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

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 93

[Docket No. 03–081–1]

Tuberculosis in Cattle; Import Requirements

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the animal importation regulations to require that steers and spayed heifers with any evidence of horn growth that are entering the United States meet the same tuberculosis testing requirements as sexually intact animals entering the United States. In their current form, the regulations do not distinguish between steers and spayed heifers imported strictly as feeders and those with horn growth, which may be used for exhibitions, rodeos, and roping and bulldogging practices. Animals used for these purposes are often maintained longer than feeder cattle. The longer the life span of an animal, the greater the chances are that, if exposed to tuberculosis, it will contract the disease, develop generalized disease, and spread it to other animals. We believe that the risks of tuberculosis transmission associated with steers and spayed heifers with horn growth justify regulating the importation of such animals in a manner equivalent to the way we regulate sexually intact cattle, which also have longer life spans than feeder cattle and are consequently more likely to spread tuberculosis if they have been exposed to that disease. This action is necessary to reduce the risk of imported cattle transmitting tuberculosis to domestic livestock in the United States.

DATES: This interim rule is effective August 19, 2004. We will consider all comments that we receive on or before September 20, 2004.

ADDRESSES: You may submit comments by any of the following methods:

- EDOCKET: Go to *http://www.epa.gov/feddocket* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once you have entered EDOCKET, click on the ''View Open APHIS Dockets'' link to locate this document.
- Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. 03–081–1, 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. 03–081–1.
- 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. 03–081–1'' on the subject line.
- Agency Web site: Go to *http://www.aphis.usda.gov/ppd/rad/cominst.html* for a form you can use to submit an e-mail comment through the APHIS Web site.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov* and follow the instructions for locating this docket and submitting comments.

Reading Room: 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.

Other Information: You may view APHIS documents published in the **Federal Register** and related information, including the names of groups and individuals who have commented on APHIS dockets, on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html.*

FOR FURTHER INFORMATION CONTACT: Dr. Terry Beals, National Tuberculosis Program Coordinator, Eradication and Surveillance Team, National Center for Animal Health Programs, VS, APHIS, 4020 N. Lincoln Blvd., Suite 101, Oklahoma City, OK 73105; (405) 427–2998.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 9 CFR part 93 prohibit or restrict the importation of certain animals, birds, and poultry into the United States to prevent the introduction of communicable diseases of livestock and poultry. Subpart D of part 93 (§§ 93.400 through 93.435, referred to below as the regulations) governs the importation of ruminants. Section 93.406 of the regulations contains requirements for diagnostic tests for brucellosis and tuberculosis. Section 93.427 contains some additional safeguards against tick-borne diseases, brucellosis, and tuberculosis for cattle imported into the United States from Mexico.

Bovine tuberculosis is an infectious disease caused by the bacterium *Mycobacterium bovis.* Although commonly defined as a chronic debilitating disease, bovine tuberculosis can occasionally assume an acute, rapidly progressive course. While body tissue can be affected, lesions are most frequently observed in the lymph nodes, lungs, intestines, liver, spleen, pleura, and peritoneum. Although cattle are considered to be the true hosts of *M. bovis,* the disease has been reported in several other species of both domestic and nondomestic animals and in humans. Currently, all areas of the United States are considered to be free of bovine tuberculosis except for Texas, Michigan, New Mexico, and California.

Currently, the regulations for tuberculosis treat imported steers and spayed heifers differently from imported sexually intact cattle. Under § 93.406(a)(2)(i), steers and spayed heifers must have come from a herd of origin that tested negative to a whole herd test for tuberculosis within 1 year prior to the date of exportation to the United States; each of the animals must have tested negative to an additional official tuberculin test conducted within 60 days prior to the date of exportation to the United States; and any individual cattle that had been added to the herd

must have tested negative to any individual tests for tuberculosis required by the Administrator. For sexually intact cattle from an accredited herd (a herd that has passed at least two consecutive annual official tuberculin tests and has no evidence of tuberculosis), the herd must have been certified as an accredited herd for tuberculosis within 1 year prior to the date of exportation to the United States. Sexually intact cattle not from an accredited herd must have originated from a herd of origin that tested negative to a whole herd test for tuberculosis within 1 year prior to the date of exportation to the United States. Each of these animals must also have tested negative to one additional official tuberculin test conducted no more than 6 months and no less than 60 days prior to the date of exportation to the United States, unless the animals are exported within 6 months of when the herd of origin tested negative to a whole herd test, in which case the additional test is not required. In addition, any individual cattle that had been added to the herd must have tested negative to any individual tests for tuberculosis required by the Administrator.

The higher level of risk of tuberculosis transmission associated with sexually intact cattle accounts for their more stringent regulatory treatment. Steers and spayed heifers are often imported as feeders and slaughtered before the age of 2 years. They usually graze with other feeders before being taken to feedlots and, subsequently, to slaughter. Sexually intact cattle, on the other hand, are typically imported for breeding purposes, and their average life span ranges from 7 to 12 years. The longer the life span of an animal, the greater the chances are that, if exposed to tuberculosis, it will contract the disease, develop generalized disease, and spread it to other animals. In addition, since bovine tuberculosis may be spread by nursing or aerosolization, an infected breeding cow may not only spread the disease to the other breeding cattle with which she is kept, but also to her offspring or the offspring of other breeding cattle.

Some imported steers and spayed heifers, however, have also been associated with higher levels of tuberculosis risk. Cattle with horn growth (*i.e.*, cattle that are not polled or dehorned; hereafter referred to as exhibition animals) may be used for exhibitions, rodeos, and roping and bulldogging practices. Cattle used for these purposes are more expensive than feeder animals and are often maintained longer. In addition, exhibition animals are managed much differently than feeder animals. Exhibition animals are housed in or near arenas for rodeo events and practice sessions. When the season is over, these animals may be commingled with breeding animals or herds during the winter. This routine practice may be repeated over the course of 2 to 5 years. Consequently, exhibition animals have historically exhibited a significantly higher risk of spreading tuberculosis than have feeder cattle. It is our view that the risks presented by exhibition animals justify regulating their importation in a manner equivalent to the way we regulate sexually intact cattle.

In their current form, the regulations do not distinguish between steers and spayed heifers imported strictly as feeders and those whose horn growth may enable them to be used in exhibitions. Because steers or spayed heifers with horn growth are far more likely to be imported for use in exhibitions than those without horn growth, they may be associated with the additional risk factors described in the previous paragraph. Therefore, in order to offer greater protection to U.S. livestock herds against tuberculosis, we are amending the regulations in § 93.406(a)(2) to require that steers or spayed heifers intended for importation into the United States that have any evidence of horn growth meet the same tuberculosis testing requirements as sexually intact cattle imported into the United States. In addition, we are amending § 93.427(c)(3), which provides, among other things, for the detention at the U.S. port of entry of sexually intact cattle from Mexico until the cattle are tested for tuberculosis with negative results. Under this rulemaking, steers or spayed heifers from Mexico with any evidence of horn growth will also be subjected to this requirement.

Emergency Action

This rulemaking, which requires that steers and spayed heifers with any evidence of horn growth that are entering the United States meet the same tuberculosis testing requirements as sexually intact animals entering the United States, is necessary on an emergency basis to reduce the risk of imported cattle transmitting tuberculosis to domestic livestock in the United States. Under these circumstances, the Administrator has determined that there is good cause under 5 U.S.C. 553 for issuing this rule as an interim rule rather than by publishing a notice of proposed rulemaking. We are making this rule effective 30 days after publication in the **Federal Register** to provide sufficient notice of the new requirements to Mexican animal health authorities and cattle exporters.

We will consider comments we receive during the comment period for this interim rule (see **DATES** above). After the comment period closes, we will publish another document in the **Federal Register**. The document will include a discussion of any comments we receive and any amendments we are making to the rule.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

This interim rule amends the animal importation regulations in §§ 93.406 and 93.427 to require that steers and spayed heifers with any evidence of horn growth that are entering the United States meet the same tuberculosis testing requirements as sexually intact animals entering the United States. This action is necessary to reduce the risk of imported cattle transmitting tuberculosis to domestic livestock in the United States.

The cattle industry plays an important role in the U.S. economy. Cash receipts from sales of meat, animals, and milk totaled about $65 billion in 2001.[1] Additionally, cattle and related product exports generated over $3 billion in sales. Other agricultural and nonagricultural sectors are highly dependent on the cattle industry for their economic activity. Maintaining favorable economic conditions for U.S. agriculture depends, in part, on continued aggressive efforts to eradicate tuberculosis from the U.S. cattle population.

Historically, most U.S. imports of live cattle and calves have come from Canada and Mexico. The United States imported 2,502,973 live cattle and calves in 2002, which were valued at $1,447 million. Of these, 1,686,508 were from Canada, and 816,460 were from Mexico.[2] Steers and spayed heifers that have horn growth and may be used for rodeo exhibitions are most likely to come to the United States from Mexico. In 2002, the number of steers from which roping steers were likely to be

[1] USDA/ERS, U.S. and State Farm Income Data/ Farm Cash Receipts, 1924–2001, Table 5—Cash Receipts, by Commodity groups and Selected Commodities, United States and States, 1997–2001. Revised July 23, 2002.

[2] USDA/ERS, Foreign Agricultural Trade of the United States, February 2003.

drawn totaled 747,069 or 91.5 percent of total imports from Mexico.[3] Of this total, about 6 percent are believed to be roping steers.

This interim rule will result in an additional tuberculosis testing requirement for steers and spayed heifers with horn growth imported into the United States, entailing some additional costs for importers. The cost of tuberculin testing is between $7.50 and $10 per head. The weighted average price of an imported steer from Mexico, which is likely to be the source of most of the animals affected by this interim rule, in 2002 was $364. The cost of the additional tuberculosis test represents about 2.4 percent of that value. If supply does not change as a result of the cost increase, U.S. importers will incur overall additional costs of between $336,180 and $549,000 annually. The exact impact of a 2.4 percent increase in cost on the supply of cattle from Mexico is unknown, but the possibility exists that the cost increase may decrease the supply of cattle from Mexico and increase lease fees and/or roping steer purchase prices.

