed this process as cumbersome and confusing to option holders. Therefore, the PCX proposes to amend PCX Rule 6.24(d) to eliminate the requirement that a CEA be submitted if the holder does not want to exercise the option when OCC has suspended its Ex-by-Ex procedure for that options class. As a result, when the Ex-by-Ex procedure has been

[6] ''In-the-money'' for a call option occurs if the current market value of the underlying security is above the exercise price of the option. For put options, ''in-the-money'' means the current value of the underlying security is below the exercise price of the option.

[7] *See* OCC Rule 805(d).

[8] A CEA may be canceled by filing an ''Advice Cancel'' with the Exchange at any time up to the submission cut-off deadline specified in proposed amended PCX Rule 6.24.

[9] ''Expiration Friday'' is generally the last business day prior to the expiration of an option contract.

[10] The ''expiration date'' of an options contract generally is the Saturday immediately following the third Friday of the expiration month of such option. *See* OCC By-Laws Article I (E)(16).

[11] A ''customer account'' is defined in OCC By-Laws Article I (C)(28) as an account of a Clearing Member which is confined to Exchange transactions cleared and positions carried by the Clearing Member on behalf of its securities customers, other than those transactions of market-makers which are cleared through a market-makers account. OCC By-Laws define a ''securities customer'' as a person having a securities account at a broker or dealer other than a non-customer of such broker or dealer. *See* OCC By-Laws Article I (S)(1).

[12] A ''non-customer account'' generally means a person that is not a customer of a broker or dealer defined in Rule 8c–1 and 15c2–1 under the Act. *See* OCC By-Laws Article I (N)(2).

suspended, submission of CEAs to the Exchange will be required only when the options holder wants to exercise the option contract.

The proposed rule change would also permit the Exchange to establish different cut-off times as an exception to amended PCX Rule 6.24(c) to address situations where the Exchange has advance prior knowledge or warning of a modified trading session at expiration, or in the case of ''unusual circumstances.''

Specifically, proposed PCX Rule 6.24(g) would apply when a different or modified close of trading is announced due to a market-wide event. In such cases, the Exchange would have forewarning of the event and would be required to provide notice of a change in cut-off times by 2:30 p.m. (PST) on the business day prior to the last trading day before expiration. For example, if the day after Thanksgiving is the last trading day prior to expiration with a close of trading of 10 a.m. (PST), then the Exchange would, with prior notice by 2:30 p.m. (PST) on the Wednesday before Thanksgiving, be able to establish the cut-off time for option holders to decide whether to exercise expiring options to 1 hour 28 minutes after the close of trading. With respect to the submission of CEAs by Members and Member Organizations, the cut-off time would be 2 hours and 28 minutes after the close of trading for customer accounts and non-customer accounts where the Members and Member Organizations employ an electronic procedure with time stamp for the submission of exercise instructions. Members and Member Organizations that do not employ an electronic submission procedure for exercise instructions would be required to submit a CEA within 1 hour and 28 minutes after the close of trading for its non-customer accounts. Accordingly, the normal exercise cut-off times would not apply and, similar to amended PCX Rule 6.24(c), the deadline for submitting CEAs to the Exchange for non-customer accounts would depend on the use of an electronic submission procedure for the submission of exercise instructions.

Proposed PCX Rule 6.24(h)(1) would permit the Exchange to extend the cut-off time periods for option holders to decide whether to exercise expiring options, as well as for Members to submit CEAs due to unusual circumstances. Situations that are deemed to be an ''unusual circumstance'' are set forth in revised Commentary .03 to PCX Rule 6.24. An ''unusual circumstance'' for purposes of proposed paragraph (h)(1) includes, but is not limited to, increased market volatility; significant order imbalances; significant volume surges and/or systems capacity constraints; significant spreads between the bid and offer in underlying securities; internal system malfunctions affecting the ability to disseminate or update market quotes and/or deliver orders; or other similar occurrences.

Proposed PCX Rule 6.24(h)(2) would permit the Exchange, with one (1) business day prior advance notice by 9 a.m. (PST), to establish a reduced cut-off time for option holders to decide whether to exercise expiring options as well as for Members to submit CEAs. The reduced cut-off time under this new paragraph for both exercise decisions and CEA submissions may not occur before the close of trading. The primary purpose of proposed paragraph (h)(2) is to permit the Exchange to reduce cut-off times because of an ''unusual circumstance,'' such as a significant news event occurring after the close. Revised Commentary .03 to PCX Rule 6.24 provides that, for purposes of subparagraph (h)(2), an ''unusual circumstance'' is a significant news announcement concerning the underlying security of an option contract that is scheduled to be released after the close on the last trading day prior to expiration. For example, a decision on whether a particular merger will be approved or whether a new product will receive regulatory approval that occurs after the close of trading would justify a reduced cut-off time so that persons holding short positions are not prejudiced by being unable to close out their positions. The Exchange believes that this would maintain a level playing field between persons holding long and short positions in expiring options.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act [13] in general, and furthers the objectives of Section 6(b)(5) of the Act [14] in particular, because it 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange 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 on the proposed rule change, as amended, were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change, as amended, has been filed by the Exchange pursuant to Section 19(b)(3)(A) of the Act [15] and subparagraph (f)(6) of Rule 19b–4 thereunder.[16] Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for thirty days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act [17] and Rule 19b–4(f)(6) [18] thereunder.[19]

A proposed rule change filed under Rule 19b–4(f)(6) [20] normally does not become operative prior to thirty days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii), the Commission may designate a shorter time if such action in consistent with the protection of investors and the public interest. The PCX has requested that the Commission waive the thirty-day operative date of the proposed rule change due to the Exchange's need to maintain competition and efficiency.

The Commission believes that waiving the thirty-day operative date is consistent with the protection of investors and the public interest.[21]

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(6).

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 17 CFR 240.19b–4(f)(6).

[19] As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date or such shorter period as designated by the Commission.

[20] 17 CFR 240.19b–4(f)(6).

[21] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on

Continued

Accelerating the operative date will allow the PCX to immediately implement rules similar to ones already in place at the American Stock Exchange LLC and the International Securities Exchange, Inc.,[22] and will simplify and clarify the process by which Members and Member Organizations accept exercise decisions from options holders and submit such decisions to the Exchange. For these reasons, the Commission designates the proposed rule change as effective and operative immediately. At any time within 60 days of the filing of the proposed rule change, as amended, the Commission may summarily abrogate such proposed 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.[23]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the PCX. All submissions should refer to File No. SR–PCX–2003–47 and should be submitted by November 13, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[24]

Margaret H. McFarland,

Deputy Secretary.

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efficiency, competition, and capital formation.15 U.S.C. 78c(f).

[22] *See* Securities Exchange Act Release Nos. 47885 (May 16, 2003), 68 FR 28309 (May 23, 2003) (SR–Amex–2001–92) and 48505 (September 17, 2003), 68 FR 55680 (September 26, 2003) (SR–ISE–2003–20).

[23] For purposes of calculating the sixty-day abrogation period, the Commission considers the period to commence on October 9, 2003, the date at which the Exchange filed Amendment No. 2.

[24] 17 CFR 200.30–3(a)(29).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48648; File No. SR–Phlx–2003–37]

Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. to Delete the Prohibition Against the Delivery of Electronically Generated Orders Via AUTOM

October 16, 2003.

I. Introduction

On May 19, 2003, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to delete Phlx Rule 1080(i) (''Rule''), which prohibits the delivery of electronically generated orders via Phlx's AUTOM system. Notice of the proposed rule change was published for comment in the **Federal Register** on June 11, 2003.[3] The Commission received two comments regarding the proposal—one from Interactive Brokers Group LLC (''IB'') supporting the proposal (''IB Letter''), and the other from Susquehanna International Group LLP (''SIG'') opposing the proposal (''SIG Letter'')[4]. The Phlx submitted a response to the SIG Letter (''Phlx Response'').[5]

This order approves the proposed rule change.

II. Description of the Proposal

The Exchange is proposing to delete the Rule, which prohibits the delivery of electronically generated orders, *i.e.*, orders that were created and communicated electronically without manual input,[6] via AUTOM.[7] According to the Exchange, it has enhanced its AUTOM and AUTO–X systems so that the concerns the Rule was intended to address have been minimized. For example, the Exchange modified its Auto-Quote[8] system to enable the Exchange to disseminate a firm quotation size of at least the sum of limit orders at the Exchange's disseminated price.[9] The Exchange has also expanded the order types[10] and delivery sizes[11] eligible for AUTOM delivery and automatic execution via AUTO–X.

III. Summary of Comments and Phlx's Response

1. IB Letter

In its letter supporting the proposal, IB urged the Commission to approve the proposal because IB believes the Rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 47977 (June 4, 2003), 68 FR 35049.

[4] *See* letters to Jonathan G. Katz, Secretary, SEC, from David M. Battan, Vice President and General Counsel, IB, dated July 22, 2003; and Gerald D. O'Connell, Director of Compliance, SIG, dated July 9, 2003.

[5] *See* letter from Richard S. Rudolph, Director and Counsel, Phlx, to Jonathan G. Katz, Secretary, SEC, dated October 6, 2003.

[6] Specifically, the Rule required order entry to involve manual input such as entering the terms of the order into an order-entry screen or manually selecting a displayed order against which the off-setting order should be sent.

[7] AUTOM is the Exchange's electronic order delivery, routing, execution and reporting system, which provides for the automatic entry and routing of equity option and index option orders to the Exchange trading floor. Orders delivered through AUTOM may be executed manually, and certain orders are eligible for AUTOM's automatic execution feature, AUTO–X. Equity option and index option specialists are required by the Exchange to participate in AUTOM. Option orders entered by Exchange members into AUTOM are routed to the appropriate specialist unit on the Exchange trading floor.

[8] Auto-Quote is the Exchange's electronic options pricing system, which enables specialists to automatically monitor and instantly update quotations.

[9] *See* Securities Exchange Act Release No. 46325 (August 8, 2002), 67 FR 53376 (August 15, 2002) (SR–Phlx–2002–15).

[10] In October 2002, the Commission permanently approved an Exchange pilot that allowed orders for the account(s) of broker-dealers to be delivered via AUTOM, and to be eligible for automatic execution via AUTO–X. *See* Securities Exchange Act Release No. 46660 (October 15, 2002), 67 FR 64951 (October 22, 2002) (SR–Phlx–2002–50). The Exchange then adopted rules providing for automatic executions for eligible orders at the Exchange's disseminated size, subject to a minimum and maximum eligible size range to be determined by the specialist, on an issue-by-issue basis. *See* Securities Exchange Act Release No. 46886 (November 22, 2002), 67 FR 72015 (December 3, 2002) (SR–Phlx–2002–39). Most recently, the Exchange adopted rules providing an equal firm quotation size and equal AUTO–X guaranteed size for both customer and broker-dealer orders. *See* Securities Exchange Act Release No. 47646 (April 8, 2003), 68 FR 17976 (April 14, 2003) (SR–Phlx–2003–18).

[11] In March 2003, the Exchange adopted rules to increase the eligible AUTOM order delivery size for off-floor broker-dealer orders from 200 contracts to 1,000 contracts for all options. At the same time, the Exchange determined to allow delivery of Immediate or Cancel orders via AUTOM. *See* Securities Exchange Act Release No. 47543 (March 20, 2003), 68 FR 14737 (March 26, 2003) (SR–Phlx–2003–11).

''hinders the public's access to the Exchange and serves only to protect those market participants who have not invested the proper time and capital to ensure that their trading systems are sufficiently robust and advanced.'' IB also expressed the view that the Rule is difficult and expensive to enforce, and encourages traders to insert manual steps in their trading processes that increase the chance of error. IB concluded that removal of the Rule will enable customers to post competitive limit orders more quickly; force specialists to upgrade their operations and update prices faster; and thus improve the quality of the options National Best Bid and Offer (''NBBO'') and enhance the linkage system.

2. SIG Letter

In its letter opposing the proposal, SIG stated that the concerns and conditions that prompted adoption of the Rule have not changed. SIG contended that removal of the Rule will ''unfairly place specialists at a competitive disadvantage [vis-a-vis] professional customers and broker-dealers who generate and send orders electronically.'' Further, SIG expressed the view that adoption of the proposal will discourage liquidity providers from quoting deep markets, ''as occasional errors or delays in quote updates will be instantaneously met with economic loss from electronic pick-off orders of professionals.''

SIG stated that the likelihood that Phlx will adopt a hybrid trading system will further compound the problems arising from electronically generated orders. Specifically, SIG believes that increased quoting by market makers in a hybrid system will create more instances of quote errors and anomalies, which will increase the opportunities for professional traders to pick off liquidity providers. Accordingly, SIG believes that any withdrawal of the Rule should be accompanied by adoption of an effective decrementation feature or other means to address quote clogging once a hybrid system is introduced.

In addition, SIG believes that recent enhancements to Phlx's AUTOM and AUTO–X systems—such as a change to Auto-Quote that enables Phlx to disseminate a firm quote size of at least the sum of limit orders at Phlx's disseminated price—do not warrant removal of the Rule. Rather, SIG stated that the enhancements exacerbate the disadvantages to specialists and market makers from electronically generated orders.

Finally, SIG argued that the Rule should be bolstered rather than eliminated. Specifically, SIG believes that regulators should enforce the human intervention requirement of the Rule by categorizing ''queue-trading'' (which occurs when an off-floor system is programmed to identify a quoting error or quote delay and then queues an order on the screen to be sent to the exchange with the stroke of a key) as electronically generated.

3. Phlx Response to SIG Letter

In its response to the SIG Letter, the Phlx reiterated its belief that the systems changes it has made to AUTOM and AUTO–X have ''narrowed the gap with respect to any actual or perceived advantage an off-floor customer or broker-dealer could have over a specialist * * *.'' The Exchange also noted that it has developed and deployed new electronic technology that provides for the automatic execution of eligible inbound customer and off-floor broker-dealer limit orders against booked customer limit orders at the Exchange's disseminated price (called ''Book Match''), and a new component of AUTOM, ''Book Sweep,'' designed to automatically execute limit orders on the book when the Exchange's electronic options pricing system, Auto-Quote, or a specialist's quote sent to the Exchange via specialized quote feed locks or crosses a limit order on the book. Phlx stated that as a result of its technology changes and as a competitive initiative, it proposed to delete the Rule. However, the Exchange also stated that it will continue to surveil for, and enforce, compliance with Exchange rules that help specialists and ROTs in managing their risk while making markets on the Exchange. In addition, the Exchange represented that it expects to monitor the effects of the deletion of this prohibition in order to readily ascertain its effects on the risk management activities of on-floor members and member organizations. If the Exchange determines that such effects are detrimental to the risk management activities of on-floor members and member organizations, the Exchange expects to take appropriate action, including the filing of appropriate rules and/or systems changes, to address such a situation.

IV. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[12] Specifically, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act,[13] which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market, and to protect investors and the public interest. Specifically, the Commission believes that the proposal should permit faster entry and execution of orders on the Exchange, thereby providing investors with improved services. The Commission also believes the proposal should facilitate the entry by traders of competitive limit orders on the Exchange, which should narrow spreads and improve the quality of the NBBO. Finally, the Commission notes that the Exchange has addressed the possible risk exposure issue of specialists and ROTs by representing that it will surveil for and enforce Exchange rules designed to help specialists and ROTs manage risk.[14] The Commission expects the Exchange to monitor the effects of the proposal on the risk management activities of on-floor members and member organizations, and take appropriate action if necessary.

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[15], that the proposed rule change (SR–Phlx–2003–37), be, and hereby is, approved.

[12] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78(c)(f).

[13] 15 U.S.C. 78f(b)(5).

[14] For example, the Exchange committed to continue to surveil for, and enforce, compliance with Phlx Rule 1080(c)(ii), which sets forth the obligations of an Exchange Order Entry Firm, defined as a member organization of the Exchange that is able to route orders to AUTOM, and a User, defined as any person or firm that obtains access to AUTO–X through an Order Entry Firm. Specifically, the rule requires Order Entry Firms to comply with all applicable Exchange options trading rules and procedures; provide written notice to all Users regarding the proper use of AUTO–X; and neither enter nor permit the entry of multiple orders in call options and/or put options in the same option issue within any 15-second period for an account or accounts of the same beneficial owner.

[15] *Id.*

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–26747 Filed 10–22–03; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48639; File No. SR–Phlx–2003–65]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to the Manner in Which a Contrary Exercise Advice Is Submitted and To Extend by One Hour the Cut-Off Time To Submit Contrary Exercise Advices

October 16, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1], and Rule 19b–4 [2] thereunder, notice is hereby given that on October 14, 2003, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Phlx. The Exchange filed the proposed rule change under paragraph (f)(6) of Rule 19b–4 under the Act.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend Phlx Rule 1042 to simplify the manner in which a Contrary Exercise Advice (''CEA'')[4] is submitted to the Exchange and to extend by one hour the cut-off time by which members and member organizations must submit CEAs to the Exchange. The proposal also indicates when the Exchange could modify (expand or reduce) the cut-off time for decisions whether to exercise an option or submit a CEA. Below is the text of the proposed rule change. Proposed new language is *italicized;* proposed deleted text is [bracketed].

* * * * *

Rule 1042, Exercise of Equity Option Contract

Rule 1042. (a) Exercise Notices. [Subject to the restrictions established by the Exchange pursuant to Rule 1002 and to such other restrictions which may be imposed by the Exchange pursuant to Rules 1004 and 1005 or by the Options Clearing Corporation (''OCC'') pursuant to the OCC Rules, an outstanding option contract may be exercised during the time period specified in the OCC Rules by the tender to the OCC of an exercise notice in accordance with OCC Rules.] *An outstanding option contract may be exercised by the tender to The Options Clearing Corporation (''OCC'') of an exercise notice made during the periods, and using the procedures, specified in OCC rules.* An exercise notice may be tendered to OCC only by the clearing member in whose OCC account the option contract is carried. *Option exercises are also subject to restrictions that are established by or may be imposed by the Exchange in Rules 1002, 1004 and 1005, and in this rule.* Members and member organizations [shall] *may* establish fixed procedures as to the latest [hour at which] *time* they will accept exercise notices from their customers.

(b) [Exercise Cut-Off] *Exercise-by-Exception Procedure* for Expiring Options. [Final exercise decisions of option holders to either exercise or not exercise expiring equity options must be indicated to the Exchange by the respective member or member organization no later than 5:30 P.M. (EST) on the business day immediately prior to the expiration date (''exercise cut-off time'') in either of the following manners.] *Special procedures apply to the exercise of equity options on the last business day before their expiration (''expiring options''). Unless waived by OCC, expiring options are subject to the Exercise-by-Exception (''Ex-by-Ex'') procedure under OCC Rule 805. This rule provides that, unless contrary instructions are given, option contracts that are in-the-money by specified amounts shall be automatically exercised. In addition to OCC rules, the following Exchange requirements apply with respect to expiring options. Option holders desiring to exercise or not exercise expiring options must either:*

(i) take no action and allow exercise determinations to be made in accordance with OCC's Rule 805 [exercise-by-exception] *Ex-by-Ex* procedure where applicable; or

(ii) submit a Contrary Exercise Advice *(''CEA'') or Advice Cancel to the Exchange by the deadline specified in paragraph (c) below.* A CEA [Contrary Exercise Advice] is a *communication either* [form approved by the Exchange for use by a member or member organization to submit a final exercise decision committing an options holder] to not exercise an option [position which] *that* would *be* automatically [be] exercised pursuant to OCC's [exercise-by-exception] *Ex-by-Ex* procedure, or to exercise an [equity] option [position which] *that* would not *be* automatically [be] exercised pursuant to OCC's [exercise-by-exception] *Ex-by-Ex* procedure. *A CEA* [Contrary Exercise Advice] may be submitted by *a* [any] member or member organization [(1)] *either by using the Exchange's CEA Form, OCC's clearing system (ENCORE), or a CEA form of any other* [at a place designated for that purpose by any] national [options] *securities* exchange of which they are a member and where the option is listed, or [(2) may be submitted to the Exchange via OCC in a form prescribed by OCC] *via such other method as the Exchange may prescribe. A CEA may be canceled or resubmitted at any time up to the exercise cut-off time specified below.*

(c) Exercise Cut-Off Time. Option holders have until 5:30 p.m. (EST) on the business day immediately prior to the expiration date to make a final decision to exercise or not exercise an expiring option. For customer accounts, members and member organizations may not accept exercise instructions after 5:30 p.m. (EST) but have until 6:30 p.m. (EST) to submit a CEA. For non-customer accounts, members and member organizations may not accept exercise instructions after 5:30 p.m. (EST) but have until 6:30 p.m. (EST) to submit a CEA if such member or member organization employs an electronic submission procedure with an electronic time stamp (with fixed procedures to ensure security of the time stamp) to indicate the time of the submission of exercise instructions by option holders. Consistent with Commentary .04, members and member organizations are required to submit a CEA by 5:30 p.m. (EST) for non-customer accounts if such members and/or member organizations do not employ an electronic submission procedure with electronic time stamp for the submission of exercise instructions by option holders. [In those instances when the exercise by exception procedure has been waived by OCC (such that OCC will not for that security on that expiration effect automatic exercise or non-exercise of expiring equity option positions), a Contrary Exercise Advice is still

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] The term CEA as used in the filing may also include Advice Cancels. Advice Cancels are documents used to cancel CEAs.

required to be submitted prior to the exercise cut-off time by members and member organizations wishing to exercise an option that would not have been automatically exercised had the exercise-by-exception procedure been in effect, or not exercise an option that would have been automatically exercised had the exercise-by-exception procedure been in effect. The applicable underlying security price in such instances will be as described in OCC Rule 805(1), which is normally the last sale price in the primary market for underlying security. OCC rules may require submission of an affirmative exercise notice even in circumstances where Contrary Exercise Advice is not required.]

[Members and member organizations which maintain proprietary or public customer positions in expiring options shall take necessary steps to ensure that final exercise decisions are properly indicated to the Exchange on behalf of such positions. Member organizations who have accepted the responsibility to indicate final exercise decisions on behalf of another member or non-member firm shall take necessary steps to ensure that such decisions are properly indicated. Member organizations may establish a processing cut-off time prior to the Exchange's exercise cut-off time at which it will no longer accept final exercise decisions in expiring options from customers.]

(d) Waiver of Ex-by-Ex Procedure. If OCC has waived the Ex-by-Ex procedure for an options class, members and member organizations must either:

(i) submit to the Exchange, a CEA, in a manner specified by the Exchange, within the time limits specified in paragraph (c) above if the holder intends to exercise the option, or

(ii) take no action and allow the option to expire without being exercised.

The applicable underlying security price in such instances will be as described in OCC Rule 805(j). In cases where the Ex-by-Ex procedure has been waived, OCC rules require that members and member organizations wishing to exercise such options must submit an affirmative Exercise Notice to OCC, whether or not a CEA has been filed with the Exchange.

(e) Indicating Final Exercise Decisions. An Exchange member organization that has accepted the responsibility to indicate final exercise decisions on behalf of another member or non-member organization shall take the necessary steps to ensure that such decisions are properly indicated to the Exchange. Such member organization may establish a processing cut-off time prior to the Exchange's exercise cut-off time at which it no longer will accept final exercise decisions in expiring options from options holders for whom it indicates final exercise decisions. Each member or member organization that indicates final exercise decisions through another broker-dealer is responsible for ensuring that final exercise decisions for all of its proprietary (including market maker) and public customer account positions are timely indicated to such broker-dealer.

(f) Exceptions to Submitting a CEA; Recordkeeping. Members and member organizations may [effect or amend] *receive and submit final* exercise decisions after the exercise cut-off time (but prior to expiration) *without having submitted a CEA* under the following circumstances:

(i) in order to remedy mistakes made in good faith[,]*;*

(ii) to take appropriate action as the result of a failure to reconcile unmatched Exchange option transactions[,]*;* or

(iii) where exceptional circumstances *have* restricted a*n* [customer's or member's] *option holder's* ability to inform [the respective] *a* member organization of [such] *a* decision[s (] *regarding exercise,* or a member organization's ability to receive such decision[s] by the cut-off time[)]. The burden of establishing [an] *any of the above* exception*s* for a proprietary or customer account of a member or member organization rest*s* solely on the member or member organization seeking to rely on such exception*s.*

In the event a member or member organization does not timely submit a *CEA* [Contrary Exercise Advice] in accordance with the requirements of this rule or does not timely submit a *CEA* [Contrary Exercise Advice] for a final exercise decision pursuant to an exception in the paragraph above, the responsible member or member organization shall set forth in a written memorandum the surrounding circumstances and shall file a copy of the memorandum with the Exchange's Market Surveillance Department no later than 12:00 noon *(EST)* on the business day following the expiration. Such memorandum must additionally include the time when such final exercise decision was made or, in the case of a customer, was received, and shall be subject to the recordkeeping requirements of SEC Rules 17a–3(a)(6) and 17a–4(b).

(g) Modifying the Time for Close of Trading in Options. In the event the Exchange provides advance notice on or before 5:30 p.m. (EST) on the business day immediately prior to the last business day before the expiration date indicating that a modified time for the close of trading in equity options on such last business day before expiration will occur, then the deadline to make a final decision to exercise or not exercise an expiring option shall be 1 hour 28 minutes following the time announced for the close of trading on that day instead of the 5:30 p.m. (EST) deadline found in Rule 1042 (c). However, members and member organizations may deliver a CEA or Advice Cancel to the Exchange within 2 hours 28 minutes following the time announced for the close of trading in equity options on that day instead of the 6:30 p.m. (EST) deadline found in Rule 1042(c) for: (i) customer accounts; and, (ii) non-customer accounts where such member firm employs an electronic submission procedure with an electronic time stamp (with fixed procedures to ensure security of the time stamp) to indicate the time of receipt of exercise instructions.

For non-customer accounts, members and member organizations that do not employ an electronic submission procedure with a time stamp for the submission of exercise instructions are required to deliver a CEA or Advice Cancel within 1 hour and 28 minutes following the time announced for the close of trading on that day instead of the 5:30 p.m. (EST) deadline found in Rule 1042(c).

(h) *Extending or Reducing the Cut-Off Time for Exercise Decisions.*

(i) The Exchange may establish extended cut-off times for a decision to exercise or not exercise an expiring option and for the submission of CEAs on a case-by-case basis due to an unusual circumstance.

(ii) The Exchange, with at least one (1) business day prior advance notice, by 12:00 noon (EST) on such day, may establish a reduced cut-off time for the decision to exercise or not exercise an expiring option and for the submission of CEAs on a case-by-case basis due to unusual circumstances; provided, however, that under no circumstances should the exercise cut-off time and the time for submission of a CEA be before the close of trading.

Commentary

.01 *For purposes of this Rule 1042, the terms ''customer account'' and ''non-customer account'' have the same meaning as in OCC By-Laws Articles I(C)(28) and I(N)(2), respectively.*

.02 Reporting final exercise decisions contemplated by this rule does not serve to substitute as the effective ''exercise notice'' to OCC for

the exercise or non-exercise of expiring options.

.03 In the event of ''unusual circumstances,'' Rule 1042(h)(i) provides that the Exchange may extend the cut-off times for exercise instructions and the submission of a CEA beyond the normal time frames specified in Rule 1042(c). For purposes of subparagraph (h)(i), an ''unusual circumstance'' includes, but is not limited to, increased market volatility; significant order imbalances; significant volume surges and/or systems capacity constraints; significant spreads between the bid and offer in underlying securities; internal system malfunctions affecting the ability to disseminate or update market quotes and/or deliver orders; or other similar occurrences. Rule 1042 (h)(ii) provides that the Exchange may also reduce such cut-off times for ''unusual circumstances.'' For purposes of subparagraph (h)(ii), an ''unusual circumstance'' includes, but is not limited to, a significant news announcement concerning the underlying security of an option contract that is scheduled to be released just after the close on the business day immediately prior to expiration.

.04 Although the deadline for options holders to make a final decision to exercise or not exercise is 5:30 p.m. (EST), the deadline for the submission of the CEA in the case of non-customer accounts will depend on the manner of the decision to exercise or not exercise as set forth below.

(i) For electronic submissions of CEAs by non-customer option holders with an electronic timestamp indicating receipt of exercise instructions on or before 5:30 p.m. (EST), members and member organizations must submit CEAs to the Exchange by 6:30 p.m. (EST).

(ii) For non-electronic submissions of CEAs by non-customer option holders, members and member organizations must submit CEAs to the Exchange via the Contrary Exercise Advice Box by 5:30 p.m. (EST).

.05 Each member organization shall establish fixed procedures to insure secure time stamps in connection with their electronic systems employed for the recording of submissions to exercise or not exercise expiring options.

[.02].*06* It is contemplated by this rule that effecting an exercise decision in an expiring option on the basis of material information obtained after the exercise cut-off time is activity inconsistent with just and equitable principles of trade.

[.03].*07* The exercise cut-off requirements contained in this rule do not apply to any foreign currency or index option products listed on the Exchange.

.08 Each Member Organization shall prepare a memorandum of every exercise instruction received showing the time when such instruction was so received. Such memoranda will be subject to the requirements of SEC Rule 17a–4(b).

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx 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 and is 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

The purpose of the proposed rule change is to amend Phlx Rule 1042 to simplify how CEAs are submitted to the Exchange in light of the Options Clearing Corporation's (''OCC'') Exercise-by-Exception (''Ex-by-Ex'') procedure and to provide additional time for members and member organizations to submit CEAs for certain accounts to the Exchange. The purpose is also to provide the Exchange with flexibility to modify the time to close options trading prior to expiration and the time by which decisions whether to exercise must be made. The proposal provides guidance to those member organizations that indicate final exercise decisions on behalf of others. Additionally, the proposal conforms the language of the various parts of the rule in light of the changes.

The OCC, issuer of all Phlx and other exchange-traded options contracts, has an established procedure pursuant to OCC Rule 805 for options holders wishing to exercise in-the-money options before they expire. Known as Ex-by-Ex, the procedure provides for the automatic exercise at expiration of any equity option contract that has an exercise price below (in the case of a call) or above (in the case of a put) the closing price of the underlying security by: ''of a point ($.75) or more if the option contract is carried in a customer account,[5] or ¼ of a point ($.25) or more if the option is carried in any other account. Options holders who wish to have their options contracts exercised in accordance with the Ex-by-Ex procedure need to take no further action. Those contracts that are in-the-money by the appropriate amount will be automatically exercised. Options holders who do not wish to have their options automatically exercised, or wish their options to be exercised under different parameters than the Ex-by-Ex procedure, must file a CEA with the Exchange pursuant to Phlx Rule 1042, and thereby instruct OCC of their ''contrary intention''.[6] Members and member organizations can satisfy the filing requirement by manually submitting a CEA to the Exchange or by electronically submitting the CEA through OCC's clearing system (ENCORE). Phlx Rule 1042 is designed to, among other things, deter individuals from taking improper advantage of late-breaking news by requiring evidence of an option holder's intention regarding whether to exercise expiring equity options via the submission of a CEA.

On occasion, OCC has had to waive or suspend its Ex-by-Ex procedure, such as when trading in the underlying stock has been halted, or where no accurate price was available to be used in the determination of the closing price. When this occurs and there is no automatic exercise per OCC Rule 805, all options holders must send exercise instructions to OCC if they wish to exercise an option regardless of whether the option is in or out-of-the-money. Currently, when OCC suspends its Ex-by-Ex procedure for an option class, Phlx Rule 1042 requires the submission of a CEA. Thus, when OCC has waived the Ex-by-Ex procedure, option holders must determine what price would have been used, even though the only available price might be a ''stale'' last sale price, and then determine whether a CEA needs to be submitted to the Exchange to indicate the option holder's intention to exercise or not exercise. Option holders and options exchanges have long viewed this process as cumbersome and confusing.

[5] A ''customer account'' is defined in OCC By-Laws as an account of a Clearing Member which is confined to Exchange transactions cleared and positions carried by the Clearing Member on behalf of its securities customers, other than those transactions of market-makers which are cleared through a market maker's account. See OCC By-Laws Article (I)(C)(28).

[6] A CEA may be cancelled by filing an Advice Cancel with the Exchange at any time up to the submission cut-off deadline specified in proposed Phlx Rule 1042(c).

The Phlx proposes to amend Phlx Rule 1042 to eliminate the requirement that a CEA be submitted if the option holder does not want to exercise the option when OCC has waived its Ex-by-Ex procedure for that options class. As a result, the proposed rule change indicates that when Ex-by-Ex procedures have been waived by OCC, submission of instructions to exercise (CEAs) are only required when the options holder wants to exercise the option contract. If an options holder takes no action, the option will expire without being exercised.[7]

Currently, Phlx Rule 1042 provides that option holders have until 5:30 p.m. (EST) on the business day immediately prior to the expiration date[8] to decide whether to exercise an expiring option. The Exchange proposes in Phlx Rule 1042(c) to extend the cut-off time for members and member organizations to deliver CEAs to the Exchange to 6:30 p.m. (EST) for customer accounts. The cut-off time would also be extended to 6:30 p.m. (EST) for non-customer accounts[9] provided that such submission was done electronically, with an electronic time stamp to record receipt of the exercise instruction by 5:30 p.m. (EST).[10] The Exchange believes that this rule change is required because members or member organizations may sometimes find it difficult to deliver CEAs in compliance with the 5:30 p.m. (EST) cut-off time when the determination of final settlement prices are sometimes delayed as members and member organizations are confirming exercise instructions with their customers. Because of such logistical problems, members and member organizations must often process and immediately submit customer CEAs to the Exchange upon receiving instructions from customers in order to meet the existing 5:30 p.m. (EST) cut-off time. Accordingly, to allow sufficient time to process CEAs for customer accounts, the Exchange proposes to extend the cut-off time to 6:30 p.m. (EST) for members and member organizations to deliver CEAs for customer accounts to the Exchange and to deliver CEAs for non-customer accounts to the Exchange, as long as the submissions are done electronically (which includes, but is not limited to, e-mail), and the member or member organization received the CEAs by 5:30 p.m. (EST) as evidenced by a time-stamp. The Exchange believes that it is appropriate to extend the cut-off time for member and member organization submission of these CEAs, and any cancellation thereof, to the Exchange as all decisions to exercise (or not exercise) must still be made by 5:30 p.m. (EST) in accordance with Phlx Rule 1042.

To address unusual circumstances, the Exchange proposes in Rule 1042 (h) that it have the ability to establish different cut-off times for the option holder to make a decision to exercise or not exercise expiring options and for members and member organizations to submit CEAs. Proposed Phlx Rule 1042(h)(i) would permit the Exchange to extend the cut-off time for option holders to decide whether to exercise expiring options, as well as for members and member organizations to submit CEAs because of unusual circumstances. Unusual circumstances would include, for example, increased market volatility and significant order imbalances. Proposed Phlx Rule 1042(h)(ii) would likewise allow the Exchange to reduce the cut-off time for option holders to decide whether to exercise options as well as for members and member organizations to submit CEAs because of unusual circumstances that include a significant news announcement regarding the underlying security of an option contract that is scheduled to be released just after the close on the business day immediately prior to expiration.[11] For example, a decision on whether a particular merger will be approved or whether a new product will receive regulatory approval that occurs after the close of trading would justify a reduced cut-off time so that persons holding short positions are not prejudiced by being unable to close out their positions. The Exchange believes that this will maintain a level playing field between persons holding long and short positions in expiring options.

In addition, proposed Phlx Rule 1042(g) provides customers and members and member organizations with added flexibility in connection with the delivery of CEAs or Advice Cancels if the Exchange announces a modified time for the close of trading in equity options prior to expiration. The Exchange proposes that, if the Exchange establishes a modified time for the close of trading in equity options on the day when expiration will occur and properly notifies its members about the modification, option holders would have 1 hour 28 minutes after the announced close of trading to make a final decision to exercise or not exercise an expiring option. The proposal would also give members and member organizations 2 hours 28 minutes after the close of trading to deliver CEAs for customer accounts and for non-customer accounts, as long as the submission were done electronically with an electronic time-stamp. However, members and member organizations that do not employ an electronic submission procedure for non-customer accounts would have to submit their CEAs within 1 hour 28 minutes following the close of trading.

Proposed Phlx Rule 1042 (e) provides that if a member organization has accepted the responsibility to indicate final exercise decisions on behalf of another member or non-member organization, it must take the necessary steps to ensure that such decisions are properly indicated to the Exchange. Such member organization may establish a processing cut-off time prior to the Exchange's exercise cut-off time after which it will not accept exercise decisions or other processing procedures.

The Exchange also proposes new Commentaries to Phlx Rule 1042. First, new Commentary .01 clarifies that for purposes of Phlx Rule 1042, the definitions of ''customer'' and ''non-customer'' in OCC's By-Laws are applicable. Second, new Commentary .03 clarifies that cut-off times for the submission of a CEA may be extended or reduced because of ''unusual circumstances'' and provides examples of such circumstances. Third, new Commentary .04 clarifies that the deadline for submission of CEAs for non-customer accounts will be 6:30 p.m. (EST) where they are submitted electronically with a timestamp indicating receipt of exercise instructions on or before 5:30 p.m. (EST), and will be 5:30 p.m. (EST) if submission is manual. Fourth, new Commentary .05 requires member and member organizations that employ an electronic submission method to adopt specific written procedures for the electronic submission of CEAs. Finally, new Commentary .08 provides that

[7] Phlx Rule 1042, as amended, indicates that, unless waived by OCC, expiring options are subject to the Ex-by-Ex procedure found in OCC Rule 805, as noted above.

[8] The ''expiration date'' of an options contract generally is the Saturday immediately following the third Friday of the expiration month of such option. *See* Phlx Rule 1000(b)21. *See also* OCC By-Laws Article (I)(E)(16).

[9] A ''non-customer account'' in respect of any person carrying an account with a broker or dealer generally means a person that is not a customer of a broker of dealer as defined in Rules 8c–1 and 15c–2–1 under the Act. *See* OCC By-Laws Article I(N)(2).

[10] The use of an electronic time stamp requires establishment by members and member organizations of a fixed procedure to ensure that the electronic time stamp for the exercise instruction decision is secure. The time to submit CEAs for non-customer accounts, where a time stamp is not used as part of an electronic submission procedure, remains at 5:30 p.m. (EST).

[11] The Exchange would provide notice prior to reducing the cut-off time period. *See* proposed Phlx Rule 1042(h)(ii).

members and member organizations will prepare a memorandum of every exercise instruction received showing the time of receipt, and that such memoranda will be subject to the requirements of SEC Rule 17a–4(b).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [12] in general, and furthers the objectives of Section 6(b)(5) of the Act [13] in particular, in that it 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system by, among other things, simplifying the manner in which CEAs or Advice Cancels are submitted to the Exchange, extending the cut-off time by which members must submit to the Exchange CEAs for certain accounts, and indicating when the Exchange could modify the cut-off time to decide whether to exercise an option.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate 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

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has been filed by the Exchange pursuant to Section 19(b)(3)(A) of the Act [14] and subparagraph (f)(6) of Rule 19b–4 thereunder.[15] Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for thirty days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act [16] and Rule 19b–4(f)(6) [17] thereunder.[18]

A proposed rule change filed under Rule 19b–4(f)(6) [19] normally does not become operative prior to thirty days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii), the Commission may designate a shorter time if such action in consistent with the protection of investors and the public interest. The Phlx has requested that the Commission waive the thirty-day operative date in order to allow the Exchange's options exercise procedures to be in line with those of OCC and other options exchanges.

The Commission believes that waiving the thirty-day operative date is consistent with the protection of investors and the public interest.[20] Accelerating the operative date will allow the Phlx to immediately implement rules similar to ones already in place at the American Stock Exchange LLC and the International Securities Exchange, Inc.,[21] and will simplify and clarify the process by which members and member organizations accept exercise decisions from options holders and submit such decisions to the Exchange. For these reasons, the Commission designates the proposed rule change as effective and operative immediately. At any time within 60 days of the filing of the proposed rule change the Commission may summarily abrogate such proposed 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 Phlx. All submissions should refer to File No. SR–Phlx–2003–65 and should be submitted by November 13, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[22]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–26748 Filed 10–22–03; 8:45 am]

BILLING CODE 8010–01–P

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6)

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6).

[18] As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date or such shorter period as designated by the Commission.

[19] 17 CFR 240.19b–4(f)(6).

[20] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation.15 U.S.C. 78c(f).

[21] *See* Securities Exchange Act Release Nos. 47885 (May 16, 2003), 68 FR 28309 (May 23, 2003) (SR–Amex–2001–92) and 48505 (September 17, 2003), 68 FR 55680 (September 26, 2003) (SR–ISE–2003–20).

[22] 17 CFR 200.30–3(a)(29).

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3554]

Commonwealth of Kentucky

Franklin County and the contiguous counties of Anderson, Henry, Owen, Scott, Shelby and Woodford constitute a disaster area due to damages caused by severe thunderstorms that occurred on August 22, 2003. Applications for loans for physical damage may be filed until the close of business on December 15, 2003 and for economic injury until the close of business on July 15, 2004 at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 2 Office, One Baltimore Place, Suite 300, Atlanta, GA 30308.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere:	5.125
Homeowners Without Credit Available Elsewhere:	2.562
Businesses with Credit Available Elsewhere:	6.199
Businesses and Non-Profit Organizations Without Credit Available Elsewhere:	3.100

	Percent
Others (Including Non-Profit Organizations) with Credit Available Elsewhere:	5.500
For Economic Injury:	
Businesses and Small Agricultural Cooperatives Without Credit Available Elsewhere:	3.100

The number assigned to this disaster for physical damage is 355411 and for economic injury the number assigned is 9X3200.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: October 15, 2003.

Hector V. Barreto,

Administrator.

[FR Doc. 03–26699 Filed 10–22–03; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 4519]

Amendment to Bureau of Educational and Cultural Affairs Request for Grant Proposals: Pre-Academic English Language Training and Academic Readiness Phase of the PLUS Program

SUMMARY: The Pre-Academic English Language Training and Academic Readiness Phase of the PLUS Program Grants Competition was announced on October 10, 2003 in the **Federal Register** (68 FR 58741). This announcement amends the original RFGP to change the international travel portion of the program budget from a round trip to a one-way ticket as previously stated in the budget guidelines section of the original announcement. All other terms and conditions in the previously published RFGP remain the same.

FOR FURTHER INFORMATION CONTACT: The Office of English Language Programs, ECA/A/L, Room 304, U.S. Department of State, SA–44, 301 4th Street, SW., Washington, DC 20547; Phone (202) 619–5886; E-mail *kmjenson@pd.state.gov;* or Internet address: *http://exchanges.state.gov/education/RFGPs.*

Dated: October 17, 2003.

C. Miller Crouch,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 03–26791 Filed 10–22–03; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 4487]

Shipping Coordinating Committee; Notice of Meeting

The Shipping Coordinating Committee (SHC) will conduct two open meetings between 10 a.m. and 12 p.m. in successive order on Wednesday, 12 November 2003, in Room 6103, at U.S. Coast Guard Headquarters, 2100 Second Street, SW, Washington, DC 20593–0001. The purpose of the first meeting, 10 a.m. to 11 a.m., is to finalize preparations for the 22nd Extraordinary Session of Council, the 91st Session of Council and the 23rd Session of the Assembly of the International Maritime Organization (IMO) which are scheduled to be held from the 21st of November to the 5th of December 2003, at the IMO Headquarters in London. Discussion will focus on the papers received for the sessions and draft U.S. positions.

Items of particular interest include:

- Reports of Committees;
- Reports on Diplomatic Conferences;
- Work Program and Budget for 2004–2005; and
- Election of Members of the Council.

The purpose of the second meeting, 11 a.m. to 12 p.m., is to finalize preparations for the 50th session of the Marine Environment Protection Committee, which is scheduled to be held on the 1st and 4th of December 2003, at the IMO Headquarters in London. Discussion will focus on papers received for the meeting and draft U.S. positions.

Items of particular interest include:

- Consideration and adoption of amendments to MARPOL 73/78;
- Consideration of the report of the Committee.

Members of the public may attend these meetings up to the seating capacity of the room. Interested persons may seek information by writing: Director, International Affairs, U.S. Coast Guard Headquarters, Commandant (G-CI), room 2114, 2100 Second Street, SW, Washington, DC 20593–0001 or by calling: (202) 267–2280.

Dated: October 14, 2003.

Steven D. Poulin,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. 03–26792 Filed 10–22–03; 8:45 am]

BILLING CODE 4710–07–P

TENNESSEE VALLEY AUTHORITY

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Transfer of Administrative Jurisdiction, Custody, and Control of Approximately 170,000 Acres of Land Owned by the Tennessee Valley Authority (TVA) Located at the Land Between The Lakes National Recreation Area in Lyon and Trigg Counties, KY, and Stewart County, TN, Subject to the Rights Expressly Reserved for the Benefit of TVA, Its Agents, Employees, Successors and Assigns as Set Forth in Exhibit A Which Is Attached Hereto and Made a Part Hereof, Said Land Hereinafter Referred to as the ''Land Between the Lakes''

AGENCIES: Tennessee Valley Authority (TVA), Forest Service, USDA (USDA–FS).

ACTION: Notice of transfer agreement.

SUMMARY: Pursuant to the Land Between The Lakes Protection Act of 1998, 16 U.S.C. 460 (Act), administrative jurisdiction over the Land Between The Lakes National Recreation Area transferred from TVA to USDA–FS on October 1, 1999. The Land Between the Lakes National Recreation Area consists of approximately 170,000 acres located in Lyon and Trigg Counties, Kentucky, and Stewart County, Tennessee, and rights appurtenant thereto. On September 7, 2001, TVA and the USDA-FS, Southern Region, executed an Agreement of Transfer to document the transfer of administrative jurisdiction over the Land Between The Lakes National Recreation Area that occurred by operation of law on October 1, 1999. A copy of the Agreement of Transfer is attached hereto and made a part hereof as Exhibit A.

The land transferred is described in the Agreement of Transfer and is generally depicted on a drawing which is available for public inspection in the Office of the Chief of the Forest Service, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Michael Lange at 404–347–2990.

SUPPLEMENTARY INFORMATION: A copy of the Agreement of Transfer is attached hereto and made a part hereof as Exhibit A.

Dated: September 25, 2003.

Robert T. Jacobs,

Regional Forester, Southern Region, USDA, Forest Service.

Dated: September 9, 2003.

Darlene H. Bradley,

Manager, Realty Services, Tennessee Valley Authority.