The Regulatory Flexibility Act requires that agencies specifically consider the economic effects of their rules on small entities. Entities that may be affected by this interim rule include U.S. order buyers that import steers from Mexico and cow-calf operations that sell steers comparable in age and size to those imported from Mexico. The Small Business Administration (SBA) classifies cow-calf and stocker operations as small entities if their annual receipts are not more than $750,000. There were 1,032,000 of these operations in the United States in 2002, and over 99 percent were considered small. This interim rule will also affect industries that purchase and lease roping steers for their shows. The number and size distributions of this industry are not available, but their sizes are likely to be small. Additionally, as these animals retire from roping service, they are likely to be sold to feedlots, so some feedlots might also be affected. The SBA classifies cattle feedlots as small entities if their annual receipts are not more than $1.5 million. There were 95,189 feedlots in the United States in 2002, of which about 93,000 (nearly 98 percent) had capacities of fewer than 1,000 head. Average annual receipts for these small feedlots totaled about $35,300, a figure well below the SBA's small-entity criterion. However, as of January 1, 2003, the remaining 2 percent of the Nation's feedlots, which had capacities of at least 1,000 head, held 82 percent of all U.S. cattle and calves on feed.

This interim rule may lead to increased costs for U.S. importers of roping steers and a decrease in the number of roping steers imported from Mexico. Any negative economic impacts for U.S. importers may be offset somewhat by the benefits that may accrue to U.S. cow-calf operations that sell or lease domestic roping steers if the price of those steers rises. In addition, if any increase in U.S. feeder cattle prices results from this rule, U.S. cow-calf and stocker domestic operations will gain from a stronger market.

The overall benefits to the U.S. livestock industry of reducing the risk of importing tuberculosis-infected cattle by requiring additional testing for steers and spayed heifers with horn growth are expected to be of far greater significance than any other economic impacts, whether positive or negative, of this interim rule.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

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

List of Subjects in 9 CFR Part 93

Animal diseases, Imports, Livestock, Poultry and poultry products, Quarantine, Reporting and recordkeeping requirements.

■ Accordingly, we are amending 9 CFR part 93 as follows:

[3] Source: Global Trade Information Services Inc., the World Trade Atlas—United States Edition, June 2003; APHIS/VS Import Tracking System National Database.

PART 93—IMPORTATION OF CERTAIN ANIMALS, BIRDS, AND POULTRY, AND CERTAIN ANIMAL, BIRD, AND POULTRY PRODUCTS; REQUIREMENTS FOR MEANS OF CONVEYANCE AND SHIPPING CONTAINERS

■ 1. The authority citation for part 93 continues to read as follows:

Authority: 7 U.S.C. 1622 and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

§ 93.406 [Amended]

■ 2. Section 93.406 is amended as follows:

■ a. In paragraph (a)(2)(i), by adding the words ''without evidence of horn growth (polled or dehorned)'' after the word ''heifers''.

■ b. In paragraph (a)(2)(ii), by adding the words ''and steers or spayed heifers with any evidence of horn growth'' after the word ''cattle''.

■ c. In paragraph (a)(2)(iii), by adding the words ''and steers or spayed heifers with any evidence of horn growth'' after the words ''intact cattle''.

§ 93.427 [Amended]

■ 3. In § 93.427, paragraph (c)(3) is amended by adding the words ''and steers or spayed heifers with any evidence of horn growth'' after the word ''cattle''.

Done in Washington, DC, this 13th day of July, 2004.

W. Ron DeHaven,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 04–16282 Filed 7–19–04; 8:45 am]

BILLING CODE 3410–34–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 36

Exempt Commercial Markets

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rulemaking.

SUMMARY: The Commodity Futures Trading Commission (''Commission'') is promulgating final rules relating to electronic trading facilities that operate in reliance on the exemption in section 2(h)(3) of the Commodity Exchange Act (''the Act''). First, the Commission is amending Rule 36.3(b), which governs Commission access to information regarding transactions on such trading facilities, to provide for access to more relevant and useful information from all such markets. Second, the Commission

is amending Rule 36.3(c)(2) to require those electronic trading facilities that operate in reliance on the exemption in section 2(h)(3) and that perform a significant price discovery function for transactions in the underlying cash market to publicly disseminate certain specified trading data. These price discovery rules are being promulgated pursuant to section 2(h)(4) of the Act, which authorizes the Commission to prescribe rules and regulations to ensure timely dissemination by such trading facilities of price, trading volume, and other trading data to the extent appropriate.

DATES: *Effective Date:* September 20, 2004.

FOR FURTHER INFORMATION CONTACT: Don Heitman, Senior Special Counsel (telephone 202–418–5041, e-mail *dheitman@cftc.gov*), Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

A. Overview

The Commodity Futures Modernization Act of 2000 (''CFMA''), appendix E of Public Law 106–554, 114 Stat. 2763 (2000), created a limited exemption from the Commission's jurisdiction for transactions conducted on certain electronic commercial markets (''exempt commercial markets,'' ''ECMs'' or ''section 2(h)(3) markets''). Specifically, section 2(h)(3) of the Act, as amended by the CFMA, provides that, except to the extent provided in section 2(h)(4), nothing in the Act shall apply to a transaction in an exempt commodity [1] that is: (a) entered into on a principal-to-principal basis solely between persons that are eligible commercial entities at the time the persons enter into the agreement, contract, or transaction; and (b) executed or traded on an electronic trading facility. Section 2(h)(4) provides that a transaction described in section 2(h)(3) shall be subject to certain specified provisions of the Act, such as the Act's antimanipulation and antifraud provisions, and furthermore, that such transactions shall be subject to price dissemination rules if the electronic trading facility serves a significant price discovery function for the underlying cash market. Section 2(h)(5) requires an electronic trading facility relying on the exemption in section 2(h)(3) to provide the Commission with certain information and to comply with trading information access provisions set out in section 2(h)(5)(B)(i). The regulations governing ECMs appear at section 36.3 of the Commission's Rules.

B. The Proposed Rules

On November 25, 2003, the Commission published proposed amendments [2] to its part 36 regulations governing exempt commercial markets. With respect to information access, the proposal noted that section 2(h)(5)(B)(i) of the Act requires ECMs to provide the Commission with either: (1) ''access to the facility's trading protocols and electronic access to the facility with respect to transactions conducted in reliance on the exemption [in section 2(h)(3)]''; or (2) ''such reports * * * regarding transactions executed on the facility in reliance on the exemption [in section 2(h)(3)] as the Commission may from time to time request to enable the Commission to satisfy its obligations under this Act.'' The proposal referred to these two statutory alternatives as, respectively, the ''electronic access option'' and the ''reporting option.''

The proposal noted that, under the existing part 36 regulations, ECMs have generally chosen to comply with the information access requirements through the electronic access option. Under this alternative, the Commission has accepted from ECMs electronic access to their trading protocols (*i.e.*, the trading agreements and/or other terms and conditions applicable to trades on the facility, generally available on their websites) in addition to view-only electronic access to the data stream of trades taking place on the system. In practice, however, the Commission has found that the information provided under the current electronic access option is neither as relevant,[3] nor as useful,[4] as anticipated.

Therefore, the Commission proposed to amend its regulations to focus Rule 36.3(b)(1) more precisely so as to provide the Commission with access to more relevant and useful information regarding trading activity on ECMs. Under the proposed rules, an ECM filing a notification with the Commission under Rule 36.3 would be required, initially and on an ongoing basis, to: (1) Provide the Commission with access to the facility's trading protocols, either electronically or in hard copy form; (2) identify those transactions conducted on the facility with respect to which it intends to rely on the exemption in section 2(h)(3); and (3) inform the Commission whether it intends to satisfy the information access requirement of section 2(h)(5)(B)(i) of the Act with respect to such transactions through either a revised reporting option or a revised electronic access option, as provided in the proposed rules.

The proposed new reporting option would require an ECM to file weekly a report for each business day, showing for each transaction executed on the facility in reliance on the exemption set forth in section 2(h)(3), certain basic commodity, maturity, price, time and quantity information. Alternatively, the proposed new electronic access option would require ECMs to grant the Commission electronic access to transactions conducted on the facility in reliance on the exemption in section 2(h)(3) that would allow the Commission to capture in permanent form a continuing record of trades on the facility such that the Commission would be able to reconstruct and compile the same information that would otherwise be provided by the trading facility under the reporting option described above.

The proposed information access rules also would require ECMs to maintain a record of allegations or complaints of instances of suspected fraud or manipulation on the facility and to provide the Commission with a copy of the record of each substantive complaint no later than three days after the complaint was received.

With respect to price discovery, the November 25 proposed rules noted that section 2(h)(4)(D) of the Act specifically provides that a transaction described in section 2(h)(3) shall be subject to:

> Such rules and regulations as the Commission may prescribe if necessary to ensure timely dissemination by the electronic trading facility of price, trading volume, and other trading data to the extent appropriate, if the Commission determines that the electronic trading facility performs a significant price discovery function for

[1] Under the Act, exempt commodities generally are tangible, non-agricultural commodities and include energy and metals products. *See* section 1a(14) of the Act, 7 U.S.C. 1a(14). *See also*, 146 Cong. Rec. S11896–01 (Dec. 15, 2000) (Statement of Senator Harkin).

[2] 68 FR 66032 (Nov. 25, 2003).

[3] The electronic access option, as currently applied, gives the Commission information regarding all contracts traded on an ECM's trading facility. This may include a large amount of extraneous data regarding contracts that are not contracts for future delivery of a commodity, or options, and are, therefore, not within the Commission's exclusive jurisdiction.

[4] The Commission's surveillance staff has determined that the information available through the current view-only electronic access to ECM trading facilities is not, in fact, equivalent to the large trader information received with respect to designated contract markets, as anticipated in the preamble to the original Part 36 Rules (*See* 66 FR 42256, at 42264 (Aug. 10, 2001)).

transactions in the cash market for the commodity underlying any agreement, contract, or transaction executed or traded on the electronic trading facility.

The existing part 36 regulations provide that if the Commission finds by order, after notice and opportunity for a hearing, that a trading facility performs a significant price discovery function for transactions in the cash market in the underlying commodity, the facility must disseminate publicly price, trading volume and other trading data, to the extent appropriate, with respect to transactions executed in reliance on the exemption as specified in the order.

The November 25, 2003 proposed rules would add specificity to the Commission's price discovery regulations in several ways. First, the Commission proposed to adopt two criteria that it would use to determine whether a section 2(h)(3) market performs a significant price discovery function for the underlying cash market. Second, the Commission proposed to specify the information that must be disseminated by section 2(h)(3) markets that serve such a significant price discovery function. Third, the Commission proposed certain amendments to its procedures for making a price discovery determination.[5]

C. Overview of Comments

The Commission received comments from two exempt commercial markets, the IntercontinentalExchange, Inc. (''ICE'') and the Natural Gas Exchange, Inc. (''NGX''). Both markets expressed concerns about various aspects of the proposed information access provisions. ICE also raised issues regarding certain elements of the price discovery provisions. The specific comments, and the Commission's responses, are described in the discussion of the Final Rules that appears below.