AGREEMENT OF TRANSFER BETWEEN TENNESSEE VALLEY AUTHORITY AND UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE

LAND BETWEEN THE LAKES NATIONAL RECREATION AREA

This Agreement of Transfer made and entered into this 7th day of September, 2001, by and between Tennessee Valley Authority, a corporation organized and existing under and by virtue of an Act of Congress known as the Tennessee Valley Authority Act of 1933, as amended (hereinafter called ''TVA''), and the United States Department of Agriculture, for the use and benefit of the Forest Service of the Department of Agriculture (hereinafter called ''USDA–FS'').

WITNESSETH:

Whereas, on October 1, 1999, pursuant to the Land Between The Lakes Protection Act of 1998, 16 U.S.C. 460lll, administrative jurisdiction over the Land Between The Lakes National Recreation Area transferred from TVA to USDA-FS; and

Whereas, the Land Between The Lakes National Recreation Area contains approximately 170,000 acres located in Lyon and Trigg Counties, Kentucky, and Stewart County, Tennessee, as described in Exhibit A which is attached hereto and made a part hereof (hereinafter called ''LBL''); and

Whereas, on November 12, 1999, TVA and the USDA–FS, Southern Region, entered into a Memorandum of Agreement (FS Agreement No. 00MU–1108310–010) to ensure an efficient, orderly, and cost-effective transition of LBL, which provided in part that the parties would execute and publish an Agreement of Transfer documenting the transfer of administrative jurisdiction, custody, and control that occurred on October 1, 1999, by operation of law;

Now, Therefore, in consideration of the premises and of the mutual covenants herein contained, TVA and USDA–FS, covenant and agree as follows:

1. TVA, subject to the conditions, exceptions, and reservations herein contained, has assigned and transferred to USDA–FS the right of possession and all other right, title, or interest which TVA may have in and to LBL.

2. All of the interests and rights assigned and transferred by TVA to the USDA–FS under section 1 hereof are assigned and transferred subject to the following rights, which are hereby expressly reserved for the benefit of TVA, its agents, employees, successors and assigns:

(a) the perpetual right, in connection with and by virtue of the erection and operation of any dam or dams across the Tennessee River or its tributaries, to permanently flood the land described in Exhibit A that is below the 375-foot contour elevation (mean sea level) and temporarily and intermittently flood the land described in Exhibit A that is between the 375-foot contour elevation and the 378-foot contour elevation (mean sea level);

(b) the perpetual right to enter upon the land lying below the 378-foot contour elevation (mean sea level) for the purposes of law enforcement or enforcement of Section 26a of the TVA Act;

(c) permanent exclusive easements for itself, its successors and assigns, to maintain, operate, modify, and upgrade the existing electric power substation and communication facilities, which are an integral part of TVA's power system, in, on, over, and across the two parcels of land described in Exhibit B attached hereto and made a part hereof, including the right to fence all or part of the lands described in Exhibit B, and the perpetual right to use the existing means of access across the land described in Exhibit A for ingress to and egress from the lands described in Exhibit B;

(d) permanent easements and rights-of-way for itself, its successors and assigns, for the Kentucky Dam-Cadiz 69-kV Transmission Line (including the tap line from the Kentucky Dam-Cadiz 69-kV Transmission Line to the Lyon, Kentucky Substation) and the Kentucky Dam-Nashville 161-kV Transmission Line, which are integral parts of TVA's power system, and the permanent right to erect, operate, and maintain additional electric power circuits and lines within the existing rights-of-way for said transmission lines, which rights-of-way are described in Exhibit C attached hereto and made a part hereof, and the permanent right of reasonable access along the roads and/or other off-right-of-way routes across the land described in Exhibit A that historically have been used by TVA for ingress to and egress from said rights-of-way and said transmission lines, said easement rights consisting of the perpetual right to enter at any time and from time to time and to erect, maintain, repair, rebuild, operate, and patrol as many lines of poles or transmission line structures within said existing rights-of-way as TVA deems necessary or useful for electric power transmission purposes, with sufficient wires and cables for electric power circuits and communication circuits, and all necessary appurtenances in, on, over, and across said rights-of-way (and if deemed necessary by TVA to anchor guy wires outside said rights-of-way), together with the perpetual right to clear said rights-of-way and keep the same clear of all brush, trees, buildings, signboards, stored personal property, and fire hazards; to destroy or otherwise dispose of such trees and brush; and to remove, destroy, or otherwise dispose of any trees located outside said rights-of-way which in falling could come within ten (10) feet of any transmission line structure or conductor.

3. Included in TVA's reservation of rights in section 2(c) and (d) is the right to attach telecommunication facilities, including circuits, to transmission line structures and to authorize third parties to attach or underbuild electric distribution circuits or communications equipment to such structures or to the communication facilities; provided, however, that such third party uses may be subject to the imposition of fees by USDA–FS.

4. With respect to the reservation by TVA in section 2(c) and (d) of the rights to operate, maintain, construct, modify, and upgrade certain facilities, it is understood and agreed that any assignee of, or successor-in-interest to, TVA is permitted to operate, maintain, repair, and rebuild facilities in existence at the time of such transfer of interest but not build additional facilities without the prior written consent of USDA–FS. Further, before any assignee or successor-in-interest commences or engages in any construction, modification, or upgrading with respect to such facilities, the assignee or successor must first obtain USDA–FS's written authorization.

5. Any additional proposed power system or other TVA presence on LBL property beyond that reserved in this Agreement will be requested by TVA and considered by USDA–FS in accordance with USDA–FS's normal procedure.

6. TVA in no way warrants the extent of the United States' interests in LBL.

7. Nothing contained in this agreement shall be construed to affect the interests, if any, of the U.S. Army Corps of Engineers or any other third party in any portion of LBL.

In Witness Whereof, the parties hereto have caused this instrument to be executed by their duly authorized representative, the day and year first above written.

Approved by:

U.S. DEPARTMENT OF AGRICULTURE—FOREST SERVICE

Elizabeth Estill,
Regional Forester.
Date: September 28, 2001.

ATTEST:

J. Wayne Owens.
Assistant Secretary.
Date: September 7, 2001.

TENNESSEE VALLEY AUTHORITY

Daniel H. Ferry
Acting Manager, Realty Asset Services.

CERTIFICATION OF CONSIDERATION

I, DANIEL H. FERRY, Acting Manager, Realty Asset Services, as legal agent of the Tennessee Valley Authority, the Grantor herein, do hereby certify, pursuant to KRS Chapter 382, that the above-stated consideration in the amount of *$0.00 (Tax Exempt)* is the true, correct, and full consideration paid for the property herein conveyed. I further certify my understanding that falsification of the stated consideration of the sale price of the property is a Class D Felony subject to one to five years imprisonment and fines up to $10,000.00.

GRANTOR:

TENNESSEE VALLEY AUTHORITY

DANIEL H. FERRY
Acting Manager, Realty Asset Services

CERTIFICATION OF CONSIDERATION

I, ELIZABETH ESTILL, Regional Forester, as legal agent of the U.S. DEPARTMENT OF AGRICULTURE—FOREST SERVICE, the Grantee herein, do hereby certify, pursuant to KRS Chapter 382, that the above-stated

consideration in the amount of *$0.00 (Tax Exempt)* is the true, correct, and full consideration paid for the purchase of the property herein conveyed. I further certify my understanding that falsification of the stated consideration of the sale price of the property is a Class D Felony subject to one to five years imprisonment and fines up to $10,000.00.

GRANTEE:

U.S. DEPARTMENT OF AGRICULTURE—FOREST SERVICE

ELIZABETH ESTILL,
Regional Forester

STATE OF TENNESSEE

COUNTY OF HAMILTON

On the *7th* day of *September*, 2001, before me appeared DANIEL H. FERRY and J. WAYNE OWENS, to me personally known, who, being by me duly sworn, did say that they are the Acting Manager, Realty Asset Services and Assistant Secretary, respectively, of the TENNESSEE VALLEY AUTHORITY, a corporation; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed, sealed, and delivered and the Certification of Consideration was subscribed and sworn to before me, on behalf of said corporation, by authority of its Board of Directors; and the said DANIEL H. FERRY and J. WAYNE OWENS acknowledged said instrument to be the free act and deed of the TENNESSEE VALLEY AUTHORITY.

WITNESS my hand and official seal of office in Chattanooga, Hamilton County, Tennessee, the day and year aforesaid.
Lynn McCurdy
NOTARY PUBLIC

My Commission Expires: *February 17, 2004.*

STATE OF GEORGIA)

COUNTY OF FULTON)

On the *28th* day of *September*, 2001, before me appeared ELIZABETH ESTILL, to me personally known, who, being by me duly sworn, did say that she is the Regional Forester of the U.S. DEPARTMENT OF AGRICULTURE—FOREST SERVICE; and that said instrument was signed and delivered and the Certification of Consideration was subscribed and sworn to before me, on behalf of the U.S. DEPARTMENT OF AGRICULTURE—FOREST SERVICE; and the said ELIZABETH ESTILL acknowledged said instrument to be the free act and deed of the U.S. DEPARTMENT OF AGRICULTURE—FOREST SERVICE.

WITNESS my hand and official seal of office in *Atlanta, Fulton County, Georgia* the day and year aforesaid.
Johnie O. Adams
NOTARY PUBLIC

My Commission Expires: *December 6, 2002*

EXHIBIT A TO AGREEMENT OF TRANSFER

LAND BETWEEN THE LAKES NATIONAL RECREATION AREA

The Land Between The Lakes National Recreation Area (LBL), being all federally owned land, water, and interests in the land and water lying between Kentucky Lake and Lake Barkley, situated in Lyon and Trigg Counties, Kentucky, and in Stewart County, Tennessee, the boundary of which is described as follows:

The **North Boundary** of LBL is the 354-foot contour elevation (mean sea level) as it lies along the Southerly shore of Barkley Canal, which connects Kentucky Lake and Barkley Lake.

The **West Boundary** of LBL is the 354-foot contour elevation (mean sea level) as it lies along the Easterly shore of Kentucky Lake, beginning at Barkley Canal and thence Westerly and Southerly along said contour to a point where it intersects the South boundary of LBL.

The **East Boundary** of LBL is the 359-foot contour elevation (mean sea level) as it lies along the Westerly shore of Lake Barkley, beginning at Barkley Canal and thence easterly and southerly along said contour to a point intersecting the easterly edge of an old road (Coordinates: N782,190, E1,445,876) said point being along the westerly bank of Rawls Pond and lying approximately 30 feet east of a Sandstone Bluff, thence Southerly along the east edge of said road 0.35 mile to a 6″ diameter Well Casing (Coordinates: N780,439; E1,446,413); thence 5 feet east to a fence; thence Southerly along and with said fence 820 feet to a drainage ditch; thence N 65°37′ E 675 feet to a 26″ diameter Red Oak in an existing fence line (Coordinates: N779,902; E1,447,025); thence Southeasterly along and with said fence approximately 0.6 mile to a point intersecting the South Boundary of LBL, said point marked by a concrete monument (Corner 10PS–1, Coordinates: N777,592; E1,448,808).

The **South Boundary** of LBL is shown on TVA Maps titled ''Land Between The Lakes Reservation'', drawing numbers 421 B511-(1–6), dated between December 1968 and January 1969, and further described as follows: Beginning at a point where the centerline of U.S. Highway 79 intersects the 354-foot contour elevation (mean sea level) lying along the Easterly shore of Kentucky Lake; thence Easterly along said centerline approximately 3.3 miles to the northwest Corner of LBL Tract 8RS:LBL–7; thence (4) four courses along and with LBL Tracts 8RS:

LBL–7 and 8RS:LBL 10;
S.7°38′ W 619 feet to Corner 8RS–6;
S.82°12′ E 1424 feet to Corner 8RS–5;
N.35°16′ E 2316 feet to Corner 8RS–4:
N.18°22′ W 209 feet to a point intersecting said centerline and being Corner 8RS–3;

Thence continuing Easterly along said centerline 2.6 miles to where it intersects the easterly boundary of LBL Tract 9RN:LBL–3, and being Corner 9RN–10; thence N 33° 33′ W 692 feet along said easterly boundary to Corner 9RN–9 at the northeast Corner of said tract; thence leaving the boundary of Tract 9RN:LBL–3 and with the boundary of Tract 9RN:LBL–2 the following nine (9) calls:

S.82°21′ E 500 feet to Corner 9RN–8,
N.33°31′ E 422 feet to Corner 9RN–7,
N.74°02′ E 470 feet to Corner 9RN–6,
N.05°59′ E 1084 feet to Corner 9RN–5,
N.83°27′ W 425 feet to Corner 9RN–4,
N.08°19′ E 1391 feet to Corner 9RN–3,
N.14°46′ W 671 feet to Corner 9RN–2,
N.29°21′ E 978 feet to Corner 9RN–1,
N.41°36′ E 703 feet to Corner 9PS–14;

Thence leaving the boundary of Tract 9RN:LBL–2 and with the boundary of Tract 9PS:LBL–4 the following five (5) calls:

S.27°44′ E 651 feet to Corner 9PS–13,
S.51°47′ W 783 feet to Corner 9PS–12,
N.16°32′ E 1044 feet to Corner 9PS–11,
N.59°44′ E 1380 feet to Corner 9PS–10,
N.08°26′ E 1540 feet to Corner 9PS–9,

Thence leaving the boundary of Tract 9PS:LBL4 and with the boundary of Tracts 9PS:LBL–5 and 9PS:LBL–6 the following nine (9) calls:

N.01°04′ E 114 feet to Corner 9PS–8,
N.35°39′ W 1080 feet to Corner 9PS–7,
N.20°12′ E 671 feet to the centerline of a road, being Corner 9PS–6,
Northeasterly with the centerline of road 1385 feet to Corner 9PS–5,
Thence leaving the road, S.85°28′ E. 799 feet to Corner 9PS–4,
N.04°31′ E 282 feet to Corner 9PS–3 on the south side of road,
N.70°36′ W 87 feet to Corner 9PS–2,
N.12°36′ E 511 feet to Corner 9PS–1,
N.12°01′ E 849 feet to Corner 10PS–26;

Thence leaving the boundary of Tract 9PS:LBL–6 and with the boundary of Tract 10PS:LBL–1 the following eight (8) calls:

S.87°08′ E. 595 feet to Corner 10PS–25,
N.01°46′ E 201 feet to Corner 10PS–24,
N.59°28′ E 347 feet to Corner 10PS–23,
S.84°21′ E 314 feet to Corner 10PS–22,
S.80°25′ E 378 feet to Corner 10PS–21,
S.81°50′ E 1375 feet to Corner 10PS–20,
N.05°16′ E 721 feet to Corner 10PS–19,
N.06°45′ E 1097 feet to Corner 10PS–18 on the south line of Tract 10PS:LBL–4;

Thence leaving the boundary of Tract 10PS:LBL–2 and with the boundaries of Tracts 10PS:LBL–4, 6608, 6607, and 6606 the following eight (8) calls:

S.82°14′ E 2024 feet to Corner 10PS 17,
S.83°39′ E 319 feet to Corner 10PS–16,
N.07°33′ E 519 feet to Corner 10PS–15,
S.85°19′ E 664 feet to Corner 10PS–14,
S.88°05′ E 420 feet to Corner 10PS–13,
N.06°37′ E 497 feet to Corner 10PS–12,
S.85°14′ E 158 feet to Corner 10PS–11 in the centerline of road, Northerly with said centerline of road 498 feet to Corner 10PS–9 on the south line of Tract 10PS:LBL–2;

Thence leaving the centerline of road and Tract 6606 and with Tract 10PS:LBL–2 the following two (2) calls:

N.84°17′ E 224 feet to Corner 10PS–8,
N.84°17′ E 787 feet to Corner 10PS–7,

Thence leaving Tract 10PS:LBL–2 and with Tract 10PS:LBL–3 the following six (6) calls:

S.02°21′ E 1151 feet to Corner 10PS–6,
S.05°25′ E 621 feet to Corner 10PS–5,
S.81°12′ E 373 feet to Corner 10PS–4,
S.01°30′ E 4 feet to Corner 10PS–3,
S.83°55′ E 1878 feet to Corner 10PS–2
S.84°01′ E 2869 feet to a point intersecting the East Boundary of LBL, said point being marked by Corner 10PS–1, (Coordinates: N 777,592; E 1,448,808).

Note: Course directions and coordinates for Corner positions are referenced to Tennessee NAD27 State Plane Coordinates, U.S. Survey Feet.

This description contained in Exhibit A prepared by the USDA–FS, Southern Region, from the maps and records of:

Tennessee Valley Authority
Haney Building 2A 1101 Market Street
Chattanooga, Tennessee 37402–2801
8/31/00

EXHIBIT B TO AGREEMENT OF TRANSFER

Lands Within The Land Between The Lakes National Recreation Area That Are Subject to Tennessee Valley Authority Reserved Interests

LYON, KENTUCKY SUBSTATION TVA TRACT NO. LYOSS–1

A parcel of land located in Lyon County, Commonwealth of Kentucky, on the southeast side of State Highway No. 58, approximately ⅙ mile northeast of the intersection of State Highway No. 58 with State Highway No. 453, as shown on sheet 1 of US–TVA drawing LW–4914, revision 1, entitled ''Lyon, Kentucky Substation Property & Contour Map,'' the said parcel being more particularly described as follows:

Commencing at a point which is the intersection of the centerlines of State Highway No. 58 and State Highway No. 453; thence leaving the said intersection and with the meanders of the centerline of State Highway No. 58 in a northeasterly direction 907 feet to a point on a curve, the said point being a railroad spike and being the Point Of Beginning.

Thence leaving the point of beginning and with the centerline of the said road as it curves to the left, having a radius of 951.6 feet and arc length of 255.8 feet, forming a chord of N44°42′ E, 255.0 feet to the point of tangent, the said point being a railroad spike; thence leaving the said curve and continuing with the centerline of the said road N37°00′ E, 181.0 feet, crossing the centerline of the existing Kentucky Dam-Cadiz Transmission Line, as shown on sheet 6 of US–TVA drawing LW–3068, to a point on the northeast right-of-way line of the said existing transmission line, the said point being a railroad spike; thence leaving the centerline of the said road and with the said right-of-way line of the existing transmission line S67°14′ E, 300.0 feet to a point, the said point being a 1½-inch iron pin; thence leaving the said right-of-way line of the existing transmission line and with the southeast line of the herein described parcel S37°46′ W, 511.8 feet to a point, the said point being a 1½-inch iron pin; thence leaving the said southeast line and with the southwest line of the herein described parcel N52°14′ W, 318.1 feet to the point of beginning and containing 3.18 acres, more or less.

Note: The described land includes a portion of the present right-of-way of the Kentucky Dam-Cadiz Transmission Line.

MODEL, TENNESSEE MICROWAVE RADIO REPEATER STATION COMMUNICATION FACILITIES TVA TRACT NO. SNSRS–3

A parcel of land located in the Eighth Civil District of Stewart County, State of Tennessee, as shown on sheet I of US–TVA drawing SC–92888, revision 1, entitled ''Model, Tennessee Microwave Radio Repeater Station Site,'' the said parcel being more particularly described as follows:

Beginning at a point in the centerline of an existing county road; thence leaving the centerline of the said road and with the west line of the herein described parcel N07°30′ E, 418.9 feet, crossing steel fence posts at 20.0 feet and at 388.9 feet, to a point; thence leaving the said west line and with the north line of the herein described parcel S82°30′ E, 420.0 feet to a point; thence leaving the said north line and with the east line of the herein described parcel S07°30′ W, 418.1 feet, crossing steel fence posts at 30.0 feet and at 398.1 feet, to a point on the aforementioned centerline of a road; thence leaving the said east line and with the centerline of the said road approximately along the following bearings and distances: N78°45′ W, 187.4 feet and N85°45′ W, 233.1 feet to the point of beginning and containing 3.98 acres, more or less.

The bearings given in the description for TVA Tract No. SNSRS–3 are based on Magnetic North.

These descriptions contained in Exhibit B prepared from the maps and records of: Tennessee Valley Authority, Haney Building 2A 1101 Market Street, Chattanooga, Tennessee 37402–2801

8/31/00

EXHIBIT C TO AGREEMENT OF TRANSFER

Transmission Line Rights-of-way Within the Land Between The Lakes National Recreation Area That Are Subject to Tennessee Valley Authority Reserved Interests

KENTUCKY DAM-CADIZ 69-kV TRANSMISSION LINE

A strip of land located in Lyon and Trigg Counties, Commonwealth of Kentucky, as shown on sheet 3, revision 17; sheet 4, revision 4; sheet 5, revision 5; sheet 6, revision 7; sheet 7, revision 5; sheet 8, revision 6; and sheet 9, revision 13, of US–TVA drawing LW–3068, which sheets are incorporated herein by reference and made a part hereof, the said strip being 200-feet wide, the centerline of the location and the end boundaries of the strip being more particularly described as follows:

Beginning at point where the centerline of the location crosses the 354-foot contour elevation (mean sea level) as it lies along the southerly shore of Barkley Canal, which connects Kentucky Lake and Barkley Lake, the said point being at survey station 226+89.4 (approximately), the said strip being bounded on the northwest end by the said contour line; thence continuing with the centerline of the location S32°29′ E, 2,608.7 feet to an angle point in the centerline of the location at survey station 252+98.1; thence continuing with the centerline of the location S57°59′ E, 13,229.7 feet to an angle point in the centerline of the location at survey station 385+27.8; thence continuing with the centerline of the location S62°14′ E, 9,635.9 feet to an angle point in the centerline of the location at survey station 481+63.7; thence continuing with the centerline of the location S67°14′ E, 10,117.5 feet to an angle point in the centerline of the location at survey station 582+81.2; thence continuing with the centerline of the location S56°35′ E, 30,009.5 feet, crossing the line between Lyon and Trigg Counties at survey station 866+23, to an angle point in the centerline of the location at survey station 882+90.7; thence continuing with the centerline of the location S65°35′ E, 4,011.9 feet to an angle point in the centerline of the location at survey station 923+02.6; thence continuing with the centerline of the location N67°25′ E, 4,960.4 feet to a point where the centerline crosses the water's edge on the west side of the Cumberland River at survey station 972+63 (approximately), the said strip being bounded on the northeast end by the said water's edge.

The strip of land described above includes the centerline of the transmission line location for a net distance of 74,573.6 feet and contains 342.39 acres, more or less.

Furthermore, the permanent easement rights include the perpetual right to install, maintain, and replace guy wires and necessary appurtenances outside the right-of-way for the transmission line structures located at survey stations 252+98.1, 385+27.8, 481+63.7, 582+81.2, 882+90.7, and 923+02.6.

KENTUCKY DAM-NASHVILLE 161-kV TRANSMISSION LINE

A strip of land located in the Third Magisterial District of Lyon County and the First Magisterial District of Trigg County, Commonwealth of Kentucky, and also located in the Eighth Civil District of Stewart County, State of Tennessee, as shown on sheet 2, revision 21; sheet 3, revision 12; sheet 4, revision 9; sheet 5, revision 11; sheet 6, revision 10; sheet 7, revision 10; sheet 8, revision 11; sheet 9, revision 8; sheet 10, revision 12; sheet 11, revision 7; sheet 12, revision 7; sheet 13, revision 8; sheet 14, revision 8; sheet 15, revision 8; sheet 16, revision 8; and sheet 17, revision 10, of US–TVA drawing LW–2171, which sheets are incorporated herein by reference and made a part hereof, the said strip being 250-feet wide from survey station 201+00.0 (approximately) to 1881+00 (structure 295) and widening to 350 feet from survey station 1881+00 (structure 295) to survey station 1909+40 (approximately), the centerline of the location and the end boundaries of the strip being more particularly described as follows:

Beginning at a point where the centerline of the location crosses the 354-foot contour elevation (mean sea level) as it lies along the southerly shore of Barkley Canal, which connects Kentucky Lake and Barkley Lake, the said point being at survey station 201+00 (approximately), the said strip being bounded on the northwest end by the said contour line; thence continuing with the centerline of the location S36°23′ E, 700 feet to an angle point in the centerline of the location at survey station 208+00; thence continuing with the centerline of the location S37°13′ E, 7,788.6 feet to an angle point in the centerline of the location at survey station 285+88.6; thence continuing with the centerline of the location S48°59′ E, 7,886.7 feet to an angle point in the centerline of the location at survey station 364+75.3; thence continuing with the centerline of the location

S50°39′ E, 9,774.5 feet to an angle point in the centerline of the location at survey station 462+49.8; thence continuing with the centerline of the location S42°35′ E, 16,583.9 feet to an angle point in the centerline of the location at survey station 628+33.7; thence continuing with the centerline of the location S24°39′ E, 8,232.8 feet to an angle point in the centerline of the location at a survey station with the equation 710+66.5 LB = 708+64.1 LA; thence continuing with the centerline of the location S33°40′ E, 17,835.9 feet, crossing the line between the Third Magisterial District of Lyon County and the First Magisterial District of Trigg County at survey station 728+70, to an angle point in the centerline of the location at survey station 887+00.0; thence continuing with the centerline of the location S22°23′ E, 18,335.9 feet to an angle point in the centerline of the location at survey station 1070+35.9; thence continuing with the centerline of the location S17°30′ E, 21,188.7 feet to an angle point in the centerline of the location at survey station 1282+24.6; thence continuing with the centerline of the location S22°40′ E, 29,149.1 feet to an angle point in the centerline of the location at survey station 1573+73.7; thence continuing with the centerline of the location SI9°37′ E, 18,234.3 feet, crossing the line between the First Magisterial District of Trigg County, State of Kentucky, and the Eighth Civil District of Stewart County, State of Tennessee, at survey station 1578+05, to an angle point in the centerline of the location at survey station 1756+08.0; thence continuing with the centerline of the location S69°15′ E, 15,332.0 feet to a point where the centerline crosses the water's edge on the west side of the Cumberland River at survey station 1909+40 (approximately), the said strip being bounded on the east end by the said water's edge.

The strip of land described above includes the centerline of the transmission line location for a net distance of 171,042.4 feet and contains 988.17 acres, more or less.

Furthermore, the permanent easement rights include the perpetual right to install, maintain, and replace guy wires and necessary appurtenances outside the right-of-way for the transmission line structures located at survey stations 208+00, 285+88.6, 364+75.3, 462+49.8, 628+33.7, 887+00.0, 1070+35.9, 1282+24.6, 1573+73.7, and 1756+08.0 and for the transmission line structure located at a survey station with the equation 710+66.5 LB = 708+64.1 LA.

These descriptions contained in Exhibit C prepared from the maps and records of: Tennessee Valley Authority, Haney Building 2A, 1101 Market Street, Chattanooga, Tennessee 37402–2801.

8/31/00
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[FR Doc. 03–26575 Filed 10–22–03; 8:45 am]

BILLING CODE 8120–08–P; 3410–11–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number MARAD 2003–16336]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel AR–DE.

SUMMARY: As authorized by Pub. L. 105–383 and Pub. L. 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket 2003–16336 at *http://dms.dot.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Pub. L. 105–383 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before November 24, 2003.

ADDRESSES: Comments should refer to docket number MARAD–2003–16336. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at *http://dmses.dot.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Hokana, U.S. Department of Transportation, Maritime Administration, MAR–830 Room 7201, 400 Seventh Street, SW., Washington, DC 20590. Telephone 202–366–0760.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel AR–DE is:

Intended Use: ''Private luxury charter.

Georgraphic Region: ''East Coast U.S.''.

Dated: October 17, 2003.

By order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 03–26765 Filed 10–22–03; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number MARAD 2003–16337]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel CRITERION.

SUMMARY: As authorized by Pub. L. 105–383 and Pub. L. 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket 2003–16337 at *http://dms.dot.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Pub. L. 105–383 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before November 24, 2003.

ADDRESSES: Comments should refer to docket number MARAD–2003–16337. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at *http://dmses.dot.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Hokana, U.S. Department of Transportation, Maritime Administration, MAR–830 Room 7201, 400 Seventh Street, SW., Washington, DC 20590. Telephone 202–366–0760.

SUPPLEMENTARY INFORMATION:

As described by the applicant the intended service of the vessel *CRITERION is:*

Intended Use: ''Private charter, short (day) cruises, bed and breakfast, by reservation only. No regularly scheduled passenger service.''.

Geographic Region: ''Monongahela, Allegheny and Ohio Rivers.''.

Dated: October 17, 2003.

By order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 03–26766 Filed 10–22–03; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number MARAD 2003–16335]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel EXPLORER.

SUMMARY: As authorized by Public Law 105–383 and Public Law 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket 2003–16335 at *http://www.dms.dot.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Public Law 105–383 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before November 24, 2003.

ADDRESSES: Comments should refer to docket number MARAD–2003 16335. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at *http://www.dmses.dot.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Hokana, U.S. Department of Transportation, Maritime Administration, MAR–830 Room 7201, 400 Seventh Street, SW., Washington, DC 20590. Telephone 202–366–0760.

SUPPLEMENTARY INFORMATION:

As described by the applicant the intended service of the vessel EXPLORER is:

Intended Use: ''We would like to be able to charter our vessel with a crew for cruising.''

Geographic Region: ''Washington and Oregon.''

Dated: October 17, 2003.

By order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 03–26764 Filed 10–22–03; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number MARAD 2003 16338]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel SEA DRAGON.

SUMMARY: As authorized by Public Law 105–383 and Public Law 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket 2003–16338 at *http://www.dms.dot.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Public Law 105–383 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before November 24, 2003.

ADDRESSES: Comments should refer to docket number MARAD–2003 16338. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at *http://www.dmses.dot.gov/submit/.* All

comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Hokana, U.S. Department of Transportation, Maritime Administration, MAR–830 Room 7201, 400 Seventh Street, SW., Washington, DC 20590. Telephone 202–366–0760.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel SEA DRAGON is:

Intended Use: ''June through September the vessel will carry passenger for hire in the Buffalo harbor and along the southern shores of Lake Erie between Buffalo N.Y. and Cleveland OH with not more than 6 passengers. October through June the vessel will charter along the U.S. East Coast and Gulf of Mexico mainly from Tarpon Springs Florida on the Gulf Coast to Key West, the Florida Keys, Bahamas and the coast of Maine. Owner's personal recreational use.''

Geographic Region: ''The Great Lakes, the U.S. East Coast and the Gulf of Mexico.''

Dated: October 17, 2003.

By order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 03–26767 Filed 10–22–03; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34399 and STB Finance Docket No. 34398]

BG & CM Railroad, Inc.—Exemption From 49 U.S.C. Subtitle IV; and BG & CM Railroad, Inc.—Acquisition and Operation Exemption—Camas Prairie Railnet, Inc.

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice of exemption.

SUMMARY: Under 49 U.S.C. 10502, the Board has: (1) Exempted BG & CM Railroad, Inc. (BG & CM) from the provisions of 49 U.S.C. Subtitle IV, subject to conditions, to allow reactivation of service on a rail line in Lewis, Nez Perce, and Idaho Counties, ID; (2) partially vacated a certificate of interim trail use (CITU) for 52 miles of this 66.8-mile line; and (3) granted a motion to dismiss a BG & CM notice of exemption to acquire and operate this line.

DATES: This exemption will be effective on October 27, 2003.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar (202) 565–1600. [Federal Information Relay Service (FIRS) for the hearing impaired: 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: Additional information is contained in the Board's decision. To obtain a copy of the Board's decision, contact Da 2 Da Legal, 1925 K Street, NW., Room 405, Washington, DC 20006 (202–293–7776). Board decisions and notices are also available on our Web site at *http://www.stb.dot.gov.*

Decided: October 17, 2003.

By the Board, Chairman Nober.

Vernon A. Williams,

Secretary.

[FR Doc. 03–26740 Filed 10–22–03; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34403]

Morristown & Erie Railway, Inc.—Lease and Operation Exemption—State of Maine

Morristown & Erie Railway, Inc. (M&E), a Class III rail carrier, d/b/a Maine Eastern Railroad, has filed a verified notice of exemption under 49 CFR 1150.41 *et seq.* to lease and operate the following 85.19 miles of rail line owned by the State of Maine: (1) The Brunswick to Augusta Branch Line between milepost 27.97 in Brunswick and milepost 55.91 in Gardiner, in Cumberland and Kennebec Counties, ME (27.94 miles); (2) the Brunswick to Rockland Branch Line between milepost 29.40 in Brunswick and milepost 85.55 in Rockland, in Cumberland and Knox Counties, ME (56.15 miles); and (3) the Atlantic Branch Line between milepost 85.55 and milepost 86.65 in Rockland, Knox County, ME (1.1 miles). M&E certifies that its projected annual revenues as a result of this transaction will not exceed $5 million, and thus the transaction will not result in the creation of a Class II or Class I rail carrier. The lease is subject to existing freight operating rights held by Maine Central Railroad Company and Springfield Terminal Railway Company over portions of these lines.

Consummation of this transaction was expected to occur on or after October 1, 2003. The lines to be operated by M&E have been operated by Safe Handling Rail Inc. (SHR) under a modified certificate of public convenience and necessity. Pursuant to an agreement between the State of Maine and SHR, SHR's service was due to terminate on September 30, 2003.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34403, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on John K. Fiorilla, Watson, Stevens, Fiorilla & Rutter, LLP, 390 George Street, P.O. Box 1185, New Brunswick, NJ 08903.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: October 17, 2003.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 03–26741 Filed 10–22–03; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–209322–82]

Proposed Collection; Comment Request For Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, REG–209322–82 (TD 8841), Return of Partnership Income (§ 1.6031(a)–1).

DATES: Written comments should be received on or before December 22, 2003 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Return of Partnership Income.

OMB Number: 1545–1583.

Regulation Project Number: REG–209322–82.

Abstract: Section 1.6031(a)–1 requires partnerships to file a partnership return. The information in this section is required to enable the IRS to verify that a taxpayer is reporting the correct amount of income or gain or claiming the correct amount of losses, deductions, or credits from that taxpayer's interest in the partnership. The partnership return is filed on Form 1065.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and farms.

The burden is reflected in the burden estimate of Form 1065.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 15, 2003.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 03–26803 Filed 10–22–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–209373–81]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, REG–209373–81 (TD 8797), Election to Amortize Start-Up Expenditures for Active Trade or Business (§ 1.195–1).

DATES: Written comments should be received on or before December 22, 2003 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Election to Amortize Start-Up Expenditures for Active Trade or Business.

OMB Number: 1545–1582.

Regulation Project Number: REG–209373–81.

Abstract: Section 1.195–1 of the regulation provides that start-up expenditures may, at the discretion of the taxpayer, be amortized over a period of not less than 60 months beginning with the month the active trade or business begins. Taxpayers may elect to amortize start-up expenditures by filing a statement with their tax return for the taxable year in which the trade or business begins.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 150,000.

Estimated Time Per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 37,500.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 15, 2003.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 03–26804 Filed 10–22–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1138; Correction

AGENCY: Internal Revenue Services (IRS), Treasury.

ACTION: Correction to notice and request for comments.

SUMMARY: This document contains a correction to a notice and request for comments, which was published in the **Federal Register** on Monday September 15, 2003 (68 FR 54052). This notice relates to a comment request on proposed and /or continuing information collections for Form 1138.

FOR FURTHER INFORMATION CONTATCT: Allan Hopkins, (202) 622–6665 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

The notice and request for comments that is the subject of this correction is required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506 (c)(2)(A)).

Need for Correction

As published, the comment request for Form 1138 contains an error which may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly, the publication of the comment request for Form 1138, which was the subject of FR Doc. 23471, is corrected as follows:

On page 54052, column 2, under the caption **SUPPLEMENTARY INFORMATION:**, line 3 from the top of the column, the language ''*OMB Number:* 1545–1035'' is corrected to read ''*OMB Number:* 1545–0135''.

Cynthia E. Grigsby,

Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 03–26805 Filed 10–22–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[EE–81–88]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, EE–81–88 (TD 8599), Deductions for Transfers of Property (§ 1.83–6(a)).

DATES: Written comments should be received on or before December 22, 2003 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6407, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Deductions for Transfers of Property.

OMB Number: 1545–1448.

Regulation Project Number: EE–81–88.

Abstract Section 1.83–6(a) of the regulation provides that when property is transferred in connection with the performance of services, the recipient of service may claim a deduction for the amount included as compensation in the gross income of the service provider. The service provider will be deemed to have included an amount in gross income if the service recipient provides a timely Form W–2 or 1099, as appropriate.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations, not-for-profit institutions, and farms.

The estimated annual burden of reporting will be reflected in the reporting requirements for Forms W–2 and 1099–MISC.

The following paragraph applies to all of the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 15, 2003.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 03–26806 Filed 10–22–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8870

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8870, Information Return for Transfers Associated With Certain Personal Benefit Contracts.

DATES: Written comments should be received on or before December 22, 2003 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Information Return for Transfers Associated With Certain Personal Benefit Contracts.

OMB Number: 1545–1702.

Form Number: 8870.

Abstract: Section 537 of the Ticket to Work and Work Incentives Improvement Act of 1999 added section 170(f)(10) to the Internal Revenue Code. Section 170(f)(10)(F) requires an organization to report annually: (1) Any premiums paid after February 8, 1999, to which section 170(f)(10) applies; (2) the name and taxpayer identification number (TIN) of each beneficiary under each contact to which the premiums relate; and (3) any other information the Secretary of the Treasury may require. A charitable organization described in section 170(c) or a charitable remainder trust described in section 664(d) that paid premiums after February 8, 1999, or certain life insurance, annuity, and endowment contracts (personal benefit contracts) must complete and file Form 8870.

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: Not-for-profit institutions.

Estimated Number of Responses: 5,000.

Estimated Time Per Response: 14 hours, 50 minutes.

Estimated Total Annual Burden Hours: 74,200.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 16, 2003.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 03–26807 Filed 10–22–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[FI–43–94]

Proposed Collection; Comment Request For Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, FI–43–94 (TD 8649), Regulations Under Section 1258 of the Internal Revenue Code of 1986; Netting Rule for Certain Conversion Transactions (§ 1.1258–1).

DATES: Written comments should be received on or before December 22, 2003 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Regulations Under Section 1258 of the Internal Revenue Code of 1986; Netting Rule for Certain Conversion Transactions.

OMB Number: 1545–1452.

Regulation Project Number: FI–43–94.

Abstract: Internal Revenue Code section 1258 recharacterizes capital gains from conversion transactions as ordinary income to the extent of the time value element. This regulation provides that certain gains and losses may be netted for purposes of determining the amount of gain recharacterized. To be eligible for netting relief, the taxpayer must identify on its books and records all the positions that are part of the conversion transaction. This must be done before the close of the day on which the positions become part of the conversion transaction.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and not-for-profit institutions.

Estimated Number of Respondents: 50,000.

Estimated Time Per Respondent: 6 minutes.

Estimated Total Annual Burden Hours: 5,000

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a

matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October, 15, 2003.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 03–26808 Filed 10–22–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0524]

Agency Information Collection Activities Under OMB Review

AGENCY: Office of Policy and Planning, Department of Veterans Affairs

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Office of Policy and Planning (OPPA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATE: Comments must be submitted on or before November 24, 2003.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030 or FAX (202) 273–5981 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0524'').

Send comments and recommendations concerning any aspect of the information collection to VA's Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0524''.

SUPPLEMENTARY INFORMATION:

Title: VA Police Officer Pre-Employment Screening Checklist, VA Form 0120.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 0120 is used to document pre-employment screening and special background checks for police officer applicants. Prior to employment of a qualified applicant, each VA medical center is required to conduct a FBI arrest record inquiry and to contact listed former employers for information. The form is completed by each VA facility and serves as a record of pre-employment screening to determine the qualification and suitability of the applicant. It is the policy of VA that no person be employed as a VA police officer who has been convicted of a serious crime or whose history reflects a disregard for laws and regulations, questionable character, or a pattern of misconduct or poor work habits.

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 *Federal Register* Notice with a 60-day comment period soliciting comments on this collection of information was published on June 3, 2003, at page 33229.

Affected Public: State, Local or Tribal Government.

Estimated Time Per Respondent and Annual Burden: 250 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 1,500.

Dated: October 8, 2003.

By direction of the Secretary.

Jacqueline Parks,

IT Specialist, Records Management Service.

[FR Doc. 03–26687 Filed 10–22–03; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0571]

Agency Information Collection Activities Under OMB Review

AGENCY: National Cemetery Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the National Cemetery Administration (NCA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Comments must be submitted on or before November 24, 2003.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030, Fax (202) 273–5981 or e-mail *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0571'' in any correspondence.

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7613. Please refer to ''OMB Control No. 2900–0571'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the National Cemetery Administration (NCA) and the Office of Inspector General (IG) Customer Satisfaction Surveys.

OMB Control Number: 2900–0571.

Type of Review: Extension of a currently approved collection.

Abstract: Executive Order 12862, Setting Customer Service Standards, requires Federal agencies and Departments to identify and survey its customers to determine the kind and quality of services they want and their level of satisfaction with existing service. NCA and IG use customer satisfaction surveys to gauge customer perceptions of VA services as well as customer expectations and desires. The results of these information collections lead to improvements in the quality of VA service delivery by helping to shape the direction and focus of specific programs and services.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection

of information was published on July 29, 2003, at pages 44563–44565.

Affected Public: Business or Other for-Profit and State, Local or Tribal Government.

Listing of Survey Activities: The following list of activities is a compendium of customer satisfaction survey plans by the NCA and IG. The actual conduct of any particular activity listed could be affected by circumstances. A change in, or refinement of, our focus in a specific area, as well as resource constraints could require deletion or substitution of any listed item. If these organizations substitute or propose to add a new activity that falls under the umbrella of this generic approval, including those activities that are currently in a planning stage, OMB will be notified and will be furnished a copy of pertinent materials, a description of the activity and number of burden hours involved. NCA and IG will conduct periodic reviews of ongoing survey activities to ensure that they comply with the PRA.

Year	Number of respondents	Estimated annual burden hours	Frequency
I. National Cemetery Administration			
Focus Groups With Next of Kin (10 Participants per Group/3 Hours Each Session)			
2004	50	150	5 Groups Annually.
2005	50	150	5 Groups Annually.
2006	50	150	5 Groups Annually.
Focus Groups With Funeral Directors (10 Participants per Group/3 Hours Each Session)			
2004	50	150	5 Groups Annually.
2005	50	150	5 Groups Annually.
2006	50	150	5 Groups Annually.
Focus Groups With Veterans Service Organizations (10 Participants per Group/3 Hours Each Session)			
2004	50	150	5 Groups Annually.
2005	50	150	5 Groups Annually.
2006	50	150	5 Groups Annually.
Visitor Comments Cards (Local Use) (2,500 Respondents/5 Minutes per Response)			
2004	2,500	208	Annually.
2005	2,500	208	Annually.
2006	2,500	208	Annually.
Next of Kin National Customer Satisfaction Survey (Mail to 15,000 Respondents/30 Minutes per Response)			
2004	15,000	7,500	Annually.
2005	15,000	7,500	Annually.
2006	15,000	7,500	Annually.
Funeral Directors National Customer Satisfaction Survey (Mail to 4,000 Respondents/30 Minutes per Response)			
2004	4,000	2,000	Annually.
2005	4,000	2,000	Annually.
2006	4,000	2,000	Annually.
Veterans-at-Large National Customer Satisfaction Survey (Mail to 5,000 Respondents/30 Minutes per Response)			
2004	5,000	2,500	Annually.
2005	5,000	2,500	Annually.
2006	5,000	2,500	Annually.
Program/Specialized Service Survey (Mail to 2,000 Respondents/15 Minutes per Response)			
2004	2,000	500	Annually.
2005	2,000	500	Annually.
2006	2,000	500	Annually.
II. Office of Inspector General			
Patient Questionnaire (1,440 Respondents/10 Minutes per Response)			
2004	1,440	240	Annually.
2005	1,440	240	Annually.
2006	1,440	240	Annually.

Most customer satisfaction surveys will be recurring so that NCA and IG can create and maintain ongoing measures of performance and to determine how well VA meets customer service standards. Each collection of information will consist of the minimum amount of information necessary to determine customer needs

and to evaluate each organization's performance. NCA expects to conduct 15 focus groups annually involving a total of 450 hours during the approval period. In addition, NCA expects to conduct mail surveys with a total annual burden of 12,000 hours and will distribute comment cards with a total annual burden of 208 hours. NCA also plans to conduct mail surveys with customers of specific programs (*e.g.* Headstones and Markers, Presidential Memorial Certificates, State Veterans Cemeteries) to determine levels of service satisfaction. Program specific surveys are estimated at 500 burden hours annually during the approval period. The IG expects to distribute 1,440 surveys to patients with a total annual burden of 240 hours.

Dated: October 8, 2003.

By direction of the Secretary.

Jacqueline Parks,

IT Specialist, Records Management Service.

[FR Doc. 03–26688 Filed 10–22–03; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Notice of Intent To Grant Exclusive License

AGENCY: Department of Veterans Affairs, Office of Research and Development.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the Department of Veterans Affairs, Office of Research and Development, intends to grant to Recovery Pharmaceuticals, Inc., 25 Main Street, Wayland, MA 01778, U.S.A., an exclusive license to practice U.S. Patent Application Serial No.09/070,263, filed April 30, 1998, issuing as U.S. Patent 6,211,194, entitled ''Solution Containing Nicotine''.

DATES: Comments must be received within fifteen (15) days from the date of this published Notice.

ADDRESSES: Send comments to: Robert W. Potts, Director of Technology Transfer, Department of Veterans Affairs; Attn: 122TT; 810 Vermont Avenue NW; Washington, DC 20420. Telephone: (202) 254–0260; Facsimile: (202) 254–0473; e-mail: *bob.potts@hq.mail.va.gov*

FOR FURTHER INFORMATION CONTACT: Copies of the published patent applications may be obtained from the U.S. Patent and Trademark Office at *http://www.uspto.gov.*

SUPPLEMENTARY INFORMATION: It is in the public interest to so license this invention as Recovery Pharmaceuticals, Inc., submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within fifteen (15) days from the date of this published Notice, the Department of Veterans Affairs Office of Research and Development receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Dated: October 16, 2003.

Anthony J. Principi,

Secretary, Department of Veterans Affairs.