II. The Final Rules

A. Information Access Provisions

1. The Scope of Commission Oversight, Reliance on Section 2(h)(3), Competitive Concerns

The proposed rules would require ECMs to ''make their best effort to identify to the Commission those transactions conducted on the facility with respect to which it intends to rely on the exemption in section 2(h)(3).'' Transactions so identified would then be subject to either the reporting requirement or the electronic access requirement. The preamble noted that the trading facility would not be required to include in such identification, agreements, contracts or transactions that are not contracts for future delivery of a commodity, or options, and are, therefore, not subject to the Commission's exclusive jurisdiction. Thus, for example, the trading facility would not be required to identify, or provide information with respect to, agreements, contracts or transactions involving ''any sale of any cash commodity for deferred shipment or delivery.'' Such transactions are excluded from the Commission's exclusive jurisdiction under section 1a(19) of the Act (commonly referred to as ''the forward contract exclusion''). Neither would a trading facility be required to identify, or provide information with respect to, agreements, contracts or transactions that constitute cash or spot transactions, which are contracts for present, rather than future, delivery and likewise are not subject to the Commission's exclusive jurisdiction.

Both commenters express concern over the scope of Commission oversight, the scope of ''reliance'' on section 2(h)(3) and the burden of categorizing transactions for purposes of the information access requirements. ICE points out that, while the Act does give the Commission ''limited jurisdiction to obtain information from ECMs,'' it does not give the Commission ''ongoing regulatory jurisdiction over ECMs.'' According to ICE, the Act does not give the Commission ''authority to require ECMs to maintain specific records or to submit prescribed reports'' except to a ''limited extent.'' In this regard, ICE asserts that, ''[i]n particular, if the ECM provides the Commission with access to its trading facility (*e.g.*, 'view only' access) the CEA does not give the Commission the authority to require that the ECM submit reports to the Commission.'' Thus, the proposed rules ''go beyond the clear direction of the CEA and subject ECMs to ongoing regulatory oversight or requirements.''

The Commission agrees that the CEA does not give the Commission the same degree of oversight authority with respect to ECMs that it has over designated contract markets (''DCMs'') or derivatives transaction execution facilities (''DTFs''). Importantly, however, Congress did make ECMs subject to the antifraud and antimanipulation provisions of the Act. If the Commission is to have the ability to enforce those provisions, it must have access to meaningful information concerning transactions on ECMs. Congress would not have written section 2(h)(5)(B)(i) into the Act for the purpose of giving the Commission access to, or reports of, information that would not assist the Commission in detecting fraud or manipulation. ICE correctly points to the current ''view only access'' as an example of the type of information that the Commission might access from an ECM, but it is not the only example. For instance, under the Act the Commission would not be prohibited from requiring access to an ECM's proprietary screen, including the names of the parties to each transaction. Such information would certainly be more useful for antifraud and antimanipulation enforcement purposes than the anonymous transaction-related data proposed in the notice of proposed rulemaking. However, as noted in the letters of both commenters, ECMs are in competition with voice brokers and the Commission is well aware that requiring ECMs to provide counterparty names to the government could put them at a significant competitive disadvantage to their voice broker competitors. The information access provisions in these final rules (which have been significantly revised and narrowed, as discussed below) strike a balance between business concerns and the Commission's need for access to meaningful information with which to enforce its antifraud and antimanipulation authority as mandated by Congress.

Also with respect to competitive concerns, NGX notes that proposed Rule 36.3(b)(1)(ii)(A), the reporting option, would require ECMs to report (in addition to time, price, quantity, *etc.*) ''such other information as the Commission may determine.'' NGX suggests that the Commission should reconsider using this phrase on the grounds that it would authorize routine collection of counterparty information, which should be available to the Commission only upon special call, and disclosure of which would put ECMs at a competitive disadvantage to voice brokers. NGX also asks that the Commission make clear that any counterparty information collected would be treated as ''nonpublic'' under the Commission's Freedom of Information Act (''FOIA'') regulations.

The language referring to ''such other information as the Commission may determine'' is necessary to give the Commission flexibility to seek additional transactional data and has not been changed in the final rules. However, it was not the Commission's intention that such language could be

[5] The types of instruments traded on exempt commercial markets vary widely. Some of these instruments, but not all of them, are subject to the Commission's exclusive jurisdiction. The Commission's proposed rules were directed only to those instruments that are traded in reliance on the section 2(h)(3) exemption and are otherwise subject to the Commission's exclusive jurisdiction.

interpreted or applied to encompass counterparty information. Under these final rules, the Commission would expect to obtain counterparty information from an ECM pursuant to a special call issued under section 2(h)(5)(B)(iii) of the Act, in which case it would be classified as ''nonpublic'' under the FOIA.

ICE raises the same competitive issue about data publishers as about voice brokers. Like voice brokers, ''data publishers similarly obtain and disseminate information regarding market transactions—including, in some cases, those executed on ECMs—and may also be involved in the execution of transactions. As a result, data publishers have as much, if not more, of an ability to influence pricing decisions in the cash and derivatives markets as ECMs. The Commission should, therefore, take into account the activities of voice brokers and data publishers and their roles in the market, and consider the competitive burdens that would be placed on ECMs, in determining the final form of the Proposed Rules.'' As noted above, the proposed information access requirements for ECMs are not intrusive, and are consistent with appropriate enforcement of the Commission's antifraud and antimanipulation authority. The Act does not give the Commission authority to require data publishers to file reports, or grant access, like ECMs. However, to the extent such data publishers published knowingly inaccurate information, or participated in other cash or futures market manipulative activity within the Commission's jurisdiction, they would be subject to the Commission's enforcement authority. The string of recent Commission enforcement actions involving false natural gas price reporting is clear evidence that the Commission is committed to strictly enforcing that authority. To date, the Commission has filed 19 major enforcement actions as a result of its investigation of wrongdoing in the energy markets. Sixteen of these actions have been settled, with sanctions that include civil monetary penalties of over $220 million, while three actions remain pending.

ICE states that, ''it will be unnecessarily burdensome for an ECM to identify all transactions for which it is relying on section 2(h)(3).'' NGX, on the other hand, suggests that the Commission should reconsider its proposal to require ECMs to segregate out transactions that are subject to the Commission's exclusive jurisdiction from (for example) physical sales and to report, or provide access, only with respect to such (futures and options) data. NGX argues against narrowing the scope of information access because: (1) ''The Commission *needs* all of the market data it is receiving'' because its fraud and manipulation authority is not limited to futures and options, but extends to the cash market as well; and (2) ''The proposal infers that only some ECM transactions (principally futures and options) are covered by section 2(h)(3),'' but ''the intent of section 2(h)(3) is to extend its benefits to all forms of transaction.''

The statute gives each ECM the right and the responsibility to determine its own reliance on the section 2(h)(3) exemption. Thus, an ECM has no choice but to identify those transactions for which it chooses to rely on the exemption. Under the final rules, if some of the transactions on the ECM's trading facility are, in its view, not within the Commission's exclusive jurisdiction—for example, the same day and next day spot trades mentioned in ICE's comments—the ECM need not rely on the exemption for those transactions and so need not provide information access with respect to those transactions. If, however, an ECM finds that making such an identification is ''unnecessarily burdensome,'' it can simply decide to rely on the exemption—and provide the Commission with information access—with respect to all transactions on the facility, just as ECMs are already doing with respect to the view-only electronic information provided to the Commission under the current rules. Thus, ECMs have the choice, but not the obligation, to limit their identification of transactions to futures and options. If ECMs voluntarily choose not to limit data to futures and options, the Commission would have access to the additional market data described in NGX's point one. However, to require ECMs to provide market data concerning transactions that are not within the Commission's exclusive jurisdiction, as suggested in NGX's point two, would appear to be contrary to the spirit of section 2(h)(3).

More significantly, in response to the commenters' concerns over the scope of the information access provisions, the Commission has determined to substantially narrow the reach of that provision. Under the final rules, an ECM will only be required to identify to the Commission (and file reports, or grant electronic access concerning) ''transactions conducted on the facility with respect to which it intends, in good faith, to rely on the exemption in section 2(h)(3) of the Act, *and which averaged five trades per day or more over the most recent calendar quarter.*'' [emphasis supplied] The Commission's surveillance staff has determined that imposing such a volume threshold test will eliminate reports concerning many thinly traded contracts. Such reports would be of very limited utility in detecting market manipulation, due to the high incidence of ''false positives'' [6] in markets that experience infrequent trading. Thinly traded contracts that do not meet the volume test would, nevertheless, remain subject to the Commission's antifraud and antimanipulation authority (as well as the complaint reporting requirement, as discussed below).

By substantially narrowing the scope of information to be provided to that which will be of real utility to Commission surveillance staff, the final rules will also address the commenters' concerns over the scope of information to be provided and the attendant problems in segregating out contracts subject to the Commission's exclusive jurisdiction. Under this standard, new ECMs first beginning operations will not be required to make a determination under Rule 36.3(b)(1)(ii) until after the first full calendar quarter of trading and will not be required to provide information under the reporting option or the electronic access option until at least one contract traded on the facility meets the five trade per day volume threshold.

NGX states that attempting to draw lines between ''futures'' and ''options'' and other types of transactions has ''engendered confusion and controversy including substantial legal uncertainty [and] the current proposal would restore that uncertainty.'' NGX further notes that imposing ''a formal duty by ECMs to confine their data streams to the Commission only to futures and options'' could generate a high error rate (including some transactions the Commission does not wish to review and overlooking others that would be of interest). It would also subject ECMs to the penalties under section 9(a)(3) for knowingly omitting a material fact in a report to the Commission. ICE points out that requiring an ECM to ''amend its notice to reflect the addition of, or amendments to, products traded in reliance on'' section 2(h)(3) will be ''burdensome and inconsistent with'' the purposes of the CFMA. It may be difficult to determine whether modifications to an existing product transform it into a new product.

[6] A ''false positive'' in this context means an instance in which an analysis of price activity alone may indicate the possibility of manipulation, but upon further examination it becomes apparent that the price activity did not result from manipulation.

Furthermore, requiring such frequent filings is ''inconsistent with the CEA and * * * unwarranted.''

As pointed out in the preamble to the NPRM, ECMs identifying contracts with respect to which they intend to rely on section 2(h)(3), or amending such identifications, would not be subject to liability under section 4(a) for any contracts that were misidentified in good faith. ECMs would not be subject to penalties under section 9(a)(3) because that section is not among the provisions of the Act, listed in section 2(h)(3), which apply to ECMs.