[FR Doc. 03–26689 Filed 10–22–03; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Thursday,
October 23, 2003

Part II

Securities and Exchange Commission

17 CFR Parts 240, 249 and 274
Security Holder Director Nominations; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240, 249 and 274

[Release Nos. 34–48626; IC–26206; File No. S7–19–03]

RIN 3235–AI93

Security Holder Director Nominations

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing new rules that would, under certain circumstances, require companies to include in their proxy materials security holder nominees for election as director. These proposed rules are intended to improve disclosure to security holders to enhance their ability to participate meaningfully in the proxy process for the nomination and election of directors. The proposed rules would not provide security holders with the right to nominate directors where it is prohibited by state law. Instead, the proposed rules are intended to create a mechanism for nominees of long-term security holders, or groups of long-term security holders, with significant holdings to be included in company proxy materials where there are indications that security holders need such access to further an effective proxy process. This mechanism would apply in those instances where evidence suggests that the company has been unresponsive to security holder concerns as they relate to the proxy process. The proposed rules would enable security holders to engage in limited solicitations to form nominating security holder groups and engage in solicitations in support of their nominees without disseminating a proxy statement. The proposed rules also would establish the filing requirements under the Securities Exchange Act of 1934 for nominating security holders.

DATES: Comments should be received on or before December 22, 2003.

ADDRESSES: To help us process and review your comments more efficiently, comments should be sent by one method—U.S. mail or electronic mail—only. Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. S7–19–03. This number should be included in the subject line if sent via electronic mail. Electronically submitted comment letters will be posted on the Commission's Internet Web site (*http://www.sec.gov*). We do not edit personal information, such as names or electronic mail addresses, from electronic submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Lillian C. Brown or Grace K. Lee, Division of Corporation Finance, at (202) 824–5250, or, with regard to investment companies, John M. Faust, Division of Investment Management, at (202) 942–0721, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington DC 20549–0402.

SUPPLEMENTARY INFORMATION: We are proposing new Rule 14a-11[1] and amendments to Rules 13a–11,[2] 13d–1,[3] 14a–4,[4] 14a–5,[5] 14a–6,[6] 14a–8,[7] 14a–12,[8] 15d–11[9] and 16a–1,[10] Schedules 13G [11] and 14A,[12] and Forms 8–K,[13] 10–Q,[14] 10–QSB,[15] 10–K [16] and 10–KSB [17] under the Securities Exchange Act of 1934,[18] and Forms N–CSR [19] and N–SAR [20] under the Securities Exchange Act of 1934 and the Investment Company Act of 1940.[21] Although we are not proposing amendment to Schedule 14C [22] under the Exchange Act, the proposed amendments would affect the disclosure provided in Schedule 14C, as Schedule 14C requires disclosure of some items of Schedule 14A.

I. Introduction

A. Review of the Proxy Rules and Regulations Regarding Procedures for the Election of Directors

On April 14, 2003, the Commission directed the Division of Corporation Finance to review the proxy rules and regulations and their interpretations regarding procedures for the nomination and election of corporate directors.[23] On May 1, 2003, the Commission solicited public input with respect to the Division's review.[24] Commenters generally supported the Commission's decision to review the proxy rules and regulations with respect to director nominations and elections. Reflecting concern over corporate scandals and the accountability of corporate directors, many commenters urged the Commission to adopt rules that would provide security holders with greater access to the nomination process and the ability to exercise their rights and responsibilities as owners of their companies.[25] In addition, many of those commenters alleged that the current director nomination procedures afford little meaningful oversight to security holders and expressed a growing frustration at security holders' lack of ability to influence the membership of the boards of directors of the companies in which they invest.[26]

On July 15, 2003, after considering the views expressed by commenters, the Division of Corporation Finance provided to the Commission its report and recommended changes to the proxy rules related to the nomination and election of directors.[27] To best address many of the issues raised by commenters, the Division recommended proposed changes in two areas—disclosure related to nominating committee functions and security holder communications with boards of directors and enhanced security holder access to the proxy process relating to the nomination of directors.[28]

On August 14, 2003, we published for comment proposed rules that would implement the first of the Division's recommendations—new disclosure standards requiring more robust disclosure of the nominating committee processes of public companies, including the consideration of

[1] 17 CFR 240.14a–11.
[2] 17 CFR 240.13a–11.
[3] 17 CFR 240.13d–1.
[4] 17 CFR 240.14a–4.
[5] 17 CFR 240.14a–5.
[6] 17 CFR 240.14a–6.
[7] 17 CFR 240.14a–8.
[8] 17 CFR 240.14a–12.
[9] 17 CFR 240.15d–11.
[10] 17 CFR 240.16a–1.
[11] 17 CFR 240.13d–102.
[12] 17 CFR 240.14a–101.
[13] 17 CFR 249.308.
[14] 17 CFR 249.308a.
[15] 17 CFR 249.308b.
[16] 17 CFR 249.310.
[17] 17 CFR 249.310b.
[18] 15 U.S.C. 78a *et seq.*
[19] 17 CFR 249.331 and 17 CFR 274.128.
[20] 17 CFR 249.330 and 17 CFR 274.101.
[21] 15 U.S.C. 80a *et seq.*
[22] 17 CFR 240.14c–101.

[23] *See* Press Release No 2003–46 (April 14, 2003).
[24] See Release No 34–47778 (May 1, 2003) [68 FR 24530] In addition to receiving written comments, the Division spoke with a number of interested parties representing security holders, the business community, and the legal community. Each of the comment letters received, memoranda documenting the Division's meetings, and a summary of the comments are included on the Commission's Web site, (*http://wwwsecgov*), in comment file number S7–10–03. [Summary of Comments in Response to the Commission's Solicitation of Public Views Regarding Possible Changes to the Proxy Rules (July 15, 2003)].
[25] *See* 2003 Summary of Comments.
[26] *See id.*
[27] *See* Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors, Division of Corporation Finance (July 15, 2003).
[28] *See id.*

candidates recommended by security holders, as well as more specific disclosure of the processes by which security holders may communicate with the directors of the companies in which they invest.[29]

Today, we are proposing rules that would implement the second of the Division's recommendations. These proposals would create a mechanism for nominees of long-term security holders, or groups of long-term security holders, with significant holdings to be included in company proxy materials where there are indications that the proxy process has been ineffective or that security holders are dissatisfied with that process.

B. Prior Commission Consideration

The Commission first addressed the issue of security holder access to company proxy materials for the nomination of directors as early as 1942, when it requested that the staff review the proxy rules and submit to the Commission recommended changes.[30] The Commission solicited comments on the staff recommendations, including a proposal to revise the proxy rules to provide that ''minority stockholders be given an opportunity to use the management's proxy material in support of their own nominees for directorships.'' [31] According to testimony of Chairman Ganson Purcell before the House Committee on Interstate and Foreign Commerce, the staff had proposed that ''stockholders be permitted to use the management's proxy statement to canvass stockholders generally for the election of their own nominees for directorships, as well as for the nominees of the management.'' [32] Under the proposal, a company would not have been required to include more than twice as many candidates on the proxy as director positions to be filled.[33] The Commission did not adopt the proposal.[34]

In 1977, the Commission again focused on security holder access to company proxy materials regarding the nomination and election of directors during its broad review of security holder communications, security holder participation in the corporate electoral process, and corporate governance generally. In anticipation of public hearings held in September of 1977, the Commission, without formally proposing rule changes, requested comment on a number of issues, including whether ''shareholders [should] have access to management's proxy soliciting materials for the purpose of nominating persons of their choice to serve on the board of directors.'' [35]

After the 1977 hearings, the Commission proposed and adopted amendments to the proxy rules. These amendments did not relate directly to security holder access to company proxy materials regarding the nomination and election of directors. The Commission did adopt a requirement, however, that companies state whether they have a nominating committee and, if so, whether the nominating committee will consider security holder recommendations. Although the Commission stated its intent to address ''some of the more complex questions which have been raised in this proceeding relating to corporate governance and the means by which corporations can best account to shareholders and the public'' and determine ''what further action, if any, is appropriate with respect to shareholder communications and shareholder participation in the corporate electoral process generally,'' [36] the Commission did not take further action on security holder access to company proxy materials at that time.[37] According to a 1980 staff report to the Senate, the staff concluded that, due to the emerging concept of nominating committees, the Commission should not propose and adopt a rule regarding the inclusion of security holder nominees in company proxy materials at that time.[38] The staff report recommended, however, that the staff monitor the development of nominating committees and their consideration of security holder recommendations.[39] The staff report further cautioned that, if an insufficient number of companies adopted nominating committees or the efforts of these committees with regard to security holder nominations proved insufficient, Commission action might be necessary.[40]

In the broad proxy revisions adopted in 1992,[41] the Commission briefly revisited the security holder nominee issue in connection with amendments to the bona fide nominee rule set out in Exchange Act Rule 14a–4, which provides that no person shall be deemed a bona fide nominee ''unless he has consented to being named in the proxy statement and to serve if elected.'' [42] In adopting the Exchange Act Rule 14a–4 amendments, the Commission noted ''the difficulty experienced by shareholders in gaining a voice in determining the composition of the board of directors,'' but stated the following with regard to security holder

[29] See Release No. 34–48301 (August 14, 2003) [68 FR 48724].

[30] *See Securit[ies] and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the House Comm on Interstate and Foreign Commerce,* 78th Cong., 1st Sess., at 17–19 (1943) (testimony of Chairman Ganson Purcell).

[31] Release No 34–3347 (December 18, 1942).

[32] *Securit[ies] and Exchange Commission Proxy Rules: Hearings,* at 19.

[33] *See id.* at 157.

[34] The Commission did not provide an explanation for its determination, stating simply that, ''a number of the suggestions proposed by the staff were not adopted,'' including the suggestion related to security holder access to company proxy materials. *See* Release No. 34–3347 (December 18, 1942).

[35] Release No. 34–13482 (April 28, 1977) [42 FR 23901], in which the Commission also asked:

(a) what criteria should be applied to nominating security holders;

(b) what disclosures should be required of nominating security holders;

(c) whether security holder nominations are permissible under state law; and

(d) whether a meaningful distinction can be drawn between control and non-control nominations.

See also Release No. 34–13901 (August 29, 1977) [42 FR 44860], in which the Commission published the final schedule of issues to be considered at the hearings, which included:

(a) whether security holders should have access to the company's proxy soliciting materials for the purpose of nominating directors;

(b) whether security holder nominations are permissible under state law and consistent with Congressional intent in enacting Exchange Act Section 14(a);

(c) what type of rule would be most appropriate and what criteria should be applied to nominating security holders;

(d) whether the proxy rules should apply to soliciting activities by a nominating security holder; and

(e) whether nominating security holders should be subject to the then-existing rules governing election contests.

[36] Release No. 34–14970 (July 18, 1978) [43 FR 31945]. *See also* Release No. 34–15384 (December 6, 1978) [43 FR 58522].

[37] *See id.*

[38] The Task Force on Corporate Accountability was formed as an outgrowth of the review of the proxy rules that began in 1977. The work of the Task Force culminated in the Staff Report on Corporate Accountability, completed and presented to the Senate Committee on Banking, Housing, and Urban Affairs. *Division of Corporation Finance, Securities and Exchange Comm'n, Staff Report on Corporate Accountability* (Sept. 4, 1980) (printed for the use of Senate Comm. on Banking, Housing, and Urban Affairs, 96th Cong., 2d Sess.), at A60–65.

[39] The *Staff Report on Corporate Accountability* states: ''all nominating committees should be open to suggestions of nominees from shareholders.'' *Id.* at A56.

[40] With regard to security holder nominations, the staff recommended, ''If there is not a substantial increase in the percentage of companies with independent nominating committees who consider shareholder nominations, the Commission should authorize the staff to develop a rule to require companies to adopt a procedure for considering shareholder nominations.'' *Id.* at A69. *See also id.* at A60–65.

[41] *See* Release No 34–31326 (October 16, 1992) [57 FR 48276].

[42] 17 CFR 240.14a–4(d)(4).

access to the company's proxy materials:

> Proposals to require the company to include shareholder nominees in the company's proxy statement would represent a substantial change in the Commission's proxy rules. This would essentially mandate a universal ballot including both management nominees and independent candidates for board seats.[43]

Rather than mandating a ''universal ballot,'' the Commission revised the bona fide nominee rule to allow security holders seeking minority board representation to ''fill out'' a partial or ''short'' slate with management nominees, thus making it easier for security holders to conduct an election contest in a non-control context. For example, if a security holder wishes to nominate only two candidates to a seven member board, Exchange Act Rule 14a–4(d) permits the security holder to choose five of management's nominees to fill out his or her ballot, provided that the security holder does not name those management nominees on his or her proxy card, but instead names only those management nominees that the security holder is opposing. Although the security holder still must disseminate and file a separate proxy statement and proxy card, he or she can now, in essence, allow security holders to vote for some of management's nominees on the non-management proxy card.

II. Proposed Changes to the Proxy Rules

A. Proposed Security Holder Director Nomination Rule

1. Background

a. Discussion

Section 14(a) of the Exchange Act[44] prohibits any person from soliciting proxies with respect to a Section 12[45]-registered security where that solicitation is in contravention of Commission rules and regulations. Section 14(a) ''stemmed from the congressional belief that 'fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange.' It was intended to 'control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which * * * [had] frustrated the free exercise of the voting rights of shareholders.' ''[46] Section 14(a) authorizes the Commission to prescribe proxy solicitation rules that are ''necessary or appropriate in the public interest or for the protection of investors.''[47] As described and discussed below, we believe that today's proposals further the goals of Section 14,[48] in that they will help facilitate the full and informed exercise of existing security holder nomination and voting rights through the proxy process by requiring companies to include disclosure regarding security holder nominees in company proxy materials in specified circumstances.

Based on the comments received in response to our solicitation of public input on the Division's review of the proxy rules relating to the election of directors, it is apparent that many of the issues raised in the Commission's 1977 review of the proxy rules merit reconsideration. In particular, because the disclosure requirements regarding nominating committees that were adopted in 1977 do not appear to have made the operation of those committees sufficiently transparent, we have proposed enhancements to those disclosure requirements. Further, it appears that the presence of nominating committees has not eliminated the concerns among some security holders with regard to the barriers to meaningful participation in the proxy process in connection with the nomination and election of directors.[49] Although we recognize that the self-regulatory organizations have proposed changes to their listing standards concerning nominating committees and related corporate governance issues, these proposed changes do not address the role of security holders in the nomination procedure.

Much of the public input that we have received suggests that including security holder nominees in company proxy materials would be the most direct and effective method of giving security holders a more effective role in the proxy process in connection with the nomination and election of directors.[50] This input also suggests that security holders believe that another result would be to make corporate boards more responsive and accountable to security holders, as well as, in many instances, more diverse.[51] Today, security holders generally are given an opportunity to vote only on those candidates nominated by the company. In addition, many companies use plurality rather than majority voting for board elections, which means that candidates can be elected regardless of whether they receive a majority of the security holder vote.[52] Accordingly, all board nominees generally are elected, regardless of the number of ''withhold'' votes by security holders. Commenters indicated that many security holders, therefore, view the proxy process as ineffective and the election of directors as a mere formality or ''rubber stamp'' of the board's choices presented in the company's proxy materials.[53]

Currently, a security holder or group of security holders that is dissatisfied with the leadership of a company generally must undertake a proxy contest, along with its related expenses, to put nominees before the security holders for a vote.[54] A board's nominees, on the other hand, do not bear the cost of their candidacies, which are funded out of corporate assets. While security holders can recommend a candidate to a company's nominating committee, security holder comments suggest that these recommendations rarely are effective and that, in some cases, it may be difficult for security holders to gain access to members of company boards and their committees.[55]

On the other hand, the business community and many of its legal advisors commented that giving security

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[43] Release No 34–31326 (October 16, 1992).

[44] 15 U.S.C. 78n(a).

[45] 15 U.S.C. 78*l*.

[46] *J.I. Case Co.* v. *Borak,* 377 U.S. 426, 431 (1964) (citing H.R. Rep. No. 1383, 73rd Cong., 2d Sess. 13–14). *See also Medical Comm. for Human Rights* v. *SEC,* 432 F.2d 659, 676 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1972) (''Congress intended by its enactment of section 14 * * * to give true vitality to the concept of corporate democracy.'').

[47] 15 U.S.C. 78n(a). *Cf. Medical Committee,* 432 F.2d at 671 (''Through section 14 of the Act, Congress has invested the Securities and Exchange Commission with sweeping authority to regulate the solicitation of corporate proxies.'').

[48] Professors Loss and Seligman have described the Commission's rules promulgated under this section as ''designed * * * to make the proxy device the closest practicable substitute for attendance at the [shareholder] meeting.'' Loss & Seligman, Chapter 6.C.2b. Securities Regulation (3d ed.).

[49] In our discussion of the proxy rules and our proposals, we use the term ''security holders,'' which is the term used currently throughout our proxy rules For purposes of our proposals, the term generally refers to shareholders having a right to vote at the meeting and on the matter in question.

[50] *See* 2003 Summary of Comments.

[51] *See id.*

[52] Under plurality voting, the candidate with the greatest number of votes is elected; therefore, in an election in which there are the same number of nominees as there are board positions open, each nominee receiving even a single vote will be elected, regardless of the number of votes ''withheld'' from a candidate.

[53] *See* 2003 Summary of Comments.

[54] Under some circumstances, security holders may be able to effect change in board membership through security holder lawsuits. For example, security holders at Hanover Compressor Company and Homestore, Inc. recently obtained the right to nominate candidates for the boards of directors as a result of the settlement of security holder lawsuits against each of these companies. *See* Hanover Compressor Company, Form 8–K filed May 13, 2003 and Homestore, Inc., Form 8–K filed August 13, 2003.

[55] *See* 2003 Summary of Comments.

holders access to company proxy materials could turn every election of directors into a contest, which would be costly and disruptive to companies and could discourage some qualified board candidates from agreeing to appear on a company's slate of nominees. Because the composition of the board of directors is fundamental to a company's corporate governance, the current filing and disclosure requirements applicable to security holders who wish to propose an alternate slate are, in the view of these commenters, more appropriate than including security holder nominees in company proxy materials.[56]

After considering the range of views on this issue, we have determined to propose new rules that would, in certain circumstances, require companies to place security holder nominees for director in company proxy materials.[57] This limited access right, which would not be available where security holders were seeking control of a board of directors or election of a director with a financial relationship to the security holder, would apply only in those instances where criteria suggest that the company has been unresponsive to security holder concerns as they relate to the proxy process. We recognize that there are many concerns regarding the operation of a security holder nomination procedure. Should we adopt such a procedure, it is our intention, therefore, to request the Commission staff to monitor that procedure and provide a report to the Commission within three years regarding the effects of the procedure and recommended improvements or modifications.

The security holder nomination procedure in proposed Exchange Act Rule 14a–11 would require any subject company to include information regarding a security holder's nominee or nominees for election as director in the company's proxy materials when the conditions of the rule are met.[58] Nothing in the proposed procedure establishes a right of security holders to nominate candidates for election to a company's board of directors; rather, the proposed procedure involves disclosure and other requirements concerning proxy materials that are conditioned on the existence of such a right under state law and the occurrence of specified events.

In connection with the recent review of the proxy process, commenters discussed both significant benefits of a security holder nomination procedure and significant concerns regarding such a procedure and its potential consequences. The proposal is intended to address this broad range of procedural and substantive issues regarding the operation of the nominating procedure. While we believe that the basic concept behind the proposed procedure is simple, addressing the concerns of commenters results in a somewhat complex proposal. To assist those who wish to comment on the proposal, we have separated our description of the proposal into a number of discrete discussions. Specifically, the discussion of the proposal will address the following:

- To which companies would the proposed rule apply?
- For those companies to which the proposed rule would apply, what events must occur before the company would be required to include a security holder nominee in its proxy materials?
- What notice must a subject company give regarding the occurrence of an event that triggers operation of the proposed rule?
- Once a nomination procedure triggering event occurs at a subject company, which security holders or security holder groups may submit a nominee that the company would be required to include in its proxy materials?
- What are the eligibility requirements for a person whom a security holder or security holder group may nominate?
- What is the maximum number of security holder nominees that the company must include in its proxy materials?
- What notice must the security holder or security holder group provide to the company and file with the Commission?
- What must the company do after it receives such a notice?
- How would the liability provisions of the federal securities laws apply to statements made by the company and the nominating security holder or nominating security holder group?
- How do the other Exchange Act proxy rules apply to solicitations by the nominating security holder or nominating security holder group?
- How would the proposed rule apply to investment companies?

b. General Questions

A.1. Should the Commission adopt revisions to the proxy rules to require companies to place security holder nominees in the company's proxy materials? Are the means that currently are available to security holders to address a company's perceived unresponsiveness to security holder concerns adequate?

A.2. What would be the cost to companies if the Commission adopted proxy rules requiring companies to include security holder nominees in company proxy materials?

A.3. What direct or indirect effect would this procedure have on companies' corporate governance policies relating to the election of directors? For example, will companies be more or less likely to adopt cumulative voting policies and/or elect directors annually?

2. To Which Companies Would the Proposed Rule Apply?

a. Security Holders Must Be Permitted by State Law To Nominate a Candidate for Election as a Director

Proposed Exchange Act Rule 14a–11 would apply to all companies that are subject to the Exchange Act proxy rules,[59] including investment companies registered under Section 8 of the Investment Company Act (''funds'').[60] However, as proposed, a company would become subject to the security holder nomination procedure in Exchange Act Rule 14a–11 only where the company's security holders have an existing, applicable state law right to nominate a candidate or candidates for election as a director. To eliminate any uncertainties in this regard, the proposed rule would state that the security holder nomination procedure would be available unless applicable state law prohibits the company's security holders from nominating a candidate or candidates for election as a director.[61] If state law

[56] *See id.*

[57] These proposals are in addition to the enhanced disclosure requirements that we proposed on August 14, 2003. *See* Release No 34–48301 (August 14, 2003).

[58] *See* proposed Exchange Act Rule 14a–11(a). These nominees would then also be included on a company's form of proxy in accordance with the requirements of Exchange Act Rule 14a–4. We have proposed two amendments to Exchange Act Rule 14a–4(b)(2) [17 CFR 240.14a–4(b)(2)]. The first proposed amendment would require a company to include in its form of proxy those security holder nominees that satisfy the requirements of proposed Exchange Act Rule 14a–11. The second proposed amendment would prohibit companies from providing a means to vote for its nominees for director as a group where the form of proxy includes such a security holder nominee or nominees.

[59] Exchange Act Rule 3a12–3 [17 CFR 240.3a12–3] exempts foreign private issuers from the Commission's proxy rules. As such, the proposed procedure would not apply to foreign private issuers.

[60] 15 U.S.C. 80a–8. *See* Section II.A.12., below, for a discussion of the specific application of the proposal to registered investment companies and business development companies.

[61] This provision is set forth in proposed Exchange Act Rule 14a–11(a)(1).

permits companies incorporated in that state to prohibit security holder nominations through provisions in companies' articles of incorporation or bylaws, the proposed procedure would not be available to security holders of a company that had included validly such a provision in its governing instruments.

The regulation of proxy solicitations under the Exchange Act co-exists with state corporate law in a number of situations. For example, state corporate law allows shareholders, generally, to raise proposals at the company's annual meeting of security holders and Exchange Act Rule 14a–8 creates a procedure for inclusion of information regarding those proposals in company proxy materials. Consistent with a basic concept underlying Exchange Act Section 14(a)—that security holders be made aware of significant matters to be decided at security holder meetings—Exchange Act Rule 14a–8 requires companies to include in their proxy materials full disclosure about and the opportunity to vote on those matters, including qualifying security holder proposals, that management knows will be presented at the annual meeting.[62] Exchange Act Rule 14a–8 accomplishes this purpose by creating a procedure that provides an opportunity for a security holder owning a relatively small amount of a company's securities to have his or her proposal placed alongside management's proposals in that company's proxy materials for presentation to a vote at a meeting of security holders.

Exchange Act Rule 14a–8 balances the costs to the company against the benefits to the company and its shareholders by including modest security holder eligibility standards, limitations on the number and types of proposals, and limitations on the number of words that the company is required to include as a discussion of the security holder proposal. Exchange Act Rule 14a–8 addresses its interaction with state corporate law by not requiring companies to include any proposal that would violate state law.[63]

Proposed Exchange Act Rule 14a–11 has a similar underlying purpose as Exchange Act Rule 14a–8—to the extent management is aware of a security holder's intent to present a nominee for director at the company's annual meeting and state corporate law allows security holders to nominate candidates for election as director at the company's annual meeting of security holders, the proposal would establish a procedure pursuant to which a company would have to provide specified information regarding that nomination in its proxy materials. Similar to Exchange Act Rule 14a–8, proposed Exchange Act Rule 14a–11 addresses its interaction with state corporate law by premising the security holder nomination procedure upon the existence of a state law right of security holders to nominate candidates for election as directors. The proposed rule, like Exchange Act Rule 14a–8, also imposes conditions and limitations on the availability of the procedure in question.

b. Accelerated Filers

We are considering as an additional element of the proposed rule, and seek comment on, whether proposed Exchange Act Rule 14a–11 should apply only to those companies that are subject to accelerated deadlines for filing Exchange Act periodic reports,[64] and investment companies registered under Section 8 of the Investment Company Act.[65] Companies that fall within the definition of ''accelerated filer'' in Exchange Act Rule 12b–2[66] would be subject to the security holder nomination procedure for any fiscal year in which they must file all of their periodic reports on an accelerated basis. Accordingly, the security holder nomination procedure would apply to a company after it first meets the following conditions as of the end of its fiscal year:

- The company's common equity public float was $75 million or more as of the last business day of its most recently completed second fiscal quarter;
- The company has been subject to the reporting requirements of Section 13(a)[67] or 15(d)[68] of the Exchange Act for a period of at least 12 calendar months;
- The company has previously filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and
- The company is not eligible to use Exchange Act Forms 10–QSB and 10–KSB.[69]

We believe that appropriate security holder participation in the nomination process is important for companies of all sizes. Given the new approach that the proposed rules represent, however, we are considering whether, at least as a first step in implementing the proposed rules, companies that are not accelerated filers should be excluded from their operation. Implementing the proposed rules in this fashion would avoid the disproportionate burdens of regulation that the proposed procedure may impose on smaller companies. It also would allow our staff and the markets to gain experience with the proposed rule in an initial stage in which the rule applied only to larger companies, while we would retain the ability to expand the rule's application to all companies after gaining this experience. In addition, the information available to us suggests that interest in the proxy process is, to a significant degree, concentrated within the universe of companies that are accelerated filers. For example, of the 266 companies that submitted letters to the Division of Corporation Finance during the 2002–2003 proxy season regarding their intention to exclude security holder proposals submitted under Exchange Act Rule 14a–8, only 26 had a common equity public float of less than the $75 million threshold as specified in the definition of ''accelerated filer.''[70] We estimate that approximately 3,159 of the 14,484 companies filing periodic reports under the Exchange Act are ''accelerated filers.'' Therefore, while 78% of reporting companies are not ''accelerated filers,'' less than 10% of the companies involved in the security holder proposal process at the Commission are not ''accelerated filers.''

c. Questions

B.1. As proposed, the security holder nomination procedure in Exchange Act Rule 14a–11 would apply to all companies subject to the proxy rules. Would this broad application have a disproportionate impact on smaller operating companies? Are there modifications that would accommodate the needs of small entities while

[62] Exchange Act Rule 14a–8 generally requires the company to include the proposal of an eligible security holder who has complied with the rule's procedural requirements. The company is not required to include the proposal if it falls within one of the 13 substantive bases for exclusion set forth in the rule.

[63] *See* Exchange Act Rule 14a–8(i)(1) and (2) [17 CFR 240.14a–8(i)(1)–(2)].

[64] *See* Release No. 33–8128 (September 5, 2002) [67 FR 56861]. The deadline for filing quarterly reports on Exchange Act Form 10–Q for these ''accelerated filers'' is set forth in General Instruction A.1.a. of that form. The deadline for filing annual reports on Exchange Act Form 10–K for these ''accelerated filers'' is set forth in General Instruction A.(2)(a) of that form.

[65] *See* Section II.A.12., below.

[66] 17 CFR 240.12b–2.

[67] 15 U.S.C. 78m(a).

[68] 15 U.S.C. 78o(d).

[69] Once a company becomes an accelerated filer, it remains an accelerated filer subject to shortened deadlines unless and until it subsequently becomes eligible to use Exchange Act Forms 10–QSB and 10–KSB for its annual and quarterly reports. In that situation, the issuer would cease to be an accelerated filer unless and until it again meets the accelerated filer criteria.

[70] Source: SEC and Compustat.

accomplishing the goals of the proposal? Would it instead be more appropriate to apply the procedure only to ''accelerated filers'' and funds? Would it be more appropriate to apply the procedure only to ''accelerated filers'' and funds as an initial step? If so, are there any special provisions that would be necessary for companies transitioning to ''accelerated filer'' status with respect to the nomination procedure in proposed Exchange Act Rule 14a–11, such as the timing of nomination procedure triggering events or the proposed disclosure requirements? Would other limitations be more appropriate, such as applying the proposed rules to all companies other than small business issuers or all companies other than those that have been subject to the proxy rules for less than a specified period of time (*e.g.*, 3 years)?

B.2. Should companies be able to take specified steps or actions that would prevent application of the proposed nomination procedure where such procedure would otherwise apply? If so, what such steps or actions would be appropriate? For example, should companies that agree not to exclude any security holder proposal submitted by an eligible security holder pursuant to Exchange Act Rule 14a–8 be exempted from application of the proposed nomination procedure for a specified period of time? Should a company that implements all security holder proposals that receive passing votes in a given year be exempted? Conversely, should companies subject to Exchange Act Rule 14a–11 be permitted to exclude certain security holder proposals that they would otherwise be required to include? If so, what categories of proposals? For example, should the company be able to exclude proposals that are precatory, proposals that relate to corporate governance matters generally, proposals that relate to the structure or composition of boards of directors, or other proposals?

B.3. Would adoption of this procedure conflict with any state law, Federal law, or rule of a national securities exchange or national securities association? To the extent you indicate that the procedure would conflict with any of these provisions, please be specific in your discussion of those provisions that you believe would be violated.

B.4. Is it appropriate to limit the availability of the proposed nomination procedure to those situations where state law permits security holders to nominate candidates for director? Is it appropriate to permit companies to limit the availability of the proposed procedure by limiting the right to nominate directors, when allowed by state law? Will the proposed procedure's reliance on the pre-existence of a state law right, combined with the possibility that companies may limit security holders' rights in this regard, adversely affect the effectiveness of the procedure? Is the proposed procedure's reliance on the pre-existence of a state law right of nomination a proper balance between federal law and state law? Regardless of the existence of a state law right to nominate candidates for director, should companies be subject to the proposed procedure?

B.5. Most companies currently use plurality voting in the election of directors; accordingly, proposed Exchange Act Rule 14a–11 is drafted assuming that in most cases plurality voting would apply to an election of directors in which the inclusion of a security holder nominee resulted in more nominees than available seats on the board of directors. What specific issues would arise in an election where state law or the company's governing instruments provided for other than plurality voting, (*e.g.,* majority voting)? Would these issues need to be addressed in revisions to the proposed rule text? If so, how?

3. What Events Must Occur Before a Company Would Be Required To Include a Security Holder Nominee in Its Proxy Materials?

a. Nomination Procedure Triggering Events

In order to focus the impact of the proposed security holder nomination procedure on those companies where there are criteria showing that the proxy process may be ineffective, the procedure would become operative for a company only after the occurrence of one or both of the nomination procedure triggering events described below. The procedure would then remain operative for any annual meetings or special meetings held during:

- The remainder of the calendar year in which the triggering event occurs;
- The calendar year following the calendar year in which the triggering event occurs; and
- The portion of the second calendar year following the calendar year in which the triggering event occurs, up to and including the annual meeting (or special meeting in lieu of an annual meeting) held during that calendar year.[71]

As proposed, the following events would trigger the nomination procedure:

- At least one of the company's nominees for the board of directors for whom the company solicited proxies received ''withhold'' votes[72] from more than 35% of the votes cast at an annual meeting of security holders held after January 1, 2004 at which directors were elected (provided, that this event may not occur in the case of a contested election to which Exchange Act Rule 14a–12(c)[73] applies or an election to which the proposed security holder nomination procedure in Exchange Act Rule 14a–11 applies); or
- A security holder proposal submitted pursuant to Exchange Act Rule 14a–8 providing that the company become subject to the security holder nomination procedure in proposed Exchange Act Rule 14a–11(a) was submitted for a vote of security holders at an annual meeting of security holders held after January 1, 2004 by a security holder or group of security holders that held more than 1% of the company's securities entitled to vote on the proposal for one year as of the date the proposal was submitted and provided evidence of such holding to the company;[74] and (b) that ''direct access'' proposal received more than 50% of the

[71] It is our intention that the procedure would remain available for the two annual meetings following the occurrence of a nomination procedure triggering event. Because there are a number of variables that could impact this application, such as special meetings being held instead of annual meetings or a delay in the date of a later annual meeting, we have proposed that the procedure be operative during the period described.

[72] Because of plurality voting, in the election of directors security holders may vote for or withhold authority to vote for each nominee rather than vote for, against or abstain, as is the case for other matters to be voted on by security holders. *See* Exchange Act Rule 14a–4(b)(2).

[73] 17 CFR 240.14a–12(c).

[74] The staff has informed us that it intends to take the position that such a proposal is not excludable under Exchange Act Rule 14a–8(i)(8) [17 CFR 240.14a–8(i)(8)]. To clarify the applicability of this provision in the context of proposed Exchange Act Rule 14a–11, we are proposing an amendment to Exchange Act Rule 14a–8(i)(8) that would, if adopted, make clear that a company may not rely on the exclusion permitted by that paragraph (*i.e.,* the exclusion for proposals relating to the election of directors) to exclude a proposal that the company become subject to the procedure in proposed Exchange Act Rule 14a–11. The requirements and exclusions in the remainder of Exchange Act Rule 14a–8 would, of course, continue to apply to any such security holder proposal. Although we are proposing a security holder nomination procedure in this release, we are not reviewing or revising the position taken by the Division of Corporation Finance regarding the application of Exchange Act Rule 14a–8(i)(8) to security holder proposals that would have the effect of creating a security holder nomination procedure, other than a direct access proposal (as described above). *See, e.g.,* Division of Corporation Finance no-action letters to Citigroup, Inc. (January 31, 2003) and AOL Time Warner (February 29, 2003).

votes cast on that proposal at that meeting.[75]

To be a nomination procedure triggering event, a direct access security holder proposal under Exchange Act Rule 14a–8, providing that the company become subject to proposed Exchange Act Rule 14a–11, would therefore have to be submitted by a security holder or group having more than 1% beneficial ownership for one year.[76] Under Exchange Act Rule 14a–8 procedures, such a security holder or group must, in the same manner that it provides evidence of eligibility to use the rule otherwise, provide evidence to the company at the time it submits the proposal that it meets the more than 1% and one year thresholds in order to have the proposal, if adopted, be a nomination procedure triggering event. Under proposed Exchange Act Rule 14a–11, a direct access security holder proposal adopted after January 1, 2004 could be a nomination procedure triggering event. Therefore, security holders and groups should be aware that in order for the adoption of such a proposal to be a nomination procedure triggering event, should we adopt Exchange Act Rule 14a–11 as proposed, those security holders or groups should, using the existing Exchange Act Rule 14a–8 procedures, provide evidence that they satisfy the more than 1% and one-year thresholds when they submit their proposals.

In order to facilitate an informed security holder vote with regard to security holder proposals that could trigger the security holder nomination procedure set out in Exchange Act Rule 14a–11, we have proposed an amendment to Exchange Act Rule 14a–5 that would require the company, where a security holder proposal is submitted by a more than 1% security holder who has held their securities for at least one year, to advise security holders of this fact in the proxy statement relating to the meeting at which the security holder proposal will be presented. We recommend that, pending final action on that proposal, companies make such an identification, both in their interest and in the interest of their security holders. Companies also should consider whether failure to make such an identification has any implications under Exchange Act Rule 14a–9.[77]

We recognize that the proposed procedure could include other nomination procedure triggering events, such as economic performance (*e.g.,* lagging a peer index for a specified number of consecutive years), being delisted by a market, being sanctioned by the Commission, being indicted on criminal charges, having to restate earnings, or having to restate earnings more than once in a specified period. Because, however, today's proposals relate to the proxy process in connection with the nomination of directors, we are of the view that the nomination procedure triggering events should be tied closely to evidence of ineffectiveness or security holder dissatisfaction with a company's proxy process. While the nomination procedure triggering event requirement would add complexity to the operation of the rule, it also would limit the use of a security holder access rule to situations where there is evidence that the proxy process may otherwise have failed to permit security holder views to be adequately taken into account. We believe that this structure addresses best the concerns of some commenters regarding the potential adverse impact of such a nomination procedure on public companies.

In determining the appropriate thresholds to propose, we considered the importance of using nomination procedure triggering events that would provide a meaningful opportunity for security holders to trigger operation of the security holder nomination procedure against the importance of ensuring that the process is used by security holders who represent a substantial and long-term interest in the subject company. The nomination procedure triggering events that we propose strike what we believe is an appropriate balance between these interests.

The first of the nomination procedure triggers that we propose relates to the level of withhold director votes. We have proposed that the trigger require a more than 35% security holder withhold vote, based on votes cast. Based on a sample of 2,227 director elections over the past 2 years, it appears that approximately 1.1% of companies had total withhold votes in excess of 35% of the votes cast;[78] however, our data does not enable us to calculate withhold votes on a candidate-by-candidate basis. Because the data available to us suggest that the frequency of significant withhold votes is currently somewhat lower than that for majority votes on security holder proposals, as discussed below, we have proposed a lower threshold for the withhold votes trigger than the security holder proposal-based trigger. While we have selected a lower threshold, we have attempted to select a still-substantial percentage that will reflect the intent of a significant percentage of security holders rather than a small minority. In addition, we believe that it is important to recognize the possibility that withhold votes for individual directors currently may occur more frequently than the data available to us suggest, and that they may, in the future, occur more frequently if they could trigger the nomination procedure.

With regard to the more than 1% threshold with a one-year holding period that would be required of a direct access security holder proponent to trigger operation of the nomination procedure, we estimate that most companies have at least one security holder that is eligible to submit a security holder proposal that would initiate the security holder nomination procedure in proposed Exchange Act Rule 14a–11. For instance, we estimate that, of companies listed on an exchange or quoted on the Nasdaq Stock Market, 84% have at least one institution that has maintained ownership of at least 1% of the shares outstanding for one year.[79] The submission of security holder proposals by security holders that own 1% of the shares outstanding is currently relatively rare, however. A

[75] The votes cast on a proposal would be calculated in the same manner as for Exchange Act Rule 14a–8 proposals. Accordingly, only votes for and against a proposal would be included in the calculation of the security holder vote. *See* Instruction 2 to proposed Exchange Act Rule 14a–11(a). For a further explanation of this calculation, *see* also Section F.4. of Staff Legal Bulletin No. 14 (July 13, 2001).

[76] Exchange Act Rule 14a–8(i)(11) [17 CFR 240.14a–8(i)(11)] permits companies to exclude duplicative security holder proposals. We have proposed an instruction to Exchange Act Rule 14a–8(i)(11) to specify that, where a company receives more than one ''direct access'' security holder proposal, the company would not be permitted by that rule to exclude a direct access proposal received by a holder of more than 1% of the company's securities.

[77] 17 CFR 240.14a–9.

[78] Sample data provided by Automated Data Processing, Inc.; sample data relate to companies traded on the New York Stock Exchange, the American Stock Exchange, and the Nasdaq Stock Market. For each election, the number of ''yes'' votes and withhold votes received are totaled across all candidates on the proxy and then are reported. Thus, the level of withhold votes received on average across all candidates in a given election can be calculated, but not the outcome candidate-by-candidate. The result is that the number of elections in which a specific candidate received a certain number of withhold votes may be larger than the data presented here. This is due to the dilution experienced in elections where one candidate receives substantially more withhold votes than others on the same proxy.

[79] Based on analysis of the Vickers Stock Research Form 13–F filings database for 2002. Consistent with the Form 13–F filings, the holdings of different funds within a mutual fund family have been combined when considering the size of an institution's ownership position. This data is limited to U.S.-based companies with common equity trading on the NYSE, AMEX, or Nasdaq markets as of December 31, 2002.

review of a sample of 237 security holder proposals submitted in 2002 found that only three were submitted by an owner of more than 1% of the shares outstanding, with all three submitted by a single 1% owner. Of these three security holder proposals, only one received in excess of 50% of the votes cast.[80] This suggests that, while it is difficult to predict, the incidence of Exchange Act Rule 14a–11 submissions would not be overwhelming absent a significant change in the ownership levels of Exchange Act Rule 14a–8 security holder proponents, a change in their willingness to submit security holder proposals, or a willingness of smaller security holders to combine to submit proposals. At the same time, the information available to our Office of Economic Analysis suggests that security holders could aggregate their shares to reach the 1% threshold to submit a security holder proposal where those security holders feel that the proxy process has been ineffective.

Conversely, at higher percentages and holding periods, we are concerned that the trigger could be too difficult to meet and, therefore, less effective. For example, at a 3% threshold with a one-year holding period, the percentage of companies with at least one institutional investor who is able to submit a security holder proposal that triggers the nomination procedure would drop to 72%, while at a 5% threshold with a one-year holding period the percentage of companies with at least one institutional investor who is able to submit a security holder proposal that triggers the nomination procedure would drop to 57%.[81] These percentages drop to 59% and 42% respectively with a two-year holding period and 46% and 31% respectively at a three-year holding period.[82] By increasing the holding period required at the 1% threshold to 2 years, the percentage of companies with at least one institutional investor who is able to submit a security holder proposal that triggers the nomination procedure would drop to 75%, while an increase to a 3-year holding period drops the percentage to 64%.[83] The combination of this data with the requirement that an eligible security holder would have to submit a security holder proposal that is approved by the majority of the votes cast on that proposal leads us to believe that a higher ownership requirement or longer holding period could limit the availability of the direct access trigger in a manner that renders this trigger less effective.

With regard to the requirement that a direct access security holder proposal submitted by an eligible security holder must receive a majority of the votes cast at the meeting, we considered the percentage of security holder proposals that have received majority votes in prior recent years, based on both votes cast and votes outstanding. Samples of security holder proposals submitted between 2000 and 2003[84] indicate that between 28–31% of security holder proposals in the sample received 50% of the votes cast on those proposals. This percentage drops significantly if based on votes outstanding, to 8–11% of companies in the sample.[85] In light of the very low percentage of companies at which security holder proposals received a majority of votes outstanding, even without considering the low number of security holder proposals that are submitted by 1% security holders, we have proposed that the direct access proposal trigger be based on votes cast rather than votes outstanding.

b. Implementation of Security Holder Proposals Under Exchange Act Rule 14a–8 as a Nomination Procedure Triggering Event

We are considering as an additional element of the procedure, and seek comment on, whether we should include a third nomination procedure triggering event that is premised upon a company's not implementing a security holder proposal submitted in accordance with Exchange Act Rule 14a–8, other than a direct access security holder proposal, that receives support from the majority of votes cast. As noted previously, the nomination procedure we propose today is premised upon the existence of evidence regarding the ineffectiveness of, or security holder dissatisfaction with, a particular company's proxy process. Accordingly, we seek comment on a third nomination procedure triggering event that would result in a company being subject to that procedure if:

- A security holder proposal submitted pursuant to Exchange Act Rule 14a–8, other than a direct access security holder proposal, was submitted for a vote of security holders at an annual meeting by a security holder or group of security holders that held more than 1% of the company's securities entitled to vote on the proposal for one year and provided evidence of such holdings to the company;
- The security holder proposal received more than 50% of the votes cast on that proposal; and
- The board of directors of the company failed to implement the proposal by the 120th day prior to the date that the company mailed its proxy materials for the annual meeting.[86]

Any such nomination procedure trigger would apply to all security holder proposals, regardless of whether a proposal requires board action (a ''mandatory'' proposal) or requests board action (a ''precatory'' proposal). It would be necessary for any new rule implementing such a nomination procedure triggering event to provide guidance to companies and security holders with regard to the determination of whether a proposal has been implemented. While it seems clear that a company would be deemed to have implemented a security holder proposal if the board of directors of the company takes all steps required to be taken by the board to implement the proposal, the timing of implementation may not fit properly within annual meeting cycles. For example, there likely would be situations in which a company would not be able to implement the proposal before the next annual meeting, either because the proposal cannot legally be implemented in that time period or the company would be required to take further action to implement the proposal (for example, where the security holder proposal requests action that would require a security holder vote to implement). Further, a security holder proposal may grant discretion to the board of directors or the company as to the manner in which the proposal should be implemented, either by its terms or because implementation of the proposal otherwise requires such discretion. In this case, a determination by the board that it had implemented the proposal or

[80] Sample data provided by Georgeson Shareholder Communications Inc. The holdings of the proponent of the security holder proposal were taken from Vickers.

[81] Based on an analysis of the Vickers Form 13–F filings database for 2002. Consistent with the Form 13–F filings, the holdings of different funds within a mutual fund family have been combined when considering the size of an institution's ownership position. This data is limited to U.S.-based companies with common equity trading on the NYSE, AMEX, or Nasdaq markets as of December 31, 2002.

[82] *Id.*

[83] *Id.*

[84] ADP sample based on 926 proposals for 2002–2003; Investor Responsibility Research Center sample based on 818 governance-related proposals from 2000–2002; Georgeson sample based on 597 proposals from 2000–2002.

[85] ADP and IRRC provided vote outcomes both by votes cast and votes outstanding, whereas the Georgeson sample provided only votes cast.

[86] As is currently required in Exchange Act Rule 14a–8, this date would be calculated by determining the release date disclosed in the previous year's proxy statement, increasing the year by one, and counting back 120 calendar days.

another mechanism for determining that a proposal had been implemented would be necessary.

In addition to the issues regarding ''implementation'' discussed above, a nomination procedure triggering event premised upon the implementation of a security holder proposal would need to provide a means to inform security holders regarding the date by which implementation would be necessary and a discussion of the manner in which a proposal would be deemed to have been implemented. We believe that the most appropriate means for informing investors of a potential triggering event and its impact upon the proposed nomination procedure would be in the periodic report in which the company discloses the results regarding any matter that has been put to a vote of security holders.[87] Similarly, the most appropriate manner for determining implementation likely would be to have the board of directors of the company provide a representation on Exchange Act Form 8–K to the effect that it is the good faith judgment of those directors that the board has implemented the security holder resolution.

We are concerned that the inclusion of this third possible triggering event may affect a board's determination of how to react to or implement a security holder proposal or how to evaluate that proposal under state law. We believe, however, that an argument can be made that where a majority of votes cast by security holders favor a proposal and the board exercises its judgment not to implement it, there is an indication of ineffectiveness in, or dissatisfaction with, the proxy process. On the other hand, we are concerned that the link between the possible ineffectiveness of, or dissatisfaction with, a company's proxy process and this possible nomination procedure triggering event is more indirect than in the case of the two nominating process triggering events proposed today. A disagreement between a company's security holders and the board regarding its judgment on a proposal is a less directly linked indication of ineffectiveness relating to the director nomination and election process than a withhold vote on a director or a direct vote by security holders to provide for compliance with the nomination procedure. This is particularly the case in light of the possible diversity of subjects that can be addressed in a security holder proposal. We also are concerned about the complexity and potential for dispute regarding whether proposals are implemented.

If we decide to adopt a nomination procedure that includes this third triggering event, non-implementation of a security holder proposal submitted as described above and adopted subsequent to January 1, 2004 could be a nominating procedure triggering event. Therefore, security holders and groups should be aware that, should we adopt a nomination procedure that includes a ''non-implementation'' trigger, they should provide evidence to the company that they satisfy the more than 1% and one-year thresholds when they submit their proposals.[88] As discussed above, we are proposing to amend Exchange Act Rule 14a–5 to require that a company identify in its proxy materials any proposal that would, if adopted, be a nominating process triggering event. We recommend that, pending final action on that proposal, companies make such an identification, both in their interest and in the interest of their security holders. Companies also should consider whether failure to make such an identification has any implications under Exchange Act Rule 14a–9.

c. Questions

C.1. As proposed, the new procedure would require a triggering event for security holders to be able to use the security holder nomination procedure. Is this appropriate? If so, are the proposed nomination procedure triggering events appropriate? Are there other events that should trigger the procedure? For example, should the following trigger the procedure: lagging a peer index for a specified number of consecutive years; being delisted by a market; being sanctioned by the Commission; being indicted on criminal charges; or having to restate earnings once or restate earnings more than once in a specified period? Should the election of a security holder nominee as a member of a company's board of directors be deemed a triggering event in itself that would extend the process by another year or longer period of time?

C.2. How long after a nomination procedure triggering event should security holders be able to use the nomination procedure, if not two years, as is proposed (*e.g.,* one year, three years, or longer)? Should there be other ways for the operation of the procedure to terminate at a company? If so, what other means would be appropriate? For example, should companies be able to take specified actions that would terminate operation of the nomination procedure? If so, what such actions would be appropriate?

C.3. As proposed, the nomination procedure could be triggered by withhold votes for one or more directors of more than 35% of the votes cast. Is 35% the correct percentage? If not, what would be a more appropriate percentage and why? Is it appropriate to base this trigger on votes cast rather than votes outstanding? If not, please provide a basis for the recommendation, including numeric data, where available. Is the percentage of withhold votes the appropriate standard in all cases? For example, what standard is appropriate for companies that do not use plurality voting? If your comments are based upon data with regard to withhold votes for individual directors, please provide such data in your response.

C.4. Should the nomination procedure triggering event related to direct access security holder proposals trigger the procedure only where a more than 1% holder or group submits the proposal? If not, what would be a more appropriate threshold, if any? For example, should the standards otherwise applicable for inclusion of a proposal under Exchange Act Rule 14a–8 apply? Should the required holding period for the securities used to calculate the security holder's ownership be longer than one year? If so, what is the appropriate holding period? Should that holding period be shorter than one year? If so, what is the appropriate holding period?

C.5. Are the existing methods under Exchange Act Rule 14a–8 sufficient to demonstrate that a proposal was submitted by a more than 1% security holder? If not, what other methods would be appropriate?

C.6. As proposed, a direct access security holder proposal could result in a nomination procedure triggering event if it receives more than 50% of the votes cast with regard to that proposal. Is this the proper standard? Should the standard be higher (*e.g.,* 55%, 60%, or 65%)? Should the standard be based on votes cast for the proposal as a percentage of the outstanding securities that are eligible to vote on the proposal (*e.g.,* 50% of the outstanding securities)?

C.7. Should direct access security holder proposals be subject to a higher resubmission standard than other Exchange Act Rule 14a–8 proposals? If

[87] For example, the company could describe the proposal in that Exchange Act report and discuss the operation of the proposed security holder nomination procedure in that situation, including the topic of the security holder proposal, the date by which the company would become subject to the security holder nomination procedure if it has not yet implemented the proposal, and any obligation of the company to continue to inform security holders regarding the implementation of the proposal.

[88] Security holders should use existing Exchange Act Rule 14a–8 procedures to provide evidence of ownership.

so, what standard would be appropriate?

C.8. We have proposed that nomination procedure triggering events could occur after January 1, 2004. Is this the proper date? Should it be an earlier date? Should it be a later date?

C.9. What are the possible consequences of the use of nomination procedure triggering events? Will there be more expense and effort related to votes on direct access security holder proposals? Will there be more campaigns seeking ''withhold'' votes? How will any such consequences affect the operation and governance of companies?

C.10. Should companies be exempted from the security holder nomination procedure for any election of directors in which another party commences or evidences its intent to commence a solicitation in opposition subject to Exchange Act Rule 14a–12(c) prior to the company mailing its proxy materials? If so, should the period in which security holders in such companies may use the nomination procedure be extended to the next year (assuming that a nomination procedure triggering event is required)? What should be the effect if another party commences a solicitation in opposition after the company had mailed its proxy materials?

C.11. We have discussed our consideration of and requested public comment on the appropriateness of a triggering event premised upon the company's non-implementation of a security holder proposal that receives more than 50% of the votes cast on that proposal. Should such a triggering event be included in the nomination procedure? In responding to this question, please also consider the following questions:

a. Should a security holder proposal that receives more than 50% of votes cast operate as a nomination procedure triggering event regardless of the topic of the proposal, or would it be appropriate to instead require that the proposal relate to a specified category of topics (*e.g.,* corporate governance matters)? If so, how should that specific category of topics (*e.g.,* corporate governance matters) be defined?

b. Should a security holder proposal result in a nomination procedure triggering event if it receives more than 50% of the votes cast with regard to that proposal? Should the standard be higher (*e.g.,* 55%, 60%, 65%)? Should the standard be based on votes cast for the proposal as a percentage of the outstanding securities that are eligible to vote on the proposal (*e.g.,* 50% of the outstanding securities)? Would the described means of determining whether a security holder proposal has been implemented be sufficient? Should there be a different means for determining implementation?

Are there other or additional criteria that would be appropriate? Should the determination be made by the entire board of directors? Should the determination be made by the independent members of the board of directors? Should the board be given broader flexibility (*e.g.,* should it be able to represent its intention to implement a proposal)? Should the Commission or its staff (for example, the Division of Corporation Finance) play a role in this process (*e.g.,* similar to that for security holder proposals under Exchange Act Rule 14a–8)? Alternatively, what role should the courts play? What is the best record for a judicial determination?

c. Should security holders that do not agree with a company's conclusion that a proposal had been implemented have the right to contest that conclusion through a judicial proceeding? Should they have a private right of action to do so? Is there any reason to believe that security holders would not have a private right of action to contest a company's determination that a proposal has been implemented? If so, what recourse, if any, should a security holder have with regard to a company's determination?

d. Should a company be required to file an Exchange Act Form 8–K stating whether or not it implemented a security holder proposal that is eligible to trigger the rule? Is it appropriate to require that companies make such a statement on Exchange Act Form 8–K? Would this impose unnecessary liability on companies that make a determination regarding implementation of a security holder proposal with which security holders may disagree?

4. What Notice Must a Subject Company Give Regarding the Occurrence of an Event That Triggers the Operation of the Proposed Rule?

a. Disclosure on Exchange Act Forms 10–Q, 10–QSB, 10–K or 10–KSB [89]

Because the proposed security holder nomination procedure would operate only upon the occurrence of specified nomination procedure triggering events, it would be essential that the company make security holders aware when a nomination procedure triggering event has occurred. As such, the security holder nomination procedure in proposed Exchange Act Rule 14a–11 would require additional disclosures in a company's Exchange Act Form 10–Q, 10–QSB, 10–K or 10–KSB.[90] The proposed procedure would require the following:

- Each company would be required to disclose the security holder vote with regard to either of the nomination procedure triggering events in its quarterly report on Exchange Act Form 10–Q or 10–QSB for the period in which the matter was submitted to a vote of security holders or, where the nomination procedure triggering event occurred during the fourth quarter of the fiscal year, on Exchange Act Form 10–K or 10–KSB;[91] and
- Each company would be required to include in that Exchange Act Form 10–Q, 10–QSB, 10–K or 10–KSB information disclosing that it would be subject to the security holder nomination procedure as a result of such vote, if applicable.[92]

b. Questions

D.1. Will the proposed disclosure requirements in Exchange Act Forms 10–Q, 10–QSB, 10–K and 10–KSB provide adequate notice to security holders? Should additional notices be required? If so, what form should that notice take and at what time should it be made public?

D.2. Should the company's notice be filed and/or made public in some other manner?

If so, what manner would be appropriate?

[89] In addition to the proposed additions to Exchange Act Forms 10–Q, 10–QSB, 10–K and 10–KSB that we discuss in this section, we also have proposed corrective revisions to these forms to update outdated references to Exchange Act Rule 14a–11 that currently appear in Paragraph (d) of Item 4 of Part II to Forms 10–Q and 10–QSB and Paragraph (d) of Item 4 of Part I to Forms 10–K and 10–KSB.

[90] In lieu of Forms 10–Q, 10–QSB, 10–K or 10–KSB, registered investment companies (''funds'') would provide the additional disclosure on Form N–CSR. *See* Section II.A.12., below.

[91] Item 4 of Part II to Exchange Act Forms 10–Q and 10–QSB and Item 4 of Part I to Exchange Act Forms 10–K and 10–KSB currently require that companies disclose the results of the voting on all matters submitted to a vote of security holders during the period covered by the report. We have proposed an addition to this provision that would require disclosure of specific information relating to the security holder nomination procedure in proposed Item 4(e) of Part II to Exchange Act Forms 10–Q and 10–QSB and proposed Item 4(e) of Part I to Exchange Act Forms 10–K and 10–KSB.

[92] *See* proposed Item 4(e) of Part II to Exchange Act Forms 10–Q and 10–QSB and proposed Item 4(e) of Part I to Exchange Act Forms 10–K and 10–KSB.

5. Which Security Holders or Security Holder Groups May Submit a Nominee That the Company Would Be Required To Include in Its Proxy Materials?

a. Proposed Eligibility Standards

To be eligible to submit a nomination in accordance with proposed Exchange Act Rule 14a–11, a security holder or group of security holders would be required to: [93]

- Beneficially own, either individually or in the aggregate, more than 5% of the company's securities that are eligible to vote for the election of directors at the next annual meeting of security holders (or, in lieu of such an annual meeting, a special meeting of security holders), with each of the securities used for purposes of calculating that ownership having been held continuously for at least two years as of the date of the nomination; [94]
- Intend to continue to own those securities through the date of that annual or special meeting; [95]
- Be eligible, as to the security holder or each member of the security holder group, to report beneficial ownership on Exchange Act Schedule 13G, rather than Exchange Act Schedule 13D,[96] in reliance on Exchange Act Rule 13d–1(b) or (c);[97] and
- Have filed an Exchange Act Schedule 13G or an amendment to Exchange Act Schedule 13G reporting their beneficial ownership as a passive or institutional investor (or group) on such schedule before or on the date of the submission of the nomination to the company, which Schedule must include a certification that the security holder or security holder group has held more than 5% of the subject securities for at least two years.[98]

The appropriate eligibility ownership threshold generated a great deal of comment in response to our solicitation of public input on the Division's review of the proxy rules.[99] While some commenters believed that all security holders should be able to access company proxy materials for the purpose of nominating directors, others advocated no ownership threshold or share ownership thresholds ranging from the $2,000 threshold required to submit an Exchange Act Rule 14a–8 proposal to substantial share ownership percentages such as 3%, 5% or 10% of a company's outstanding common stock.[100] Those who advocated no threshold or a nominal dollar amount argued that the imposition of a threshold would discriminate against smaller investors or unfairly advantage larger security holders who already may have the resources to run their own slates using the existing rules for contested elections.[101] Those who advocated a larger share ownership threshold contended that a nominating security holder should have a substantial, long-term stake in the company in order to require the use of company funds to nominate a candidate.[102] In addition, advocates of a larger share ownership threshold pointed out that the composition of the board of directors is critical to a corporation's functions and, accordingly, security holders should have to evidence a significant financial interest by satisfying a substantial ownership threshold in order to use a security holder nomination procedure that may impact that composition.[103]

We have proposed an ownership threshold of more than 5% in an effort to balance security holders' interest in being able to access company proxy materials for the purpose of nominating directors against companies' concerns about the potential disruption that some contend may result from frequent use of the process by security holders who do not represent a significant ownership stake in the subject company. We believe that a threshold of more than 5% ownership for two years strikes an appropriate balance between these interests. Roughly 42% of filers have at least one security holder that can meet this threshold individually, while roughly 50% of filers have two or more security holders that each have held at least 2% of the shares outstanding for the appropriate period and, thus, could more easily aggregate their securities in order to meet the threshold ownership requirement.[104] A higher threshold amount would result in significantly fewer filers having even one security holder who could meet the required threshold. For example, using an ownership threshold of 10% would reduce the number of companies where a single security holder could make a nomination to 13% of the companies. Further, only 18% of filers have two or more security holders that have held at least 5% of the shares for the appropriate period. This data suggest that security holders may have significant difficulty in aggregating their shares to meet a 10% ownership threshold.

b. Questions

E.1. Are the proposed thresholds for use of the proposed procedure appropriate? If not, should there be any restrictions regarding which security holder nominees for director would be required to be disclosed in the company proxy materials under the proposed procedure? If so, should those restrictions be consistent with the ownership requirements of Exchange Act Rule 14a–8? Should those restrictions be more extensive than the minimum requirements in Exchange Act Rule 14a–8?

E.2. Is it appropriate to include a restriction on security holder eligibility that is based on percentage of securities owned? If so, is the more than 5% standard that we have proposed appropriate? Should the standard be lower (*e.g.*, 2%, 3%, or 4%) or higher

[93] The manner in which a nominating security holder or nominating security holder group would establish its eligibility to use the procedure in proposed Exchange Act Rule 14a–11 is discussed in Section II.8.a., below.

[94] *See* proposed Exchange Act Rule 14a–11(b)(1)–(2).

[95] The requirement regarding the nominating security holder's intent to continue to own the securities is set forth in proposed Exchange Act Rule 14a–11(b)(2). The nominating security holder would be required to include a representation regarding this intent in its notice to the company, pursuant to proposed Exchange Act Rule 14a–11(c)(2).

[96] 17 CFR 240.13d–101.

[97] 17 CFR 240.13d–1(b)–(c). This requirement is set forth in proposed Exchange Act Rule 14a–11(b)(3). The nominating security holder would be required to include a representation regarding this eligibility in its notice to the company, pursuant to proposed Exchange Act Rule 14a–11(c)(2). This requirement would not apply in the case of an open-end management investment company (''mutual fund'') because security holders of mutual funds are not required to file Exchange Act Schedules 13D or 13G. *See* Exchange Act Rules 13d–1(a) and (i) [17 CFR 240.13d–1(a) and (i)] (requiring any person who is directly or indirectly the beneficial owner of more than 5% of a class of equity securities to file with the Commission a statement containing the information required by Exchange Act Schedule 13D, and defining ''equity security'' to mean any equity security of a class which is registered pursuant to Section 12 of the Exchange Act [15 U.S.C. 78l], or any equity security of any insurance company which would have been required to be so registered except for the exemption contained in Section 12(g)(2)(G) of the Exchange Act [15 U.S.C. 78l(g)(2)(7)], or any equity security issued by a closed-end investment company registered under the Investment Company Act).

[98] This requirement is set forth in proposed Exchange Act Rule 14a–11(b)(4). A nominating security holder or group for a mutual fund would be required to file information reporting the security holder or group's beneficial ownership as part of the security holder's notice to the fund, pursuant to proposed Exchange Act Rule 14a–11(c)(11). *See* Section II.A.12., below.

[99] *See* 2003 Summary of Comments.

[100] *See id.*

[101] *See id.*

[102] *See id.*

[103] *See id.*

[104] Based on analysis of the Vickers Form 13–F filings database for 2002. Consistent with the Form 13–F filings, the holdings of different funds within a mutual fund family have been combined when considering the size of an institution's ownership position. This data is limited to U.S.-based companies with common equity trading on the NYSE, AMEX, or Nasdaq markets as of December 31, 2002.

(*e.g.* 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)?

E.3. Should there be a restriction on security holder eligibility that is based on the length of time securities have been held? If so, is two years the proper standard? Should the standard be shorter (*e.g.*, 1 year) or longer (*e.g.*, 3 years, 4 years, or 5 years)? Should the standard be measured by a different date (*e.g.*, 2 years as of the date of the meeting, rather than the date of nomination)?

E.4. As proposed, a nominating security holder would be required to represent its intent to hold the securities until the date of the election of directors. Is it appropriate to include such a requirement? Would it be appropriate to require the security holder to intend to hold the securities beyond the election of directors (*e.g.*, for six months after the election, one year after the election, or two years after the election) and to so represent?

E.5. Is the eligibility requirement that a security holder or security holder group must file an Exchange Act Schedule 13G appropriate? Should there be a different mechanism for putting companies and other security holders on notice that a security holder or security holder group has ownership of more than 5% of the company's securities and intends to nominate a security holder? Is it appropriate to permit the filing to be on Exchange Act Schedule 13G rather than Exchange Act Schedule 13D? If not, why not?

E.6. Should the procedure include a provision that would deny eligibility for any nominating security holder or nominating security holder group that has had a nominee included in the company materials where that nominee did not receive a sufficient number of votes (*e.g.*, 5%, 15%, 25%, or 35%) within a specified period of time in the past? If there should be such an eligibility standard, how long should the prohibition last?

E.7. Should security holders be allowed to aggregate their holdings in order to meet the ownership eligibility requirement to nominate directors? If so, is it appropriate to require that all members of a nominating security holder group individually meet the minimum holding period? Is it appropriate to require that all members of the group be eligible to file on Exchange Act Schedule 13G?

E.8. As proposed, the beneficial ownership level of a nominating security holder or nominating security holder group would be established by the Exchange Act Schedule 13G filed by that security holder or security holder group, for companies other than open-end management investment companies (''mutual funds''). Is the filing of the Exchange Act Schedule 13G sufficient evidence of ownership? If not, what additional evidence would be appropriate? Should there be an additional procedure by which disputes regarding ownership levels are resolved?

6. What Are the Requirements for the Person Whom the Eligible Security Holder or Security Holder Group May Nominate?

a. The Nomination Must Be Consistent With Applicable Law and Regulation

A company would not be required to include a security holder nominee in its proxy materials if the nominee's candidacy or, if elected, board membership, would violate:

- Controlling state law;
- Federal law; or
- Rules of a national securities exchange or national securities association (other than rules of a national securities exchange or national securities association that set forth requirements regarding the independence of directors).[105]

Because compliance with independence standards can depend on the overall make-up of a board, we have excluded independence standards from this requirement and have, instead, proposed a separate requirement regarding independence standards.[106] Pursuant to that separate requirement, a nominating security holder or nominating security holder group would be required to represent that the nominee meets the objective criteria for ''independence'' in any applicable national securities exchange or national securities association rules. For this purpose, the nominee would be required to meet the definition of ''independence'' that is generally applicable to directors of the company and not any particular definition of independence applicable to members of the audit committee of the company's board of directors. To the extent a rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board (for example, requiring that the board of directors or any group or committee of the board of directors make a determination regarding the existence of factors material to a determination of a nominee's independence), this element of an independence standard would not have to be satisfied.[107]

b. Prohibited Relationships Between the Nominee and the Nominating Security Holder or Group

A number of commenters expressed concerns regarding the disruptive effect a security holder nomination procedure could have on board dynamics and board operation. A number of these comments related to the potential for ''special interest'' or ''single issue'' directors that would advance the interests of the nominating security holder over the interests of security holders as a group. While we recognize this concern, we believe that the procedure we propose today under Exchange Act Rule 14a–11 should afford a security holder or group meeting the proposed standards the ability to propose a candidate for director that, in the nominating security holder's view, is more qualified than those put forward by a nominating committee, board, management, or company. We therefore propose that, to be eligible to nominate a candidate under the proposal, a nominating security holder or nominating security holder group may not have specified relationships with the nominee. We believe that the proper procedures for nomination and solicitation of proxies for a candidate that would be an interested representative of a security holder, including a security holder meeting the proposed standards under Exchange Act Rule 14a–11, are those that otherwise exist under our current proxy rules. Therefore, as proposed, each person that is a security holder nominee would be required to meet the following standards of independence from the security holder or each member of the security holder group that has nominated such person:

[105] This requirement is set forth in proposed Exchange Act Rule 14a–11(a)(3)(i). Pursuant to proposed Exchange Act Rule 14a–11(c)(1), the notice to the company by the nominating security holder or nominating security holder group would be required to include a representation that the nominee's candidacy or, if elected, board membership, would not violate any of the specified provisions.

[106] As proposed, there would not be a separate standard regarding the security holder nominee's compliance with the applicable independence requirements of a national securities exchange or national securities association. Rather, compliance with these existing independence standards would be established through the inclusion in the notice to the company by the nominating security holder or nominating security holder group of a representation that the nominee satisfies the existing standard. This representation is required in proposed Exchange Act Rule 14a–11(c)(4). In the case of a fund, a nominating security holder or group would be required to represent that its nominee is not an ''interested person'' of the fund as defined in Section 2(a)(19) of the Investment Company Act. [15 U.S.C. 80a–2(a)(19)]. *See* Section II.A.12., below.

[107] *See* the Instruction to proposed Exchange Act Rule 14a–11(c)(4). This proposed standard is discussed further in Section II.A.6.c., below.

• If the nominating security holder or any member of the nominating security holder group is a natural person, the nominee is not the nominating security holder, a member of the nominating security holder group, or a member of the immediate family of the nominating security holder or any member of the nominating security holder group;[108]

• If the nominating security holder or any member of the nominating security holder group is an entity, neither the nominee nor any immediate family member of the nominee has been an employee of the nominating security holder or any member of the nominating security holder group during the then-current calendar year nor during the immediately preceding calendar year;

• Neither the nominee nor any immediate family member of the nominee has, during the year of the nomination or the immediately preceding calendar year, accepted directly or indirectly any consulting, advisory, or other compensatory fee from the nominating security holder or any member of the group of nominating security holders or any affiliate of any such holder or member, provided that compensatory fees would not include the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with such holder or any such member (provided that such compensation is not contingent in any way on continued service);

• The nominee is not an executive officer, director (or person fulfilling similar functions) of the nominating security holder or any member of the nominating security holder group, or of an affiliate of the nominating security holder or any such member of the nominating security holder group; and

• The nominee does not control the nominating security holder or any member of the nominating security holder group (or in the case of a holder or member that is a fund, an interested person of such holder or any such member as defined in Section 2(a)(19) of the Investment Company Act).

c. Relationships Between the Nominee, the Nominating Security Holder or Group, and the Company

A number of commenters expressed concerns regarding the effect of a nomination procedure on a company's compliance with requirements that certain of its directors be ''independent.'' Other commenters addressed the potential use of the process by nominating security holders that were acting merely as a surrogate for the company. To balance the benefits of a security holder nomination procedure against these concerns, we propose that the nominating security holder or nominating security holder group be required to include a representation regarding relationships between the nominee and the company and between the nominating security holder or nominating security holder group and the company.[109] Specifically, as proposed, each nominating security holder or each member of the group of nominating security holders would be required to represent to the company that:

• The nominee submitted under the proposed rule by that nominating security holder or group of nominating security holders satisfies the applicable standards of a national securities exchange or national securities association regarding director independence, if any, except that, where a rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board (for example, requiring that the board of directors or any group or committee of the board of directors make a determination regarding the existence of factors material to a determination of a nominee's independence), this element of an independence standard would not have to be satisfied;[110] and

• Neither the nominee nor the nominating security holder (or any member of the nominating security holder group, if applicable) has a direct or indirect agreement with the company regarding the nomination of the nominee.

Commenters have expressed concern that the use of the proposed security holder nomination procedure, by itself, may be deemed to establish a relationship between the nominating security holder or nominating security holder group and the company that would result in that holder or group being deemed an ''affiliate'' of the company for purposes of the federal securities laws. It is our view that the mere use of the proposed procedure should not have such an effect. Accordingly, proposed Exchange Act Rule 14a–11(a) would include an instruction making clear that a nominating security holder will not be deemed an ''affiliate'' of the company under the Securities Act of 1933[111] or the Exchange Act solely as a result of nominating a director or soliciting for the election of such a director nominee or against a company nominee pursuant to the security holder nomination procedure.[112] In addition, where a security holder nominee is elected, and the nominating security holder or nominating security holder group does not have an agreement or relationship with that director, otherwise than relating to the nomination, the nominating security holder or nominating security holder group would not be deemed an affiliate solely by virtue of having nominated that director under the proposed rules.

d. Questions

F.1. Should there be any other or additional limitations regarding nominee eligibility? Would any such limitations undercut the stated purposes of the proposed process? Are any such limitations necessary? If so, why?

F.2. Is it appropriate to use compliance with state law, federal law, and listing standards as a condition for eligibility?

F.3. Should there be requirements regarding independence from the

[108] For these purposes, ''immediate family'' would be defined in a manner that is consistent with the definition of ''family member'' that requires disclosure under Item 401(d) of Regulation S–K [17 CFR 228401(d)].

[109] This representation would be required in the nominating security holder's notice to the company, pursuant to proposed Exchange Act Rule 14a–11(c)(5). Instruction 1 to proposed Exchange Act Rule 14a–11(d) clarifies that any nominee about which the nominating security holder is not able to make this representation shall not be counted in calculating the number of security holder nominees for purposes of proposed Exchange Act Rule 14a–11(d).

[110] For example, the NYSE proposed listing standards include both subjective and objective components in defining an ''independent director.'' Section 303A(2)(a) provides that no director will qualify as ''independent'' unless the board of directors ''affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company).'' Section 303A(2)(b) provides that ''a director who receives, or whose immediate family member receives, more than $100,000 per year in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service), is presumed not to be independent until five years after he or she ceases to receive more than $100,000 per year in such compensation.'' *See* Release No. 34–47672 (April 11, 2003). In the case of a fund, a nominating security holder or group would be required to represent that its nominee is not an ''interested person'' of the fund as defined in Section 2(a)(19) of the Investment Company Act. *See* Section II.A.12., below.

[111] 15 USC 77a *et seq.*

[112] This safe harbor is set forth in Instruction 3 to proposed Exchange Act Rule 14a–11(a). The safe harbor is intended to operate such that the determination of whether a holder or group is an ''affiliate'' of the company would continue to be made based upon all of the facts and circumstances regarding the relationship of the holder or group to the company, other than such holder's or group's activities under the proposed security holder nomination procedure.

company? Should the fact that the nominee is being nominated by a security holder or security holder group, combined with the absence of any direct or indirect agreement with the company, be a sufficient independence requirement?

F.4. How should any independence standards be applied? Should the nominee and the nominating security holder or nominating security holder group have the full burden of determining the effect of the nominee's election on the company's compliance with any independence requirements, even though those consequences may depend on the outcome of any election and may relate to the outcome of the election with regard to nominees other than security holder nominees?

F.5. Are the proposed standards with regard to independence appropriate? If not, what standards would be appropriate? If these limitations generally are appropriate, are there instances where they should not apply?

F.6. Where a company is subject to an independence standard of a national securities exchange or national securities association that includes a subjective component (*e.g.*, subjective determinations by a board of directors or a group or committee of the board of directors), should the security holder nominee be subject to those same requirements as a condition to nomination?

F.7. As proposed, a nominating security holder or nominating security holder group would be required to represent that the security holder nominee satisfies applicable standards of a national securities exchange or national securities association regarding director independence, except where a rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board. What independence requirements should be used if the company is listed on more than one market with such independence requirements? Should the nominating security holder or nominating security holder group have the discretion to choose the applicable standards? Should the company have discretion to choose the applicable standards? Should all the standards of all markets on which shares are traded apply? Should the more stringent standards apply?

F.8. Should there be requirements regarding independence of the nominee from the nominating security holder, nominating security holder group, or the company? If so, are the proposed limitations appropriate? What other or additional limitations would be appropriate? If these limitations generally are appropriate, are there instances where they should not apply?

F.9. Should there be any standards regarding separateness of the nominee and the nominating security holder or nominating security holder group? Would such a limitation unnecessarily restrict access by security holders to the proxy process? If such standards are appropriate, are the proposed standards the proper standards? Should other standards be included? Should any of the proposed standards be eliminated?

F.10. Should there be a prohibition, as is proposed, on any affiliation between nominees and nominating security holders or nominating security holder groups? If so, are the proposed rules appropriate? For example, we have proposed a definition of ''immediate family'' that is consistent with the existing disclosure requirement under Item 401(d) of Regulation S-K. Is this the appropriate definition for purposes of addressing relationships between the nominee and the nominating security holder or nominating security holder group? If not, what definition would be more appropriate?

F.11. Should there be exceptions to the prohibition on any affiliation between nominees and nominating security holders or nominating security holder groups? If so, what exceptions would be appropriate?

F.12. Is the two-year prohibition on payments from nominating security holders to nominees appropriate? Should it be longer (*e.g.*, 3 years, 4 years, or 5 years) or shorter (*e.g.*, 1 year)? Should there be exceptions to this prohibition? If so, what exceptions would be appropriate?

F.13. Is the prohibition on direct or indirect agreements between companies and nominating security holders appropriate? Would such a prohibition inhibit desirable negotiations between security holders and boards or nominating committees regarding nominees for directors? Should the prohibition provide an exception to permit such negotiations? If so, what should the relevant limitations be?

F.14. Should there be a nominee eligibility criterion that would exclude an otherwise eligible nominee or nominating security holder or nominating security holder group where that nominee (or a nominee of that security holder or security holder group) has been included in the company's proxy materials as a candidate for election as director but received a minimal percentage of the vote? If so, what would be the appropriate standard (*e.g.*, 5%, 15%, 25%, or 35%)?

F.15. As proposed, the rule includes a safe harbor providing that nominating security holders will not be deemed ''affiliates'' solely as a result of using the security holder nomination procedure. This safe harbor would apply not only to the nomination of a candidate, but also where that candidate is elected, provided that the nominating security holder or nominating security holder group does not have an agreement or relationship with that director otherwise than relating to the nomination. Is it appropriate to provide such a safe harbor for security holder nominations? Should the safe harbor continue to apply where the nominee is elected?

7. How Many Security Holder Nominees Must the Company Include in Its Proxy Materials?

a. Proposed Limitation

We do not intend the security holder nomination procedure in proposed Exchange Act Rule 14a–11 to be available for any security holder or security holder group that is seeking control of a company. The existing procedures regarding contested elections of directors are intended to continue to fulfill that purpose.[113] The elements of this aspect of the proposal insofar as they relate to eligibility to use Exchange Act Schedule 13G are discussed below.

As proposed, a company would be required to include one security holder nominee if the total number of members of the board of directors is eight or fewer, two security holder nominees if the number of members of the board of directors is greater than eight and less than 20 and three security holder nominees if the number of members of the board of directors is 20 or more. The proposal would have a separate standard for companies with classified or ''staggered'' boards of directors. Where a company has a director (or directors) currently serving on its board of directors who was elected as a security holder nominee, and the term of that director extends past the date of the meeting of security holders for which the company is soliciting proxies, the company would not be required to include on its proxy card more security holder nominees than could result in the total number of directors serving on the board that were elected as security holder nominees being greater than one if the total number of members of the board of directors is eight or fewer, two if the number of members of the board of directors is greater than eight and less than 20 and three if the number of

[113] *See, e.g.,* Exchange Act Rule 14a–12(c).

members of the board of directors is 20 or more.[114]

The proposed security holder nomination procedure would address situations where more than one security holder or group of security holders would be eligible to nominate a person or persons to a company's board of directors pursuant to the proposed rule. In those situations, the company would be required to include in its proxy statement and form of proxy the nominee or nominees of the security holder or security holder group with the largest beneficial ownership (as reported on Exchange Act Schedule 13G) at the time of the delivery of the nominating security holder's notice of intent to nominate a director pursuant to the rule, up to and including the total number required to be included by the company.[115] We believe this method of determining which security holder or security holder group's nominees are included in the company's proxy materials is appropriate, as it relates directly to the level of interest in the company of the nominating security holder or the nominating security holder group.

b. Questions

G.1. Is it appropriate to include such a limitation on the number of security holder nominees? If not, how would the proposed rules be consistent with our intention not to allow the proposed procedure to become a vehicle for changes in control?

G.2. If there should be a limitation, is the proposed limitation appropriate? Should the number of security holder nominees be higher or lower? Should the limitation instead be based on the total percentage of the board that the security holder nominees would comprise? Should the limitation be the greater or lesser of the number or a specified percentage, rather than a set number, as proposed? Is it appropriate to permit more than one security holder nominee regardless of the size of the company's board of directors?

G.3. Should the number increase during the second year of the proposed procedure? Should the number decrease during the second year of the proposed procedure?

G.4. The proposal contemplates taking into account incumbent directors in the case of classified or ''staggered'' boards for purposes of determining the maximum number of security holder nominees. Is that appropriate? Should there be a different procedure to account for such incumbent directors? Also with regard to staggered boards, should the procedure address situations in which, due to a staggered board, fewer director positions are up for election than the maximum permitted number of security holder nominees? If so, how?

G.5. We have proposed a limitation that permits the security holder or security holder group with the largest beneficial ownership to include its nominee(s) where there is more than one eligible nominating security holder or nominating security holder group. Is this proposed procedure appropriate? If not, should there be different criteria for selecting the security holder nominees (*e.g.,* length of security ownership, date of the nomination, random drawing, allocation among eligible nominating security holders or security holder groups, *etc.*)? Rather than using criteria such as that proposed, should the company's nominating committee have the ability to select among eligible nominating security holders or security holder groups?

G.6. Rather than a limitation on the maximum number of security holder nominees, should there be only a limitation on the number of security holder nominees that may be elected?

8. What Notice Must the Nominating Security Holder or Nominating Security Holder Group Provide to the Company and File With the Commission?

a. Notice to the Company

To have a nominee included in the company's proxy statement and form of proxy, we propose that the nominating security holder or nominating security holder group be required to provide notice to the company of its intent to require that the company include that security holder's nominee on the company's proxy card no later than 80 days before the date that the company mails its proxy materials for the annual meeting.[116] This notice would be required to include:

- A representation that the nominating security holder is eligible to submit a nominee under the security holder nomination procedure;[117]
- A statement that, to the knowledge of the nominating security holder or group, the candidate's nomination or service on the board, if elected, would not violate controlling state law, federal law, or listing standards (other than a standard relating to independence);[118]
- A representation that the nominee meets the objective criteria for independence from the company that are set forth in applicable rules of a national securities exchange or national securities association;[119]
- Representations regarding the absence of a prohibited relationship between the nominee and the nominating security holder or nominating security holder group;[120]
- A representation that neither the nominee nor the nominating security holder (or any member of the nominating security holder group, if applicable) has a direct or indirect agreement with the company regarding the nomination of the nominee;[121]
- A copy of the nominating security holder's or nominating security holder group's filed Exchange Act Schedule 13G indicating ownership of more than 5% of the appropriate class of the company's securities;[122]

[114] Based on a sample of 1,439 public companies provided by IRRC to our Office of Economic Analysis, in 2002, the median board size was 9, with boards ranging in size from 4 to 24 members. Approximately 42% of the boards in the sample had 8 or fewer directors, approximately 58% had between 9 and 19 directors, and less than 1% had 20 or more directors.

[115] This requirement is set forth in proposed Exchange Act Rule 14a–11(d)(3).

[116] As is currently required in Exchange Act Rule 14a–8, this date would be calculated by determining the release date disclosed in the previous year's proxy statement, increasing the year by one, and counting back the required number of calendar days. If the company did not hold an annual meeting during the prior year, or if the date of the meeting has changed more than 30 days from the prior year, then the nominating security holder would be required to provide notice a reasonable time before the company mails its proxy materials for the current year, as specified by the company in an Exchange Act Form 8–K filed pursuant to proposed Item 13.

[117] The eligibility standards for nominating security holders are set forth in proposed Exchange Act Rule 14a–11(b). This representation would be included in the nominating security holder's notice pursuant to proposed Exchange Act Rule 14a–11(c)(2).

[118] Proposed Exchange Act Rule 14a–11(a)(3)(i) requires that the nomination not violate these standards. This representation would be included in the nominating security holder's notice pursuant to proposed Exchange Act Rule 14a–11(c)(1).

[119] This representation would be included in the nominating security holder's notice pursuant to proposed Exchange Act Rule 14a–11(c)(4). In the case of a fund, a nominating security holder or group would be required to represent that its nominee is not an ''interested person'' of the fund as defined in Section 2(a)(19) of the Investment Company Act. *See* Section II.A.12., below.

[120] This representation would be included in the nominating security holder's notice pursuant to proposed Exchange Act Rule 14a–11(c)(3).

[121] This representation would be included in the nominating security holder's notice pursuant to proposed Exchange Act Rule 14a–11(c)(5).

[122] Proposed Exchange Act Rule 14a–11(b)(4) would require that the nominating security holder or nominating security holder group to have filed this Exchange Act Schedule 13G. A copy of this Exchange Act Schedule 13G would be included in the nominating security holder's notice pursuant to proposed Exchange Act Rule 14a–11(c)(6). This requirement would not apply in the case of a company that is a mutual fund because security holders of mutual funds are not required to file Exchange Act Schedule 13G. *See* Exchange Act Rules 13d–1(a) and (i). A nominating security holder or group for a mutual fund would be required to file information reporting the security holder or group's beneficial ownership as part of

• A representation that the nominating security holder or each member of the nominating security holder group was eligible to report its security ownership on Exchange Act Schedule 13G in reliance on Exchange Act Rule 13d–1(b) or (c); [123]

• A representation that more than 5% of the appropriate class of the company's securities, as reflected in the Exchange Act Schedule 13G of the nominating security holder or nominating security holder group, have been held continuously for at least two years and that the nominating security holder or nominating security holder group intends to continue to own those securities through the date of the subject election of directors; [124]

• A statement from the nominee that the nominee consents to be named in the company's proxy statement and to serve on the board if elected, for inclusion in the company's proxy statement; [125]

• Disclosure about the nominee complying with the requirements of Item 7(a), (b) and (c) and, for investment companies, Item 22(b) of Exchange Act Schedule 14A, for inclusion in the company's proxy statement; [126]

• Any of the following information with regard to each nominating security holder or member of a nominating security holder group that is not included in the Exchange Act Schedule 13G, for inclusion in the company's proxy statement: [127]

—Name and business address;
—Present principal occupation or employment and the name, principal business and address of any corporation or other organization in which such employment is carried on;
—The amount of each class of securities of the company that the individual owns beneficially, directly or indirectly, determined in accordance with Exchange Act Rule 13d–3; [128]
—Whether or not, during the past ten years, the individual has been convicted in a criminal proceeding (excluding traffic violations or similar misdemeanors) and, if so, the dates, the nature of the conviction, the name or other disposition of the case; and whether the individual has been involved in any other legal proceeding during the past five years, as specified in Item 401(f) of Regulation S–K; [129] and

• The methods by which the nominating security holder or nominating security holder group may solicit security holders, including any Web site address on which the nominating security holder or nominating security holder group may publish soliciting materials.[130]

b. Filing With the Commission

The nominating security holder or the nominating security holder group would be required to file the notice described in the preceding section, excluding the already-filed Exchange Act Schedule 13G, with the Commission. This notice would be viewed as soliciting material of the nominating security holder or nominating security holder group, in that much of the information included in the notice would ultimately be disseminated to security holders in the company's proxy statement. Accordingly, the notice as filed with the Commission would be subject to the provisions of Exchange Act Rule 14a–9. We contemplate that this solicitation would be made in accordance with the exemption set out in proposed Exchange Act Rule 14a–11(f)(2). The notice would be filed with the Commission in the following manner: [131]

• The filing would include a cover page in the form set forth in Exchange Act Schedule 14A, as proposed to be amended, with the appropriate box on the cover page marked;

• The filing would be made under the subject company's Exchange Act file number; [132] and

• The nominating security holder or nominating security holder group would be required to make the filing no later than two business days after providing the notice to the company.

c. Questions

H.1. Are the proposed content requirements of the notice appropriate? Are there matters included in the notice that should be eliminated? Are there additional matters that should be included? For example, is there additional information that should be included with regard to the nominating security holder or nominating security holder group (*e.g.*, disclosure similar to that required from participants in solicitations in opposition with regard to contracts, arrangements or understandings relating to the company's securities), or with regard to the security holder nominee?

H.2. Are the required representations appropriate? Should there be additional representations? Should any of the proposed representations be eliminated?

H.3. Is it appropriate to require that the notice (other than the copy of the Exchange Act Schedule 13G included in that notice) be filed with the Commission? Should additional or lesser information be filed with the Commission and be made publicly available? Is the proposed filing requirement appropriate? For example, should the notice be filed as an exhibit

the security holder's notice to the fund pursuant to proposed Exchange Act Rule 14a–11(c)(11). *See* Section II.A.12., below.

[123] Proposed Exchange Act Rule 14a–11(b)(3) requires that the nominating security holder or nominating security holder group satisfy this standard. This representation would be included in the nominating security holder's notice pursuant to proposed Exchange Act Rule 14a–11(c)(2). This requirement would not apply in the case of a company that is a mutual fund because security holders of mutual funds are not required to file Exchange Act Schedule 13G. *See* Exchange Act Rules 13d–1(a) and (i); Section II.A.12., below.

[124] Proposed Exchange Act Rules 14a–11(b)(1) and 14a–11(b)(2) require that the nominating security holder meet these standards. This representation would be included in the nominating security holder's notice pursuant to proposed Exchange Act Rule 14a–11(c)(2). For companies that are mutual funds, this representation is modified to reflect the fact that security holders of mutual funds are not required to file Exchange Act Schedule 13G. *See* Exchange Act Rules 13d–1(a) and (i); Section II.A.12., below.

[125] This statement would be included in the nominating security holder's notice pursuant to proposed Exchange Act Rule 14a–11(c)(7).

[126] This information would be included in the nominating security holder's notice pursuant to proposed Exchange Act Rule 14a–11(c)(8). This information would identify the nominee, describe certain legal proceedings, if any, related to the nominee, and describe certain of the nominee's transactions and relationships with the company. *See* paragraphs (a), (b), and (c) of Item 7 of Exchange Act Schedule 14A. With respect to a nominee for director of a fund, the disclosure would include certain basic information about the nominee and any arrangement or understanding between the nominee and any other person pursuant to which he was selected as a nominee; information about the positions, interests, and transactions and relationships of the nominee and his immediate family members with the fund and persons related to the fund; information about the amount of equity securities of funds in a fund complex owned by the nominee; and information describing certain legal proceedings related to the nominee, including legal proceedings in which the nominee is a party adverse to, or has a material interest adverse to, the fund or any of its affiliated persons. *See* paragraph (b) of Item 22 of Exchange Act Schedule 14A.

[127] This information would be included in the nominating security holder's notice pursuant to proposed Exchange Act Rule 14a–11(c)(9). Where the nominating security holder is an entity rather than an individual, the required disclosure would be provided with regard to the control persons of the entity. For example, if the nominating security holder is a corporation, the information called for in Exchange Act Rule 14a–11(c)(9) must be given with respect to each executive officer and director of the corporation, each person controlling the corporation, and each executive officer and director of any corporation or other person ultimately in control of the corporation. *See* the Instruction to proposed Exchange Act Rule 14a–11(c)(9).

[128] 17 CFR 240.13d–3.

[129] 17 CFR 229.401(f).

[130] This information would be included in the nominating security holder's notice pursuant to proposed Exchange Act Rule 14a–11(c)(10).

[131] The requirement to file this information with the Commission is set forth in proposed Exchange Act Rule 14a–6(q).

[132] For a fund, the filing would be made under the subject company's Investment Company Act file number. *See* Section II.A.12., below.

to an amendment to the nominating security holder or nominating security holder group's Exchange Act Schedule 13G?

H.4. When should the notice be required to be filed with the Commission? Should it be required to be filed at the time it is provided to the company? Should it be required to be filed within a specified period of time, such as two business days, after it is provided to the company, as is proposed? Should the information in the notice that is included in the company's proxy statement instead be filed on or about the date that the company releases its proxy statement to security holders?

H.5. What should be the consequence to the nominating security holder or nominating security holder group of submitting the notice to the company after the deadline? Should such a late submission render the nominating security holder or nominating security holder group ineligible to use the nomination procedure, as is currently proposed under the rule? What should be the consequence to the nominating security holder or nominating security holder group of filing the notice with the Commission late? Should such late filing be viewed exclusively as a violation of Exchange Act Rule 14a–6 or should it affect eligibility to use the nomination procedure? Should the failure of a nominating security holder or nominating security holder group to file the notice with the Commission be viewed exclusively as a violation of Exchange Act Rule 14a–6 or should it affect eligibility to use the nomination procedure?

H.6. The proposed notice requirements address both regularly scheduled annual meetings and circumstances where a company may not have held an annual meeting in the prior year or has moved the date of the meeting more than 30 days from the prior year. Under these circumstances, what is the appropriate date by which a nominating security holder must submit their notice to the company? We have proposed a standard similar to that currently used in connection with the Exchange Act Rule 14a–8 security holder proposal process. Is such a standard appropriate? If not, what standard would be more appropriate?

H.7. As proposed, Exchange Act Rule 14a-11 includes a number of notice and other timing requirements. Should these timing requirements incorporate or otherwise address any advance notice provisions under state law or a company's governing instruments? If so, should any advance notice provisions govern? Should they instead be provided as an alternative to the timing provisions set out in the rule?