With respect to legal uncertainty, consistent with section 2(i) of the Act,[7] even if an agreement, contract or transaction was identified as being traded in reliance on the section 2(h)(3) exemption, in any enforcement action involving any such agreement, contract or transaction, the Commission would be required to prove its jurisdiction independently of an ECM's identification of that agreement, contract or transaction for purposes of compliance with the information access provisions under Rule 36.3. Also, should a trading facility seeking in good faith[8] to comply with the information access provisions of Rule 36.3 fail to identify a particular agreement, contract or transaction, which is later determined to be a futures or option contract subject to the Commission's exclusive jurisdiction, such failure would not be construed by the Commission as a violation of section 4(a) of the Act.[9] However, such transaction would still remain subject to the Commission's antifraud and antimanipulation authority. Furthermore, in view of the new volume threshold test, the universe of contracts to which the identification will have to be applied should be significantly narrowed.

As noted in the preamble to the proposed rules, a trading facility that does not offer trading in any futures or option contracts subject to the Commission's exclusive jurisdiction—for example, a facility where only cash or forward contracts are traded—is not required to file a notification under Rule 36.3. Such a facility is not generally subject to the Act.[10]

2. Applying the Information Access Rules

Trading facilities electing to provide information under the reporting option (Rule 36.3(b)(1)(ii)(A)) will be required to file weekly reports concerning only agreements, contracts or transactions with respect to which they are relying on the section 2(h)(3) exemption, and which meet the five trade per day volume standard for the preceding calendar quarter. Such reports will contain information that could be useful to the Commission in enforcing its antifraud and antimanipulation authority with respect to those trading facilities. Such reports would include, in a form and manner approved by the Commission, a report for each business day, showing for each qualifying transaction executed on the facility the following information: the commodity, the location,[11] the maturity date, whether it is a financially settled or physically delivered instrument, the date of execution, the time of execution, the price, the quantity, and such other information as the Commission may determine, and for an option instrument, in addition to the foregoing information, the type of option (call or put) and the strike price. Each such report would be required to be electronically transmitted weekly, within such time period as is acceptable to the Commission following the end of the week to which the data applies. At the beginning of each new calendar quarter, within such time period as is acceptable to the Commission, ECMs will be required to review trading for the previous calendar quarter to determine which of the contracts traded in reliance on section 2(h)(3) during that quarter also meet the five trade per day or more volume test. All contracts meeting both the reliance test and the volume test during the previous quarter will be subject to the weekly reporting requirement for the new quarter.

Those ECMs wishing to provide information pursuant to the electronic access option (Rule 36.3(b)(1)(ii)(B)) will be required, initially and on an ongoing basis, to provide the Commission with electronic access to those transactions conducted on the facility in reliance on the exemption in section 2(h)(3), which averaged five trades per day or more over the most recent calendar quarter. Such access must be structured so as to permit the Commission to capture in permanent form a continuing record of trades on the facility such that the Commission would be able to reconstruct and compile the same information regarding transactions on the trading facility that would otherwise be provided by the trading facility under the reporting option (Rule 36.3(b)(1)(ii)(A) described above). If a trading facility does not wish to undertake the task of determining which contracts meet the five-trade-per-day requirement, it can give the Commission access to information on all transactions conducted in reliance on section 2(h)(3) and the Commission will implement appropriate surveillance.

The Commission expects that the information that will be provided by ECMs in reports required under Rule 36.3(b)(1)(ii)(A), or compiled by the Commission through electronic access provided under Rule 36.3(b)(1)(ii)(B), will be useful in identifying aberrant price behavior, including intraday price spikes. Such price anomalies may serve as indicators of the need for further Commission investigation. In such instances, the Commission may, among other things, use the special call authority provided by section 2(h)(5)(B)(iii) of the Act to determine whether a fraud or manipulation may have been attempted or occurred warranting appropriate enforcement action.

3. Recording and Reporting Complaints

The proposed rules would require ECMs to maintain a record of complaints received by the trading facility concerning instances of

[7] Section 2(i) of the Commodity Exchange Act provides that:

(1) No provision of this Act shall be construed as implying or creating any presumption that—

(A) any agreement, contract, or transaction that is excluded from this Act under section 2(c), 2(d), 2(e), 2(f), or 2(g) of this Act or title IV of the Commodity Futures Modernization Act of 2000, or exempted under section 2(h) or 4(c) of this Act; or

(B) any agreement, contract, or transaction, not otherwise subject to this Act, that is not so excluded or exempted, is or would otherwise be subject to this Act.

(2) No provision of, or amendment made by, the Commodity Futures Modernization Act of 2000 shall be construed as conferring jurisdiction on the Commission with respect to any such agreement, contract or transaction, except as expressly provided in section 5a of this Act (to the extent provided in section 5a(g) of this Act), 5b of this Act, or 5d of this Act.

[8] The ''good faith'' standard will apply only to the requirement that ECMs identify *contracts* with respect to which they intend to rely on section 2(h)(3). It does not apply to the requirement that ECMs must comply with section 2(h)(5), including notice to the Commission of their intention to operate an electronic trading facility in reliance on section 2(h)(3), in order to qualify for the exemption. In other words, the Division of Enforcement would not have to establish that a trading facility did not act in good faith in order to prevail in an action alleging violation, for example, of section 4(a), against a trading facility that failed to comply with the notice requirements of section 2(h)(5). *See, e.g.*, CFTC v. Enron Corp., *et al.*, No. H–03–909 (S.D. Tex. filed Mar. 12, 2003).

[9] Section 4(a) of the Act makes it unlawful to trade a contract for future delivery of a commodity in the U.S. unless on a contract market designated by, or a derivatives transaction execution facility registered with, the Commission.

[10] The Commission notes that, under section 12(e)(2) of the Act, an agreement, contract, or transaction that is not subject to the Commission's exclusive jurisdiction would be subject to state antifraud provisions of general applicability.

[11] In this context, ''location'' means the delivery or the price-basing location specified in the agreement, contract or transaction.

suspected fraud or manipulation. The nature of the information to be recorded (and subsequently reported) concerning complaints remains unchanged in the final rules. Thus, Rule 36.3(b)(1)(iii) will require an ECM to maintain a record of all allegations or complaints concerning instances of suspected fraud or manipulation. The record will be required to include the name of the complainant, if provided, the date of the complaint, the market instrument, the substance of the allegations, and the name of the person at the trading facility who received the complaint.

The proposed rules also would require ECMs to ''Provide to the Commission * * * a copy of the record of each substantive complaint * * * no later than three business days after the complaint is received.'' The preamble notes that the Commission's intent, in limiting the reporting requirement to ''substantive'' claims of manipulation or fraud, was to ''allow an ECM to exercise its judgment to weed out clearly frivolous claims.''

ICE argues that the meaning of ''substantive'' is vague and potentially problematic. ICE is concerned that ''substantive'' could be construed to apply to every complaint, no matter how frivolous, provided the complaint, ''relates to substantive, and not procedural, aspects of the ECM's operations.'' The Commission agrees that ''substantive'', in this context, is not a very precise term. In order to clarify the scope of the complaint-reporting requirement, the Commission has amended the final rules to provide that ECMs must report to the Commission complaints that allege, or relate to, facts that would constitute a violation of the Act or Commission regulations.

ICE further argues that requiring complaints to be reported to the Commission after only three days ''is unnecessarily burdensome.'' ICE recommends that the rules should be amended to allow ECMs 30 calendar days to report complaints to the Commission. The Commission agrees that, with respect to most complaints, 30 calendar days is an appropriate time frame within which to evaluate complaints and has amended the final rules accordingly. However, with respect to one class of complaints, the Commission believes that the reporting period should not be changed. In the case of an ongoing market manipulation or fraud, time is of the essence. Therefore, if a complaint alleges, or relates to, a suspected ongoing market manipulation or fraud, an ECM will be required to provide to the Commission a copy of the record thereof within the original three-business-day time limit.

Finally, ICE argues that the Commission should not require reports of complaints concerning markets ''other than those in which the ECM performs a significant price discovery function.'' The information access and price discovery portions of the proposed rules are based on separate statutory provisions with distinct purposes. The Commission's antifraud and antimanipulation authority and responsibility apply to all transactions conducted in reliance on the exemption in section 2(h)(3), not just those that perform a significant price discovery function. Thus, there is a statutory basis for requiring ECMs to provide records of complaints concerning all trades conducted in reliance on the exemption in section 2(h)(3), not just those relating to a significant price discovery function, if the Commission is to discharge its duties under the Act. Therefore, the scope of the reporting requirement for complaints has not been changed in the final rules. Moreover, the Commission notes, this means that the complaint recording and reporting requirements apply to all trades conducted in reliance on section 2(h)(3), not just those that meet the five-trade-per-day volume test. In such instances, the need for prompt review of any and all bona fide complaints alleging fraud or manipulation outweigh any inconvenience caused by applying the recording and reporting requirements to a larger group of agreements, contracts or transactions.

B. Price Discovery Provisions

As the Commission notes above, with respect to price dissemination rules, section 2(h)(4)(D) specifically provides that a transaction described in § 2(h)(3) shall be subject to such rules and regulations as the Commission may prescribe to ensure timely dissemination of trading data if the Commission determines that the electronic trading facility performs a significant price discovery function for transactions in the underlying cash market for the commodity.

On August 10, 2001, the Commission published Rule 36.3, which implements the notification, information and other provisions of the CFMA related to section 2(h)(3) exempt commercial markets. *See* 66 FR 42255. Subsection (c)(2) of Rule 36.3 provides that the Commission may make a determination that such a trading facility performs a significant price discovery function under section 2(h)(4)(D) by order, and that such finding shall be made after notice and an opportunity for a hearing through submission of written data, views and arguments.

To date, ten electronic trading facilities have notified the Commission of their intent to operate as ECMs in reliance on the section 2(h)(3) exemption. In view of the Commission's receipt of these section 2(h)(3) notifications, the Commission proposed to add specificity to its price discovery rules in several ways. First, the Commission proposed to adopt two criteria to use to determine whether a section 2(h)(3) market performs a significant price discovery function for the underlying cash market. Second, the Commission proposed to specify the information that must be disseminated by section 2(h)(3) markets that serve such a significant price discovery function. Third, the Commission proposed certain amendments to its procedures for making a price discovery determination.

1. The Elements of Price Discovery

Price discovery commonly is defined as the process of determining prices through the interaction of buyers and sellers based on supply and demand conditions. Prices may be discovered by a single buyer and seller in a privately negotiated bilateral cash market transaction, or through the simultaneous interaction of multiple buyers and sellers in organized markets.