9. What Must the Company Do After It Receives a Notice From a Nominating Security Holder or a Nominating Security Holder Group Under Proposed Exchange Act Rule 14a–11?

a. Proposed Procedure

We propose that a company that receives a nominee from a nominating security holder or nominating security holder group under the security holder nomination procedure in Exchange Act Rule 14a–11 would determine whether the nominating security holder or nominating security holder group has complied with proposed Exchange Act Rule 14a–11 and whether the nominee satisfies each of the requirements of the proposed procedure. Unless a company determines that it is not required to include a nominee from a nominating security holder or nominating security holder group in its proxy materials, the company would be required to include information regarding the security holder nominee in the company's proxy statement that it sends to its security holders, including the Web site address on which the nominating security holder or nominating security holder group intends to solicit in favor of its nominee, and include the name of the nominee on the company's proxy card that is included in those materials.[133] The proposed procedure specifies the information regarding that nominee that the company must include in its proxy materials.[134]

In addition to required disclosures related to each director candidate, companies may wish to include statements in the proxy statement supporting company nominees and/or opposing the nominating security holder or nominating security holder group nominee or nominees. While we believe that companies should be able to include such disclosure in the proxy statement, provided that it complies with Exchange Act Rule 14a-9, we also are of the view that nominating security holders or nominating security holder groups should be afforded the same opportunity, if the company chooses to include such a statement. Accordingly, we are proposing that if the company includes any such statement in its proxy materials, other than a mere recommendation to vote in favor of or withhold votes from specified candidates, a nominating security holder or nominating security holder group would be given the opportunity to include in the company's proxy statement a statement of support for the security holder nominee or nominees, of a length not to exceed 500 words.[135] Should the company choose not to make any statement in its proxy statement supporting company nominees and/or opposing the security holder nominee or nominees, other than the mere recommendation described above, the company would not be required to include in its proxy statement the nominating security holder's supporting statement. In either case, both the company and the nominating security holder or nominating security holder group would be able to solicit in favor of their nominees outside the proxy statement, for example on a designated Web site, provided that such solicitations were made within the parameters of the applicable proxy rules.

With regard to the company's proxy card, similar to the current practice with regard to security holder proposals submitted pursuant to Exchange Act Rule 14a–8, the company could identify any security holder nominees as such and recommend that security holders vote against, or withhold votes from, those nominees and in favor of the management nominees on the form of proxy. The company must otherwise present the nominees in an impartial manner in accordance with Exchange Act Rule 14a–4. Under the current rules, a company may provide security holders with the option to vote for or withhold authority to vote for the company's nominees as a group, provided that security holders also are given a means to withhold authority for specific nominees. In our view, this option would not be appropriate where the company's proxy card includes security holder nominees, as grouping the company's nominees may make it easier to vote for all of the company's nominees than to vote for the security holder nominees in addition to some of the company nominees. Accordingly, the proposed rules would not permit a company to provide security holders the option of voting for or withholding authority to vote for the company nominees as a group, but would instead

[133] These requirements are set forth in proposed Exchange Act Rule 14a–11(a) and proposed amendments to Exchange Act Rule 14a–4(b)(2).

[134] This information is specified in proposed Item 7(i) of Exchange Act Schedule 14A.

[135] Under the proposed rules, inclusion of a security holder nominee in the company's proxy materials would not require the company to file a preliminary proxy statement provided that the company was otherwise qualified to file directly in definitive form. In this regard, the proposed rules make clear that inclusion of a security holder nominee would not be deemed a solicitation in opposition. *See* proposed revisions to Exchange Act Rule 14a–6(a)(4) and Note 3 to that rule.

require that each candidate be voted on separately.[136]

A company may determine that it is not required to include a nominee from a nominating security holder or nominating security holder group in its proxy materials if it determines any of the following:

- The security holder nomination procedure in proposed Exchange Act Rule 14a-11 is not applicable to the company;
- The nominating security holder or nominating security holder group has not complied with the requirements of the procedure;
- The nominee does not meet the requirements of the procedure;
- Any representation required to be included in the notice to the company is false in any material respect; or
- The company has received more nominees than it is required to include by proposed Exchange Act Rule 14a–11 and the nominating security holder or nominating security holder group is not entitled to have its nominee included in that situation.[137]

The nominating security holder or nominating security holder group would need to be made aware of the company's determination whether or not to include the security holder nominee in sufficient time to consider the validity of any determination to exclude the nominee. As such, the company would be required to notify the nominating security holder or nominating security holder group, in writing, of its determination. As proposed, the company would have to provide this notice promptly, but in no case less than 30 calendar days before the date of the company's proxy statement released to security holders in connection with the previous year's annual meeting and, where the company did not hold an annual meeting in the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting, then the notice must be provided a reasonable time before the company mails its proxy materials for the current year. If the company determines that it is entitled to exclude the nominee, the notice must include the following information regarding the company's determination:

- A description of the determination made by the company's board of directors, including an affirmative statement of its determination not to include that specific nominee;
- A discussion of the specific requirement or requirements of Exchange Act Rule 14a–11 that the company's board of directors has determined permit the company not to include that specific nominee; and
- A discussion of the specific basis for the belief of the company's board of directors that the company is permitted to not include that specific nominee.

The company would be required to include in its proxy statement for the meeting for which the nominee was submitted a statement that it has made such a determination as well as disclosure of the information relating to that determination that the company included in the notice to the nominating security holder.

If the company determines that it must include the security holder nominee, it would be required to advise the nominating security holder or nominating security holder group of this determination and state whether the company intends to include in its proxy statement disclosure opposing the security holder nominee and/or supporting company nominees. If the company intends to include such a statement, it must advise the nominating security holder or nominating security holder group that it may submit a statement of not more than 500 words supporting the security holder nominee(s). The company also must advise the nominating security holder or nominating security holder group of the date by which this statement must be provided to the company, which could not be less than 10 business days from the date of the company's notice to the security holder. The nominating security holder or nominating security holder group's supporting statement would be viewed as soliciting material and would therefore be required to be filed as such by the nominating security holder in accordance with proposed Exchange Act Rule 14a–11(f)(2) and proposed Exchange Act Rule 14a–6(p), on or about the date that the company's proxy statement is first released to security holders.

b. Questions

I.1. Is it appropriate to require that the company include in its proxy statement a supporting statement by the nominating security holder or nominating security holder group? If so, is it appropriate to limit this requirement to instances where the company wishes to make a statement opposing the nominating security holder's nominee or nominees and/or supporting company nominees? Is it appropriate to limit the supporting statement to 500 words? If not, what limit, if any, is more appropriate? Is it appropriate to require filing of the statement on the date that the company releases its proxy statement to security holders? If not, what filing requirement would be appropriate?

I.2. Is it appropriate for the company to make the specified determinations regarding the basis on which a nominee would not be included? By what means should a company's determination be subject to review? By the courts? Should there be an explicit statement by the Commission regarding this review? Should any determination by the company be subject to review by the Commission or its staff? Should there be an explicit provision for such review, as, for example, with security holder proposals under Exchange Act Rule 14a–8?

I.3. Proposed Exchange Act Rule 14a–11(a)(3) provides that a company is not required to include a security holder nominee where either: (a) The nominee's candidacy or, if elected, board membership, would violate controlling state law, federal law or rules of a national securities exchange or national securities association, (b) the nominating security holder's notice is not adequate, (c) any representation in the nominating security holder's notice is false in any material respect, or (d) the nominee is not required to be included in the company's proxy materials due to the proposed limitation on the number of nominees required to be included. Instruction 4 to proposed Exchange Act Rule 14a–11(a)(3) provides that the company shall determine whether any of these events have occurred. Should the nomination procedure include a procedure for a company to gather information additional to that included in the notice that is reasonably necessary for the company to make its determination in this regard? If so, please respond to the following additional questions.

a. Should the company be provided with a maximum amount of time to request specific information (*e.g.*, three days, five days, one week, two weeks, or one month)?

b. Should nominating security holders and/or nominees be provided with a maximum amount of time to respond to such a request (*e.g.*, three days, five days, one week, two weeks, or one month)?

c. Should the procedure prescribe the type of information that a company may request from a nominating security holder or nominee? Should the

[136] We anticipate that companies would continue to be able to solicit discretionary authority to vote a security holder's shares for the company nominees, as well as to cumulate votes for the company nominees in accordance with applicable state law, where such state law provides for cumulative voting.

[137] *See* proposed Exchange Act Rule 14a–11(a).

procedure specify those representations in the nominating security holder's notice to the company with regard to which the company may request information?

d. Should the procedure include a method for a company to obtain follow-up information after a nominating security holder or nominee submits an initial response? If so, should that follow-up method have similar time frames and informational standards to those related to the initial request and response?

e. Should the rule explicitly state that a nominee may be excluded from a company's proxy materials if the nominating security holder or nominee does not provide the requested information in the required timeframe, or if the information does not confirm the representations included in the notice to the company, or is it sufficient to rely on the proposed provision that permits the exclusion of nominees when a representation is false in any material respect? In order to facilitate reliance on this proposed provision if a nominating security holder or nominee fails to provide requested information, would it be appropriate to require that a nominating security holder represent that the nominating security holder or nominee will respond to a request by the company for information that is reasonably necessary to confirm the accuracy of representations of the nominating security holder?

f. Should this procedure be the same for operating companies, registered investment companies, and business development companies? Should there be unique procedures for different types of entities? If so, what is unique to a particular type of entity that would require a unique procedure?

I.4. As proposed, the company must provide the nominating security holder or nominating security holder group with notice of its determination whether to include in its proxy statement the security holder nominee by a date that will generally fall approximately 30 days prior to the date the company will mail its proxy statement. Does this requirement allow the nominating security holder or nominating security holder group adequate time to contest a company's determination with regard to a potential security holder nominee? If not, what timing would be more appropriate? Is the timing requirement with regard to the nominating security holder's submission of its statement of support to the company appropriate? If not, what timing would be appropriate?

I.5. As proposed, the rule would not provide a mechanism by which a nominating security holder or nominating security holder group could ''cure'' a defective notice. Would such a ''cure'' period, similar to that currently provided under Exchange Act Rule 14a–8, be appropriate? If so, how and by what date should a company be required to notify a nominating security holder or nominating security holder group of a defect in the notice? How long should the nominating security holder or nominating security holder group have to cure any defects? Are there any defects that would not require notice by the company, for example, where a defect could not be remedied?

I.6. As proposed, inclusion of a security holder nominee in the company's proxy materials would not require the company to file a preliminary proxy statement provided that the company was otherwise qualified to file directly in definitive form. In this regard, the proposed rules make clear that inclusion of a security holder nominee would not be deemed a ''solicitation in opposition.'' Is it appropriate to view the inclusion of a nominee in this manner or should the inclusion of a nominee instead be viewed as a solicitation in opposition that would require a company to file its proxy statement in preliminary form? Should we view inclusion of a security holder nominee as a solicitation in opposition for other purposes (*e.g.*, expanded disclosure obligations)?

I.7. As proposed, the rule would prohibit companies from providing security holders the option of voting for the company's slate of nominees as a whole. Should we allow companies to provide that option to security holders? Are any other revisions to the form of proxy appropriate?

10. How Would the Liability Provisions in the Federal Securities Laws Apply to Statements Made By the Company and the Nominating Security Holder or Nominating Security Holder Group?

a. Exchange Act Liability for Statements

It is our intent that the nominating security holder or nominating security holder group be liable for any false or misleading statements included in the notice provided to the company by the nominating security holder or nominating security holder group. The proposed rules contain express language, modeled on Exchange Act Rule 14a–8(*l*)(2),[138] providing that the company would not be responsible for that disclosure.[139]

b. Securities Act and Exchange Act Liability Resulting From Incorporation by Reference

As proposed, the security holder nomination procedure would provide that any information that is provided to the company in the notice from the nominating security holder or nominating security holder group (and, as required, filed with the Commission by the nominating security holder or nominating security holder group) and then included in the company's proxy materials would not be incorporated by reference into any filing under the Securities Act or the Exchange Act unless the company determines to incorporate that information by reference specifically into that filing.[140] However, to the extent the company does so incorporate that information by reference, we would consider the company's disclosure of that information as the company's own statement for purposes of the antifraud and civil liability provisions of the Securities Act or the Exchange Act, as applicable.

c. Questions

J.1. Is it appropriate to characterize the statements in the nominating security holder's notice as the nominating security holder's representations and not the company's? Does the proposal make clear that the nominating security holder would be responsible for the information submitted to the company? Should the proposal characterize these statements differently? If so, please explain in what manner.

J.2. Does the proposal make clear the company's responsibilities when it includes such information in its proxy materials? Should the proposal include language otherwise addressing a company's responsibility for repeating statements that it knows are not accurate?

J.3. Should information provided by nominating security holders or nominating security holder groups be deemed incorporated by reference into Securities Act or Exchange Act filings? Why?

[138] 17 CFR 240.14a–8(*l*)(2).

[139] *See* proposed Exchange Act Rule 14a–11(e). Exchange Act Rule 14a–8(*l*)(2) applies with respect to proposals and supporting statements that are submitted by shareholders and then required to be repeated in the company's proxy materials by Exchange Act Rule 14a–8. In this regard, Exchange Act Rule 14a–8 states that ''the company is not responsible for the contents of [the shareholder proponent's] proposal or supporting statement.''

[140] *See* the Instruction to proposed Item 7(i) of Exchange Act Schedule 14A.

11. How Do the Other Exchange Act Proxy Rules Apply to Solicitations by the Nominating Security Holder or Nominating Security Holder Group?

a. Discussion

As proposed, Exchange Act Rule 14a-11 would permit security holders to form groups that would aggregate their securities in order to meet the minimum ownership threshold of more than 5% to nominate a director candidate under the rule. Accordingly, we anticipate that security holders would, in many instances, engage in communications with other security holders in an effort to form these nominating security holder groups that would be deemed solicitations under the proxy rules. In an effort to facilitate these types of communications, we are proposing a limited exemption from certain of the proxy rules that would enable security holders to communicate for the limited purpose of forming a nominating security holder group without filing and disseminating a proxy statement. To qualify for the exemption, security holders would have two options. The communications would be made either to a limited number of security holders or, in the alternative, to an unlimited number of security holders, provided that the communication is limited in content, as described below, and filed with the Commission.[141]

As proposed, Exchange Act Rules 14a–3 to 14a–6(o),[142] 14a–8, 14a–10, and 14a–12 to 14a–15 [143] would not apply to any solicitation by or on behalf of any security holder in connection with the formation of a nominating security holder group, provided that:

- The total number of persons solicited is not more than 30; or
- Each written communication includes no more than:
  - —A statement of the security holder's intent to form a nominating security holder group in order to nominate a director under the proposed rule;
  - —The percentage of securities that the security holder beneficially owns or the aggregate percentage owned by any group to which the security holder belongs; and
  - —The means by which security holders may contact the soliciting party; and
- Any soliciting material published, sent or given to security holders in accordance with this paragraph is filed with the Commission by the nominating security holder, under the company's Exchange Act file number, no later than the date the material is first published, sent or given to security holders.[144] The soliciting material would be required to include a cover page in the form set forth in Exchange Act Schedule 14A, with the appropriate box on the cover page marked.

Both the nominating security holder or nominating security holder group and the company may wish to solicit in favor of their nominees for director by various means, including U.S. mail, electronic mail, and Web site postings. While the company ultimately would file a proxy statement and could therefore rely on the existing proxy rules to solicit outside the proxy statement,[145] security holders could be limited in their soliciting activities under the current proxy rules. Accordingly, we are proposing a new exemption to the proxy rules providing that solicitations by or on behalf of a nominating security holder or nominating security holder group in support of a nominee placed on the company's proxy card in accordance with the proposed rule, would not be subject to Exchange Act Rules 14a–3 to 14a–6(o), 14a–8, 14a–10, and 14a–12 to 14a–15, provided that:

- The soliciting party does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a security holder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form or revocation, abstention, consent or authorization;
- Each written communication includes:
  - —The identity of the nominating security holder or nominating security holder group and a description of his or her direct or indirect interests, by security holdings or otherwise;
  - —A prominent legend in clear, plain language advising security holders that a security holder nominee is or will be included in the company's proxy statement and to read the company's proxy statement when it becomes available because it includes important information. The legend also must explain to security holders that they can find the proxy statement, other soliciting material and any other relevant documents, at no charge on the Commission's Web site; and
- Any soliciting material published, sent or given to security holders in accordance with this paragraph must be filed by the nominating security holder or nominating security holder group with the Commission, under the company's Exchange Act file number, no later than the date the material is first published, sent or given to security holders.[146] Three copies of the material would at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the company is listed and registered. The soliciting material would be required to include a cover page in the form set forth in Exchange Act Schedule 14A, with the appropriate box on the cover page marked.[147]

b. Questions

K.1. What requirements should apply to soliciting activities conducted by a nominating security holder? In particular, what filing requirements and specific parameters should apply to any such solicitations? For example, we have proposed that certain solicitations by security holders seeking to form a nominating security holder group be limited to no more than 30 security holders. Is this limitation appropriate? If not, what limitation would be appropriate, if any (*e.g.*, fewer than 10 security holders, 10 security holders, 20 security holders, 40 security holders, more than 40 security holders)? In addition, is the alternate, content-based limitation appropriate? If not, what limitations would be more appropriate?

K.2. Should communications in connection with a direct access security holder proposal, for example by security holders seeking to form a more than 1% group to submit a security holder proposal, be included in the exemption provided for communications between security holders seeking to form a nominating security holder group? Would such an exemption be necessary and/or appropriate? If so, what parameters should apply?

K.3. Should all soliciting materials be filed with the Commission on the date of first use? For example, as proposed, security holder communications that are limited to no more than 30 security holders would be filed with the Commission. Would such filing render the limitation unworkable in that the communication would be readily accessible to security holders on EDGAR?

K.4. We contemplate that solicitations in connection with elections involving Exchange Act Rule 14a–11 could involve electronic means. We have

[141] *See* proposed Exchange Act Rule 14a–11(f)(1).

[142] 17 CFR 240.14a–3—14a–6(o).

[143] 17 CFR 240.14a–10—14a–15.

[144] For a fund, the filing would be made under the subject company's Investment Company Act file number. *See* Section II.A.12., below.

[145] *See* Exchange Act Rule 14a–12.

[146] For a fund, the filing would be made under the subject company's Investment Company Act file number. *See* Section II.A.12., below.

[147] *See* proposed Exchange Act Rule 14a–11(f)(2).

provided that, where requested, the company would include in its proxy materials the Web site address where solicitation materials related to a security holder nominee may be found. Are there other steps that we should take to provide for or encourage the use of electronic means for these elections?

12. How Would the Proposed Rule Apply to Investment Companies?

a. Application of the Security Holder Nomination Procedure to Investment Companies

We are proposing to apply the security holder nomination procedure in proposed Exchange Act Rule 14a–11 to funds. Funds currently are required to comply with the proxy rules under the Exchange Act when soliciting proxies, including proxies relating to the election of directors.[148] As in the case of operating companies, the proposed rules are intended to improve the ability of fund security holders to participate meaningfully in the nomination and election of directors. The nomination procedure would apply to funds in the same manner that it would apply to operating companies, with the following modifications to reflect the different circumstances and reporting requirements applicable to funds.

As in the case of operating companies, the proposed nomination procedure would become operative for a fund only after the occurrence of one or both of the nomination procedure triggering events described above.[149] Funds would be required to provide disclosure regarding the occurrence of these nomination procedure triggering events parallel to that required for operating companies. However, because funds do not file quarterly reports on Exchange Act Form 10–Q, the disclosure would be included on Form N–CSR, which funds file semi-annually.[150] We also are proposing to require disclosure in Form N–CSR regarding each matter submitted to a vote of security holders similar to that currently required by Item 4 of Part II of Exchange Act Form 10–Q, and to delete as duplicative Item 77C of Form N–SAR, which currently requires similar disclosure.[151]

As with operating companies, if the fund did not hold an annual meeting during the prior year, or if the date of the meeting has changed more than 30 days from the prior year, then the nominating security holder would be required to provide notice a reasonable time before the fund mails its proxy materials for the current year, as specified by the fund in an Exchange Act Form 8–K filed pursuant to proposed Item 13.[152] The fund also would be required to disclose the date of the meeting in Item 13 of Exchange Act Form 8–K. Although funds generally are not required to file on Exchange Act Form 8–K, we are proposing to require them to file on Exchange Act Form 8–K for this limited purpose, in order to help ensure that security holders are made aware in a timely manner of the date by which they must submit a notice of intent to nominate a director.[153]

The proposals would require any nominating security holder or group of security holders to represent that its nominee to the board of a fund is not an ''interested person'' of the fund as defined in Section 2(a)(19) of the Investment Company Act, rather than independent under the listing standards of a national securities exchange or national securities association, as in the case of operating companies.[154] This ''interested person'' test also would apply to nominees by a security holder or security holder group for election to the board of directors of a business development company.[155] We are proposing to substitute the Section 2(a)(19) test for the test applied to operating companies because this test is tailored to capture the broad range of affiliations with investment advisers, principal underwriters, and others that are relevant to ''independence'' in the case of funds.

Because security holders of a mutual fund are not required to file Exchange Act Schedule 13G, the proposals would require a nominating security holder or security holder group for a mutual fund to include the following information, similar to certain information that would otherwise be required on Exchange Act Schedule 13G, as part of the notice to the fund of the security holder's intent to require its nominee on the company's proxy card:[156]

- The percentage of each class of securities of the fund that the individual owns beneficially, directly or indirectly, and the number of shares as to which the person has:
  - —Sole power to vote or to direct the vote;
  - —Shared power to vote or to direct the vote;
  - —Sole power to dispose or to direct the disposition of such shares; and
  - —Shared power to dispose or to direct the disposition of such shares;[157] and
- A certification, signed by each person on whose behalf the notice is filed or his or her authorized representative, that the securities have been held continuously for at least three years.[158]

This information would be in addition to the information required to be included in the security holder notice by any nominating security holder or member of a nominating security holder group.[159] The security holder notice, as well as any soliciting material published, sent, or given to security holders in connection with the formation of a nominating security holder group, would be required to be filed under the fund's Investment Company Act file number.[160]

We note that the proposed security holder nomination procedure is consistent with the provisions in several of our exemptive rules under the Investment Company Act that require independent directors of funds relying on those rules to select and nominate any other independent directors.[161] As discussed above, the proposed security

[148] *See* Investment Company Act Rule 20a–1 [17 CFR 270.20a–1] (requiring funds to comply with Regulation 14A, Schedule 14A, and all other rules and regulations adopted pursuant to Section 14(a) of the Exchange Act that would be applicable to a proxy solicitation if it were made in respect of a security registered pursuant to Section 12 of the Exchange Act)

[149] *See* Section II.A.3., above.

[150] Proposed Item 8 of Form N–CSR.

[151] Proposed Items 8(a), (b), (c), and (d) of Form N–CSR. Small business investment companies, which are not required to file Form N–CSR, would provide the required disclosure regarding matters submitted to a vote of security holders, and the new disclosure regarding the occurrence of any of the nomination procedure triggering events, under Item 102B of Form N–SAR. *See* proposed Instruction to Item 102B of Form N–SAR.

[152] Proposed Item 13 of Exchange Act Form 8–K; Instruction 5 to proposed Exchange Act Rule 14a–11(a).

[153] *See* proposed Exchange Act Rule 13a–11(b)(2) and 15d–11(b)(2).

[154] *See* proposed Exchange Act Rule 14a–11(c)(4); 15 U.S.C. 80a–2(a)(19).

[155] Business development companies are a category of closed-end investment company that are not registered under the Investment Company Act, but are subject to certain provisions of that Act. *See* Sections 2(a)(48) and 54–65 of the Investment Company Act [15 U.S.C. 80a–2(a)(48) and 80a–53–64].

[156] *See* proposed Exchange Act Rule 14a–11(c)(11).

[157] For purposes of determining the amount of outstanding securities of a class of equity securities, the security holder generally could rely upon information set forth in the fund's most recent report on Form N–CSR. *See* proposed Instruction to Exchange Act Rule 14a–11(c)(11)(i).

[158] *See* proposed Exchange Act Rule 14a–11(c)(11)(ii).

[159] *See* proposed Exchange Act Rule 14a–11(c)(9).

[160] *See* proposed Exchange Act Rules 14a–11(f)(1)(iii) and 14a–11(f)(2)(iii).

[161] *See* Release No IC–24816 (Jan. 2, 2001) [66 FR 3734, 3737] (adopting a requirement that independent directors of funds select and nominate any other independent directors as a condition of relying on Investment Company Act Rules 10f–3, 12b–1, 15a–4(b)(2), 17a–7, 17a–8, 17d–1(d)(7), 17e–1, 17g–1(j), 18f–3, or 23c–3).

holder nomination procedure is premised upon the existence of a state law right of security holders to nominate candidates for election as directors.[162] As we have previously stated, the exemptive rule provision requiring independent directors to select and nominate any other independent director was not intended to supplant or limit the ability of fund security holders under state law to nominate independent directors.[163]

b. Questions

L.1. Should the proposed security holder nomination procedure apply to funds? If so, to which funds should it apply? Are there any aspects of the proposed nomination procedure that should be modified in the case of funds?

L.2. Should we apply the ''interested person'' standard of Section 2(a)(19) of the Investment Company Act with respect to the representation that a security holder nominee be independent from a company that is a fund? Should the ''interested person'' standard also apply to security holder nominees for election to the board of directors of a business development company? Should we instead apply a different independence standard to funds or business development companies, such as the definition of independence in Exchange Act Rule 10A–3? [164]

L.3. Is it appropriate to require a nominating security holder or group of security holders of a mutual fund to provide disclosure of its 5% beneficial ownership of the fund's securities in its notice to the fund of its intent to require its nominee on the fund's proxy card? If so, what requirements from Exchange Act Schedule 13G (or other information) should be required to be included in the notice? Should such a security holder or group instead be required to file on Exchange Act Schedule 13G upon reaching the 5% beneficial ownership threshold, in order to provide the fund with notice in advance that the security holder or group has reached this threshold? If so, are there any requirements of Exchange Act Schedule 13G that should be modified for this purpose?

L.4. Are the triggering events proposed for use of the security holder nomination procedure appropriate for funds? Are there other nomination procedure triggering events that should be used?

L.5. Should a fund be required to provide disclosure on Form N–CSR of whether it would be subject to the security holder nomination procedure as a result of a security holder vote with regard to any of the nomination procedure triggering events, and the required disclosure regarding such a nomination procedure triggering event? Will this disclosure allow sufficient time for a security holder to effectively exercise the nomination procedure? Should this disclosure instead be required on a different form?

L.6. We are proposing to delete as duplicative Item 77C of Form N–SAR, which currently requires disclosure regarding matters submitted to a vote of security holders similar to that required by Item 4 of Part II of Exchange Act Form 10–Q, and move this disclosure to Form N–CSR. Should this disclosure remain in Form N–SAR?

L.7. Should a fund be required to disclose on Exchange Act Form 8–K the date by which a security holder or security holder group must submit the notice to the fund of its intent to require its nominees on the fund's proxy card? Should funds instead be permitted to provide this disclosure in a different manner?

B. Related Rule Changes

1. Beneficial Ownership Reporting Requirements

a. Discussion

Any person who is directly or indirectly the beneficial owner of more than 5% of a class of equity securities registered under Section 12 of the Exchange Act must report that ownership by filing an Exchange Act Schedule 13D with the Commission.[165] There are exceptions to this requirement, however, that permit such a person to report that ownership on Exchange Act Schedule 13G rather than Exchange Act Schedule 13D.[166] One exception permits filings on Exchange Act Schedule 13G for a specified list of qualified institutional investors who have acquired the securities in the ordinary course of their business and not with the purpose nor with the effect of changing or influencing control of the company. A second exception applies to persons who are not specified in the first exception. These beneficial owners of more than 5% of a subject class of securities may file on Exchange Act Schedule 13G if they have not acquired the securities with the purpose nor with the effect of changing or influencing control of the company and they are not directly or indirectly the beneficial owner of 20% or more of the subject class of securities.

Two of the eligibility requirements for a nominating security holder or nominating security holder group under proposed Exchange Act Rule 14a–11 relate to that security holder or group filing an Exchange Act Schedule 13G to report their ownership. The first is that the security holder or group would have to be eligible to report their ownership on Exchange Act Schedule 13G, rather than Exchange Act Schedule 13D. The second is that the security holder or group would be required to have filed an Exchange Act Schedule 13G to report their ownership by the date that the nominating security holder or nominating security holder group submits its notice of intent to nominate a director to the company.[167]

Central to Exchange Act Schedule 13G eligibility is that the security holder be a passive investor that has acquired the securities without the purpose nor with the effect of changing or influencing control of the company. In addition, security holders who are filing as qualified institutional investors must have acquired the securities in the ordinary course of their business. We believe that the formation of a security holder group solely for the purpose of nominating a director pursuant to proposed Exchange Act Rule 14a–11, the nomination of a director, soliciting activities in connection with such a nominee, or having a nominee elected as a director under the proposed procedure, should not be viewed as having a purpose or effect of changing or influencing control of the company. We therefore believe that beneficial owners who engage in these activities should be permitted to report on Exchange Act Schedule 13G, rather than Exchange Act Schedule 13D. Accordingly, we are proposing to add an instruction to the description of the first and second categories of persons who may report their ownership on Exchange Act Schedule 13G to make clear our belief that a beneficial owner who acquires or holds a company's securities in connection with a nomination, soliciting activities, or election of a nominee under Exchange Act Rule 14a–11 should not be deemed to have a purpose or effect of changing or influencing the control of the company solely by virtue of making the nomination or engaging in such activities. Any activity other than those provided for under Exchange Act Rule

[162] *See* Section IIA2a, above.

[163] *See* Release No IC–24816 (Jan. 2, 2001) [66 FR 3734, 3737].

[164] 17 CFR 240.10A–3.

[165] *See* Exchange Act Rule 13d–1.

[166] *See, e.g.,* Exchange Act Rules 13d–1(b) and 13d–1(c).

[167] This requirement would not extend the date by which the beneficial ownership report is otherwise due under Exhange Act Regulation 13D.

14a–11 would make these instructions inapplicable.

To enable the functioning of the proposed procedure, we also propose to amend Exchange Act Schedule 13G to require that the security holder or group certify that they have owned at least the required more than 5% amount of the securities for the minimum time period of two years required in proposed Exchange Act Rule 14a–11. A security holder or group of security holders that previously had filed an Exchange Act Schedule 13G would be required to amend that Schedule to provide the required certification to make a nomination under proposed Exchange Act Rule 14a–11.[168] Upon termination of the nominating security holder group, the group would file a final amendment to the Exchange Act Schedule 13G disclosing termination of the group and, therefore, the group's filing obligation on Exchange Act Schedule 13G.[169] As is currently the case in determining that a group has been formed and a group filing is therefore required, the group would be required to file as such only so long as the security holders comprising that group continue to have an agreement to act together for the purpose of acquiring, holding, voting or disposing of the company's equity securities.[170]

b. Questions

M.1. The proposal would provide that a security holder or security holder group would not, solely by virtue of nominating a director under proposed Exchange Act Rule 14a–11, soliciting on behalf of that candidate, or having that candidate elected, be viewed as having acquired securities for the purpose or effect of changing or influencing the control of the company. This provision would then permit those holders or groups of holders to report their ownership on Exchange Act Schedule 13G, rather than Exchange Act Schedule 13D. Is this approach appropriate? Should other conditions be required to be satisfied? If so, what other conditions?

M.2. Should nominating security holders, including groups, be deemed to have a ''control'' purpose that would create additional filing and disclosure requirements under the Exchange Act beneficial ownership reporting standards?

M.3. As proposed, security holders that intend to nominate a director pursuant to Exchange Act Rule 14a–11 would be required to disclose this intent on Exchange Act Schedule 13G. Those filers who originally filed an Exchange Act Schedule 13G without an Exchange Act Rule 14a–11 intent would be required to amend their Exchange Act Schedule 13G to disclose such intent if it exists. Is it appropriate to require such an amendment by existing filers? If not, how should such filers indicate their intent to make a nomination pursuant to Exchange Act Rule 14a–11? Are the security holder notice requirements of Exchange Act Rule 14a–11(c) sufficient for this purpose? Intent to use the nomination procedure would be evidenced in both new filings and amendments to already-filed Schedules by the beneficial owner checking the box on the cover page of the Schedule to identify the filing as having been made in connection with a nomination under the procedure and by making the proposed new certification regarding ownership of the required amount of company securities. Is this sufficient notice of the beneficial owner's intent to use the nomination procedure? Should we also require new disclosure related to such intent in a new item requirement to the Schedule? Would this be appropriate in light of the fact that Exchange Act Schedule 13G currently does not require such ''purpose'' disclosure?

M.4. As proposed, nominating security holders and nominating security holder groups would be required to amend their Exchange Act Schedule 13G filings in accordance with the existing timing requirements for qualified institutional investors and passive investors. Should we instead require that such filers amend on a more expedited basis? For example, should such filers be required to report changes in the information reported previously promptly after such change or within another, specified period of time? Should amendments be limited to material changes in the information reported if such an expedited requirement is used? Should the election as director of a nominating security holder group's nominee be deemed the termination of that group (provided that the group does not have an agreement to act together for some other purpose)? Should such an election require an amendment to the nominating security holder or nominating security holder group's Exchange Act Schedule 13G?

M.5. Are there any qualified institutional investors under Exchange Act Rule 13d–1(b) that would be qualified to file on Exchange Act Schedule 13G but should not be included in the category of filers who may nominate a director using the proposed procedure? If so, please explain why.

M.6. A related issue with regard to beneficial ownership reporting is whether the withhold votes nomination procedure trigger may result in increased numbers of ''vote no'' campaigns by security holders who are attempting to trigger the nomination procedure. The possibility of triggering Exchange Act Schedule 13D reporting requirements currently may have a chilling effect on security holders who otherwise would organize such an effort. With regard to this concern, do the current rules under Exchange Act Regulation 13D have such a chilling effect?

Are the current rules sufficient to determine when such activities should require additional security holder filings? Should security holders who organize such a campaign be deemed to have a control purpose or effect that would necessitate filing on Exchange Act Schedule 13D rather than Exchange Act Schedule 13G? Should we issue specific guidance with regard to these ''vote no'' campaigns and the beneficial ownership reporting requirements generally? Should any such guidance be limited to circumstances where the security holder engaging in the ''vote no'' campaign does so solely to trigger the security holder nomination procedure?

2. Exchange Act Section 16

a. Proposed Amendments to Rules Under Exchange Act Section 16

Eligible security holder groups under proposed Exchange Act Rule 14a–11 may be concerned that using the proposed nomination procedure will subject them to Section 16 of the Exchange Act.[171] Exchange Act Section 16 applies to every person who is the beneficial owner of more than 10% of any class of equity security registered under Section 12 of the Exchange Act (''10% owners''), and each officer and director (collectively with 10% owners,

[168] The percentage of securities listed in such certification will be used not only to determine eligibility to submit a security holder nomination pursuant to proposed Exchange Act Rule 14a–11, but also to determine the security holder or security holder group with the largest percentage of eligible subject securities where more than one security holder or security holder group provides notice of its intention to submit a nomination pursuant to proposed Exchange Act Rule 14a–11 and is otherwise eligible to do so.

[169] This and other amendments would be filed in accordance with the existing timing requirements for beneficial holders who qualify as either qualified institutional investors or passive investors.

[170] *See* Exchange Act Rule 13d–5(b)(1) [17 CFR 240.13d–5(b)(1)].

[171] 15 U.S.C. 78p.

''insiders'') of the issuer of such security. Generally:

• Exchange Act Section 16(a) requires an insider to file an initial report with the Commission disclosing his or her beneficial ownership of all equity securities of the issuer upon becoming an insider. To keep this information current, Exchange Act Section 16(a) also requires insiders to report changes in such holdings, in most cases within two business days following the transaction.[172]

• Exchange Act Section 16(b) provides the issuer (or security holders suing on behalf of the issuer) a private right of action to recover from an insider any profit realized by the insider from any purchase and sale (or sale and purchase) of any equity security of the issuer within any period of less than six months.[173]

• Exchange Act Section 16(c) makes it unlawful for an insider to sell any equity security of the issuer if the insider: (1) does not own the security sold; or (2) owns the security, but does not deliver it against the sale within specified time periods.[174]

We do not believe that a group formed solely for the purpose of nominating a director pursuant to proposed Exchange Act Rule 14a–11, soliciting in connection with the election of that nominee, or having that nominee elected as a director, would be the type of group that should be viewed as being aggregated together for purposes of Exchange Act Section 16. Their actions are fully disclosed and are not for a ''control'' purpose, and they clearly do not have presumed ''insider'' status. Moreover, we believe it would be a disincentive to using the proposed security holder nomination procedure if security holders forming a group to nominate a director could become subject to Exchange Act Section 16 once the group owned over 10% of the company's equity securities. Accordingly, we are proposing an amendment to Exchange Act Rule 16a–1(a)(1), the rule that defines who is a 10% owner for Exchange Act Section 16 purposes, to exclude an Exchange Act Rule 14a–11 nominating security holder group from the definition.[175] These groups would remain subject to the general condition of the rule that they not have the purpose or effect of changing or influencing control of the issuer, but a note to Exchange Act Rule 16a–1(a)(1) would provide that members of nominating security holder groups would not be deemed to have a control purpose or effect solely by virtue of group membership.[176] We are not proposing to exclude from the definition of beneficial ownership for purposes of Exchange Act Section 16 security holders whose individual ownership exceeds 10% and are not otherwise excluded under the current rule.

Some security holders, particularly institutions and other entities, may be concerned that successful use of the proposed nomination procedure to elect a director may result in the nominating person also being deemed a director under the ''deputization'' theory developed by courts in Exchange Act Section 16(b) short-swing profit recovery cases.[177] Under this theory it is possible for a person to be deemed a director subject to Exchange Act Section 16, even though the issuer has not formally elected or otherwise named that person a director. The judicial decisions in which this theory was applied do not establish precise standards for determining when ''deputization'' may exist. However, the express purpose of Exchange Act Section 16(b) is to prevent the unfair use of information by insiders through their relationships to the issuer.[178] Accordingly, one factor that courts may consider in determining if Exchange Act Section 16(b) liability applies is whether, by virtue of the ''deputization'' relationship, the ''deputizing'' entity's transactions in issuer securities may benefit from the deputized director's access to inside information.[179]

Proposed Exchange Act Rule 14a–11 includes standards for establishing the independence of the nominee from the nominating security holder, or members of the nominating security holder group, as applicable. We believe that, given these independence standards the ''deputization'' theory, whereby the beneficial ownership of a security holder or group is imputed to a ''deputized'' director (and director status imputed to the security holder or group), should not apply. In considering the proposed independence standards, discussed in Section II.A.8, above, commenters also should consider the director by ''deputization'' theory, and whether the proposed standards should be modified in any way to make it less likely that in Exchange Act Section 16(b) cases courts would find nominating security holders to be ''deputized'' directors in circumstances where liability should not apply.

b. Questions

N.1. Would the proposed Exchange Act Rule 16a–1(a)(1) amendments address nominating security holders and nominating security holder groups appropriately? Should the proposed exclusion be based on any additional or different conditions?

N.2. If the Commission adopts a security holder nomination rule with an eligibility threshold of 10% or greater, would Exchange Act Section 16 reporting and short swing profit liability deter the formation of nominating security holder groups?

C. General Request for Comment

We request and encourage any interested person to submit comments regarding:

• The proposed amendments that are the subject of this release;

• Additional or different changes; or

• Other matters that may have an effect on the proposals contained in this release.

We request comment from the point of view of companies, investors and other market participants. With regard to any comments, we note that such comments are of great assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

III. Paperwork Reduction Act

A. Background

The proposed amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995.[180] We are submitting the proposal to the Office of Management and Budget for review in accordance with the PRA.[181] The titles for the collections of information are:

(1) ''Proxy Statements—Regulation 14A (Commission Rules 14a–1 through

[172] Exchange Act Section 16(a) [15 U.S.C. 78p(a)].

[173] Exchange Act Section 16(b) [15 U.S.C. 78p(b)].

[174] Exchange Act Section 16(c) [15 U.S.C. 78p(c)].

[175] Proposed Exchange Act Rule 16a–1(a)(1)(i). Exchange Act Rule 16a–1(a)(1) also would be reorganized for clarity.

[176] Exchange Act Rule 16a–1(a)(1) [17 CFR 240.16a–1(a)(1)] also contains a general condition that the securities be held for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business, but this condition would not be applicable to nominating security holder groups. We believe that the requirement that they qualify for Exchange Act Schedule 13G rather than Exchange Act Schedule 13D provides adequate protection in this area.

[177] *See Feder* v. *Martin Marietta*, 406 F2d 260 (2d Cir.), cert. denied, 396 U.S. 1036 (1970); *Blau* v. *Lehman*, 368 U.S. 403 (1962); and *Rattner* v. *Lehman*, 193 F.2d 564 (2d Cir. 1952).

[178] Exchange Act Section 16(b) begins: ''For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer. . . .''

[179] *See, e.g., Feder* v. *Martin Marietta*, at note 177, above.

[180] 44 U.S.C. 3501 *et seq.*

[181] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

14a–15 and Schedule 14A)'' (OMB Control No. 3235–0059);

(2) ''Information Statements—Regulation 14C (Commission Rules 14c–1 through 14c–7 and Schedule 14C)'' [182] (OMB Control No. 3235–0057);

(3) ''Securities Ownership—Regulation 13D and 13G (Commission Rules 13d–1 through 13d–7 and Schedules 13D and 13G)'' (OMB Control No. 3235–0145);

(4) ''Form 10–K'' (OMB Control No. 3235–0063);

(5) ''Form 10–KSB'' (OMB Control No. 3235–0420);

(6) ''Form 10–Q'' (OMB Control No. 3235–0070);

(7) ''Form 10–QSB'' (OMB Control No. 3235–0416);

(8) ''Form 8–K'' (OMB Control No. 3235–0060);

(9) ''Form N–CSR under the Investment Company Act of 1940 and Securities Exchange Act of 1934, Certified Shareholder Report'' (OMB Control No. 3235–0570);

(10) ''Form N–SAR under the Investment Company Act of 1940, Semi-Annual Report for Registered Investment Companies'' (OMB Control No. 3235–0330); and

(11) ''Rule 20a–1 under the Investment Company Act of 1940, Solicitations of Proxies, Consents, and Authorizations'' (OMB Control No. 3235–0158).

These regulations, rules and forms were adopted pursuant to the Exchange Act and the Investment Company Act and set forth the disclosure requirements for securities ownership reports filed by investors and proxy and information statements,[183] periodic reports and current reports filed by companies to ensure that investors are informed and can make informed voting or investing decisions. The hours and costs associated with preparing, filing and sending these schedules and forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

B. Summary of Proposed Amendments

The proposed rules would, under certain limited circumstances, require companies to include in their proxy materials security holder nominees for election as director. Specifically, the proposed rules would create a mechanism for nominees of long-term security holders, or groups of long-term security holders, with significant holdings to be included in company proxy materials where security holders are permitted under state law to nominate directors and where evidence suggests that the company has been unresponsive to security holder concerns as they relate to the proxy process. For purposes of the PRA, we estimate the total annual incremental paperwork burden for operating companies, funds and security holders that would be required under our proposed rules to be approximately 1,793 hours of personnel time for operating companies, funds and security holders and a cost of approximately $409,000 for the services of outside professionals.[184] As discussed further below, these total costs include all additional disclosure burdens associated with the proposed rules including burdens related to the triggering events, notice requirements and direct access itself.[185] Compliance with the proposed requirements would be mandatory. There would be no mandatory retention period for the information disclosed, and responses to the disclosure requirements would not be kept confidential.

1. Applicability of Proposed Exchange Act Rule 14a–11

a. State Law Considerations

The proposed rules would apply only where the company's security holders are permitted under state law to nominate a candidate or candidates for election as a director. We do not know the precise number of states that prohibit security holders from nominating a candidate or candidates for election as director or the number of companies that are permitted to and do/or (would) include a prohibition against nominating a candidate or candidates in their articles of incorporation or bylaws. We request comment and supporting empirical data, for purposes of the PRA, on any existing, applicable state law provisions that would prohibit security holders or security holder groups from nominating a candidate or candidates for election as director.

b. Nomination Procedure Triggering Events

The proposed security holder nomination procedure would become operative for the company only after the occurrence of one or both of the following two nomination procedure triggering events:

- At least one of the company's nominees for the board of directors for whom the company solicited proxies received ''withhold'' votes from more than 35% of the votes cast at an annual meeting of security holders held after January 1, 2004, at which directors were elected (provided, that this event may not occur in the case of a contested election to which Exchange Act Rule 14a–12(c) applies or an election to which the proposed security holder nomination procedure in Exchange Act Rule 14a–11 applies); or
- A security holder proposal submitted pursuant to Exchange Act Rule 14a–8 providing that the company become subject to the security holder nomination procedure in proposed Exchange Act Rule 14a–11(a) was submitted for a vote of security holders at an annual meeting of security holders held after January 1, 2004 by a security holder or group of security holders that held more than 1% of the company's securities entitled to vote on the proposal for one year as of the date the proposal was submitted and provided evidence of such holding to the company; and (b) that ''direct access'' proposal received more than 50% of the votes cast on that proposal at that meeting.

Exchange Act Schedule 14A prescribes the information that a company must include in its proxy statement to ensure that security holders are provided material information relating to voting decisions. Exchange Act Schedule 14C prescribes the information that a company that is registered under Section 12 of the Exchange Act must include in its information statement in advance of a security holders' meeting when it is not

[182] Exchange Act Schedule 14C requires disclosure of some items of Exchange Act Schedule 14A. Therefore, while we are not proposing to amend the text of Exchange Act Schedule 14C, the proposed amendments to Exchange Act Schedule 14A must also be reflected in the PRA burdens for Exchange Act Schedule 14C.

[183] The proxy rules apply only to domestic companies with equity securities registered under Section 12 of the Exchange Act and to investment companies registered under the Investment Company Act. There is a discrepancy between the number of annual reports by reporting companies and the number of proxy and information statements filed with the Commission in any given year. This is because some companies are subject to reporting requirements by virtue of Section 15(d) of the Exchange Act, and therefore are not covered by the proxy rules. In addition, companies that are not listed on a national securities exchange or traded on the Nasdaq Stock Market may not hold annual meetings and therefore would not be required to file a proxy or information statement.