Organized markets, which include futures markets and certain cash markets where trading takes place in accordance with established rules, often perform an important role in facilitating price discovery in the broader cash markets. In particular, these markets facilitate price discovery in cash markets by efficiently incorporating supply and demand information for the underlying commodity into the transaction prices or bids and offers through the operation of a centralized market for the commodity. Thus, the price discovery process on organized markets may significantly enhance the efficiency of the overall cash market.

The extent to which price information is used in establishing prices for cash market transactions that occur outside of the organized markets provides a relevant factor for determining the contribution of that market to price discovery and for determining whether there is a federal interest in the public dissemination of such price information.[12] Such price information may be used in varying degrees to

[12] It is this effect that section 2(h)(4) addresses when it provides that information shall be disseminated by an exempt commercial market when ''the electronic trading facility performs a significant price discovery function for transactions in the cash market for the commodity underlying any agreement, contract, or transaction executed.''

facilitate the establishment of prices and may also serve as one of a number of sources of price information that are consulted by cash market participants in developing bids, offers, or transaction prices. In certain circumstances, such price information may be sufficiently well regarded by the industry that it serves as an important benchmark for cash market participants to consider in setting bids or offers or in negotiating cash market transaction prices.[13] In other circumstances, prices discovered on a market may be such an integral and indispensable part of the price determination process in the underlying cash market that bids, offers or cash market transaction prices have a relatively high correlation to the prices discovered on the market. This latter practice is known as price basing.

Price basing is a frequently observed practice in many futures markets and some cash markets. As indicated above, under price basing, commercial entities establish transaction prices for the underlying commodity, or a related commodity, based directly on the prices discovered on an organized market. These entities may or may not trade in the organized market. The cash market transaction prices established through price basing may be either spot or forward prices.

The relative significance of prices discovered on an organized market for its underlying cash market is directly related to the extent to which such prices are used in establishing transaction prices between commercial entities. As a result of this relationship, the use of a market's prices for price basing, either directly or indirectly, provides observable indicia that the market performs a significant price discovery function that would serve as a basis for such a determination under section 2(h)(4).

2. Proposed Criteria for Making Price Discovery Determination

While the Act authorizes the Commission to make a determination that a section 2(h)(3) market performs a significant price discovery function, it does not define that term or contain criteria to guide that determination. Accordingly, the Commission proposed two alternative criteria for making a determination that an ECM performs a significant price discovery function. The first criterion (the ''price basing criterion'') is whether ''cash market bids, offers or transactions are directly based on or quoted at a differential to the prices generated on the market on a more than occasional basis.''[14] This criterion reflects the commercial practice known as price basing. As explained in the proposed rules, price basing directly confirms that the prices being generated on the market have significant utility with regard to discovering prices in connection with cash market transactions.

In evaluating a section 2(h)(3) market's price discovery role, assessments under this criterion would include an analysis of whether cash market participants are quoting bid or offer prices or entering into transactions at prices that are set, either explicitly or implicitly, at a differential to prices established on a particular section 2(h)(3) market. Cash market prices are set *explicitly* at a differential to the section 2(h)(3) market when, for instance, they are quoted in dollars and cents above or below the reference market's prices. Cash prices are set *implicitly* at a differential to a section 2(h)(3) market's prices when, for instance, they are arrived at after adding to, or subtracting from, the section 2(h)(3) market's price, but then quoted or reported as a flat price.[15] The Commission will also consider whether cash market entities are quoting cash prices based on a section 2(h)(3) market's prices on a more than occasional basis.[16] The price-basing criterion is unchanged in the final rules.

The second criterion proposed by the Commission (the ''price discovery criterion'') is whether ''the market's prices are routinely disseminated in a widely distributed industry publication and are consulted by the industry on a more than occasional basis for pricing cash market transactions.'' With respect to this second criterion, the Commission stated in its proposal that such publication and industry consultation ''confirms that the prices are thought to be sufficiently reliable and acceptable to be considered a significant source of price discovery.''

ICE believes that the second test should be deleted for a number of reasons. First, it asserts that the term ''consulted'' is vague and potentially all encompassing. In ICE's view, any published information is potentially consulted by market participants on more than an occasional basis but might not be a principal component of pricing decisions and thus should not be a basis for determining that an ECM performs a significant price discovery function. ICE further asserts that this test is circular in that it uses publication as a basis for determining that timely dissemination is required. Finally, ICE asserts that this second criterion adds nothing to the first.

The Commission has considered ICE's comments and believes that the price discovery criterion is necessary to effectuate Congress's intent that ECMs that serve a ''significant price discovery function'' are subject to such rules as the Commission determines are necessary to ensure timely dissemination of trading data. If the Commission were to delete the second test, it essentially would be concluding that the only markets that can serve a significant price discovery function are those that are used for price basing. However, by imposing price dissemination requirements on markets that serve a significant price discovery function, in addition to those that serve a price basing function, Congress clearly did not intend such a result. In this regard, the Act explicitly references the price-basing role of futures markets in many places (*see, e.g.*, section 4b(a)(2)(B)), and had Congress intended to limit the price discovery requirement with respect to ECMs only to those markets providing a price basing function, it would have set forth this requirement explicitly in the statute. Accordingly, the Commission has determined to retain the price discovery criterion, which will ensure that markets that serve a significant price discovery function, but do not necessarily serve a traditional price basing function, will be required to timely disseminate market data in the manner prescribed by the Commission's rules.

However, in response to ICE's concerns that a standard based on prices that are consulted ''on a more than occasional basis'' is too vague and all-encompassing, the Commission has revised Rule 36.3(c)(2)(i)(B). In

[13] If the price information discovered on a market is widely recognized in an industry, such recognition by the industry in question may lead to the publication of such information in established industry publications.

[14] 68 FR 66032 at 66035 (Nov. 25, 2003).

[15] For example, if crude oil prices were generated on a section 2(h)(3) market, practices that would satisfy the price basing criterion would include cases where cash market bids or offers would be explicitly quoted at a differential to the prices generated on that market (*e.g.*, ten cents per barrel above the exempt market's price for crude oil delivered in July). In addition, the price basing criterion would encompass cases where cash market bids, offers or transaction prices are quoted as a net price (*e.g.*, $30/barrel) and such price is calculated implicitly by adding to, or subtracting from, the section 2(h)(3) market's prices a specified price differential (*e.g.*, a $30/barrel quoted price is derived as the sum of a ten-cent per barrel differential plus the exempt market's price of $29.90/barrel).

[16] As in cash markets underlying many established futures markets, the differential for a particular cash market bid, offer or transaction may vary from time to time in response to changes in various factors that affect the relationship between cash market prices and prices discovered on a section 2(h)(3) market.

describing the industry's use of a market's prices, the final rules replace the phrase, ''are consulted by the industry on a more than occasional basis for pricing cash market transactions,'' with the phrase, ''are routinely consulted by industry participants in pricing cash market transactions.''

The Commission acknowledges the apparent circularity of the test in the price discovery criterion—*e.g.*, it requires ECMs to disseminate data based in large part upon a finding that the market is already disseminating such data—but notes that these rules will ensure that the trading data disseminated conforms to federal standards, subject to federal oversight, as Congress intended.

Under the final rules, in applying the price discovery criterion, consideration will be given to whether prices established on a section 2(h)(3) market are reported in a widely distributed industry publication, such as Platts Oil Gram, Inside FERC or the Lundberg Survey. In making this determination, the Commission will consider the reputation of the publication within the industry, how frequently it is published, and whether the information contained in the publication is routinely consulted by industry participants in pricing cash market transactions.

Under the final rules, an ECM will be required to notify the Commission when it has reason to believe that one or more of the markets on which it is conducting agreements, contracts, or transactions in reliance on section 2(h)(3) meet either of the specified criteria.[17] Upon receipt of such a filing, the Commission's staff will conduct an assessment of the markets on which the ECM is conducting agreements, contracts, or transactions in reliance on section 2(h)(3) to identify those markets that perform a significant price discovery function for the associated cash market. The scope of the inquiry conducted by the Commission will vary. In the course of its assessment, Commission staff might contact cash market participants to verify the extent to which they refer to the market for price basing. The assessment might also examine whether the section 2(h)(3) market, although occasionally performing a price discovery function, was not routinely consulted by industry participants in pricing cash market transactions and thus does not perform a significant price discovery function.

If the available information indicates that a market is serving a significant price discovery function for the underlying cash market, the Commission will notify the ECM that it appears to be performing a significant price discovery function and provide the market with an opportunity for a hearing through the submission of written data, views and arguments. The Commission's notification creates a presumption that the ECM is performing a significant price discovery function, which presumption the ECM can rebut during the hearing process. The Commission, after consideration of all relevant information, will issue an order determining whether or not the ECM serves a significant price discovery function.[18]

3. Information To Be Disseminated by a Price Discovery Market

The Commission has not previously addressed the nature and scope of the information that should be disclosed by a price discovery market subject to section 2(h)(4)(D), other than by incorporating in its rules the Act's requirement that the ECM disseminate publicly ''price, trading volume and other trading data to the extent appropriate with respect to transactions executed in reliance on the exemption as specified in the order.'' *See* Commission Rule 36.3(c)(2). In determining the nature and scope of the information that should be disclosed under the proposed rules, the Commission looked to other provisions of the Act that impose public dissemination requirements on other categories of regulated and unregulated markets.

With respect to other markets, sections 5(d)(7) and (8) of the Act require DCMs to make available to the public: (i) Information concerning the terms and conditions of the contracts and the mechanisms for executing transactions; and (ii) daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts. Sections 5a(d)(4) and (5) require registered DTFs to disclose publicly: (i) information concerning contract terms and conditions, trading conventions, mechanisms and practices, financial integrity protections, and other information relevant to participation in trading on the facility; and (ii) if the Commission determines that the contracts perform a significant price discovery function for transactions in the cash market for the commodity underlying the contracts, daily information on settlement prices, volume, open interest, and opening and closing price ranges for contracts traded on the facility. Section 5d(d) requires exempt boards of trade (''EBOTs'') to disseminate publicly on a daily basis information on trading volume, opening and closing ranges, open interest, and other trading data appropriate to the market if the Commission determines that the EBOT is a significant source of price discovery for transactions in the cash market for the commodity underlying the contracts.

As noted, the Act only stipulates that an ECM should make available ''price, trading volume and other trading data to the extent appropriate.'' However, as also noted above, this requirement is unclear as to what precisely is intended to be made available to the public by ECMs, especially with regard to the term ''price.'' Based on the information that is required to be made available by the Act's other category of exempt market, the EBOT, the Commission requested comment on the reasonableness of requiring similar information, including trading activity measures, price information, and certain contextual information. The Commission also requested comment on what contextual information should be made available in order to assure that the public can accurately interpret the meaning of the trading activity and price information.