[184] For convenience, the estimated PRA hour burdens have been rounded to the nearest whole number, and the estimated PRA cost burdens have been rounded to the nearest $100. In connection with other recent rulemakings, we have had discussions with several private law firms to estimate an hourly rate of $300 as the cost of outside professionals that assist companies and security holders (or security holder groups) in preparing these disclosures.

[185] The paperwork burden for funds will be discussed in the footnotes to Sections III.B.1–3., below.

soliciting proxies from its security holders, including the taking of corporate action by written authorization or consent of security holders. Exchange Act Rule 14a–8 requires the company to include a security holder proposal in its Exchange Act Schedule 14A or 14C unless the security holder has not complied with the procedural requirements in Exchange Act Rule 14a–8 or the proposal falls within one of the 13 substantive bases for exclusion in Exchange Act Rule 14a–8. Investment Company Act Rule 20a–1 requires registered investment companies to comply with Exchange Act Regulation 14A or 14C, as applicable.[186]

For purposes of the PRA, we estimate the total annual incremental paperwork burden for operating companies and security holders or security holder groups to prepare the disclosure that would be required under this portion of the proposed rules to be approximately 648 hours of personnel time and a cost of approximately $64,800 for the services of outside professionals.[187] These burdens and costs include the new disclosure requirement that the company notify security holders that it has received a proposal seeking direct access by a more than 1% security holder who has held the securities for at least one year. They also include the burdens and costs associated with the Exchange Act Rule 14a–8 security holder proposal process, including the security holder or security holder groups' preparation of the security holder proposal, the company's preparation of a no-action request, if applicable, and the company's preparation of the statement of opposition if the proposal is included in the proxy materials.[188] Because Exchange Act Rule 14a–8 already requires companies to have a process for reviewing security holder proposals, the proposed amendments should not impose new incremental burdens and costs on companies in connection with such reviews or with training personnel.

We believe that the annual incremental PRA burden due to the triggering events is likely to arise from the submission of Exchange Act Rule 14a–8 security holder proposals by holders of 1% or more of a company's securities providing that the company become subject to the security holder nomination procedure in proposed Exchange Act Rule 14a–11. We estimate that the number of such proposals would be 54.[189] We estimate an annual incremental disclosure burden of 1 hour for each company to disclose that it has received a security holder proposal seeking direct access by an over 1% security holder who has held the securities for one year, for a total of 54 hours. We estimate that the annual incremental disclosure burden for the proponent's preparation of the proposal and the Exchange Act Rule 14a–8 no-action process would average 15 hours per proposal, for a total of 810 hours.[190]

We do not believe that there would be any increased paperwork burden under this portion of the proposed rules for the triggering event related to company nominees for directors who receive over 35% ''withhold'' votes.

We estimate that this total burden of 864 hours would result in 648 hours of internal time and $64,800 of outside costs.

2. Notice Requirements

Proposed Exchange Act Rule 14a–11 would require each company to disclose the following:

- Each company would be required to disclose the security holder vote with regard to any of the nomination procedure triggering events in its quarterly report on Exchange Act Form 10–Q or 10–QSB for the period in which the matter was submitted to a vote of security holders; where the nomination procedure triggering event occurred during the fourth quarter of the fiscal year, on Exchange Act Form 10–K or 10–KSB; or semi-annually on Investment Company Act Form N–CSR, in the case of a fund;[191] and
- Each company would be required to include in that Exchange Act Form 10–Q, 10–QSB, Exchange Act Form 10–K or 10–KSB, or Investment Company Act Form N–CSR, information disclosing that it would be subject to the security holder nomination procedure as a result of such vote, if applicable.

If the company did not hold an annual meeting during the previous year, or if the date of the current year's annual meeting has been changed by more than 30 days from the previous year's annual meeting, the company would be required to disclose the date by which security holders must submit their notice to require that the company include the security holder's nominee on the company's proxy card.

For purposes of the PRA, we estimate the annual incremental paperwork burden for companies to prepare the disclosure that would be required under this portion of the proposed rules to be approximately 86 hours of company personnel time and a cost of approximately $8,700 for the services of outside professionals.[192] This estimate includes the company's cost to disclose the security holder vote with regard to a security holder proposal seeking direct access,[193] the company's cost to disclose

[186] The annual responses to Investment Company Act Rule 20a–1 reflect the number of proxy and information statements that are filed by funds.

[187] For funds, we estimate that 14 Exchange Act Rule 14a–8 security holder proposals seeking direct access will be submitted by holders of 1% or more of a fund's securities each year. We estimate that the incremental disclosure burden will be 1 hour for each fund to disclose on Exchange Act Schedule 14A that it has received a direct access security holder proposal by a more than 1% security holder who has held the securities for at least one year, for a total of 14 hours. We estimate that the annual incremental disclosure burden for the proponent's preparation of the proposal and the Exchange Act Rule 14a–8 no-action process would average 15 hours per proposal, for a total of 210 hours (14 proposals × 15 hours). Hence, the total burden would be 224 hours (14 hours + 210 hours), corresponding to 168 hours of personnel time and $16,800 of costs for services of outside professionals. This burden would be added to the PRA burden of Rule 20a–1.

[188] We recognize that a company that receives a security holder proposal has no obligation to make a no-action request under Exchange Act Rule 14a–8 unless it intends to exclude the proposal from its proxy materials. Similarly, we recognize that a company is not obligated to provide a statement of opposition.

[189] We estimate that 5% of the total number of security holder proposals received will be direct access proposals Based on an IRRC estimate that there will be 1,070 security holder proposals submitted in 2003, this corresponds to 54 proposals.

[190] We estimate an annual incremental disclosure burden of approximately 25 hours for each Exchange Act Rule 14a–8 no-action request that a company makes The Division of Corporation Finance received 465 Exchange Act Rule 14a–8 proposals in the 2002 proxy season. Based on the statistic provided by IRRC that 802 security holder proposals were filed in the 2002 proxy season, we estimate that companies will seek no-action relief on 58% of the proposals received 58% of 25 hours would correlate to 15 hours for each security holder proposal that a company receives.

[191] We are proposing that funds be required to provide disclosure on Form N–CSR regarding each matter submitted to a vote of security holders and to delete as duplicative Item 77C of Form N–SAR, which currently requires similar disclosure We estimate that 281 matters submitted for a vote of security holders were disclosed on Item 77C of Form N–SAR during the most recent 12 months. We estimate that the removal of Item 77C will decrease the PRA burden for Form N–SAR by 0.5 hours per filing, or 140.5 hours total. This burden of 140.5 hours will be added to Form N–CSR under our proposals, together with the proposed new disclosure regarding the nomination procedure triggering events.

[192] For funds, we estimate that 14 funds will be required to provide disclosure on Form N–CSR regarding a direct access security holder proposal each year, which we estimate would average approximately 0.5 burden hours, for a total of 7 hours. We estimate that 14 funds will need to disclose on Form N–CSR that they are subject to the security holder nomination procedure, which we estimate would average approximately 1 burden hour, for 14 hours total. Hence, the total burden would be 21 hours (7 hours + 14 hours), corresponding to 16 hours of fund personnel time and $1,500 for the services of outside professionals. This burden would be added to the PRA burden of Form N–CSR.

[193] Item 4 of Part II of Exchange Act Forms 10–Q and 10–QSB and Item 4 of Part I of Exchange Act

Continued

that it would be subject to the security holder nomination procedure, if applicable, and the company's cost to disclose the date of the annual meeting if the company did not hold an annual meeting during the prior year or if the date of the meeting changed by more than one year. This estimate includes the time and the cost of preparing disclosure that has been appropriately reviewed by executive officers, the disclosure committee, in-house counsel, outside counsel, and members of the board of directors.

As noted above, we estimate that 54 companies would receive a direct access security holder proposal, which we estimate would average approximately 0.5 hours burden hours, for a total of 27 hours. We estimate that 73 companies would need to disclose that they are subject to the security holder nomination procedure, which we estimate would average approximately 1 burden hour, for 73 hours annually.[194] We estimate that 3 of these 73 companies would need to file the Exchange Act Form 8–K because the company did not hold an annual meeting during the prior year or the date of the annual meeting has changed more than 30 days from the prior year.[195] We estimate 5 burden hours to prepare, review and file the Exchange Act Form 8–K, for a total of 15 hours.

This total burden of 115 hours corresponds to 86 hours of internal time and $8,700 in outside costs.

3. Exchange Act Rule 14a–11 Nomination Procedure

To be eligible to submit a nomination in accordance with proposed Exchange Act Rule 14a–11, a security holder or group of security holders would be required to:

- Beneficially own, either individually or in the aggregate, more than 5% of the company's securities that are eligible to vote for the election of directors at the next annual meeting of security holders (or, in lieu of such an annual meeting, a special meeting of security holders), with each of the securities used for purposes of calculating that ownership having been held continuously for at least two years as of the date of the nomination and intend to continue to own those securities through the date of that annual or special meeting;
- Be eligible, as to the security holder or each member of the security holder group, to report beneficial ownership on Exchange Act Schedule 13G and have filed an Exchange Act Schedule 13G or an amendment to Exchange Act Schedule 13G reporting their beneficial ownership as a passive or institutional investor (or group), which Schedule must include a certification that the security holder or security holder group has held more than 5% of the subject securities for at least two years;[196] and
- Provide notice to the company of its intent to require that the company include that security holder's nominee(s) on the company's proxy card and make certain representations and provide information about the candidate or candidates.

Unless the company determines that it is not required to include a nominee from a nominating security holder or nominating security holder group in its proxy materials, the company would be required to include information regarding the security holder nominee in the company's proxy statement. In addition, if the company chooses to include statements supporting company nominees and/or opposing the nominating security holder's nominees, nominating security holders would be afforded the same opportunity. If the company determines that it is not required to include a nominee in its proxy materials, it must provide notice of its determination.

For purposes of the PRA, we estimate the total annual incremental paperwork burden for operating companies and security holders or security holder groups to prepare the disclosure that would be required under this portion of the proposed rules to be approximately 668 hours of personnel time and a cost of approximately $282,600 for the services of outside professionals.[197] This estimate includes the security holder or security holder group's preparation of the nominating security holder or nominating security holder group's notice to the company of its intent to require that the company include that security holder's nominee on the company's proxy card; the security holder or security holder group's preparation and filing of an Exchange Act Schedule 13G and the related certification; and the security holder or security holder group's preparation of a statement of support for its candidate or candidates and/or opposition to the company's nominees, if applicable. This estimate also includes the company's preparation and review of the information to be included in the proxy materials if a nominee is to be included in the proxy materials, and the company's preparation and review of its statement of opposition to the security holder's nominee, if applicable. If the company determines that the security holder's nominee can be excluded from the proxy materials, this annual incremental burden also includes the company's preparation of the notice as to why the nominee is not eligible.

We estimate that the proposed access rule would be triggered in 73 companies, and in 45 of these companies at least one security holder or security holder group would make a nomination.[198] Further, we estimate that, in companies where a nomination is made, an average of 2 security holders

Forms 10–K and 10–KSB currently require that companies disclose the results of the voting on all matters submitted to a vote of security holders during the period covered by the report. Because security holders would be allowed to submit a direct access proposal under Exchange Act Rule 14a–8 as a result of the proposed rules, there would be an annual incremental disclosure burden to disclose the vote on this proposal.

[194] Our best estimate is that 11% of U.S. exchange-traded companies have director withhold votes of more than 35%, which corresponds to approximately 57 companies We combine this estimate with our estimate that 30% of companies will receive direct access proposals from holders of more than 1% of the companies' securities that will pass, which corresponds to 16 proposals.

[195] Based on a review of 1,255 companies' annual meeting dates, we estimate that 375% of companies' annual meeting dates changed by more than 30 days from the prior year. 3.75% of 73 companies would correspond to roughly 3 companies that would be required to file a Form 8–K Source: IRRC.

[196] A nominating security holder or security holder group of a mutual fund would be required to file information reporting the security holder or security holder group's beneficial ownership as part of the security holder's notice to the fund, pursuant to proposed Exchange Act Rule 14a–11(c)(11).

[197] For funds, we estimate that the proposed access rule would be triggered in 14 funds each year, and in 9 of these funds at least one security holder or security holder group will make a nomination. Further, we estimate that, in funds where a nomination is made, an average of 2 security holders or groups will submit a nomination. We estimate that the disclosure burden for each of these 18 security holders or groups to provide notice of its intent to require that the fund include the security holder's nominee on the fund's proxy card would be approximately 4 hours, for a total of 72 hours. We also estimate that the disclosure burden for these 18 security holders or groups to review and file an Exchange Act Schedule 13G (in the case of a closed-end fund) or the portion of the notice to the fund requiring disclosure of beneficial ownership similar to Exchange Act Schedule 13G (in the case of a mutual fund) and the accompanying certification would be approximately 12 hours, for a total of 216 hours. This burden would be added to the PRA burden of Rule 20a–1.

[198] Based on data on the size of institutional shareholdings, we estimate that approximately 50% of companies that receive over 35% of withhold votes for one of their nominees would have an individual security holder or security holder group with 5% of the shares outstanding that would be able to make a nomination This would correspond to 29 companies. We estimate that all of the companies that receive a direct access proposal that passes will have an individual security holder or security holder group with 5% of the shares outstanding since security holders who submit an access proposal would likely do so only if they are confident that a group will make a nomination. This would correspond to 16 companies.

or security holder groups would submit a nomination. We estimate that the disclosure burden for each of these 90 nominating security holders or nominating security holder groups to provide notice of its intent to require that the company include the security holder's nominee in the company's proxy materials would be approximately 4 hours, for a total of 360 hours. We also estimate that the disclosure burden for these 90 security holders or security holder groups to review and file an Exchange Act Schedule 13G and certification would be approximately 12 hours, for a total of 1,080 hours.

In order to conservatively estimate the PRA burden, we estimate that 49 nominees would be excluded from the proposed Exchange Act Rule 14a–11 nomination procedure.[199] We estimate that the annual disclosure burden for companies to notify the 49 nominating security holders or nominating security holder groups of their determination not to include the nominee(s) in its proxy materials would be 1 hour, for a total of 49 hours. We estimate the annual disclosure burden for companies to include the remaining 41 nominees in their proxy materials to be 1 burden hour, for a total of 41 hours. Of these 41 companies, we estimate that 20 companies would include a statement with regard to the security holder nominee or nominee.[200] We estimate that this burden would be approximately 2 hours. Similarly, we estimate the disclosure burden for the security holder or security holder group to prepare a statement of support for its nominee or nominees to be approximately 2 burden hours.[201]

We estimate that this total burden of 1,610 hours would result in 668 hours of internal time and $282,600 of outside costs.

All of the figures above are estimates because there is no reliable way to predict how many more security holder proposals would be submitted based on the proposed amendments, how often the events would be triggered or how many security holders would be able to meet the applicable requirements (*e.g.,* minimum ownership threshold). We request comment and supporting empirical data on whether, for purposes of the PRA, there likely would be an increase in the number of Exchange Act Rule 14a–8 security holder proposals that companies receive as a result of creating triggering events to activate the nomination procedure; how often the triggering events likely would be triggered; and how likely it would be for security holders or security holder groups to be able to meet the requirements under proposed Exchange Act Rule 14a–11. We also request comment and supporting empirical data on the costs of submitting a no-action request.

C. Revisions to PRA Reporting and Cost Burden Estimates

Table 1 below illustrates the incremental annual compliance burden of the collection of information in hours and in cost for securities ownership reports filed by investors and proxy and information statements, periodic reports and current reports under the Exchange Act.[202] The burden was calculated by multiplying the estimated number of responses by the estimated average number of hours each entity spends completing the form. We estimate that 75% of the burden of preparation of the proxy and information statement, periodic reports and current reports is carried by the company and security holder or security holder groups internally and that 25% of the burden of preparation is carried by outside professionals at an average cost of $300 per hour. We estimate that 100% of the burden for preparing Form N–SAR is carried by the fund. We estimate that 25% of the burden of preparation of securities ownership filings is carried by the security holder or security holder groups internally and that 75% of the burden of preparation is carried by outside professionals at an average cost of $300 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried internally by the company and security holder or security holder groups is reflected in hours.[203]

[199] The proposed rules contemplate that the company only would be required to include in its proxy statement and form of proxy the nominee or nominees of the security holder or security holder group with the largest beneficial ownership. As such, only 45 of the 90 nominating security holders or security holder groups would be eligible to nominate a candidate or candidates to the board. Further, although there is no reliable way to predict the number of companies that would determine that they are not required to include a nominee in their proxy materials due to the nominee being ineligible under proposed Exchange Act Rule 14a–11, we estimate that approximately 10% of companies would make this determination.

[200] There is no way to determine how many companies would choose to include a statement regarding the security holder nominee or nominees We estimate that 50% of companies would include such a statement.

[201] For funds, we estimate that 10 nominees will be excluded from the security holder nomination procedure each year, and the annual disclosure burden for a fund to notify the 10 nominating security holders or groups of the fund's determination not to include the nominee in its proxy materials would be 1 hour, for a total of 10 hours. We estimate that the annual disclosure burden for a fund to include the remaining 8 nominees in its proxy materials to be 1 burden hour, for a total of 8 hours. Of these 8 funds, we estimate that 4 funds and nominating security holders will include a statement with regard to the security holder nominee or nominees and the disclosure burden would be approximately 4 hours, for a total of 16 hours. The total burden with respect to the Exchange Act Rule 14a–11 nomination procedure would be 322 hours (72 hours + 216 hours + 10 hours + 8 hours + 16 hours), corresponding to 242 hours of fund personnel time and $24,000 for the services of outside professionals. See note 197, above. This burden also would be added to the PRA burden of Rule 20a–1.

[202] As discussed further below, we estimate that no small businesses will be affected by the proposed rule so we did not include any PRA estimates for the Form 10–QSB and Form 10–KSB.

[203] The estimated PRA burdens have not been rounded to the nearest whole number and $100 in order to accurately reflect figures in the text.

TABLE 1.—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES [204]

	Annual responses	Annual responses affected	Incremental hours/form	Incremental burden	75% Company	25% Professional	$300 Prof. cost
		(A)	(B)	(C)=(A) × (B)	(D)=(C) × 0.75	(E)=(C) × 0.25	(F)=(E) × $300
SCH 14A * †	7,188	104	12.56	1,306	980	326	$97,800
SCH 14C * †	446	7	12.56	88	66	22	$6,600
FORM 10–K *	8,484	28	0.9	25	19	6	$1,800
FORM 10–Q *	[1] 23,743	83	0.9	75	56	19	$5,700
FORM 8–K	[2] 333,915	3	5	15	11	4	$1,200
FORM N–CSR	[3] 6,658	281	0.575	161.5	21.1	40.4	$12,120
Rule 20a–1 * †	1,058	24	22.75	546	410	136	$40,800
	Annual responses	Annual responses affected	Incremental hours/form	Incremental burden	25% Company	75% Professional	$300 Prof. cost
SCH 13G	9,500	90	12	1,080	270	810	$243,000
	Annual responses	Annual responses affected	Incremental hours/form	Incremental burden	100% Company and security holders	0% Professional	$300 Prof. cost
FORM N–SAR	[4] 9306	281	(0.5)	(140.5)	(140.5)	0	0
Total	.....	.....	.....	3,156	1792.6	1363.4	$409,020

* These figures have been prorated across all the estimated number of responses affected.

† We have reflected the security holder's provision of notice to the company of its intent to require the company to include the security holder's nominee on the company's proxy card as a burden under Exchange Act Schedules 14A and 14C and Rule 20a–1.

[1] 7,914 respondents.

[2] 13,200 respondents.

[3] 3,829 respondents.

[4] 4,653 respondents.

D. Solicitation of Comment

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

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, 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. S7–19–03. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–19–03, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 450 Fifth Street, NW., Washington, DC 20549. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

IV. Cost-Benefit Analysis

A. Background

On April 14, 2003, the Commission directed the Division of Corporation Finance to review the proxy rules and regulations and their interpretations regarding procedures for the nomination and election of corporate directors [205] and on May 1, 2003, the Commission solicited public input on the Division's review.[206] On July 15, 2003, after considering the views expressed by commenters, the Division of Corporation Finance provided to the Commission its report and recommended changes to the proxy rules related to the nomination and election of directors.[207] To best address many of the issues raised by commenters, the Division recommended changes in two areas—disclosure related to nominating committee functions and security holder communications with boards of directors and enhanced

[204] The incremental burden estimate for Form N–CSR includes 140.5 hours (281 responses X 0.5 hours per response) transferred in connection with the deletion of Item 77C of Form N–SAR. This Item currently requires disclosure regarding each matter submitted to a vote of security holders. In addition, the burden for Form N–CSR includes disclosure parallel to that proposed with respect to the nomination procedure triggering events on Forms 10–Q and 10–K. As discussed above, we estimate that the disclosure burden would be 21 hours for this nomination procedure disclosure. Thus, we estimate that the incremental burden estimate for Form N–CSR will increase by a total of 161.50 hours (140.5 hours + 21 hours) or 0.57 hours per response (161.5 hours/281 responses) as a result of the required disclosure in this proposed rulemaking We estimate, however, that the net incremental burden increase for funds to comply with Form N–SAR and Form N–CSR would be 21 hours.

The incremental burden estimate for Rule 20a–1 includes the disclosure that would be required on Exchange Act Schedule 14A, discussed above, with respect to funds. We estimate that the burden associated with these disclosure requirements would be 546 hours (224 hours + 322 hours) or 22.75 hours per response (546 hours/24 responses) as a result of the required disclosure in this proposed rulemaking.

[205] *See* Press Release No 2003–46 (April 14, 2003).

[206] *See* Release No 34–47778 (May 1, 2003).

[207] *See* Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors, Division of Corporation Finance (July 15, 2003).

security holder access to the proxy process relating to the nomination of directors.[208] On August 14, 2003, we published for comment proposed rules that would implement the first of the Division's recommendations—new disclosure standards requiring more robust disclosure of the nominating committee processes of public companies, including the consideration of candidates recommended by security holders, as well as more specific disclosure of the processes by which security holders may communicate with the directors of the companies in which they invest.[209] Today, we are proposing rules that would implement the second of the Division's recommendations. These proposed rules would require companies to include in their proxy materials security holder nominees for election as director under certain limited circumstances.

Under the existing structure, security holders generally can have input in the director nomination procedure in two ways: Undertake an election contest and recommend candidates to the nominating committee. In the broad proxy revisions adopted in 1992, the Commission eased the requirements for security holders conducting an election contest in a non-control context when it revised Exchange Act Rule 14a–4(d) to allow security holders seeking minority board representation to ''fill out'' a partial or ''short'' slate with management nominees. Under the current proxy rules, these security holders still must disseminate and file a separate proxy statement. Although commenters noted the availability of this existing alternative, many other commenters noted the prohibitive expense in conducting an election contest.[210] Pursuant to a company's bylaws, security holders also may recommend board candidates to the nominating committee. Several commenters noted that this process is not effective and expressed the view that nominating committees rarely include security holder candidates in company proxy materials.[211]

After reviewing the existing proxy rules and comments from the public, we are proposing rules that would create a mechanism for nominees of long-term security holders, or groups of long-term security holders, with significant holdings to be included in company proxy materials. The intent of the proposed amendments is to improve the ability of security holders to participate meaningfully in the nomination and election of directors where evidence suggests that the company has been unresponsive to security holder concerns as they relate to an effective proxy process. Greater security holder involvement also may increase director accountability and responsiveness to security holders and their concerns.

The Commission has considered a variety of reforms to achieve its regulatory objectives. As one possible approach, we considered requiring companies to include a separate security holder proxy card in the company mailing. Alternatively, we considered amending Exchange Act Rule 14a–8(i)(8)[212] to allow security holder proposals requesting access to the company's proxy card for the purpose of making nominations. Based on comments we have received to date, we believe that requiring companies to include in their proxy materials security holder nominees for election as director under certain limited circumstances would best address the concerns raised by commenters and would provide the most benefit for the least cost.

B. Potential Benefits of the Proposed Rules

The proposed amendments may serve to align the interests of the board and security holders, thereby giving investors greater confidence that the board is serving the interest of security holders, even if the provisions of the rule are rarely used.[213] This alignment can occur in three ways. First, the presence of triggering events, as described below, may improve the responsiveness of boards to security holder preferences. Second, the disclosure requirements may enable investors to better understand and evaluate the performance of the board. Third, the ability of relatively large and long-term security holders to make a board nomination that is included in the company's proxy materials may improve corporate governance by enhancing security holders' ability to participate meaningfully in the proxy process.

The security holder nomination procedure would become operative only if one or both of the following triggering events occur:

- At least one of the company's nominees for the board of directors for whom the company solicited proxies received ''withhold'' votes from more than 35% of the votes cast at an annual meeting of security holders; or
- A security holder proposal submitted pursuant to Exchange Act Rule 14a–8 providing that the company become subject to the security holder nomination procedure in proposed Exchange Act Rule 14a–11 (a) was submitted for a vote of security holders at an annual meeting of security holders by a security holder or group of security holders that held more than 1% of the company's securities entitled to vote on the proposal for one year as of the date the proposal was submitted and provided evidence of such holding to the company; and (b) that ''direct access'' proposal received more than 50% of the votes cast on that proposal at that meeting.

Allowing security holders access to company proxy materials in these two circumstances would limit the use of proposed Exchange Act Rule 14a–11 to companies where there is evidence indicating ineffectiveness of or dissatisfaction with the proxy process. In addition, the triggering events may serve to make boards more responsive to security holder concerns and security holder dissatisfaction with directors in cases where companies wish to avoid triggering the procedure in proposed Exchange Act Rule 14a–11.

Under the proposed rules, a company would be required to disclose the security holder vote with respect to either of the triggering events and whether the company would be subject to proposed Exchange Act Rule 14a–11. These proposed notice requirements may benefit security holders by providing greater transparency of the level of security holder discontent with the company's nominees and the degree to which security holders believe a company is responsive to security holder concerns.

In those cases where proposed Exchange Act Rule 14a–11 is triggered, requiring companies to include nominees of larger, long-term security holders or groups of security holders may benefit security holders by allowing them to have greater input in the nomination procedure where there is evidence indicating that the proxy process may be ineffective. Greater security holder input may lead to better performing boards whose interests are better aligned with security holders. When a security holder nominee is elected to a board, commenters were also of the opinion that this may lead to a more diverse board that could offer a

[208] *See id.*

[209] *See* Release No 34–48301 (August 14, 2003).

[210] *See* 2003 Summary of Comments.

[211] *See id.*

[212] Exchange Act Rule 14a–8(i)(8) permits a company to exclude a security holder proposal from its proxy statement if the proposal ''relates to an election for membership on the company's board of directors or analogous governing body.''

[213] *See* 2003 Summary of Comments. Several commenters noted that better corporate governance would increase the long-term value of security holders' investments in companies.

fresh perspective and improve boardroom dynamics.[214]

C. Potential Costs of the Proposed Rules

The proposed rules may impose additional direct costs. For purposes of the PRA, we estimate that the annual incremental burden to prepare the required disclosure would be approximately 1,828 hours of personnel time for operating companies, funds, and security holders, which translates into an estimated cost of $155,400 ($1,200 per company affected).[215] We also estimate a cost of approximately $398,400 for the services of outside professionals ($3,000 per company affected).[216]

As we noted above, under the current rules, security holders generally can participate in the director nomination procedure only by recommending candidates to the nominating committee or by undertaking an election contest. As previously noted, commenters have found the first alternative to be largely ineffective and the latter to be too costly. Given the high costs associated with undertaking an election contest, many of the costs of the proposed rules to companies would be offset by the cost to security holders of undertaking an election contest.

For example, companies may incur additional printing and mailing costs if there is an increase in the number of security holder proposals seeking direct access that companies receive and must include in their proxy materials. Companies also may incur incremental printing and mailing costs to include the name and background information of security holder nominees in their proxy materials. In 1998, when the Commission last sought comment on a proxy rule amendment, companies reported that the average cost of printing and mailing security holder proposals was approximately $50,000.[217] In response to our May 203 request for public input, one commenter noted that increasing the weight of a company's proxy materials by two ounces could increase the cost of mailing 100,000 packages by $308,825.[218] The additional incremental printing and mailing costs would vary based on the number of security holder proposals that are required to be included in a company's proxy materials, the number of security holder nominees that are required to be included in company proxy materials and the size and weight of a company's existing proxy statement.

The additional incremental cost of printing and mailing security holder proposals seeking direct access and including security holder or security holder nominees in the company's proxy material would likely represent costs that would otherwise be borne by security holders to print and mail their own complete proxy statement when a security holder undertakes an election contest.

There also may be increased costs associated with additional solicitations by both companies and security holders. Companies may increase solicitations to vote against security holder proposals or to vote for their slate of directors. Security holders may also increase solicitations to vote for security holder proposals or to withhold votes for a company's directors. Similarly, companies may also increase their costs for solicitations if security holders or security holder groups undertake election contests. For the purposes of the PRA, we estimate that the proposed Exchange Act Rule 14a–11 nomination procedure would occur in 41 incidences for operating companies and 9 incidences for funds.

There also may be a cost if the proposed rules serve to influence corporate behavior. Commenters argued that there is no evidence that security holder access would lead to better managed companies.[219] To the extent that there is a change in corporate behavior, companies may incur additional costs in instituting more responsive policies and procedures to address security holder concerns. Commenters also were concerned that the time a company spends on its security holder relations could lessen the time that boards would have to engage in strategic and long-term thinking.[220] Such a decrease in the time spent by a board on overseeing the management of a company may negatively affect the value of security holders' investments.

In those cases where proposed Exchange Act Rule 14a–11 would be triggered, commenters also were concerned that security holder access may discourage qualified board members from running.[221] If a security holder nominee is elected, commenters were further concerned that the security holder-nominated director may disrupt boardroom dynamics and polarize the board.[222] In particular, commenters expressed concern that the security holder access rule could be used by special interest groups who have interests that are different from security holders generally.[223] Any potential degradation in the quality of the individuals on the board may decrease the value of security holder investments.

D. Small Business Issuers

Although the proposed rules apply to small business issuers, we do not anticipate any significant impact on them. Small businesses historically have received fewer security holder proposals than larger issuers.[224] Further, the number of security holder proposals that generally receive a majority vote, the number of directors that receive 35% ''withhold'' votes, and the percentage of nominating security holders that meet the ownership threshold and holding periods may be lower for small business issuers than other issuers since insiders generally hold a large percentage of shares in small businesses.[225] While we recognize that issues of corporate accountability and security holder rights may affect small companies as much as they affect large companies, we have included a specific request for comment regarding

[214] *See* 2003 Summary of Comments.

[215] We estimate the average hourly cost of in-house personnel to be $85. This cost estimate is based on data obtained from *The SIA Report on Management and Professional Earnings in The Securities Industry* (Oct 2001).

[216] The cost may vary from company to company. The total dollar costs have been prorated across all companies, funds and security holders affected. We estimate that 111 operating companies and 24 funds will be impacted by some aspect of the proposed rules. These figures differ slightly from the PRA figures reflected in the Calculation of Incremental PRA Burden Estimates table because they do not reflect the number of funds affected by the removal of Item 77C from Form N–SAR and the transfer of the burden of 1405 hours associated with Item 77C to Form N–CSR. This transfer does not result in any net new costs to funds.

[217] *See* Release No 34–40018 (May 21, 1998) [63 FR 29106].

[218] *See* 2003 Summary of Comments. The response may have accounted for the printing of more than one proposal.

[219] *See id.*

[220] *See id.*

[221] *See* id.

[222] *See* id.

[223] *See id.* Although the proposed rules address the issue of special interest directors by requiring that the nominating security holder be independent from the security holder nominee, there still may be concern that the security holder nominee is informally beholden to the nominating security holder.

[224] Of the 266 companies that submitted letters to the Division of Corporation Finance during the 2002–2003 proxy season regarding their intentions to exclude a security holder proposal submitted under Exchange Rule 14a–8, only 26 had a common equity public float of less than the $75 million threshold in the definition of ''accelerated filer.'' Accordingly, the number of small businesses issuers would be even less than that figure.

[225] *See* James S Ang, Rebel A Cole, & James Wuh Lin, *Agency Costs and Ownership Structure,* The Journal of Finance, Volume LV No 1, 81, 96 (February 2000). Based on a sample size of 1,708 small companies, defined as companies with $6 million in sales, on average, 73% of these companies had one family that owned 50% or more of the company.

whether only those operating companies that fall within the definition of ''accelerated filer'' in Exchange Act Rule 12b–2 should be subject to the security holder nomination procedure. Implementing the proposed rule in this fashion would avoid the disproportionate burdens of regulation that the proposed procedure may impose on smaller companies. It also would allow our staff and the markets to gain experience with the proposed rule in an initial stage in which the rule applied only to larger companies, while we would retain the ability to expand the rule's application to all companies after gaining this experience. In addition, the information available to us suggests that interest in the proxy process is, to a significant degree, concentrated within the universe of companies that are accelerated filers.

E. Request for Comments

We are sensitive to the costs and benefits imposed by our rules, and have identified certain costs and benefits imposed by these proposals. We request comment on all aspects of this cost-benefit analysis, including identification of any additional costs and benefits. We encourage commenters to identify and supply relevant data concerning the costs and benefits of the proposed amendments. We also request comment on the following specific concerns:

O.1. We solicit quantitative data to assist our assessment of the benefits and costs of enhanced security holder access to company proxy materials when there has been a demonstrated failure in the proxy process. Will proposed Exchange Act Rule 14a–11 increase director accountability and responsiveness? If so, what costs would be incurred in instituting responsive policies and procedures? Will more accountability and responsiveness lead to better managed boards? What effects, if any, would increased accountability and responsiveness have on the board's time spent in its duties overseeing management?

O.2. We solicit quantitative data on the potential increases, if any, of security holder proposals under Exchange Act Rule 14a–8 as a result of these proposed rules. We also solicit quantitative data on how often the two triggering events that would activate proposed Exchange Act Rule 14a–11 would occur.

O.3. We solicit quantitative date on the time and cost spent in preparing a no-action request to exclude a proposal under Exchange Act Rule 14a–8, the incremental cost spent to print and mail such a security holder proposal and to include a security holder nominee and his/her background information in the proxy materials, and the cost borne by both companies and security holders to solicit security holders regarding a direct access security holder proposal and election of a nominee or nominees to the board.

V. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act [226] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, 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. The proposed rules are intended to provide security holders with information about security holder nominees in company proxy materials where there has been evidence of an ineffective proxy process. The proposed rules should increase the transparency of security holder concerns and boards responsiveness to those concerns, increase investor confidence, and potentially cause companies to be better managed. Companies may consider their existing policies and responses to security holder concerns in relation to the policies and responses of other companies. As a result, companies may compete to adopt policies and procedures that effectively balance security holder and director interests and therefore attract investors.

The notice requirements of the proposed rules would enable investors to compare companies' responsiveness to security holder proposals and compare security holders' general level of satisfaction with companies' nominees for director. Investors may place a premium on companies that are more responsive to security holder concerns and whose boards' interests are more closely aligned with those of security holders.

In addition, if a company is required to include a security holder nominee in its proxy materials, there may be increased competition for board positions. To the extent that this would discourage less-qualified candidates from running or, alternatively, would increase the quality of board members due to increased competition, investors may be more or less willing to invest in those companies where proposed Exchange Act Rule 14a–11 has been triggered.

We request comment regarding the degree to which our proposed disclosure requirements would create competitively harmful effects upon public companies, and how to minimize those effects. We also request comment on any disproportionate cross-sectional burdens among the firms affected by our proposals that could have anti-competitive effects.

Section 3(f) of the Exchange Act [227] and Section 2(c) of the Investment Company Act [228] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

One possible adverse impact on efficiency, competition and capital formation is that boards may devote less time to overseeing the management of companies because they are spending more time on security holder relations. We believe, however, that the proposed rules may increase director accountability and responsiveness, which would lead to better corporate governance and better-managed boards. As a result, we believe that these measures ultimately may serve to enhance investors' value. In addition, we believe that investors may be able to evaluate a company's board of directors more effectively and make more informed investment decisions. We believe that, as a consequence of these developments, there may be some positive impact on the efficiency of markets and capital formation. The possibility of these effects, their magnitude if they were to occur and the extent to which they would be offset by the costs of the proposals are difficult to quantify. We request comment on these matters and how the proposed amendments, if adopted, would affect efficiency and capital formation. Commenters are requested to provide empirical data and other factual support to the extent possible.

VI. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Act Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed revisions to the rules and forms under the Exchange Act and the Investment Company Act that would, under certain limited circumstances, require companies to include in their proxy materials security holder nominees for election as director. The

[226] 15 U.S.C. 78w(a)(2).

[227] 15 U.S.C. 78c(f).

[228] 15 U.S.C. 80a–2(c).

proposals are intended to improve the ability of security holders to participate meaningfully in the nomination and election of directors.

A. Reasons for the Proposed Action

On April 14, 2003, the Commission directed the Division of Corporation Finance to review the proxy rules and regulations and their interpretations regarding procedures for the nomination and election of corporate directors [229] and on May 1, 2003, the Commission solicited public input on the Division's review.[230] On July 15, 2003, after considering the views expressed by commenters, the Division of Corporation Finance provided to the Commission its report and recommended changes to the proxy rules related to the nomination and election of directors.[231] To best address many of the issues raised by commenters, the Division recommended changes in two areas—disclosure related to nominating committee functions and security holder communications with boards of directors and enhanced security holder access to the proxy process relating to the nomination of directors.[232]

On August 14, 2003, we published for comment proposed rules that would implement the first of the Division's recommendations—new disclosure standards requiring more robust disclosure of the nominating committee processes of public companies, including the consideration of candidates recommended by security holders, as well as more specific disclosure of the processes by which security holders may communicate with the directors of the companies in which they invest.[233] Today, we are proposing rules that would implement the second of the Division's recommendations. These proposals would create a mechanism for long-term security holders, or groups of long-term security holders, with significant holdings to access company proxy materials to nominate directors.

B. Objectives

The proposed amendments have two primary objectives. The first objective is to improve the ability of security holders to participate meaningfully in the nomination and election of directors. The second objective is to meet the first objective without unduly burdening companies. We seek to limit the cost and burden on companies by limiting the proposed security holder nomination procedure to only those companies:

- Where the company's security holders are permitted under state law to nominate a candidate or candidates for election as directors;
- Where there are criteria showing that the proxy process may be ineffective—specifically, only after the occurrence of one or both of the following triggering events:

—At least one of the company's nominees for the board of directors for whom the company solicited proxies received ''withhold'' votes from more than 35% of the votes cast at an annual meeting of security holders; or

—A security holder proposal submitted pursuant to Exchange Act Rule 14a–8, providing that the company become subject to the security holder nomination procedure in proposed Exchange Act Rule 14a–11(a) was submitted for a vote of security holders at an annual meeting of security holders by a security holder or group of security holders that held more than 1% of the company's securities entitled to vote on the proposal for one year as of the date the proposal was submitted and provided evidence of such holding to the company; and (b) that ''direct access'' proposal received more than 50% of the votes cast on that proposal at that meeting; and

- Where the nominating security holder or group of security holders demonstrate continuous beneficial ownership of more than 5% of the company's securities for at least two years as of the date of the nomination.

These limitations would lower the cost to companies while still improving the ability of security holders to participate meaningfully in the nomination and election of directors. This increased participation may improve corporate governance by increasing director accountability and responsiveness and aligning the interests of the board and security holders, thereby, giving investors greater confidence that the board is serving the interest of security holders. This may, in turn, enhance the value of security holders' investments.

C. Legal Basis

We are proposing amendments to the forms and rules under the authority set forth in Sections 3(b), 10, 13, 14, 15, 16, 23(a) and 36 of the Securities Exchange Act of 1934, as amended, and Sections 10, 20(a) and 38 of the Investment Company Act of 1940, as amended.

D. Small Entities Subject to the Proposed Rules

The proposals would affect companies that are small entities. Exchange Act Rule 0–10(a) [234] defines a company to be a ''small business'' or ''small organization'' for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year.[235] We estimate that there were approximately 2,500 public companies, other than investment companies, that may be considered small entities. We estimate from information compiled by the Commission staff that there are less than 25 listed investment companies and less than 25 non-listed investment companies that are small entities that file proxy statements. As discussed below, we believe that the proposals would affect virtually no small entities that are reporting companies.

As noted above, the number of security holder proposals that receive a majority vote, the number of directors that receive 35% withhold votes, and the percentage of nominating security holders that meet the ownership threshold and holding periods may be more infrequent for small entities because insiders may hold a larger percentage of shares in such entities.[236]

We request comment on the number of small entities that would be impacted by our proposals, including any available empirical data.

E. Reporting, Recordkeeping and Other Compliance Requirements

The proposed rules are expected to impact a limited number of companies because the nomination procedure would be triggered only where there are criteria showing that the proxy process may be ineffective. For purposes of the PRA, we estimate that the proposed nomination procedure would be triggered at only 73 operating companies and 14 funds and that only 41 operating companies and 9 funds would be subject to that procedure. Given the limited number of security holder proposals received by small entities and the ownership makeup of smaller entities, the proposed rules are likely to have virtually no impact on small entities.

[229] *See* Press Release No 2003–46 (April 14, 2003).

[230] *See* Release No 34–47778 (May 1, 2003).

[231] *See* Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors, Division of Corporation Finance (July 15, 2003).

[232] *See id.*

[233] *See* Release No 34–48301 (August 14, 2003).

[234] 17 CFR 240.0–10(a).

[235] 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. 17 CFR 270.0–10.

[236] Ang *et al,* above at note 225.

For purposes of the PRA, we estimate that the highest hourly burden for the company and the security holder to disclose the required information would be 43.5 if the nomination procedure is triggered, notice by the company that the nomination procedure is triggered is provided, notice that the upcoming annual meeting has changed by more than 30 days is provided, notice by the security holder or security holder group that it is seeking to use the procedure is provided, an Exchange Act Schedule 13G is filed and is provided, the company determines to include the proposal and the company provides a statement opposing the security holder nominee or nominees and/or supporting the company nominees, and the security holder also provides such a statement. This translates to a cost of $2,300, as a monetization of burden, to be carried by the company internally and a cost of $5,100 to be paid by a third party. A cost of $7,400 per small entity may not constitute a significant economic impact. That conclusion is based on our analysis of 1,245 small entities available on the Compustat database. We found that the average revenue of those small entities is $2.07 million per company. Therefore, among larger ''small entities,'' the estimated $7,400 compliance expense would constitute approximately 0.003% of a small entity's revenues. If small entities are impacted, there may be a greater impact on smaller ''small entities.''

We encourage written comments regarding this analysis. We solicit comments as to whether the proposed changes could have an effect that we have not considered. We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact. We also note that we are considering as an additional element of the proposed rule, and seek comment on, whether proposed Exchange Act Rule 14a–11 should apply only to those companies that are subject to the accelerated deadlines for filing Exchange Act periodic reports, and investment companies registered under Section 8 of the Investment Company Act.

F. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no rules that conflict with or completely duplicate the proposed rules.

G. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following amendments:

1. The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
2. The clarification, consolidation or simplification of disclosure for small entities; and
3. An exemption for small entities from coverage under the proposals.

The Commission has considered a variety of reforms to achieve its regulatory objectives. As one possible approach, we considered requiring companies to include the security holder's proxy card in the company mailing. Alternatively, we considered amending Exchange Act Rule 14a–8(i)(8) [237] to allow security holder proposals requesting access to the corporation's proxy card for the purpose of making nominations. We also have included a specific request for comment regarding whether only those operating companies that fall within the definition of ''accelerated filer'' in Exchange Act Rule 12b–2 should be subject to the security holder nomination procedure. We believe that the current proposals are the most cost-effective initial approach to address specific concerns related to small entities, as small entities may be less likely to be impacted by proposed Exchange Act Rule 14a–11 because of their limited receipt of security holder proposals and their ownership makeup.

In addition, an exemption or separate requirements for small entities may not address issues of corporate accountability and security holder rights that may affect small entities as much as they would affect large companies. Accordingly, it may be more appropriate to allow for the nomination procedure at small entities, where there has been evidence indicating ineffectiveness in the proxy process. The establishment of any differing compliance or reporting requirements or timetables or any exemptions for small business issuers may not be in keeping with the objectives of the proposed rules.

H. Solicitation of Comment

We encourage comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding: (i) The number of small entities that may be affected by the proposals; (ii) the existence or nature of the potential impact of the proposals on small entities discussed in the analysis; and (iii) how to quantify the impact of the proposed rules. 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, or, in the alternative, a certification under Section 605(b) of the Regulatory Flexibility Analysis, if the proposals are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[238] a rule is ''major'' if it has resulted, or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on whether our proposals would be a ''major rule'' for purposes of SBREFA. We solicit comment and empirical data on: (a) The potential effect on the U.S. economy on an annual basis; (b) any potential increase in costs or prices for consumers or individual industries; and (c) any potential effect on competition, investment or innovation.

VIII. Statutory Basis and Text of Proposed Amendments

The amendments are proposed pursuant to Sections 3(b), 10, 13, 14, 15, 16, 23(a) and 36 of the Securities Exchange Act of 1934, as amended, and Sections 10, 20(a) and 38 of the Investment Company Act of 1940, as amended.

List of Subjects

17 CFR Parts 240 and 249

Reporting and recordkeeping requirements, Securities.

17 CFR Part 274

Investment companies, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, the Securities and Exchange Commission proposes to amend Title 17, chapter II of the Code of Federal Regulations as follows:

[237] Exchange Act Rule 14a–8(i)(8) permits a company to exclude a security holder proposal from its proxy statement if the proposal ''relates to an election for membership on the company's board of directors or analogous governing body.''

[238] Pub. L. No. 104–121, Title II, 110 Stat. 857 (1996).

PART 240—GENERAL RULES AND REGULATION, SECURITIES EXCHANGE ACT OF 1934

1. The authority citations for Part 240 continues to read, in part, 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, 80b–11, 7202, 7241, 7262, and 7263; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. The authority citations following §§ 240.13d–1, 240.13d–102, 240.14a–4 and 240.14a–5 are removed.