Specifically, the Commission requested comment on a requirement that the ECMs serving a significant price discovery function publicly disseminate the following information on a daily basis:

Contextual information:

- Contract terms and conditions or product descriptions; and
- Trading conventions, mechanisms, and practices.

Trading activity information:

- Trading volume; and
- Open interest, if available.

Price information:

- Opening and closing prices or price ranges;
- High and low prices;
- A volume-weighted average price; or

[17] In addition, the Commission may, at any time, *sua sponte*, conduct an assessment as to whether an ECM is serving a significant price discovery function for the associated cash market. In this regard, the Commission would consider a number of factors in deciding whether to initiate a review of a market's price discovery function, including whether the market holds itself out as performing a price discovery function for the underlying cash market. To facilitate its review of a market's price discovery function in such cases, the Commission will require that an electronic trading facility operating in reliance on section 2(h)(3) notify the Commission when the facility commences holding its markets out as serving a price discovery function.

[18] The final rules also provide the market with an opportunity to request at any time that the Commission review the continuing appropriateness of its determination in light of changed facts or circumstances.

• Any other price information approved by the Commission.[19]

The types of contextual, trading activity and price information that the Commission proposed to require to be published potentially would be useful to the price basing process; *i.e.*, this information potentially would be useful for commercial entities that do not participate directly in a market, but use the market's prices as a basis for setting prices for cash market transactions. Neither of the commenters commented on the contextual or trading information aspects of the proposed rules and the final rules with respect to public dissemination of that information are unchanged.

With respect to price information, however, ICE asked the Commission to clarify its statement in the preamble to the proposed rules that ECMs are required to publish certain market summary information without charge to the marketplace on a delayed basis.[20] Specifically, ICE suggested that the Commission clarify that, to the extent that ECMs are required to make information available on a delayed basis, DCMs are subject to the same requirement. ICE also requested clarification as to the meaning of the term ''delayed,'' and suggested that the Commission make express in its rules that delayed data be made available free of charge, if such a requirement is to be imposed. Finally, ICE requested clarification that the information dissemination requirements apply only to information on markets for which the ECM performs a significant price discovery function.

The Commission's discussion in the proposed rules of industry price dissemination practices was intended to provide a context for establishing price dissemination standards for this relatively new category of markets. The Commission is unable at this time to directly respond to ICE's request that the Commission amend its rules concerning price dissemination by DCMs since the Commission has not yet proposed rules in this area. To the extent further clarification is needed regarding the price reporting obligations of DCMs, the Commission will clarify those obligations in a separate rulemaking.

In response to ICE's request that the Commission clarify the meaning of the term ''delayed,'' the Commission is amending its proposed rules to provide that ECMs are required to make the data ''readily available to the news media and the general public without charge no later than the business day following the day to which the information pertains.'' An ECM should make such information available on a fair, equitable and timely basis and may make it available by such means as providing the information to a financial information service and by timely placement of the information on the ECM's Web site. The Commission confirms that the price dissemination rules apply only to information on markets for which the ECM performs a significant price discovery function.

In view of the different types of exempt markets, the Commission proposed, and the final rules provide, flexibility in regard to the specific price information to be published by section 2(h)(3) markets. Specifically, the final rules require that markets publish opening and closing prices or price ranges, daily high and low prices, or volume weighted average prices over a period of time that is representative of trading on the market. In addition, on a case-by-case basis, markets may publish other price information, in lieu of the price measures enumerated above, subject to the Commission's approval.

As noted above, the Act requires that opening and closing price ranges be provided by the Act's other category of exempt market—EBOTs. However, because not all exempt markets will have such information available, as a consequence of the way trading is conducted, the final rules provide that two alternative price measures, the day's high and low, or the day's volume weighted average price, may be used. Established exchanges commonly publish high and low prices for each trading session. In addition, high and low prices provide useful information regarding the range of daily trading activity. Volume weighted average prices provide a good estimate of the price applicable to most transactions executed on a market during daily trading sessions and, accordingly, may provide a better indication of the representative prices observed in a market on a given day than the other measures noted above. Finally, as noted, the final rules give ECMs the flexibility of publishing alternative price measures, subject to Commission approval, if such measures would provide the public with an adequate indication of the market's daily price levels.

III. Cost Benefit Analysis

Section 15(a) of the Act, as amended by section 119 of the CFMA, requires the Commission to consider the costs and benefits of its action before issuing a new regulation or order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of its action or to determine whether the benefits of the action outweigh its costs. Rather, section 15(a) simply requires the Commission to ''consider the costs and benefits'' of the subject rule or order.

Section 15(a) further specifies that the costs and benefits of the proposed rule or order shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern and may, in its discretion, determine that, notwithstanding its costs, a particular rule or order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The Commission's proposal contained an analysis of its consideration of these costs and benefits and solicited public comment thereon. 68 FR at 66038. The Commission specifically invited commenters to submit any data that they had quantifying the costs and benefits of the proposed rules with their

[19] The section 2(h)(3) market may satisfy the dissemination requirements by placing the information on its website, providing the information to a financial information service, or using a combination of these media. Furthermore, the section 2(h)(3) market may disseminate such additional information as it believes is appropriate for price discovery purposes. A section 2(h)(3) market may also publish all of the information specified in Rule 36.3(c)(2)(iv) whether or not the Commission has made a price discovery determination applicable to that market under Rule 36.3(c)(2)(iii). Such voluntary dissemination by a section2(h)(3) market may, in appropriate circumstances, obviate the need for the market to notify the Commission and for the Commission to make a significant price discovery determination.

[20] That statement appears in the following passage from the preamble of the proposed rules (68 FR at 66037–66038):

In considering price-reporting requirements, the Commission has focused on the reporting of delayed price information, rather than real-time price data. In this regard, the Commission notes that the Act does not appear to require publication of real-time price data. The Commission also notes that many exchanges charge fees for real-time market data (usually bids, offers and transaction prices), and that such fees can be an important source of exchange revenues. The exchanges also make certain market summary data freely available to the public on a delayed basis (where the delay can be as little as 10 minutes). This delayed market information generally includes opening and closing prices or price ranges, daily high and low prices, settlement prices, daily trading volume and open interest. The Commission interprets the Act as allowing exempt commercial markets to reap gains from the sale of real-time market data, but also to require these markets to publish the required market summary information noted above without charge to the marketplace on a delayed basis.

comment letters. *Id.* The Commission has considered the comment letters received, which included some narrative discussion of the costs and benefits of the proposed rule amendments, but neither of which set forth any data that quantified such costs and benefits.

The Commission has considered the costs and benefits of these rules in light of the specific areas of concern identified in section 15. The Commission has endeavored in these rules to impose the minimum requirements necessary to enable the Commission to perform its oversight functions, to carry out its mandate of assuring the continued existence of competitive and efficient markets and to protect the public interest in markets free of fraud and abuse. After considering their costs and benefits, the Commission has decided to adopt these rules as discussed above.

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601, *et seq.*, requires federal agencies, in promulgating rules, to consider the impact of those rules on small entities. These rules will affect exempt commercial markets. The Commission has previously determined that exempt commercial markets are not small entities for purposes of the RFA.[21] The Commission received no comments regarding this determination.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (''PRA''), 44 U.S.C. 3507(d), which imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA, does not apply to these rules. The rules do not contain information collection requirements that require the approval of the Office of Management and Budget.

List of Subjects in 17 CFR Part 36

Commodity futures, Commodity Futures Trading Commission.

■ In consideration of the foregoing, and pursuant to the authority in the Commodity Exchange Act and, in particular, sections 2(h)(3)–(5) of the Act, the Commission hereby amends title 17, chapter I, part 36 of the Code of Federal Regulations as follows:

[21] 66 FR 42268 (Aug. 10, 2001).

PART 36—EXEMPT MARKETS

■ 1. The authority section for part 36 continues to read as follows:

Authority: 7 U.S.C. 2, 6, 6c, and 12a.

■ 2. Section 36.3 is amended by revising paragraphs (b)(1)(i) and (ii), by adding new paragraphs (b)(1)(iii) and (iv), by redesignating paragraphs (b)(2) and (b)(3) as paragraphs (b)(3) and (b)(4), by adding a new paragraph (b)(2), by adding a heading to paragraph (c)(1), by revising paragraph (c)(2), and by adding a heading to paragraph (c)(3) to read as follows:

§ 36.3 Exempt commercial markets.

* * * * *

(b) * * *

(1) * * *

(i) Provide the Commission with access to the facility's trading protocols, either electronically or in hard copy form;

(ii) Identify to the Commission those transactions conducted on the facility with respect to which it intends, in good faith, to rely on the exemption in section 2(h)(3) of the Act, and which averaged five trades per day or more over the most recent calendar quarter, and, with respect to such transactions, either:

(A) Submit to the Commission, in a form and manner acceptable to the Commission, a report for each business day, showing for each transaction executed on the facility in reliance on the exemption set forth in section 2(h)(3) of the Act, and meeting the five trades per day or more threshold test of this section, the following information: the commodity, the location, the maturity date, whether it is a financially settled or physically delivered instrument, the date of execution, the time of execution, the price, the quantity, and such other information as the Commission may determine, and for an option instrument, in addition to the foregoing information, the type of option (call or put) and the strike price. Each such report shall be electronically transmitted weekly, within such time period as is acceptable to the Commission after the end of the week to which the data applies; or

(B) Provide the Commission, in a form and manner acceptable to the Commission, with electronic access to those transactions conducted on the facility in reliance on the exemption in section 2(h)(3) of the Act, and meeting the five trades per day or more threshold test of this section, which access would allow the Commission to compile the information described in paragraph (b)(1)(ii)(A) of this section and create a permanent record thereof;

(iii) Maintain a record of allegations or complaints received by the trading facility concerning instances of suspected fraud or manipulation in trading activity conducted in reliance on the exemption set forth in section 2(h)(3) of the Act. The record shall contain the name of the complainant, if provided, the date of the complaint, the market instrument, the substance of the allegations, and the name of the person at the trading facility who received the complaint; and

(iv) Provide to the Commission, either electronically or in hard copy form, a copy of the record of each complaint received pursuant to paragraph (b)(1)(iii) of this section that alleges, or relates to, facts that would constitute a violation of the Act or Commission regulations. Such copy shall be provided to the Commission no later than 30 calendar days after the complaint is received. Provided, however, that in the case of a complaint alleging, or relating to, facts that would constitute an ongoing fraud or market manipulation under the Act or Commission regulations, such copy shall be provided to the Commission within three business days after the complaint is received.

(2) The Commission hereby delegates, until the Commission orders otherwise, the authority to determine the form and manner of submitting reports, the time within which such reports shall be filed, and the form and manner of providing electronic access, under paragraph (b)(1) of this section, to the Director of the Division of Market Oversight and such members of the Commission's staff as the Director may designate. The Director may submit to the Commission for its consideration any matter that has been delegated by this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

* * * * *

(c) * * *

(1) *Prohibited representation.* * * *

(2) *Market data dissemination.* (i) *Criteria for price discovery determination.* An electronic trading facility operating a market in reliance on the exemption in section 2(h)(3) of the Act performs a significant price discovery function for transactions in the cash market for a commodity underlying any agreement, contract, or transaction executed or traded on the electronic trading facility when:

(A) Cash market bids, offers or transactions are directly based on, or quoted at a differential to, the prices generated on the market on a more than occasional basis; or

(B) The market's prices are routinely disseminated in a widely distributed industry publication and are routinely consulted by industry participants in pricing cash market transactions.

(ii) *Notification*. An electronic trading facility operating in reliance on section 2(h)(3) of the Act shall notify the Commission when it has reason to believe that:

(A) Cash market bids, offers or transactions are directly based on, or quoted at a differential to, the prices generated on the market on a more than occasional basis;

(B) The market's prices are routinely disseminated in a widely distributed industry publication and are routinely consulted by industry participants in pricing cash market transactions; or

(C) The market holds itself out to the public as performing a price discovery function for the cash market for the commodity.

(iii) *Price discovery determination*. Following receipt of a notice under paragraph (c)(2)(ii) of this section, or on its own initiative, the Commission may notify an electronic trading facility operating in reliance on section 2(h)(3) of the Act that the trading facility appears to meet the criteria for performing a significant price discovery function under paragraph (c)(2)(i)(A) or (B) of this section. Before making a final price discovery determination under this paragraph, the Commission shall provide the electronic trading facility with an opportunity for a hearing through the submission of written data, views and arguments. Any such written data, views and arguments shall be filed with the Secretary of the Commission in the form and manner and within the time specified by the Commission. After consideration of all relevant matters, the Commission shall issue an order containing its determination whether the electronic trading facility performs a significant price discovery function under the criteria of paragraph (c)(2)(i)(A) or (B) of this section.

(iv) *Price dissemination*. (A) An electronic trading facility that the Commission has determined performs a significant price discovery function under paragraph (c)(2)(iii) of this section shall disseminate publicly and on a daily basis all of the following information with respect to transactions executed in reliance on the exemption:

(*1*) Contract terms and conditions, or a product description, and trading conventions, mechanisms and practices;

(*2*) Trading volume by commodity and, if available, open interest; and

(*3*) The opening and closing prices or price ranges, the daily high and low prices, a volume-weighted average price that is representative of trading on the trading facility, or such other daily price information as proposed by the facility and approved by the Commission.

(B) The trading facility shall make such information readily available to the news media and the general public without charge no later than the business day following the day to which the information pertains.

(v) *Modification of price discovery determination*. A trading facility that the Commission has determined performs a significant price discovery function under paragraph (c)(2)(iii) of this section may petition the Commission at any time to modify or vacate that determination. The petition shall contain an appropriate justification for the request. The Commission, after notice and opportunity for a hearing through the submission of written data, views and arguments, shall by order grant, grant subject to conditions, or deny such request.

(3) *Required representation*. * * *

Issued in Washington, DC, on July 13, 2004, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 04–16319 Filed 7–19–04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33–8442; File No. S7–17–04]

RIN 3235–AJ03

Covered Securities Pursuant to Section 18 of the Securities Act of 1933

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting an amendment to a rule under section 18 of the Securities Act of 1933 (''Securities Act''). The purpose of the amendment is to designate options listed on the International Securities Exchange, Inc. (''ISE'') as covered securities. Covered securities under section 18 of the Securities Act are exempt from State law registration requirements.

DATES: *Effective Date:* August 19, 2004.

FOR FURTHER INFORMATION CONTACT: Kelly Riley, Assistant Director, (202) 942–0752, Gordon Fuller, Counsel to the Assistant Director, (202) 942–0792 or Brian Trackman, Attorney, (202) 942–7951, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–1001.

SUPPLEMENTARY INFORMATION:

I. Introduction

In 1996, Congress amended section 18 of the Securities Act to exempt from State registration requirements securities listed, or authorized for listing, on the New York Stock Exchange (''NYSE''), the American Stock Exchange (''Amex''), or the National Market System of the Nasdaq Stock Market (''Nasdaq/NMS'') (collectively, the ''Named Markets''), or any national securities exchange determined by the Commission to have substantially similar listing standards to those markets.[1] More specifically, section 18(a) of the Securities Act provides that ''no law, rule, regulation, or order, or other administrative action of any State * * * requiring, or with respect to, registration or qualification of securities * * * shall directly or indirectly apply to a security that—(A) is a covered security.''[2] Covered securities are defined in section 18(b)(1) of the Securities Act to include those securities listed, or authorized for listing, on the Named Markets, or securities listed, or authorized for listing on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule are ''substantially similar'' to the Named Markets.[3]

The Commission adopted Rule 146 pursuant to section 18(b)(1)(B) of the Securities Act.[4] Rule 146(b) lists those national securities exchanges, or segments or tiers thereof that the Commission has determined to have listing standards substantially similar to those of the Named Markets, and thus securities listed on such exchanges are covered securities.[5] The ISE has petitioned the Commission to amend Rule 146(b) to determine that its listing standards for securities listed on the ISE are substantially similar to those of the Named Markets and, accordingly, that securities listed pursuant to such listing

[1] *See* National Securities Markets Improvement Act of 1996, Public Law No. 104–290, 110 Stat. 3416 (October 11, 1996).

[2] 15 U.S.C. 77r(a).

[3] 15 U.S.C. 77r(b)(1). In addition, securities of the same issuer that are equal in seniority or senior to a security listed on a Named Market or national securities exchange designated by the Commission as having substantially similar listing standards to a Named Market are covered securities for purposes of section 18 of the Securities Act. 15 U.S.C. 77r(b)(1)(C).

[4] Securities Act Release No. 7494, Securities Exchange Act Release No. 39542 (January 13, 1998), 63 FR 3032 (January 21, 1998).

[5] 17 CFR 230.146(b).

standards are covered securities for purposes of section 18(b) of the Securities Act.[6]

On March 22, 2004, the Commission issued a release proposing to amend Rule 146(b) to designate options listed on the ISE as covered securities for purposes of section 18(a) of the Securities Act.[7] The Commission solicited comment on the proposal, and received one comment letter in response to the proposal.[8]

After careful comparison, the Commission concludes that the current listing standards of the ISE are substantially similar to the listing standards of the Amex. Accordingly, the Commission today is amending Rule 146(b) to designate options listed on the ISE as covered securities under section 18(b)(1) of the Securities Act. Amending Rule 146(b) to include options listed on ISE as covered securities will exempt those securities from State registration requirements as set forth under section 18(a) of the Securities Act.

II. Background

In 1998, the Chicago Board Options Exchange, Inc. (''CBOE''), Pacific Exchange, Inc. (''PCX''), the Philadelphia Stock Exchange, Inc. (''Phlx''), and the Chicago Stock Exchange (''CHX'') petitioned the Commission to adopt a rule determining that specified portions of the exchanges' listing standards were substantially similar to the listing standards of the Named Markets.[9] In response to the petitions, and after extensive review of the petitioners' listing standards, the Commission adopted Rule 146(b), determining that the listing standards of the CBOE, Tier 1 of the PCX, and Tier 1 of the Phlx were substantially similar to those of the Named Markets and that securities listed pursuant to those standards would be deemed covered securities for purposes of section 18 of the Securities Act.[10]

In its petition, ISE has asked the Commission to amend Rule 146(b) based on a determination that its listing standards are substantially similar to those of the Named Markets so that securities listed on ISE will be ''covered securities'' under section 18(b) of the Securities Act.[11] The ISE currently lists only standardized options issued and guaranteed by the Options Clearing Corporation (''OCC'') that are already listed on at least one of the other options exchanges named in section 18(b)(1)(A) of the Securities Act or Rule 146—*i.e.*, Amex, CBOE, PCX and Phlx. These options are by definition ''covered securities'' for purposes of section 18 of the Securities Act. ISE, however, stated that it may in the future list standardized options issued and guaranteed by OCC that are not listed on one of the other options exchanges specified in section 18(b)(1)(A) of the Securities Act or Rule 146. Accordingly, the ISE requested that the Commission amend Rule 146(b) to designate securities listed on ISE as covered securities for purposes of section 18 of the Securities Act.

III. Comment Letters

As noted above, the Commission received one comment letter in response to the proposed rule amendment, which supported ISE's petition to amend Rule 146(b).[12] The OCC Letter noted that designating options listed on the ISE as ''covered securities'' would place the ISE on an equal competitive footing with other options exchanges whose listed securities are presently exempt from State blue sky laws. The OCC agreed with the Commission's preliminary view that ISE's selection and maintenance requirements for underlying securities are substantially similar to those of Amex. Finally, in response to the Commission's request for comment on whether the absence of an express provision in ISE's rules that it will monitor news sources for information indicating that an underlying security no longer meets the requirements for continued approval should impact the Commission's determination of whether ISE's rules are ''substantially similar'' to Amex's rules, the OCC Letter explained that the absence of such a provision in the ISE maintenance requirements is a difference without substance. The OCC expressed its view that, because the ISE is obligated under sections 6 and 19(g) of the Securities Exchange Act of 1934 (''Exchange Act'') to enforce its rules, including its maintenance requirements, the ISE is required to monitor for corporate events that render a security ineligible to underlie ISE listed options.

IV. Discussion

The Commission has reviewed the ISE listing standards for options traded on the ISE and determines that they are substantially similar to those of Amex. The Commission notes that, under section 18(b)(1)(A) of the Securities Act, the Commission has the authority to compare the listing standards of a petitioner with those of either the NYSE, Amex, or Nasdaq/NMS. Because Amex is the only Named Market that lists standardized options, the Commission compared ISE's listing standards to the listing standards applicable to options traded on the Amex.

In addition, the Commission has interpreted the ''substantially similar'' standard to require listing standards at least as comprehensive as those of the Named Markets.[13] To the extent that the ISE's listing standards are stricter than those of Amex, the Commission may determine that they meet the substantially similar standard. Finally, the Commission notes that differences in language or approach do not necessarily lead to a determination that the listing standards of the petitioner are not substantially similar to those of a Named Market.

The Commission reviewed ISE's listing standards for each class of security it trades, specifically equity options and index options. Using the approach outlined above, the Commission concludes that currently the listing standards of the ISE are substantially similar to the listing standards of the Amex.