3. 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 an investment company is required to file:

(1) Notice of a blackout period pursuant to § 245.104 of this chapter; or

(2) Disclosure pursuant to Instruction 5 to § 240.14a–11(a) of the date by which a security holder or security holder group must submit the notice required pursuant to § 240.14a–11(c).

4. By amending § 240.13d–1 by adding an Instruction after paragraph (c)(3) to read as follows:

§ 240.13d–1 Filing of Schedules 13D and 13G.

* * * * *

(c)(3) * * *

Instruction to paragraphs (b) and (c): purposes of paragraphs (b) and (c), a beneficial owner who acquires or holds a registrant's securities in connection with a nomination under § 240.14a–11 will not be deemed to have a purpose or effect of changing or influencing the control of the registrant solely by virtue of acquiring or holding the securities in connection with a director nomination pursuant to § 240.14a–11, a solicitation for the election of that director nominee and/or against a registrant nominee, or the election of that director nominee.

* * * * *

5. By amending § 240.13d–102 to:

a. Add a box on the cover page after the box titled ''[ ] Rule 13d–1(d)''; and

b. Add paragraph (c) to Item 10 before the ''Signature'' section.

The additions read as follows:

§ 240.13d–102 Schedule 13G—Information to be included in statements filed pursuant to § 240.13d–1(b), (c), and (d) and amendments thereto filed pursuant to § 240.13d–2.

* * * * *

[ ] Rule 13d–1(b) or (c), filed in connection with Rule 14a–11

* * * * *

Item 10. Certifications

(a) * * *

(c) The following certification shall be included, in addition to the certification required under paragraph (a) or (b) of this Item, as applicable, if the statement is filed in connection with a security holder nomination pursuant to § 240.14a–11:

By signing below, I further certify that __% of the securities referred to above have been held continuously for at least 2 years.

Instruction to paragraph (c).

The percentage of securities listed above shall be used both for the purpose of determining eligibility to submit a security holder nomination pursuant to § 240.14a–11 and, where more than one eligible security holder or security holder group provides notice of its intention to submit a nomination pursuant to § 240.14a–11, for the purpose of determining the security holder or security holder group with the largest percentage of subject securities.

* * * * *

6. By amending § 240.14a–4 to:

a. Revise the first sentence of paragraph (b)(2); and

b. Add a sentence to the end of the paragraph following paragraph (b)(2)(iv), immediately preceding the Instructions.

The revision and addition read as follows:

§ 240.14a–4 Requirements as to proxy.

* * * * *

(b) * * *

(2) A form of proxy that provides for the election of directors must set forth the names of persons nominated for election as directors, including any person whose nomination by a security holder or security holder group satisfies the requirements of § 240.14a–11. * * *

* * * * *

(iv) * * * Means to grant authority to vote for any nominees as a group or to withhold authority for any nominees as a group may not be provided if the proxy card includes one or more security holder nominees in accordance with § 240.14a–11.

* * * * *

7. By amending § 240.14a–5 to add paragraphs (g) and (h) to read as follows:

§ 240.14a–5 Presentation of information in proxy statement.

* * * * *

(g) If the proxy statement includes a security holder proposal providing that the registrant become subject to the security holder nomination procedure in § 240.14a–11 that was submitted pursuant to § 240.14a–8 by any security holder or group of security holders that has held more than 1% of the securities entitled to vote on that proposal for at least one year as of the date of the nomination and has provided evidence of such holding to the registrant, the registrant must disclose that the security holder vote on that proposal may determine whether the registrant will become subject to the security holder nomination procedure pursuant to § 240.14a–11 for the annual (or, in lieu of annual, special) meetings at which directors are elected during the remainder of the calendar year in which the subject vote was held, the following calendar year and the portion of the next calendar year up to and including the annual meeting (or special meeting held in lieu of an annual meeting) during that calendar year.

(h) If the registrant received a security holder nomination that indicated that it was submitted pursuant to § 240.14a–11 and the registrant determined that it was not required to include that nominee in its proxy materials, describe the determination made by the registrant's board of directors (including an affirmative statement of its determination not to include that specific nominee), discuss the specific provisions of § 240.14a–11 that the registrant's board of directors relied upon to exclude the nominee, and discuss the specific basis for the belief of the registrant's board of directors that the registrant is permitted to not include that nominee in its proxy materials.

8. By amending § 240.14a–6 to:

a. Redesignate paragraphs (a)(4), (a)(5) and (a)(6) as paragraphs (a)(5), (a)(6) and (a)(7) respectively;

b. Add new paragraph (a)(4);

c. Add a sentence at the end of Note 3; and

d. Add paragraphs (p) and (q).

The additions read as follows:

§ 240.14a–6 Filing requirements.

(a) * * *

(4) The name of a security holder nominee is included pursuant to § 240.14a–11.

* * * * *

Note 3. Solicitation in Opposition. * * * The inclusion of a security holder nominee in the registrant's proxy materials pursuant to § 240.14a–11 does not constitute a ''solicitation in opposition,'' even if the registrant opposes the security holder nominee and solicits against the security holder nominee and in favor of a registrant nominee.

* * * * *

(p) *Solicitations subject to § 240.14a–11.* Solicitations that are published or sent or given to security holders in connection with § 240.14a–11 must be filed with the Commission as specified in that section.

(q) *Security holder notice of intent to nominate a candidate for director under § 240.14a–11.* Any notice sent to a registrant by a security holder or group of security holders indicating an intent to nominate a candidate for director in accordance with the procedure set forth in § 240.14a–11 must be filed with the Commission no later than two business days after it is first provided to the registrant. For purposes of Regulation 14A (§ 240.14a–1—103), the notice filed pursuant to this requirement shall be deemed a solicitation.

9. By amending § 240.14a–8 to:

a. Revise paragraph (i)(8); and

b. Add an Instruction to paragraph (i)(11).

The revision and addition read as follows:

§ 240.14a–8 Security holder proposals.

* * * * *

(i) * * *

(8) *Relates to election:* If the proposal relates to an election for membership on the company's board of directors or analogous governing body, except that a company may not exclude a proposal that would subject the company to § 240.14a–11 on the basis of this paragraph;

* * * * *

(11) * * *

Instruction to paragraph (i)(11): For purposes of this paragraph, a proposal requesting that the company become subject to the security holder nomination procedure set out in § 240.14a–11 that is submitted by a more than 1% security holder may not be excluded on the basis that it duplicates a previously submitted proposal by a security holder that holds 1% or less of the registrant's securities. In this instance, the earlier submitted proposal by a security holder that holds 1% or less of the registrant's securities may be excluded under this paragraph.

* * * * *

10. By adding § 240.14a–11 to read as follows:

§ 240.14a–11 Security holder nominations.

(a) *Applicability.* In connection with an annual meeting of security holders (or, in lieu of an annual meeting, a special meeting) at which directors are elected, a registrant will be required to include in its proxy statement and form of proxy the name of a person or persons nominated by a security holder or group of security holders for election to the board of directors and include in its proxy statement the disclosure about such nominee or nominees and the nominating security holder or holders that is specified in paragraphs (c)(7), (c)(8), (c)(9) and (c)(10) of this section and, if the registrant includes a statement supporting the registrant's nominee(s) and/or opposing the security holder nominee or nominees, at the election of the nominating security holder or nominating security holder group, a statement of support for the security holder nominee or nominees, of a length not to exceed 500 words, provided that:

(1) Applicable state law does not prohibit the registrant's security holders from nominating a candidate or candidates for election as a director;

(2) One or more of the following events has occurred during the calendar year in which the meeting that is the subject of the proxy statement is being held or during either of the preceding two calendar years:

(i) At least one of the registrant's nominees for the board of directors for whom the registrant solicited proxies received ''withhold'' votes from more than 35% of the votes cast at an annual meeting of security holders (or, in lieu of an annual meeting, a special meeting) held after January 1, 2004, at which directors were elected (provided, that this event will be deemed not to occur with regard to any contested election to which § 240.14a–12(c) applies or an election to which this section applies); or

(ii) A security holder proposal providing that the registrant become subject to § 240.14a–11 that was submitted pursuant to § 240.14a–8 by a security holder or group of security holders that held more than 1% of the securities entitled to vote on that proposal for at least one year as of the date the proposal was submitted and provided evidence of such holding to the registrant, received more than 50% of the votes cast on that proposal at an annual meeting of security holders (or, in lieu of an annual meeting, a special meeting) held after January 1, 2004; and

(3) No security holder nominee is required to be included on the registrant's proxy card, and no disclosure regarding such nominee is required to be included in the registrant's proxy statement, in the event of one or more of the following:

(i) The nominee's candidacy or, if elected, board membership, would violate controlling state law or federal law or rules of a national securities exchange or national securities association applicable to the registrant (other than rules of a national securities exchange or national securities association regarding director independence);

(ii) Any information required to be included in the notice to the registrant required pursuant to paragraph (c) of this section is not so included;

(iii) Any representation required to be included in the notice to the registrant required pursuant to paragraph (c) of this section is false in any material respect; or

(iv) A nominee is not required to be included pursuant to the provisions of paragraph (d) of this section limiting the number of nominees required to be included.

Instructions to paragraph (a).

1. For purposes of paragraph (a)(2)(ii) of this section, the amount of a person's security ownership and the duration of that ownership shall be calculated as of the date that person submits the proposal to the registrant.

2. For purposes of paragraph (a)(2)(ii) of this section, only votes for and against a proposal shall be included in the calculation of the security holder vote on that proposal. Accordingly, abstentions and broker non-votes will not be included in this calculation.

3. A nominating security holder will not be deemed an ''affiliate'' of the registrant under the Securities Act of 1933 (15 U.S.C 77a *et seq.*.) or the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) solely as a result of nominating a director or soliciting for the election of such a director nominee or against a registrant nominee pursuant to this section. Where a security holder nominee is elected, and the nominating security holder or nominating security holder group does not have an agreement or relationship with that director, otherwise than relating to the director's nomination pursuant to § 240.14a–11, solicitation for the election of the director nominee or against a registrant nominee, or the election of the director nominee, the nominating security holder or nominating security holder group will

not be deemed an affiliate solely by virtue of having nominated that director.

4. The registrant shall determine whether any of the events permitting exclusion of a security holder nominee has occurred and shall notify the nominating security holder or nominating security holder group whether the registrant will include or exclude the security holder nominee. In the event that a registrant determines that it shall exclude the nominee, the registrant shall provide such notice promptly, but in no case less than 30 calendar days before the date of the registrant's proxy statement released to security holders in connection with the previous year's annual meeting and, where the registrant did not hold an annual meeting in the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting, the notice must be provided a reasonable time before the registrant mails its proxy materials for the current year. If the registrant determines that it is entitled to exclude the nominee, the notice must include (a) A description of the determination made by the registrant's board of directors, including an affirmative statement of its determination not to include that specific nominee; (b) a discussion of the specific requirement or requirements of § 240.14a–11 that the registrant's board of directors have determined permit the registrant not to include that specific nominee; and (c) a discussion of the specific basis for the belief of the registrant's board of directors that the registrant is permitted to not include that specific nominee. The registrant also must include in its proxy statement for the meeting for which the nominee was submitted a statement that it has made such an exclusion and provide the information included in the notice to the nominating security holder with regard to the basis for its determination to exclude the nominee. The exclusion of a security holder nominee by a registrant where that exclusion is not permissible under § 240.14a–11(a)(3) shall be a violation of this section. If the registrant determines that it must include the security holder nominee, it must advise the nominating security holder or nominating security holder group of this determination and state whether the registrant intends to include in its proxy statement disclosure supporting the registrant's nominees and/or opposing the security holder nominee. If the registrant intends to include such a supporting statement and/or opposing statement, it must advise the nominating security holder or nominating security holder group that it may submit a statement of no more than 500 words supporting the security holder nominee. The registrant also must advise the nominating security holder or nominating security holder group of the date by which this statement must be provided to the registrant, which shall be not less than 10 business days from the date of the registrant's notice to the security holder. A statement by the registrant that it recommends a vote for its nominees and/or against the nominating security holder or nominating security holder group's nominee or nominees will not be deemed an opposing or supporting statement for purposes of this requirement.

5. If any of the events described in paragraph (a)(2) of this section occur, and the registrant did not hold an annual meeting the previous year, or if the date of the current year's annual meeting has been changed by more than 30 days from the date of the previous year's annual meeting, the registrant must disclose pursuant to Item 13 of Form 8–K (§ 249.308 of this chapter) the date by which a security holder or security holder group must submit the notice required pursuant to paragraph (c) of this section, which date shall be a reasonable time prior to the date the registrant mails its proxy materials for the meeting.

(b) *Nominating security holder eligibility.* A security holder or group of security holders nominating a person or persons must satisfy the following requirements:

(1) The security holder individually, or the security holder group in the aggregate, must beneficially own more than 5% of the registrant's securities that are eligible to vote for the election of directors at that annual meeting of securities (or, in lieu of such an annual meeting, a special meeting of security holders);

(2) The security holder or each member of the security holder group must have held the securities that are used for purposes of determining the more than 5% ownership threshold required by paragraph (b)(1) of this section continuously for at least two years and intend to continue to hold those securities through the date of the subject election of directors;

(3) In the case of a registrant that is not an open-end investment company registered under the Investment Company Act of 1940, the security holder or each member of the security holder group must meet the requirements set out in § 240.13d–1(b) or (c) to file on Schedule 13G (§ 240.13d–102); and

(4) In the case of a registrant that is not an open-end investment company registered under the Investment Company Act of 1940, the nominating security holder or the nominating security holder group must have reported its beneficial ownership on Schedule 13G (§ 240.13d–102), including the certification required by Item 10(c) of Schedule 13G, or have amended a previously filed Schedule 13G to include the certification required by Item 10(c) of Schedule 13G, before or on the date of sending the notice specified in paragraph (c) of this section. Notwithstanding the provisions of Schedule 13G, the Schedule 13G filed in satisfaction of this requirement must set forth information demonstrating compliance with the requirements of paragraphs (b)(1) and (b)(2) of this section and disclose the filing person's intention to nominate one or more directors under § 240.14a–11.

(c) *Security holder notice.* In order to have a nominee included in the registrant's proxy statement and proxy card, the nominating security holder must provide notice to the registrant of its intent to require that the registrant include that security holder's nominee on the registrant's proxy card no later than 80 days before the date that the registrant mailed its proxy materials for the prior year's annual meeting, except that, if the registrant did not hold an annual meeting during the prior year, or if the date of the meeting has changed more than 30 days from the prior year, then the nominating security holder must provide notice a reasonable time before the registrant mails its proxy materials, as specified by the registrant in a Form 8–K (§ 249.308 of this chapter) filed pursuant to Item 13 of Form 8–K. This notice must include:

(1) A representation that, to the knowledge of the nominating security holder or group, the nominee's candidacy or, if elected, board membership, would not violate controlling state law or federal law or rules of a national securities exchange or national securities association applicable to the registrant (other than rules of a national securities exchange or national securities association regarding director independence);

(2) A representation that the nominating security holder or nominating security holder group satisfies the conditions in paragraph (b) of this section;

(3) A representation that:

(i) If the nominating security holder or any member of the nominating security holder group is a natural person, the

nominee is not the nominating security holder, a member of the nominating security holder group, or a member of the immediate family of the nominating security holder or any member of the nominating security holder group;

(ii) If the nominating security holder or any member of the nominating security holder group is an entity, neither the nominee nor any immediate family member of the nominee has been an employee of the nominating security holder or any member of the nominating security holder group during the then-current calendar year nor during the immediately preceding calendar year;

(iii) Neither the nominee nor any immediate family member of the nominee has accepted during the then-current calendar year or during the immediately preceding calendar year directly or indirectly any consulting, advisory, or other compensatory fee from the nominating security holder or any member of the nominating security holder group or any affiliate of any such holder or any such member, provided that compensatory fees do not include the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the nominating security holder or nominating security holder group member (provided that such compensation is not contingent in any way on continued service); and

(iv) Such nominee:

(A) Is not an executive officer or director (or person performing similar functions) of the nominating security holder or any member of the nominating security holder group, or of an affiliate of such holder or any such member; and

(B) Does not control the nominating security holder or any member of the nominating security holder group (or in the case of a holder or member that is an investment company, an interested person of such holder or any such member as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19));

Instruction to paragraph (c)(3). For purposes of paragraph (c)(3) of this section, ''immediate family'' shall include any person related to the nominee by blood, marriage, or adoption, not more remote than first cousin.

(4) In the case of a registrant other than an investment company, a representation that the nominee meets the objective criteria for ''independence'' of the national securities exchange or national securities association rules applicable to the registrant, if any, and, in the case of a registrant that is an investment company, a representation that the nominee is not an ''interested person'' of the registrant as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19));

Instruction to paragraph (c)(4). For this purpose, the nominee would be required to meet the definition of ''independence'' that generally is applicable to directors of the registrant and not any particular definition of independence applicable to members of the audit committee of the registrant's board of directors. To the extent a national securities exchange or national securities association rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board (for example, requiring that the board of directors or any group or committee of the board of directors make a determination regarding the existence of factors material to a determination of a nominee's independence), that standard would not have to be satisfied.

(5) A representation that neither the nominee nor the nominating security holder or, where there is a nominating security holder group, the members of the nominating security holder group, has a direct or indirect agreement with the registrant regarding the nomination of the nominee;

(6) In the case of a registrant that is not an open-end investment company registered under the Investment Company Act of 1940, a copy of the Schedule 13G (§ 240.13d–102) filed by the nominating security holder or nominating security holder group in satisfaction of the requirement in paragraph (b)(4) of this section;

(7) A statement from the nominee that the nominee consents to be named in the registrant's proxy statement and form of proxy and, if elected, to serve on the registrant's board of directors, for inclusion in the registrant's proxy statement;

(8) Disclosure about the nominee providing all of the information necessary to comply with the disclosure requirements of Item 7(a), (b) and (c) and, for investment companies, Item 22(b) of Schedule 14A (§ 240.14a–101), as applicable, for inclusion in the registrant's proxy statement;

(9) Any of the following information with regard to each nominating security holder or member of a nominating security holder group that is not included in the Schedule 13G (§ 240.13d–102), for inclusion in the registrant's proxy statement:

(i) Name and business address;

(ii) Present principal occupation or employment and the name, principal business and address of any corporation or other organization in which such employment is carried on;

(iii) The amount of each class of securities of the registrant that the individual owns beneficially, directly or indirectly, determined in accordance with § 240.13d–3; and

(iv) Whether or not, during the past ten years, the individual has been convicted in a criminal proceeding (excluding traffic violations or similar misdemeanors) and, if so, the dates, the nature of the conviction, the name or other disposition of the case; and whether the individual has been involved in any other legal proceeding during the past five years, as specified in Item 401(f) of Regulation S–K (§ 229.10 of this chapter);

Instruction to paragraph (c)(9). Where the nominating security holder is a general or limited partnership, syndicate or other group, the information called for in § 240.14a–11(c)(9) must be given with respect to (i) each partner of the general partnership; (ii) each partner who is, or functions as, a general partner of the limited partnership; (iii) each member of the syndicate or group; and (iv) each person controlling the partner or member. If the nominating security holder is a corporation or if a person referred to in (i), (ii), (iii) or (iv) of this Instruction is a corporation, the information called for in § 240.14a–11(c)(9) must be given with respect to (a) each executive officer and director of the corporation; (b) each person controlling the corporation; and (c) each executive officer and director of any corporation or other person ultimately in control of the corporation.

(10) The methods by which the nominating security holder or nominating security holder group may solicit security holders, including, at the election of the nominating security holder or nominating security holder group, any Web site address on which the nominating security holder or nominating security holder group may publish soliciting materials; and

(11) In the case of a registrant that is an open-end investment company registered under the Investment Company Act of 1940, the following information with regard to each nominating security holder or member of a nominating security holder group, in addition to the information required by paragraph (c)(9) of this section:

(i) The percentage of each class of securities of the registrant that the individual owns beneficially, directly or indirectly, determined in accordance with § 240.13d–3, and the number of shares as to which the person has:

(A) Sole power to vote or to direct the vote;

(B) Shared power to vote or to direct the vote;

(C) Sole power to dispose or to direct the disposition of such shares; and

(D) Shared power to dispose or to direct the disposition of such shares; and

Instruction to paragraph (c)(11)(i). For purposes of paragraph (c)(11)(i) of this section, any person, in determining the amount of outstanding securities of a class of equity securities, may rely upon information set forth in the investment company's most recent report on Form N–CSR (§§ 249.331 and 274.128) filed with the Commission pursuant to the Securities Exchange Act of 1934 and the Investment Company Act of 1940, unless he or she knows or has reason to believe that the information contained therein is inaccurate.

(ii) The following certification and signature, signed by each person on whose behalf the notice is filed or his or her authorized representative. If the notice is signed on behalf of a person by his or her authorized representative other than an executive officer or general partner of the filing person, evidence of the representative's authority to sign on behalf of such person shall be filed with the notice, provided, however, that a power of attorney for this purpose which is already on file with the Commission may be incorporated by reference. The name and any title of each person who signs the notice shall be typed or printed beneath his or her signature:

Certification

By signing below, I certify that ____% of the securities referred to above have been held continuously for at least 2 years.

Signature

After reasonable inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

_____

Date

_____

Signature

_____

Name/Title

Instruction to paragraph (c)(11)(ii). The percentage of securities listed in the certification in paragraph (c)(11)(ii) of this section shall be used both for the purpose of determining eligibility to submit a security holder nomination pursuant to this section and, where more than one eligible security holder or security holder group provides notice of its intention to submit a nomination pursuant to this section, for the purpose of determining the security holder or security holder group with the largest percentage of subject securities.

Instruction to paragraph (c). Refer to § 240.14a–6(q) with regard to the obligation of the nominating security holder or nominating security holder group to file certain of the information specified in this paragraph (c) with the Commission.

(d) *Number of security holder nominees.*

(1) The registrant is not required to include in its proxy statement and form of proxy more than:

(i) One security holder nominee where the total number of members of the registrant's board of directors is eight or fewer;

(ii) Two security holder nominees where the total number of members of the registrant's board of directors is greater than eight and less than 20; and

(iii) Three security holder nominees where the total number of members of the registrant's board of directors is 20 or more;

(2) Provided that, where the registrant has one or more directors currently serving on its board of directors who were elected as a security holder nominee pursuant to this section, and the term of that director or directors extends past the date of the meeting of security holders for which it is soliciting proxies, the registrant will not be required to include in the proxy statement or form of proxy more security holder nominees than could result in the total number of directors who were elected as security holder nominees pursuant to § 240.14a–11 and serving on the board being greater than:

(i) One where the total number of members of the board of directors is eight or fewer;

(ii) Two where the total number of members of the board of directors is greater than eight and less than 20; and

(iii) Three where the total number of members of the board of directors is 20 or more; and

(3) In the event that more than one security holder or group of security holders is otherwise permitted to nominate a person or persons to a registrant's board of directors pursuant to § 240.14a–11, the registrant shall include in the proxy statement and form of proxy the nominee or nominees of the security holder or security holder group with the largest two-year beneficial ownership at the time of the delivery of the notice specified in paragraph (c) of this section, as specified in the filed Schedule 13G (§ 240.13d–102), up to and including the total number required to be included by the registrant.

Instructions to paragraph (d).

1. If a nominee, a nominating security holder or any member of a nominating security holder group has any direct or indirect agreement with the registrant or any affiliate of the registrant regarding the nomination of a candidate for election as a member of the registrant's board of directors, any such nominee or any nominee of such nominating security holder or nominating security holder group shall not be included in calculating the number of nominees required under this section.

2. For purposes of paragraph (d)(3) of this section, the registrant must rely on the beneficial ownership percentage reported in the nominating security holder's filed Schedule 13G, except where the registrant has reason to believe that the beneficial ownership reported in the Schedule 13G is inaccurate.

(e) *Liability for false or misleading statements.* The registrant is not responsible for any information in the notice from the nominating security holder or nominating security holder group pursuant to paragraph (c) of this section or otherwise provided by the nominating security holder or nominating security holder group.

(f) *Exempt solicitations.* Sections 240.14a–3 to 240.14a–6(o), 240.14a–8, 240.14a–10 and 240.14a–12 to 240.14a–15 do not apply to the following:

(1) Any solicitation by or on behalf of any security holder in connection with the formation of a nominating security holder group pursuant to § 240.14a–11, provided that:

(i) The total number of persons solicited is not more than 30; or

(ii) Each written communication includes no more than:

(A) A statement of each soliciting security holder's intent to form a nominating security holder group in order to nominate a director under § 240.14a–11;

(B) The percentage of securities that each soliciting security holder beneficially owns or the aggregate percentage owned by any group to which the security holder belongs; and

(C) The means by which security holders may contact the soliciting party; and

(iii) Any soliciting material published, sent or given to security holders in accordance with this paragraph is filed with the Commission by the soliciting party, under the registrant's Exchange Act file number, or, in the case of a registrant that is an investment company registered under the Investment Company Act of 1940, under the registrant's Investment Company Act file number, no later than the date

the material is first published, sent or given to security holders. The soliciting material must include a cover page in the form set forth in Schedule 14A (§ 240.14a–101) and the appropriate box on the cover page must be marked; and

(2) Any solicitation by or on behalf of a nominating security holder or nominating security holder group in support of a nominee placed on the registrant's proxy card in accordance with § 240.14a–11, provided that:

(i) The soliciting party does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a security holder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization;

(ii) Each written communication includes:

(A) The identity of each nominating security holder and a description of his or her direct or indirect interests, by security holdings or otherwise;

(B) A prominent legend in clear, plain language advising security holders that a security holder nominee is or will be included in the registrant's proxy statement and to read the registrant's proxy statement when it becomes available because it includes important information (or, if the registrant's proxy statement is publicly available, advising security holders of that fact and encouraging security holders to read the registrant's proxy statement because it includes important information). The legend also must explain to security holders that they can find the registrant's proxy statement, and any other relevant documents, at no charge on the Commission's Web site; and

(iii) Any soliciting material published, sent or given to security holders in accordance with this paragraph must be filed by the nominating security holder with the Commission, under the registrant's Exchange Act file number, or, in the case of a registrant that is an investment company registered under the Investment Company Act of 1940, under the registrant's Investment Company Act file number, no later than the date the material is first published, sent or given to security holders. Three copies of the material must at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered. The soliciting material must include a cover page in the form set forth in Schedule 14A (§ 240.14a–101) and the appropriate box on the cover page must be marked.

Instruction to paragraph (f)(2). If the information required by paragraph (f)(2)(ii)(A) is presented in a Schedule 13G filed electronically with the Commission, the written communication will be deemed to satisfy the requirements of that paragraph if it states that the information is presented in a Schedule 13G, presents the file number and file date for the Schedule 13G, and presents a direct Internet address where that Schedule 13G may be located.

11. By amending § 240.14a–12 to add Instruction 3 to read as follows:

§ 240.14a–12 Solicitation before furnishing a proxy statement.

* * * * *

Instructions to § 240.14a–12:

* * * * *

3. Solicitations by a nominating security holder or nominating security holder group that are made in connection with a § 240.14a–11 nomination will not be deemed a solicitation in opposition subject to § 240.14a–12(c).

12. Amend § 240.14a–101 by:

a. Adding on the cover page two boxes before the box ''Soliciting Material under § 240.14a–12'';

b. Adding paragraph (i) to Item 7; and

c. Revising the reference ''paragraphs (d)(3), (f) and (g)'' in the introductory text of paragraph (b) of Item 22 to read ''paragraphs (d)(2), (d)(3), (f), (g), (h), and (i)''.

The additions and revision read as follows:

§ 240.14a–101—Schedule 14A. Information required in proxy statement.

SCHEDULE 14A INFORMATION

* * * * *

[ ] Soliciting Material under § 240.14a–11

[ ] Nominating Security Holder Notice Under § 240.14a–11(c)

* * * * *

Item 7. Directors and executive officers. * * *

* * * * *

(i) If a security holder nominee or nominees are submitted to the registrant and the registrant is not permitted to exclude the nominee or nominees pursuant to the provisions of § 240.14a–11, the registrant must include the disclosure required from the nominating security holder under § 240.14a–11(c)(7), (c)(8), (c)(9), (c)(10) and (c)(11), with regard to the nominee and the nominating security holder. In addition, if the registrant includes a statement supporting the registrant nominee(s) and/or opposing the security holder nominee, the registrant must also include, at the election of the nominating security holder or nominating security holder group, a statement of support for the security holder nominee, of a length not to exceed 500 words, in accordance with § 240.14a–11.

Instruction to Item 7(i). The information disclosed pursuant to paragraph (i) will not be deemed incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates that information by reference.

* * * * *

13. 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 reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except where such an investment company is required to file:

(1) Notice of a blackout period pursuant to § 245.104 of this chapter; or

(2) Disclosure pursuant to Instruction 5 to § 240.14a–11(a) of the date by which a security holder or security holder group must submit the notice required pursuant to § 240.14a–11(c).

14. By amending § 240.16a–1 to revise paragraph (a)(1) and add ''Note to Paragraph (a)(1)(ii)(K)'' to read as follows:

§ 240.16a–1 Definition of terms.

(a) * * *

(1) (i) Solely for purposes of determining whether a person is a beneficial owner of more than ten percent of any class of equity securities registered pursuant to section 12 of the Act (15 U.S.C. 78*l*), the term ''beneficial owner'' means any person who is deemed a beneficial owner pursuant to Section 13(d) of the Act (15 U.S.C 78m) and the rules thereunder, except that the institutions or persons specified in paragraph (a)(1)(ii) of this section are not deemed the beneficial owner of securities of such class:

(A) That are acquired by such institutions or persons without the purpose or effect of changing or influencing control of the issuer or engaging in any arrangement subject to § 240.13d–3(b); and

(B) With respect to the institutions or persons specified in paragraphs (a)(1)(ii)(A) through (a)(1)(ii)(J) of this section, that are held for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business (or in the case of an employee benefit plan specified in paragraph (a)(1)(ii)(F) of this section, that are allocated to plan participants where participants have voting power).

(ii) (A) A broker or dealer registered under section 15 of the Act (15 U.S.C. 78o);

(B) A bank as defined in section 3(a)(6) of the Act (15 U.S.C. 78c(a)(6));

(C) An insurance company as defined in section 3(a)(19) of the Act (15 U.S.C. 78c(a)(19));

(D) An investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8);

(E) Any person registered as an investment adviser under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3) or under the laws of any state;

(F) An employee benefit plan as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. 1001 *et seq.* (''ERISA'') that is subject to the provisions of ERISA, or any such plan that is not subject to ERISA that is maintained primarily for the benefit of the employees of a state or local government or instrumentality, or an endowment fund;

(G) A parent holding company or control person, provided the aggregate amount held directly by the parent or control person, and directly and indirectly by their subsidiaries or affiliates that are not persons specified in paragraphs (a)(1)(ii)(A) through (J) of this section, does not exceed one percent of the securities of the subject class;

(H) A savings association as defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813);

(I) A church plan that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(c)(14);

(J) A group, provided that all the members are persons specified in § 240.16a–1(a)(1)(ii)(A) through (I); and

(K) Members of a nominating security holder group formed in accordance with § 240.14a–11.

Note to paragraph (a)(1)(ii)(K). Members of a security holder group formed in order to nominate a director under § 240.14a–11 are not deemed to have the purpose or effect of changing or influencing control of the issuer solely by virtue of such group membership or by virtue of a director nomination pursuant to § 240.14a–11, a solicitation for the election of that director nominee or against that registrant nominee, or the election of that director nominee.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

15. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.,* 7202, 7233, 7241, 7262, 7264, and 7265; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

16. By amending Form 8–K (referenced in § 249.308) to:

a. Add a sentence at the end of General Instruction B.1; and

b. Add Item 13 before the ''Signature'' section.

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 pursuant to Item 13 is to be filed promptly after the registrant determines the anticipated meeting date.

* * * * *

Information To Be Included in the Report

* * * * *

Item 13. Security Holder Nominations Pursuant to Exchange Act Rule 14a–11

If any of the events described in § 240.14a–11(a)(2) occur, and the registrant did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting, then the registrant is required to disclose the date by which a security holder or security holder group must submit the notice required pursuant to § 240.14a–11(c), which date shall be a reasonable time before the registrant mails its proxy materials for the meeting.

17. By amending Item 4 to ''Part II—Other Information'' of Form 10–Q (referenced in § 249.308a) to:

a. Revise paragraph (d); and

b. Add paragraph (e).

The revision and addition read as follows:

Note: The text of Form 10–Q does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–Q

* * * * *

Part II—Other Information

* * * * *

Item 4. Submission of Matters to a Vote of Security Holders

* * * * *

(d) A description of the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (§ 240.14a–101) of Regulation 14A under the Act) terminating any solicitation subject to § 240.14a–12(c), including the cost or anticipated cost to the registrant.

(e) If the meeting involved the election of directors or a vote on a security holder proposal under § 240.14a–8 and, as a result of that vote, the registrant will become subject to the security holder nomination procedure in § 240.14a–11, provide disclosure of that result and disclose that the registrant will be subject to § 240.14a–11 for the annual (or, in lieu of annual, special) meetings at which directors are elected during the remainder of the calendar year in which the subject vote was held, the following calendar year and the next calendar year up to and including the annual meeting (or special meeting in lieu of an annual meeting) during that calendar year, and state the date by which security holders must submit their nominations.

* * * * *

18. By amending Item 4 to ''Part II—Other Information'' of Form 10–QSB (referenced in § 249.308b) to:

a. Revise paragraph (d); and

b. Add paragraph (e).

The revision and addition read as follows:

Note: The text of Form 10–QSB does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–QSB

* * * * *

Part II—Other Information

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Item 4. Submission of Matters to a Vote of Security Holders

* * * * *

(d) A description of the terms of any settlement between the registrant and any other participant (as defined in

Instruction 3 to Item 4 of Schedule 14A (§ 240.14a–101) of Regulation 14A under the Act) terminating any solicitation subject to § 240.14a–12(c), including the cost or anticipated cost to the registrant.

(e) If the meeting involved the election of directors or a vote on a security holder proposal under § 240.14a–8 and, as a result of that vote, the registrant will become subject to the security holder nomination procedure in § 240.14a–11, provide disclosure of that result and disclose that the registrant will be subject to § 240.14a–11 for the annual (or, in lieu of annual, special) meetings at which directors are elected during the remainder of the calendar year in which the subject vote was held, the following calendar year and the next calendar year up to and including the annual meeting (or special meeting in lieu of an annual meeting) during that calendar year, and state the date by which security holders must submit their nominations.

* * * * *

19. By amending Item 4 to Part I of Form 10–K (referenced in § 249.310) to:

a. Revise paragraph (d); and

b. Add paragraph (e).

The revision and addition read as follows:

Note: The text of Form 10–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–K

* * * * *

Part I

* * * * *

Item 4. Submission of Matters to a Vote of Security Holders

* * * * *

(d) A description of the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (§ 240.14a–101) of Regulation 14A under the Act) terminating any solicitation subject to § 240.14a–12(c), including the cost or anticipated cost to the registrant.

(e) If the meeting involved the election of directors or a vote on a security holder proposal under § 240.14a–8 and, as a result of that vote, the registrant will become subject to the security holder nomination procedure in § 240.14a–11, provide disclosure of that result and disclose that the registrant will be subject to § 240.14a–11 for the annual (or, in lieu of annual, special) meetings at which directors are elected during the remainder of the calendar year in which the subject vote was held, the following calendar year and the next calendar year up to and including the annual meeting (or special meeting in lieu of an annual meeting) during that calendar year, and state the date by which security holders must submit their nominations.

* * * * *

20. By amending Item 4 to Part I of Form 10–KSB (referenced in § 249.310b) to:

a. Revise paragraph (d); and

b. Add paragraph (e).

The revision and addition read as follows:

Note: The text of Form 10–KSB does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–KSB

* * * * *

Part I

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Item 4. Submission of Matters to a Vote of Security Holders

* * * * *

(d) A description of the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (§ 240.14a–101) of Regulation 14A under the Act) terminating any solicitation subject to § 240.14a–12(c), including the cost or anticipated cost to the registrant.

(e) If the meeting involved the election of directors or a vote on a security holder proposal under § 240.14a–8 and, as a result of that vote, the registrant will become subject to the security holder nomination procedure in § 240.14a–11, provide disclosure of that result and disclose that the registrant will be subject to § 240.14a–11 for the annual (or, in lieu of annual, special) meetings at which directors are elected during the remainder of the calendar year in which the subject vote was held, the following calendar year and the next calendar year up to and including the annual meeting (or special meeting in lieu of an annual meeting) during that calendar year, and state the date by which security holders must submit their nominations.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

21. The authority citation for Part 274 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l*, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.

* * * * *

22. By amending Form N–SAR (referenced in §§ 249.330 and 274.101) by:

a. Removing and reserving sub-item 77C;

b. Removing and reserving the Instruction to sub-item 77C in Instructions to Specific Items (referenced in §§ 249.330 and 274.101); and

c. Revising the Instruction to sub-item 102B in Instructions to Specific Items.

The revision reads as follows:

Note: The text of Form N–SAR does not, and this amendment will not, appear in the Code of Federal Regulations.

Form N–SAR

* * * * *

Instructions to Specific Items

* * * * *

Sub-Item 102B: Submission of Matters to a Vote of Security Holders

If any matter has been submitted to a vote of security holders during the period covered by this report, through the solicitation of proxies or otherwise, furnish the following information:

(a) The date of the meeting and whether it was an annual or special meeting.

(b) If the meeting involved the election of directors, the name of each director elected at the meeting and the name of each other director whose term of office as a director continued after the meeting.

(c) A brief description of each matter voted upon at the meeting and state the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes, as to each such matter, including a separate tabulation with respect to each nominee for office.

(d) A description of the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (§ 240.14a–101) of Regulation 14A under the 1934 Act) terminating any solicitation subject to Rule 14a–12(c) under the 1934 Act (17 CFR 240.14a–12(c)), including the cost or anticipated cost to the registrant.

(e) If the meeting involved the election of directors or a vote on a security holder proposal under § 240.14a–8 under the 1934 Act (17 CFR 240.14a–8) and, as a result of that vote, the registrant will become subject to the security holder nomination procedure

in Rule 14a–11 under the 1934 Act (17 CFR 240.14a–11), provide disclosure of that result and disclose that the registrant will be subject to Rule 14a–11 under the 1934 Act for the annual (or, in lieu of annual, special) meetings at which directors are elected during the remainder of the calendar year in which the subject vote was held, the following calendar year and the next calendar year up to and including the annual meeting (or special meeting in lieu of an annual meeting) during that calendar year, and state the date by which security holders must submit their nominations.

Instructions

1. If any matter has been submitted to a vote of security holders otherwise than at a meeting of such security holders, corresponding information with respect to such submission shall be furnished. The solicitation of any authorization or consent (other than a proxy to vote at a stockholders' meeting) with respect to any matter shall be deemed a submission of such matter to a vote of security holders within the meaning of this item.

2. Paragraph (a) need be answered only if paragraph (b) or (c) is required to be answered.

3. Paragraph (b) need not be answered if (i) proxies for the meeting were solicited pursuant to Regulation 14A under the 1934 Act, (ii) there was no solicitation in opposition to the management's nominees as listed in the proxy statement, and (iii) all of such nominees were elected. If the registrant did not solicit proxies and the board of directors as previously reported to the Commission was re-elected in its entirety, a statement to that effect in answer to paragraph (b) will suffice as an answer thereto.

4. Paragraph (c) must be answered for all matters voted upon at the meeting, including both contested and uncontested elections of directors.

5. If the registrant has furnished to its security holders proxy soliciting material containing the information called for by paragraph (d), the paragraph may be answered by reference to the information contained in such material.

6. If the registrant has published a report containing all of the information called for by this item, the item may be answered by a reference to the information contained in such report.

23. By amending Form N–CSR (referenced in §§ 249.331 and 274.128) by adding text to Item 8 to read as follows:

Note: The text of Form N–CSR does not, and this amendment will not, appear in the Code of Federal Regulations.

Form N–CSR

* * * * *

Item 8. Submission of Matters to a Vote of Security Holders.

If any matter has been submitted to a vote of security holders during the period covered by this report, through the solicitation of proxies or otherwise, furnish the following information:

(a) The date of the meeting and whether it was an annual or special meeting.

(b) If the meeting involved the election of directors, the name of each director elected at the meeting and the name of each other director whose term of office as a director continued after the meeting.

(c) A brief description of each matter voted upon at the meeting and state the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes, as to each such matter, including a separate tabulation with respect to each nominee for office.

(d) A description of the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (§ 240.14a–101) of Regulation 14A under the Exchange Act) terminating any solicitation subject to Rule 14a–12(c) under the Exchange Act (17 CFR 240.14a–12(c)), including the cost or anticipated cost to the registrant.

(e) If the meeting involved the election of directors or a vote on a security holder proposal under § 240.14a–8 under the Exchange Act (17 CFR 240.14a–8) and, as a result of that vote, the registrant will become subject to the security holder nomination procedure in Rule 14a–11 under the Exchange Act (17 CFR 240.14a–11), provide disclosure of that result and disclose that the registrant will be subject to Rule 14a–11 under the Exchange Act for the annual (or, in lieu of annual, special) meetings at which directors are elected during the remainder of the calendar year in which the subject vote was held, the following calendar year and the next calendar year up to and including the annual meeting (or special meeting in lieu of an annual meeting) during that calendar year, and state the date by which security holders must submit their nomination.

Instructions

1. If any matter has been submitted to a vote of security holders otherwise than at a meeting of such security holders, corresponding information with respect to such submission shall be furnished. The solicitation of any authorization or consent (other than a proxy to vote at a stockholders' meeting) with respect to any matter shall be deemed a submission of such matter to a vote of security holders within the meaning of this item.

2. Paragraph (a) need be answered only if paragraph (b) or (c) is required to be answered.

3. Paragraph (b) need not be answered if (i) proxies for the meeting were solicited pursuant to Regulation 14A under the Exchange Act, (ii) there was no solicitation in opposition to the management's nominees as listed in the proxy statement, and (iii) all of such nominees were elected. If the registrant did not solicit proxies and the board of directors as previously reported to the Commission was re-elected in its entirety, a statement to that effect in answer to paragraph (b) will suffice as an answer thereto.

4. Paragraph (c) must be answered for all matters voted upon at the meeting, including both contested and uncontested elections of directors.

5. If the registrant has furnished to its security holders proxy soliciting material containing the information called for by paragraph (d), the paragraph may be answered by reference to the information contained in such material.

6. If the registrant has published a report containing all of the information called for by this item, the item may be answered by a reference to the information contained in such report.

* * * * *

Dated: October 14, 2003.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–26351 Filed 10–22–03; 8:45 am]

BILLING CODE 8010–01–P

Federal Register

Thursday,
October 23, 2003

Part III

Department of Education

Rehabilitation Continuing Education Programs; Institute on Rehabilitation Issues; Notice Inviting Applications for New Awards for Fiscal Year 2004; Notices

DEPARTMENT OF EDUCATION

RIN 1820–ZA14

Rehabilitation Continuing Education Programs

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice of final priorities.

SUMMARY: The Assistant Secretary for the Office of Special Education and Rehabilitative Services announces priorities under the Rehabilitation Continuing Education Programs. The Assistant Secretary may use these priorities for competitions in fiscal year (FY) 2004 and in later years.

We take this action to focus on training in areas of national need. The purpose of these priorities is to select entities to provide leadership for the Institute on Rehabilitation Issues (IRI) topic study groups and to plan and conduct the National IRI Forum. We intend these priorities to meet the needs of our customers by improving the responsiveness of the IRI study process to changes in the field of vocational rehabilitation (VR).

EFFECTIVE DATE: These priorities are effective November 24, 2003.

FOR FURTHER INFORMATION CONTACT: Christine Marschall, U.S. Department of Education, 400 Maryland Avenue, SW., room 3325, Switzer Building, Washington, DC 20202–2649. Telephone: (202) 205–2779 or via Internet: *Christine.Marschall@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the TDD number at (202) 205–8133.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION: The Institute on Rehabilitation Issues (IRI) has operated for over 55 years, bringing together subject experts from across the field of disability to form Primary Study Groups (PSG) to research, study, and prepare a written summary on a nationally selected topic of interest. Each PSG's project is presented for final feedback, commentary, and editing suggestions at the National IRI Forum, an annual meeting held annually in Washington, DC, to solicit input from rehabilitation constituents, professionals and interested others. The final documents produced through the IRI are used widely throughout the field of public rehabilitation.

We published a notice of proposed priorities for this program in the **Federal Register** on June 19, 2003 (68 FR 36876). The notice of proposed priorities included a discussion of the significant issues and analysis used in the determination of these priorities.

Except for minor editorial and technical revisions, there are no differences between the notice of proposed priorities and this notice of final priorities.

Public Comment

In the notice of proposed priorities, we invited comments on the proposed priorities. We did not receive any comments.

Note: This notice does *not* solicit applications. In any year in which we choose to use one or more of these priorities, we invite applications through a notice in the **Federal Register**. When inviting applications we designate each priority as absolute, competitive preference, or invitational. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by either (1) awarding additional points, depending on how well or the extent to which the application meets the competitive priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the competitive priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the invitational priority. However, we do not give an application that meets the invitational priority a competitive or absolute preference over other applications (34 CFR 75.105(c)(1)).

Priorities

Priority 1—Leadership of IRI Primary Study Group

This priority funds projects to lead a PSG on a topic selected by the IRI Planning Committee. Projects must demonstrate the ability to provide leadership to members of the PSG that results in the production of a high quality document in the assigned topic area. Projects must ensure that documents are relevant to the public rehabilitation system and to the work of VR counselors and accurately interpret and integrate the current body of knowledge of the selected topic contained in published professional research and demonstrations.

Specifically, projects must demonstrate an in-depth knowledge of and understanding of relevant current and emerging issues in the public rehabilitation system, the public VR program, and the continuing education needs of VR personnel and related professionals. Projects must have the demonstrated ability to direct a rehabilitation research investigation in cooperation with a variety of experienced participants.

Projects must provide leadership to all phases of the IRI process, including assisting PSG members to define the areas of focus for the designated topic, to identify and address the continuing education needs of personnel of the public rehabilitation system, and to plan and write the project document. Projects must ensure that the group product meets the expectation of the IRI Planning Committee in terms of content areas and depth of review. At the conclusion of the National IRI Forum, projects must submit the final version of the IRI document to the Rehabilitation Services Administration for approval. Projects must distribute the approved document to State VR agencies and to others in an accessible format on request for use in staff development, training, and service planning.

Projects must include a plan to meet the communication, coordination, logistical, and budgetary requirements necessary to conduct at least three in-person meetings of the PSG, one of which must take place at the National IRI Forum in Washington, DC, at the end of the project year.

Priority 2—Leadership of the National IRI Forum

This priority funds projects to plan and to lead the annual National IRI Forum of PSG members and other stakeholders in each year of the project period. Projects must demonstrate in-depth knowledge of current, relevant issues in the public rehabilitation system and of methods to facilitate professional development and continuing education activities. Project staff, in cooperation with the IRI Planning Committee, must identify and solicit key stakeholders to provide input and feedback on selected IRI topics, and facilitate discussion and input sessions of diverse individuals with a wide variety of backgrounds so that each of the two IRI PSGs receives feedback on its draft document in a collaborative and positive manner.

Projects must provide a detailed plan for all aspects of the planning and coordination of the meeting, including, but not limited to, facilitation of document feedback sessions, site planning, coordination of accommodations and travel for PSG members funded by the project, coordination of accommodations

requested by other participants, and the provision of on-site support services, including the provision of reasonable accommodations upon request. Projects must include a description of a process and methods that will result in high quality input on the IRI documents presented for review.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Applicable Program Regulations: 34 CFR parts 385 and 389.

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/news/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.gpoaccess.gov/nara/index.html.*

Program Authority: 29 U.S.C. 772.

(Catalog of Federal Domestic Assistance Number 84.264A–3 Rehabilitation Continuing Education Programs)

Dated: October 17, 2003.

Robert H. Pasternack,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 03–26701 Filed 10–22–03; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[CFDA No.: 84.264A–3]

Rehabilitation Continuing Education Programs (RCEP)—Institute on Rehabilitation Issues (IRI); Notice Inviting Applications for New Awards for Fiscal Year (FY) 2004

Purpose of Program: The Rehabilitation Continuing Education Programs—

(a) Train newly employed State agency staff at the administrative, supervisory, professional, paraprofessional, or clerical levels in order to develop needed skills for effective agency performance;

(b) Provide training opportunities for experienced State agency personnel at all levels of State agency practice to upgrade their skills and to develop mastery of new program developments dealing with significant issues, priorities, and legislative thrusts of the State and Federal vocational rehabilitation program; and

(c) Develop and conduct training programs for staff of—

(1) Private rehabilitation agencies and facilities that cooperate with State vocational rehabilitation units in providing vocational rehabilitation and other rehabilitation services;

(2) Centers for independent living; and

(3) Client assistance programs.

For FY 2004, the competition for new awards focuses on projects designed to meet the priorities we reference in the PRIORITIES section of this application notice.

Eligible Applicants: States and public or nonprofit agencies and organizations, including Indian tribes and institutions of higher education.

Applications Available: October 31, 2003.

Deadline for Transmittal of Applications: January 8, 2004.

Deadline for Intergovernmental Review: March 8, 2004.

Estimated Available Funds: The Administration has requested $42,629,000 for the Rehabilitation Training Programs for FY 2004, of which an estimated $190,000 would be allocated for this competition. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Estimated Range of Awards: $75,000–$125,000.

Estimated Average Size of Awards: $80,000.

Estimated Number of Awards: 3. We expect to fund two awards under Priority 1 and one award under Priority 2.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit Part III to the equivalent of no more than 45 pages, using the following standards:

(1) A page is 8.5″ by 11″, on one side only, with 1″ margins at the top, bottom, and both sides.

(2) Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.

(3) Use a font that is either 12-point or larger or no smaller than 10 pitch (characters per inch).

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, you must include all of the application narrative in Part III.

We will reject your application if—

- You apply these standards and exceed the page limit; or
- You apply other standards and exceed the equivalent of the page limit.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 85, and 86. (b) The regulations for this program in 34 CFR parts 385 and 389.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

Selection Criteria: In evaluating an application for a new grant under this competition, we use the selection criteria in 34 CFR 385.31 and 389.30. The selection criteria to be used for this competition will be provided in the application package for this competition.

Priorities

This competition focuses on projects designed to meet the priorities in the notice of final priorities for this program, published elsewhere in this issue of the **Federal Register**.

For FY 2004, these priorities are absolute priorities. Under 34 CFR

75.105(c)(3), we consider only applications that meet one or more of the priorities.

Application Procedures

Note: Some of the procedures in these instructions for transmitting applications differ from those in the Education Department General Administrative Regulations (EDGAR) (34 CFR 75.102). Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed regulations. However, these amendments make procedural changes only and do not establish new substantive policy. Therefore, under 5 U.S.C. 553(b)(A), the Secretary has determined that proposed rulemaking is not required.

Governmentwide Grants.gov Project for Electronic Submission of Applications

We have been accepting applications electronically through the Department's e-Application system since FY 2000. In order to expand on those efforts and comply with the President's Management Agenda, we are participating as a partner in the new governmentwide Grants.gov Apply site in FY 2004. The Rehabilitation Continuing Education Programs (RCEP)—Institute on Rehabilitation Issues (IRI), CFDA number 84.264A–3, is one of the programs included in this project. If you are an applicant under RCEP—IRI, you may submit your application to us in either electronic or paper format.

The project involves the use of the Grants.gov Apply site (Grants.gov). If you use Grants.gov, you will be able to download a copy of the application package, complete it offline, and then upload and submit the application via the Grants.gov site. You may not e-mail an electronic copy of a grant application to us. We request your participation in Grants.gov.

If you participate in Grants.gov, please note the following:

- Your participation is voluntary.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation. We strongly recommend that you do not wait until the application deadline date to begin the application process through Grants.gov.
- To use Grants.gov, you, as the applicant, must have a D–U–N–S Number and register in the Central Contractor Registry (CCR). You should allow a minimum of five days to complete the CCR registration.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You may submit all documents electronically, including all information typically included on the Application for Federal Education Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- Your application must comply with any page limit requirements described in this notice.
- After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Department will retrieve your application from Grants.gov and send you a second confirmation, which will include a PR/Award number (an ED-specified identifying number) unique to your application.
- We may request that you give us original signatures on forms at a later date.
- If you experience technical difficulties on the application deadline date and are unable to meet the 4:30 p.m. (Washington, DC time) deadline, print out your application and follow the instructions included in the application package for the transmittal of paper applications.

You may access the electronic grant application for RCEP—IRI at: *http://www.grants.gov.*

Note: Please note that you must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha letter in your search.

For Applications Contact: Education Publications Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), you may call (toll free): 1–877–576–7734.

You may also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs.html.*

Or you may contact ED Pubs at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.264A–3.

Individuals with disabilities may obtain a copy of the application package in an alternative format by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 3317, Switzer Building, Washington, DC 20202–2550. Telephone: (202) 205–8207. If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339. However, the Department is not able to reproduce in an alternative format the standard forms included in the application package.

FOR FURTHER INFORMATION CONTACT: Christine Marschall, U.S. Department of Education, 400 Maryland Avenue, SW., room 3325, Switzer Building, Washington, DC 20202–2649. Telephone: (202) 205–8926 or via Internet: *Christine.Marschall@ed.gov.*

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

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

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/news/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.gpoaccess.gov/nara/index.html.*

Program Authority: 29 U.S.C. 772.

Dated: October 17, 2003.

Robert H. Pasternack,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 03–26702 Filed 10–22–03; 8:45 am]

BILLING CODE 4000–01–P

Federal Register

Thursday,
October 23, 2003

Part IV

Department of Transportation

Federal Aviation Administration

14 CFR Parts 91, 121 and 135

Air Tour Operators in the State of Hawaii; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 91, 121 and 135

[Docket No. FAA–2003–14830; Special Federal Aviation Regulation (SFAR) No. 71]

RIN 2120–AH02

Air Tour Operators in the State of Hawaii

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This final rule continues the existing safety requirements in Special Federal Aviation Regulation No. 71 (SFAR 71) and eliminates the termination date for SFAR 71. The procedural, operational, and equipment safety requirements of SFAR 71 will continue to apply to Parts 91, 121, and 135 air tour operators in Hawaii. SFAR 71 does not apply to operations conducted under part 121 in airplanes with a passenger-seating configuration of more than 30 seats and a payload capacity of more than 7,500 pounds or to flights conducted in gliders or hot air balloons.

DATES: This final rule is effective October 26, 2003.

FOR FURTHER INFORMATION CONTACT: Alberta Brown, Aviation Safety Inspector, Air Transportation Division, AFS–200, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; Telephone (202) 267–8321, or by e-mail at *Alberta.Brown@faa.gov.*

SUPPLEMENTARY INFORMATION:

Availability of the Rulemaking Documents

You can download an electronic copy of this final rule through the Internet by:

(1) Searching the Department of Transportation's (DOT) electronic Docket Management System (DMS) Web page (*http://dms.dot.gov/search*); by going to the DOT in person; or by requesting by mail to DOT at 400 Seventh Street, SW., Washington, DC 20590;

(2) Visiting the Office of Rulemaking's Web page at *http://www.faa.gov/avr/armhome.htm;* or

(3) Accessing the **Federal Register**'s Web page at *http://www.access.gpo.gov/su_docs/aces/aces140.html.*

You also can get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure you put docket number FAA–2003–14830 on your request, to identify this rulemaking.

You may review the public docket containing this final rule, any comments received, and any final disposition, in person in the Docket Management System office (*see* address above) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone is able to search the electronic form of all comments received into our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Statement in the **Federal Register** published on April 11, 2000 (volume 65, Number 70, pages 19477–78), or you may visit *http://dms.dot.gov.*

Small Entity Inquiries

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires the FAA to comply with small entities requests for information or advice about compliance with statutes and regulations within its jurisdiction. Internet users can find additional information on SBREFA on the FAA's Web page at *http://www.2faa.gov/avr/arm/sbref.htm.* Persons without Internet access may call the office of rulemaking at (202) 267–8677 for more information.

Background

On August 8, 2003, the FAA published a notice of proposed rulemaking (NPRM) that would continue the safety requirements of SFAR 71 and eliminate its termination date. (68 FR 47269) The FAA omitted the Regulatory Flexibility Analysis from the final document. Therefore, on August 20, 2003, the FAA published a correction to the proposed rule including the Regulatory Flexibility Analysis (68 FR 50085).

Summary of Comment on the Proposal

Note: ''Petitioners'' as used in this summary of comments refers to the 15 petitioners who filed a petition for rulemaking to operate helicopters at 300 feet above uncongested terrain, dated October 15, 2002, Docket FAA–2002–13959. The petition may also be reviewed in Docket FAA–2003–14830. All material and relevant comments have been reviewed. Most of the comments raised issues that the FAA has already addressed in prior rulemakings regarding this SFAR.

Eliminate SFAR 71

Some commenters want SFAR 71 eliminated completely. They maintain that the air tour operators in Hawaii should be allowed to operate under parts 91 and 135 like the rest of the air tour operators in the United States. They claim that the SFAR's additional requirements have not reduced the accident rate, or fatalities, and may have contributed to accidents and fatalities. These commenters believe that restrictions are unnecessary because SFAR 71 adds to pilot workload and fatigue. These commenters argue that pilot judgment should dictate altitude and standoff distances, not the SFAR, in accordance with regulatory practices and flight conditions. Some individual pilots state that the SFAR's 1500-foot altitude minimum has forced them into controlled airspace to maintain cloud clearance. They also state the SFAR's minimum altitude requirements increase the possibility of flying inadvertently into instrument meteorological conditions.

FAA Response

The issues from the comments summarized above have been addressed in prior rulemakings concerning SFAR 71. Commenters have provided no new information.

SFAR 71 as a Noise Abatement Rule

Some commenters continue to refer to SFAR 71 as a noise abatement regulation and ask the FAA to continue the rule or enhance it. Others maintain that SFAR 71 was issued to address noise and environmental issues, not safety, and want the SFAR eliminated. Elected officials and environmental groups characterize SFAR 71 as reducing noise pollution in Hawaii's national parks, forests, and scenic wildlife areas and ask for its continuation or enhancement.

FAA Response

In 1994, the FAA issued SFAR 71 as an emergency final rule because of the increase in the number of fatal accidents involving air tour aircraft during the period 1991–1994 and the causes of those accidents. The FAA extended the SFAR in 1997 and 2000 to keep the SFAR's safety requirements in place. There were Congressional concerns that noise could be addressed at the same time, but noise was not the reason for issuing the rule. The FAA's mandate for this rulemaking was safety. The comments regarding noise, noise impacts, and noise benefits are speculative.

Commenters Proposing Changes to SFAR 71

Elected officials, the Sierra Club, and some commenters seek elimination of the SFAR's 500-foot deviations or ''exemptions'' from the minimum altitude requirements. They believe that eliminating the deviations would mean less noise and less impact on the human environment, forests, and plants of Hawaii.

Elected officials and other commenters oppose petitioners' request that the FAA amend the SFAR to allow tour helicopter flights at 300 feet above uncongested terrain because they believe noise would increase.

Still other elected officials and commenters want to raise the SFAR's minimum altitudes because they believe air tour operations at higher altitudes would generate less noise.

Still other commenters request that overflights of national parks in Hawaii be eliminated.

The petitioners and some commenters want to lower minimum altitudes and standoff distances for helicopters because that would allow helicopters to fly comfortably in the rainforest and away from populated noise-sensitive areas. They claim it would greatly reduce air traffic in the SFAR's flight corridors.

FAA's Response

SFAR 71 continues to serve a safety purpose. The FAA chooses to continue the altitude minimums and the deviation authority of SFAR 71 for safety reasons. The minimum altitude and standoff distances provide pilots with more time to make decisions, to recover in the event of an error, or land in the event of an emergency. Because the FAA maintains control of deviations, they reduce the potential for congestion over a particular site at the SFAR's 1500-foot altitude while still allowing for a safe landing in the event of engine failure. The SFAR's regulatory safety requirements were promulgated based on NTSB safety recommendations. We disagree that the minimum altitudes and stand off distances should be increased, or decreased, for alleged noise benefits. Noise abatement is beyond the scope of this rulemaking.

Overflights of the national parks are part of the national airspace system. The National Parks Air Tour Management Act of 2000 (the Act) was enacted on April 5, 2000. The Act applies to any person who conducts a commercial air tour operation over a unit of the National Park System, over tribal lands that are within or abutting a unit of the National Park System, or any area within ½ mile outside a unit of the National Park System. The regulations codifying the National Parks Air Tour Management Act of 2000 can be found in Title 14, Code of Federal Regulations, Part 136. The FAA has no mandate to eliminate overflights of national parks. Banning or restricting air tour aircraft from national parks, or other areas, for asserted noise benefits or to avoid asserted impacts, is beyond the scope of this rule.

The national parks in Hawaii will be subject to the development of an ATMP under 14 CFR Part 136 (67 FR 65667; October 25, 2002). The FAA encourages persons interested in the development of these ATMPs to visit the Web site at *http://www.atmp.faa.gov.* There you may search by individual park for the status of any ATMP development.

Potential for Mid-Air Collisions

Commenters' concerns on the potential for mid-air collisions can be divided into four categories:

(1) The mix of airplanes and helicopters;

(2) Congestion at the same altitude;

(3) The use of different frequencies; and

(4) Weather-related factors.

(1) Commenters state that helicopters should not be flown in an airplane environment. A helicopter pilot's initial reaction to unforecasted poor weather, and/or a mechanical problem, is to immediately descend to a lower altitude with slower airspeed. Fixed-wing aircraft do not have this option.

(2) A commenter states that the primary routes for small commuter and private fixed wing aircraft around the Hawaiian Islands are around the coastal shorelines 1000–2500 MSL. This commenter maintains that SFAR 71 places Hawaii air tour helicopters at the same altitudes, in opposite directions, and at points of no two-way communications with commuter and general aviation aircraft.

Petitioners and commenters state that because of SFAR 71's altitude requirement and the normal orographic cloud ceiling that forms along the windward sides of the Hawaiian islands, helicopter tours are often forced to fly over, or close to, coastal communities. In these circumstances, general aviation airplanes fly low to stay below the helicopters. Commenters maintain that the practice is contrary to safe practices and increases the potential risk of midair collisions as well as noise exposure.

(3) Commenters find that because one aircraft may be on a common frequency and another on an airport frequency, they may not be able to talk to each other. If these aircraft are at the same altitude, this could be a problem.

Another individual comments that the present route structures tend to concentrate air traffic too densely in certain areas presenting greater midair accident potential. Examples are the Pahoa NDM and the ''Mill'' in Hilo. At these points a pilot must fly between frequencies or off communication frequencies to monitor STID in very critical areas.

(4) Commenters also state that in marginal weather, SFAR 71 concentrates air traffic along specific routes, which is not conducive to a safe flight environment. Pilots have come close to mid-air collisions in the valleys and open areas because the SFAR requires them to maintain the same altitudes in the same areas. Pilots are forced to fly over noise sensitive areas at 1,500 feet above the surface when they could have avoided the areas if they could have flown lower and not had such cloud restriction rules.

FAA Response

The FAA is not aware of any safety issue with allowing helicopters and airplanes to operate in the same airspace in Hawaii. The air tour environment in Hawaii is ''see and be seen.'' There has been no identified problem with mid-air accidents in Hawaii; the preponderance of accidents involve weather factors and engine shutdowns with the pilot having insufficient time to recover or no place to land.

The SFAR has never prescribed routes, and this rulemaking did not propose doing so. If the FAA were to propose routes, to include frequencies, it would have to be done in a separate rulemaking.

The FAA is aware of areas all over the country where certain aircraft operate safely on different frequencies. If air tour operators have identified an issue that needs to be brought to the attention of the local flight standards district office or air traffic control facility, then those offices will work with the operators to develop a common frequency format for the areas of concern. Through their own organizations, operators can develop common frequency monitoring procedures, and in an emergency, a guard channel can be used. The FAA is not aware of any reason to develop rules that will regulate the routes in these areas, and a proposal was not included in this document.

Standoff Distances in Valleys

Commenters suggest that complying with the SFAR's 1,500-foot standoff

distances in narrow valleys makes a safe environment hazardous because they must fly in the middle of the valley rather than near the sides where there is less wind turbulence.

FAA Response

We disagree. The FAA did not propose to make changes to the standoff distances in this rulemaking. The FAA does not agree that the SFAR's standoff distances should be reduced or eliminated for valleys for the reasons discussed in this and prior rulemakings. The commenters have not presented a compelling safety argument for reducing the rule's baseline standoff distance. Generally speaking, the greater the standoff distance, the greater the chances that the pilot can avoid a collision with steep rugged terrain. The FAA has granted deviations from the baseline standoff distance after making safety assessments on a location-by-location basis.

The National Air Tour Safety Rule

A commenter states that to codify the flawed SFAR instead of designing a national air tour policy is unsound. A proposed national rule would force the FAA to provide a competent safety analysis. A national rule would eliminate the ''improper and extraordinary impact on the rulemaking process heretofore enjoyed by the Hawaii Congressional delegation.''

In a related comment, an air tour operator argues that the FAA's policy of ''equivalent level of safety'' should move the agency to either eliminate SFAR 71 or to get Part 135 in line with it, if the agency is not going to issue a national rule anytime soon.

Another commenter states that the FAA should present a new version of SFAR 71 or replace it with a national rule.

Numerous pilots state that the rule is inherently unfair. If air tour operators under Part 135 can fly at a 300-foot altitude over congested areas in the United States mainland, why should Hawaii pilots be restricted to 1,500 feet?

FAA Response

The FAA is not certain what the commenters are attempting to say in its discussion of the advantage enjoyed by Congressional interest of Hawaii, so it will not discuss that portion of the comment.

The SFAR has been in effect without substantive change since 1994, and it has been successful in reducing the rate of air tour accidents in Hawaii. This final rule continues SFAR 71 with no changes other than the elimination of the expiration date; it allows SFAR 71 to continue until further notice from the FAA. The FAA continues to work on a proposed national air tour safety rule that could, if adopted, supersede the SFAR.

To the extent that any commenter believes that it is only fair to have the altitude restriction and standoff distances in SFAR 71 apply to all part 135 air tour operators nationally, the FAA responds as follows: First, the existing SFAR and the SFAR adopted today apply to all air tour operators in Hawaii regardless of whether they are conducting tours under parts 91, 121 or 135. Second, as we have previously stated, the FAA is considering whether aviation safety requires that the longstanding air tour safety rules in Hawaii should be applied nationally and whether Part 91 commercial air tour operators should be required to operate under part 135.

The FAA disagrees with some commenters' argument that the Hawaii SFAR should be set aside until the national rule is developed. The FAA received a series of recommendations from the NTSB, which it acted on, and the resulting regulatory effort was SFAR 71. Those rules have been effective, they have withstood court challenge, and the FAA will not rescind the SFAR while it considers whether to issue a national rule.

Continue or Increase the Minimum Altitude and Standoff Distances; Eliminate the Deviation Authority of SFAR 71.

More than 100 individuals, residents of Hawaii or persons who enjoy the environment there, filed almost identical comments to support maintaining or increasing the 1500-foot altitude, eliminating the lower altitudes exceptions (deviations), and giving the state of Hawaii and the National Park Service (NPS) the ability to restrict tour overflights of state and national parks and wilderness areas. They would like the SFAR's minimum altitude increased. Further, they object to petitioners' request for an amendment that would permit a 300-foot above the surface altitude for helicopters over uncongested areas. In support, they state that ''government studies'' have demonstrated that higher minimum altitudes save lives, constant noise adversely impacts human health and can ruin the wilderness experience for hikers and campers, and overflights disrupt Hawaii's wildlife. They also note that the vibration from helicopters flying close to cliffs and precarious rock structures may cause landslides or rock falls.

FAA Response

In this rulemaking, the FAA proposed only to eliminate the expiration date. Comments regarding changing the altitude restriction or eliminating deviations are beyond the scope of this rulemaking and will not be considered.

In response to commenters who wish to give sole authority to regulate the airspace of parks to the National Park Service (NPS) or State governments, the FAA has sole and exclusive jurisdiction and control over the navigable airspace. That power cannot be delegated to the NPS or a State absent express Congressional legislation. The comments are also beyond the scope of this rulemaking. As to national parks, the FAA is working cooperatively with the NPS on development of certain air tour management plans, as required by 14 CFR part 136, National Parks Air Tour Management. This work is being conducted independently of SFAR 71, and when appropriate, public participation will be invited.

Frequency and Reporting Requirements

One individual comments that many pilots have discontinued the practice of reporting position, altitude, and direction of flight or report only the legal details required by SFAR 71.

FAA's Response

The SFAR does not require any special reporting by pilots. However, since the purpose of the comment is unclear, the FAA offers the following. As a matter of general practice, the FAA allows operators to develop standard procedures as to how they operate in the scenic areas. As long as the operating procedures are not in conflict with the regulations, the FAA generally will not be involved. If the commenter is saying that pilots are ignoring operating procedures that have been approved by the FAA as part of the operator's manual, then the FAA urges the commenter to provide the necessary information to the Flight Standards District Office for investigation and appropriate action.

Using Landmarks for Reporting Requirements

Another commenter recommends that, to the extent there is an increased risk of midair collisions, a system of common frequency and reports over landmarks should be used.

FAA's Response

Development and implementation of a procedures manual for pilots does not require regulatory action. Incorporation of landmarks and common frequencies are issues that the operators and pilots

could agree on. In fact, a procedures manual used by operators in the Grand Canyon Special Flight Rules Area was developed by the Flight Standards District Office (FSDO) in cooperation with the operators and is a primary document used in the training of new pilots.

The FAA continues to be puzzled by comments it has received on this rule proposal. On the one hand, commenters are demanding that SFAR 71 needs to be rescinded, while on the other hand, commenters seem to want more procedural regulation. The FAA is more than willing to provide additional guidance and, as a result of recent accidents and the comments received in this rulemaking, the FAA has decided to hold a series of safety meetings to discuss these issues with pilots and operators. Additional procedural guidance may result from these meetings.

Public Disclosure of SFAR 71 Rulemaking Proceedings

A commenter requests that the Administrator produce for public comment and inspection in the FAA docket all rulemaking documents related to the promulgation of SFAR 71. This commenter believes that this action would disclose the ''deficient safety analysis'' of SFAR 71 and also would highlight the Congressional pressure to limit helicopter operations in Hawaii.

FAA's Response

Commenters should be aware that the FAA rulemaking process is a public process, and issues involved with the rule are in a public docket open for all persons to review. The Congressional record and NTSB recommendations are also public documents that are readily available through the Internet.

However, deliberative material and internal FAA working documents used in the development of an NPRM or rule are not subject to public scrutiny and do not belong in the public docket. These documents are predecisional and are exempt from public review under the Freedom of Information Act. Moreover, they are not helpful to anyone since the decision of the FAA to issue a proposal may change as issues are discussed internally within the FAA.

During the development of this proposal and disposition of comments in this final rule, it has become apparent that many commenters believe SFAR 71 is a noise rule and is not related to safety. The FAA cannot change what commenters believe, nor will it try since neither this commenter nor any other commenter has provided any evidence that the FAA should support their opinions instead of the NTSB and the FAA's aviation safety expertise.

In support of commenters, it is a matter of public record that the Hawaii Congressional delegation believes low flying aircraft are causing serious noise pollution. They have written numerous pieces of correspondence to the FAA concerning this issue. Air tour operators do not need to receive copies of internal FAA documents in order to know what their delegation thinks because their public position is very clear. On the other hand, the FAA has not been directed by any act of Congress to regulate air tour operators in Hawaii for noise with the exception of the recently passed the National Parks Air Tour Management Act. That act has been codified as part 136 and its provisions were developed by a National Parks Overflights Working Group (NPOWG), which included an air tour operator from Hawaii.

No Justification for Altitude Restrictions

A commenter states that although accident statistics show that a compelling argument can be made for the life vest requirement in SFAR 71, just the opposite is true of the altitude restriction. This commenter notes that 77% of the accidents attributable to engine failures occurred before the SFAR was issued; 23% occurred afterward. The engines used in the pre-SFAR timeframe are no longer in use. The engines used predominantly in the post-SFAR timeframe have proven very reliable.

FAA's Response

The decrease in engine failures is encouraging; however, in-flight engine failures (*e.g.*, mechanical failures, fuel starvation) continue to occur.

To the extent that commenters are suggesting that the altitude restriction and associated increases in weather minimums are not necessary, the FAA disagrees. The SFAR's life vest and altitude requirements have been analyzed in the regulatory evaluation and each measure provides a safety benefit. The altitude baseline in the SFAR, which is higher than those altitudes suggested by some commenters, gives a pilot a better opportunity to make a safe landing should an engine failure occur. The FAA has granted deviations from the baseline altitude of 1,500 feet to lower altitudes based on numerous factors, including whether the terrain permits a safe landing and the performance capabilities of the aircraft.

Additional Training as an Alternative

A commenter states that given the unique terrain and climate features of Hawaii, if the FAA is really concerned about safety, it should mandate additional training instead of imposing artificial altitudes. Another commenter credits the Tour Operators Program of Safety (TOPS), that has been in effect since the mid-1990's, with providing great benefits to the safety of air tour operations in Hawaii.

FAA's Response

The FAA considered the uniqueness of Hawaii when it issued SFAR 71 in 1994. Additional training may be necessary in the future but the FAA does not consider such measures necessary at this time.

Operators are always free to provide additional training; the regulations contain only minimum requirements. The FAA encourages programs such as TOPS that can provide pilots additional training benefits and help develop a culture of compliance.

The FAA's Claim That the SFAR Has Increased Safety Is Misleading

Some commenters believe that the altitude restriction has not been the contributing cause to the decrease in accidents, but rather cite three factors: (1) Efforts of air tour operators and pilots to increase training and standards; (2) the replacement of helicopters with engines that had a high failure rate with helicopters with reliable engines; and (3) a number of safety devices, such as the use of flotation devices, that were mandated by the SFAR. This commenter states that it is the operators' opinion that the altitude restriction may have added to the accident potential.

Other commenters state that the intent of the SFAR was to reduce accidents and fatalities/injuries due to loss of power in cruise.

FAA's Response

The FAA agrees that the overall decrease in the accident rate may be due to a number of unquantifiable factors. However, as stated previously, the altitude restrictions in SFAR 71 are needed. The reasons the FAA issued the SFAR, with the altitude restriction, are articulated in the 1994 final rule and discussed in the extensions. The stated intent of the 1,500-foot altitude provision is not to prevent accidents solely due to loss of power in cruise. Comments that the SFAR increases the potential for accident have been addressed in prior rules, and the FAA disagrees with such comments.

Accident Rates

Using the figures that supported the original promulgation of SFAR 71, a commenter concludes that the accident rate for helicopters was one-fourth that of airplanes. Between 1982 and 1994, air tour airplanes had an accident rate of over 24 per million flights, and helicopters had a rate of 5.9 per million flights. This commenter maintains that the accident rates for helicopters in Hawaii were lower than many other states. Further, the commenter posits that the drop in the accident rate for helicopters is due to better equipment, not the SFAR, and that the majority of the accidents from 1982 to 1994 were because of mechanical failures.

FAA's Response

The commenter is incorrect; the analysis addresses the benefits of the rule to airplanes and helicopters separately. While the commenter correctly cites information in the FAA's 1994 regulatory evaluation (which are also incorporated in the evaluation for this rulemaking) regarding airplane and helicopter accident rates, the cited accident rates only apply to accidents attributable to weather and flying low, and are not a comprehensive rate for all accidents which the commenter apparently assumes. The FAA's estimate of accidents avoided is only based on accidents rates related to specific provisions of the rule and are not related to accidents due to mechanical failures. Since accidents attributed to mechanical failures are not included, the helicopter accident rate is not misleading.

Affordability Analysis

A commenter notes that the FAA stated that the drop in business since the enactment of the SFAR was due to the nature of tourism. This commenter claims that the majority of helicopter services have lost a great deal of income due to a lack of repeat customers because of the altitude and standoff distances. The claim is that prior to SFAR 71 almost 25% of the air tour business was made up of returning tourists.

FAA's Response

The FAA cannot use this cost estimate because the information is insufficient and undocumented. It is also at odds with a comment by a large helicopter operator that the helicopter tour industry in Hawaii ''has flown well over 80,000 hours per year in every year since 1985.''

Cost-benefit Analysis

A commenter contests ''the elusive cost-benefit analysis'' because no real analysis, statistics, or time parameters are provided. This commenter claims that the FAA promised, both in 1997 and 2000, that such an analysis would be provided in a final rule, which has not been forthcoming. The commenter further remarked that the estimated number of fatalities avoided lacked sufficient detail and another commenter questioned the basis for the accident rate referenced in the NPRM.

FAA's Response

The regulatory evaluation provided a list of all Hawaii air tour accidents related to the provisions of SFAR 71 from 1982 to June 30, 2003. The commenters included a listing of helicopter accidents in Hawaii covering the period from November 19, 1985—July 23, 2003 based on NTSB data. The FAA used the same database but for the time period of 1982-June 30, 2003 and with some differences in the results. The commenters included three helicopter accidents that the NTSB narratives do not indicate were sightseeing or air tours and therefore are not incorporated in the FAA's analysis.[1] The number of accidents, fatalities, and injuries associated with each of the major provisions of the rule were extracted and the accident rate per million air tour flights was calculated for helicopters and airplanes. The number of air tour flights was derived from the FAA's Terminal Area Forecast, the 1994 FAA final regulatory evaluation and FAA operations specification data on air tour operators.[2] The accident rate was determined for the 1982–1994 and 1995–2002 time periods. The difference between the post-SFAR and the pre-SFAR accident rates were then applied to the number of forecasted helicopter and airplane air tour flights to arrive at the estimated number of accidents that would be avoided by adoption of the minimum altitude and weather provision of the rule. The 1982–1994-accident rate related to helicopter flotation gear requirement was applied to the forecast number of helicopter flights to estimate the number of fatalities that would be avoided by adoption of the flotation gear provision.

The Final Rule

The FAA continues the safety requirements of SFAR 71 without a termination date because of the regulation's continuing success in reducing the air tour accident rate in Hawaii and the proven effectiveness of the SFAR's requirements.

Justification for Immediate Adoption

The FAA finds that good cause exists under 5 U.S.C. 553(d) for this final rule to become effective upon issuance. The FAA notes that this final rule does not change the long-standing requirements of SFAR 71 for air tour operators in Hawaii; it only eliminates the termination date.

Environmental Review

In accordance with FAA Order 1050.1D, the FAA has determined that this amendment is categorically excluded from environmental review under section 102(2)(C) of the National Environmental Policy Act. In 1994 the original SFAR 71 established procedural, operational, and equipment safety requirements for air tour aircraft in the state of Hawaii. This amendment will maintain those requirements and is part of an ongoing action. The continuation of SFAR 71 will not involve any significant impacts to the human environment and the FAA has determined that there are no extraordinary circumstances. This rule does not change the existing environment and is not likely to effect listed, endangered or threatened species. Comments requesting that the FAA ban overflights from critical habitat are beyond the scope of this rule.

Regulatory Evaluation Summary

Proposed changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall 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 Trade Agreements Act (19 U.S.C. sections 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider

[1] Accidents not identified by NTSB as air tours: LAX86FA243, LAX87FA112, and LAX01LA083. The first 2 accidents occurred in the take-off phase of operation and the third during a pre-departure check. None appear to be related to the SFAR provisions. The FAA has therefore not added these accidents to the database used in the regulatory analysis.

[2] FAA Office of Aviation, Policy, and Plans: *Terminal Area Forecast, Fiscal years 2002–2020.* Final Regulatory Evaluation, Final Regulatory Flexibility Determination, and Trade Impact Assessment: ''Air Tour Operators in the State of Hawaii'' August 1994.

international standards and, where appropriate, that they be the basis for U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Public Law 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.)

In conducting these analyses, FAA has determined this rule: (1) Has benefits that justify its costs, is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures; (2) will have a significant economic impact on a substantial number of small entities; (3) will not constitute a barrier to international trade; and (4) will not impose an unfunded mandate on state, local, or tribal governments, or on the private sector. The FAA has placed these analyses in the docket and summarized them below.

Costs

The FAA estimates the total cost of this rule at $29.8 million or $20.9 million, discounted. The costs reflect maintenance and operating costs attributable to flotation devices and life vests, operating costs required for calculating helicopter performance plans and providing a passenger briefing for emergency egress in the event of a water landing. Lost opportunity costs will also be incurred due to the minimum weather provisions.

The rule requires single-engine helicopters conducting air tours beyond the shore of any island to be either amphibious or equipped with flotation devices. The capital costs associated with this provision are reflected in the maintenance costs. In addition, there are operating costs from increased fuel consumption. The cost for required float inspections is estimated at $4.0 million over a 10-year period, $2.8 million, discounted. The helicopters will incur an operating penalty from increased fuel consumption due to the extra weight of the floats. The FAA estimates the 10-year weight-related costs at $4.6 million or $3.2 million, discounted. The total operating costs of these provisions over a 10-year period are estimated at $8.6 million or $6.0 million, discounted.

Each person on board an air tour helicopter is required to wear a life vest. Air tour operators in Hawaii had provided life vests aboard helicopters prior to the issuance of SFAR 71 in 1994 and thus already complied with the equipment requirement so there are no acquisition costs associated with this provision. Prior to SFAR 71, the life vests were stowed under the passenger's seat. Since the issuance of SFAR 71, passengers have to wear a life vest during the helicopter air tour. This results in additional continuing maintenance costs associated with these life vests since the rule requires the vests to be worn as well as a weight penalty. The 10-year cost totals $485,000 or $341,000, discounted.

Each helicopter air tour operator must develop and comply with a performance plan. The development costs have already been incurred but each pilot must complete the performance plan before each flight. The 10-year cost of preparing the performance plans are estimated at $4.9 million or $3.5 million, discounted.

The pilot in command must ensure each passenger is briefed on water ditching procedures, use of required life vests, and emergency egress from the aircraft in event of a water landing. The 10-year cost of this provision is estimated at $8.1 million or $5.7 million, discounted.

Opportunity costs will also be incurred due to the minimum weather provisions. The total lost net revenue due to cancelled air tours is estimated at $7.6 million or $5.3 million, discounted.

Benefits

The FAA has quantified the benefits of the life vests and minimum altitude provisions and estimates the monetary benefits of these provisions at $125.3 million. An estimated 39 fatalities will be avoided, if the rule is 100 percent effective. This rule would be cost beneficial if it were only 24 percent effective. The benefits of the briefing provision are reflected in the life vest provision. The benefits of the performance plan have not been quantified.

Between 1982 and 1994 there were 3 helicopter water-landing accidents in which 8 persons drowned. These 3 accidents occurred in the course of an estimated 1.176 million flights or 2.55 accidents per million helicopter air tour flights. Applying this accident rate to the forecast of 1.157 million flights over the next 10-years results in 8 fatalities averted and a monetary benefit of $24 million.

There were 7 helicopter accidents between 1982 and 1994 related to weather or flying low. These accidents resulted in 11 fatalities, 9 serious and 12 minor injuries. The helicopter air tour accident rate related to weather equaled 5.95 accidents per million flights. Between 1995 and 2002 there were 2 helicopter accidents resulting in 13 fatalities and a weather related accident rate of 2.43 accidents per million flights. The difference in accident rates was 3.514 accidents per million flights. Based on a forecast of 1.16 million helicopter tours over the next 10-years, applying this accident rate results in 4 accidents avoided and 11 fatalities averted and monetary benefits of $38.8 million.

Airplane air tour operators experienced 5 weather related accidents between 1982 and 1994 (24.04 weather-related accidents per million operations) but only 1 weather-related accident between 1995 and 2002 (6.9 weather-related accidents per million operations). These 6 accidents resulted in 39 fatalities and 4 serious injuries. The difference in accident rates was 17.14 per million operations. Applying this accident rate differential to the forecast of 183,000 flights over the next 10-years results in 3 accidents avoided and 20 fatalities averted and a monetary benefit of $62.5 million.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.'' To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The FAA conducted the required review of this rule and determined that it will have a significant economic impact on a substantial number of small entities. Accordingly, pursuant to Section 603 of the Regulatory Flexibility Act, the Federal Aviation Administration has prepared the following final regulatory flexibility analysis.

Reasons Why Agency Action Is Being Considered

The FAA will continue the existing safety standards in SFAR 71 without a termination date as a result of the reduction in accidents and incidents involving air tour operators in Hawaii and NTSB recommendations. The rationale for the major provisions of the rule are summarized below:

Safety provisions addressing the risks of beyond the shore operations. Based on an analysis of the risks of beyond the shore operations and NTSB recommendations, the FAA concludes that the benefits of these provisions justify the costs. Based on survivors' testimony, life vests alone are insufficient in preventing loss of life in helicopter accidents over water. Without floats, helicopters sink very quickly upon impact, giving occupants little time to exit the aircraft. The FAA believes that helicopter floats, in conjunction with life vests and pre-flight briefing on water ditching procedures, will significantly improve the chances of survival. Therefore, this rule requires life vests and passenger briefings for all air tours and floats for helicopters.

Provisions addressing weather. Between 1982 and 1994 there were 12 weather related accidents in Hawaii while between 1994 and 2002 there were 3 weather related accidents. This illustrates the effectiveness of the existing SFAR 71 weather related provisions and warrant their continuation.

Summary of Significant Issues Raised In Comment Period

The FAA received four comments related to economic evaluation issues, and the FAA has determined none of the comments were significant. One comment mistakenly interpreted accident rate data presented in the economic analysis to support removing the altitude restriction on helicopters. Another comment questioned the basis for the accident rate referenced in the NPRM, and a third claimed a lack of detail on the estimated number of fatalities avoided. The FAA has provided a detailed response to these comments and determined the analysis questioned is accurate and complete. A fourth comment claimed the rule has resulted in a loss of income due to a lack of repeat customers, which prior to 1994 accounted for almost 25 percent of tour business. The comment was not supported by any documentation and was contrary to a comment by a small, but well-known operator, that the helicopter tour industry in Hawaii ''has flown well over 80,000 hours per year in every year since 1985''.

Statement of Objectives and Legal Basis

The objective of this rule is to continue a higher level of safety for Hawaii air tours. Under the United States Code, the FAA Administrator is required to consider the following matter, among others, as being in the public interest: assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce. [See 49 U.S.C. § 40101(d)(1).] Additionally, it is the FAA Administrator's statutory duty to carry out her responsibilities ''in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation.'' [See 49 U.S.C. § 44701(c).] Accordingly, this rule will amend Title 14 of the Code of Federal Regulations to continue the safety requirements of air tour operations in Hawaii, without a termination date.

Description of Small Entities Affected

The FAA concludes that all of the entities affected by the rule are small according to thresholds established by the Small Business Administration (*i.e.*, employ fewer than 1,500 employees). An estimated 6 part 91 operators and 24 part 135 operators will be affected by the rule. The part 91 operators own about 11 aircraft, while the part 135 operators have about 80 aircraft. This rule will impose total annualized costs per operator of approximately $99,000. According to a Small Business Administration analysis of Bureau of Census data for non-scheduled air transportation firms, firms with fewer than 500 employees have average revenues of $1.87 million. The estimated cost to each of these small entities is approximately 5.3 percent of the average revenue of non-scheduled air transportation firms with fewer than 500 employees based on the SBA's Census data cited.

Projected Reporting, Recordkeeping and Other Compliance Requirements

The annualized cost for completing the performance plan and conducting the passenger briefing will impose average annualized costs per operator of approximately $43,500.

Overlapping, Duplicative, or Conflicting Federal Rules

The rule will not overlap, duplicate, or conflict with existing Federal Rules.

Analysis of Alternatives

Affected operators and helicopter air tour pilots have petitioned the FAA to amend SFAR 71. They argue that SFAR 71's 1,500 feet minimum altitude requirement is cumbersome and lacks flexibility in dynamic circumstances. The petitioners also maintain that allowing air tour flights as low as 300 feet above the surface would make SFAR 71 safer in certain circumstances.

The FAA has considered the petitioners' views in formulating this rule. The issues raised are similar to comments received by the agency during the three SFAR rulemaking preceding this rule. The FAA concludes that 1,500 feet provides a pilot with more distance, and thus time, to avoid an accident or to deal with an error. An altitude of 300 feet provides 80 percent less distance and thus, much less reaction time.

Affordability Analysis

The FAA lacks reliable revenue and profit data on the individual entities affected by this rule, but the estimated cost to each of these small entities is approximately 5.3 percent of the average revenue of non-scheduled air transportation firms with fewer than 500 employees based on the SBA's Census data. Hawaii air tour operators have been subject to the provisions of this rule since 1994.

Business Closure Analysis

The FAA estimates that none of the operators currently providing air tour flights will elect to stop providing the service. These operators have been complying with these provisions since 1994. While there are fewer operators today than in 1994, the cause cannot be directly attributed to SFAR 71, but rather the vagaries and nature of the tourism market. New air tour operators have entered the market after making the business decision to accept the provisions of this rule.

Disproportionality Analysis

All Hawaiian entities in the air tour market are small. Accordingly, the costs imposed by this rule will be borne almost entirely by small businesses. The estimated costs are proportional to the frequency of operations and thus the burden is not disproportionate. Air tour safety in Hawaii has been significantly improved, and the FAA believes that the only way to continue this is to maintain these higher standards on these entities.

Key Assumptions Analysis

The FAA has made several conservative assumptions in this analysis, which may have resulted in an overestimate of the costs of the rule. For example, the revenue loss resulting from tour cancellations due to the minimum flight altitude provision has been partially offset by the FAA's issuance of ''deviations'' allowing lower minimum altitudes and thus fewer tour cancellations. In addition, the FAA assumes that the pilot in command will conduct all pre-flight briefings but the provision only requires the pilot to ''ensure that each passenger has been briefed''. The briefing could be recorded or provided by a lower paid employee. Also, the helicopter life vest costs may be overestimated since there is a voluntary industry standard to which 13 helicopter tour operators subscribe that requires occupants to wear a personal flotation device.

International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, 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.

In accordance with the above statute, the FAA has assessed the potential effect of this final rule and has determined that it would have only a domestic impact and therefore no affect on any trade-sensitive activity.

Paperwork Reduction Act

SFAR 71 contains information collection requirements. OMB approval (No. 2120–0620) has been extended through January 31, 2004.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (the Act) 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 the expenditure of $100 million or more (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. The requirements of Title II do not apply.

Federalism Implications

The regulations herein will not have substantial direct effects on the State, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, the FAA certifies that this regulation will not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects

14 CFR Part 91

Aircraft, Airmen, Aviation safety.

14 CFR Part 121

Air carriers, Aircraft, Airmen, Aviation safety, Charter flights, Safety, Transportation.

14 CFR Part 135

Air taxi, Aircraft, Airmen, Aviation safety.

The Amendment

■ The Federal Aviation Administration amends 14 CFR parts 91, 121, and 135 as follows:

PART 91—GENERAL OPERATING AND FLIGHT RULES

■ 1. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120, 44101, 44111, 44701, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46502, 46504, 46506–46507, 47122, 47508, 47528–47531.

PART 121—OPERATING REQUIREMENTS: DOMESTIC FLAG, AND SUPPLEMENTAL OPERATIONS

■ 2. The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 40119, 41706, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 44901, 44903–44904, 44912, 46105.

PART 135—OPERATING REQUIREMENTS: COMMUTER AND ON-DEMAND OPERATIONS

■ 3. The authority citation for part 135 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44705, 44709, 44711–44713, 44715–44717, 44722.

■ 4. In parts 91, 121, and 135, SFAR No. 71—Special Operating Rules For Air Tour Operators In The State of Hawaii, Section 8 is revised to read as follows:

SFAR No. 71—Special Operating Rules For Air Tour Operators In The State Of Hawaii

* * * * *

Section 8. *Termination date.* This SFAR No. 71 shall remain in effect until further notice.

Issued in Washington, DC, on October 20, 2003.

Marion C. Blakey,

Administrator.

[FR Doc. 03–26836 Filed 10–21–03; 10:39 am]

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This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.nara.gov/fedreg/plawcurr.html*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.access.gpo.gov/nara/nara005.html*. Some laws may not yet be available.

H.R. 2152/P.L. 108–99

To amend the Immigration and Nationality Act to extend for an additional 5 years the special immigrant religious worker program. (Oct. 15, 2003; 117 Stat. 1176)

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