With respect to equity options, the ISE listing and maintenance requirements closely track the corresponding Amex provisions.[14] Specifically, the ISE's original listing requirements pertaining to the public

[6] *See* letter from Michael Simon, Senior Vice President and General Counsel, ISE, to Jonathan G. Katz, Secretary, Commission, dated October 9, 2003.

[7] Securities Act Release No. 8404, 69 FR 16154 (March 26, 2004) (''Proposing Release'').

[8] *See* letter from William H. Navin, Executive Vice President and General Counsel, Options Clearing Corporation, to Jonathan G. Katz, Secretary, Commission, dated April 23, 2004 (''OCC Letter'').

[9] *See* letter from David P. Semak, Vice President, Regulation, PCX, to Arthur Levitt, Jr., Chairman, Commission, dated November 15, 1996; letter from Alger B. Chapman, Chairman, CBOE, to Jonathan G. Katz, Secretary, Commission, dated November 18, 1996; letter from J. Craig Long, Esq., Foley & Lardner, Counsel to CHX, to Jonathan G. Katz, Secretary, Commission, dated February 4, 1997; and letter from Michele R. Weisbaum, Vice President and Associate General Counsel, Phlx, to Jonathan G. Katz, Secretary, Commission, dated March 31, 1997.

[10] Securities Act Release No. 7494, Securities Exchange Act Release No. 39542 (January 13, 1998), 63 FR 3032 (January 21, 1998). Review of CHX's listing program, including its listing standards and operations, is ongoing. CHX has petitioned the Commission to amend Rule 146(b) to include Tier 1 of CHX's listing standards. *See* letter from Paul B. O'Kelly, Executive Vice President, Market Regulation and Legal, CHX, to Jonathan G. Katz, Secretary, Commission, dated May 17, 2000.

[11] The Commission notes that, currently, the ISE lists only standardized options and, accordingly, only has listing standards for equity and index options.

[12] *See supra* note 8.

[13] Securities Act Release No. 7422, Securities Exchange Act Release No. 38728 (June 9, 1997), 62 FR 32705 (June 17, 1997).

[14] *Compare* ISE Rules 502 and 503 *with* Amex Rules 915 and 916.

float, distribution of shares and trading volume of the underlying security are identical to those of the Amex.[15] The ISE and Amex also impose the same initial listing and maintenance requirements for options on American Depositary Receipts (''ADRs''), International Funds, Restructured Companies, Exchange-Traded Fund shares (''ETFs''),[16] and Trust Issued Receipts.[17] The only difference, identified in the Proposing Release, between the ISE and Amex original listing standards was a provision in the Amex rules that permits Amex members to propose the listing of an option that otherwise meets established listing requirements. ISE rules do not contain a similar provision. The Commission has determined that because this difference does not impact the quality of ISE's listing standards, it does not render ISE's listing standards less comprehensive than Amex's listing standards.[18] Further, as noted above, differences in language or approach of listing standards are not dispositive.

With regard to the maintenance standards for equity options, the ISE's maintenance requirements for its equity options substantively track those of the Amex.[19] With respect to the underlying security of an equity option, the ISE and Amex have identical maintenance requirements regarding the number of publicly traded shares, their distribution, trade volumes and market price. Failure to meet any one of these criteria may result in delisting the option.[20]

Both Amex and ISE may withdraw approval for options trading if the issuer of an underlying security that is principally traded on a national securities exchange is delisted from trading on that exchange and neither meets National Market System (''NMS'') criteria nor is traded through the facilities of a national securities association. Amex and ISE may also withdraw approval for options trading on a security that is principally traded through facilities of a national securities association, if such security is no longer designated as an NMS security.[21] Likewise, the ISE and Amex impose the same maintenance requirements for continued listing of options on ADRs, ETFs, Trust Issued Receipts, and Holding Company Depositary Receipts.[22]

The Commission noted in the Proposing Release that ISE did not have an express provision requiring the ISE to monitor on a daily basis news sources for information of corporate actions, which may indicate that an underlying security no longer meets requirements for continued approval, while Amex rules did have this express provision. Because ISE is obligated under sections 6 and 19(g) of the Exchange Act to comply with its own rules, which necessitates ISE monitoring corporate events that have a bearing on whether an underlying security satisfies ISE's listing standards, the Commission finds that the absence of such express provision does not represent a significant enough difference between the ISE and the Amex to change our conclusion that their listing standards are substantially similar. The Commission notes that the OCC supported this conclusion by stating that ''[t]he fact that ISE's rules do not describe specifically how ISE will conduct such monitoring does not mean that ISE's maintenance standards are less comprehensive.''[23]

With respect to index options, the Commission finds that the ISE and the Amex have substantially similar requirements for stock indices that may underlie index options. With regard to broad-based index options, both the ISE and the Amex require that the listing of a class of options on a new underlying index must be filed with the Commission as a proposed rule change under section 19(b) of the Exchange Act.[24] Furthermore, the Commission finds that the exchanges have substantially similar provisions for the designation of narrow-based indices as eligible to underlie index options, including rules that allow certain options to be traded on certain narrow-based indices using an expedited procedure, which involves submitting to the Commission a Form 19b–4(e) under Rule 19b–4(e) of the Exchange Act.[25] The listing and maintenance requirements for component securities comprising narrow-based index options listed on the ISE appear in all material respects to be substantially similar to those of the Amex.[26] Specifically, the ISE and the Amex appear to have substantially similar criteria for index components relating to market value, trading volume, calculation of the index, and inclusion of non-U.S. component securities or ADRs.[27] In addition, the Commission believes that ISE and Amex requirements for the index regarding weighting, index components, rebalancing, information barriers maintained by broker-dealers, and the dissemination of index values are substantially similar.[28] Likewise, the ISE rules setting forth position and exercise limits, margin requirements, and settlement terms applicable to index options are substantially similar to those of the Amex.[29] Accordingly, the Commission has determined that the listing standards of the ISE and the Amex for index options are substantially similar.

Therefore, the Commission has determined that the ISE's listing standards are substantially similar to a Named Market and is amending Rule 146(b) to reflect this determination, designating options listed on the ISE as ''covered securities'' for purposes of section 18 of the Securities Act.

The Commission notes that designating ISE options as covered securities under Rule 146(b)(1) subjects ISE's listing standards to Rule 146(b)(2). Rule 146(b)(2) under the Securities Act conditions the designation of securities as ''covered securities'' under Rule 146(b)(1) on the identified exchange's listing standards continuing to be substantially similar to those of the

[15] *See id.* The Commission notes that no exchange has standards establishing qualifications for issuers of exchange-traded options because all options are issued by the OCC. All options issued by the OCC have the equal protection of OCC's backup system of clearing members' obligations, margin deposits and clearing funds.

[16] ETFs are defined under Amex Rule 915 to include ''shares or other securities that are principally traded on a national securities exchange or through the facilities of a national securities association and reported as a national market security, and that represent an interest in a registered investment company organized as an open-end management investment company, a unit investment trust or a similar entity which holds securities constituting or otherwise based on or representing an investment in an index or portfolio of securities. * * *'' *See* Amex Rule 915 Commentary .06. These securities are referred to as ''Fund Shares'' in the ISE rules. *See* ISE Rule 502(h).

[17] *Compare* subsections (c), (f)–(h), and (j) of ISE Rule 502 *with* Subsections .03–.07 of Amex Rule 915, and Subsections (g)–(j) of ISE Rule 503 *with* Subsections .06–.09 of Amex Rule 916.

[18] The Proposing Release contains a more detailed description of the Commission's analysis comparing ISE's listing and maintenance standards for equity options to those of Amex. *See* Securities Act Release No. 8404 (March 22, 2004), 69 FR 16154 (March 26, 2004).

[19] *Compare* ISE Rule 503 *with* Amex Rule 916.

[20] *See* ISE Rule 503.

[21] *See* ISE Rule 503(b)(6); Amex Rule 916 Commentary .01(6).

[22] *Compare* subsections (g)–(j) of ISE Rule 503 *with* subsections .06–.09 of Amex Rule 916.

[23] *See supra* note 8.

[24] *See* ISE Rule 2002(a), Amex Rule 901C.01.

[25] *Compare* ISE Rule 2002(b) *with* Amex Rule 901C.02.

[26] *Compare* ISE Rules 502, 2002(c) *with* Amex Rules 915, 901C.02(d).

[27] *Compare* ISE Rule 2002(b) *with* Amex Rule 901C.02.

[28] *Compare* ISE Rules 2002 and 2003 *with* Amex Rule 901C.

[29] *Compare* ISE Rules 413, 417, 418, 709, 1102, 2004–2010, 2012 *with* Amex Rules 462, 903C, 904C, 905C, 909C, 916C, 918C, 951C, and 980C. The ISE and Amex's disclaimer provisions relating to index options are also substantially similar. *Compare* ISE Rule 2011 *with* Amex Rule 902C.

Named Markets. In essence, Congress intended for the Commission to monitor the listing and maintenance requirements of the exchanges, consistent with our supervisory responsibility under the Exchange Act, to evaluate the continued integrity of these markets and the protection of investors. Thus, under Rule 146(b)(2), the designation of its securities as covered securities is conditioned on the ISE maintaining listing standards that are substantially similar to those of the Named Markets.

V. Consideration of Promotion of Efficiency, Competition and Capital Formation

As required under the Securities Act,[30] the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. Options exchanges are prohibited by Commission rule from prohibiting, conditioning or limiting the listing of any stock options class first listed on another options exchange.[31] Nevertheless, options exchanges do compete for listings of non-equity options such as index options. The Commission believes that designating ISE-listed options as ''covered securities'' by amending Rule 146(b) will permit ISE to better compete for new options and listings, which will increase competition and, potentially, the overall liquidity of the U.S. securities markets. The Commission does not, however, believe that the amendment to Rule 146(b) will have any impact—positive or negative—on capital formation because options are not used by issuers to raise money. The Commission solicited comment on the proposed amendment's effect on competition, efficiency and capital formation. No comments were received. Thus, the Commission concludes that the proposed amendment to Rule 146(b) would promote efficiency and competition.

VI. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 does not apply because the proposed amendment to Rule 146(b) does not impose recordkeeping or information collection requirements or other collection of information, which require the approval of the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

[30] 15 U.S.C. 77b(b).

[31] *See* 17 CFR 240.19c–5.

VII. Cost and Benefits of Proposed Rulemaking

Congress amended section 18 of the Securities Act to exempt covered securities from State registration requirements. Covered securities are those listed on the Named Markets or any other national securities exchange determined by the Commission to have substantially similar listing standards to the Named Markets.[32] Consistent with statutory authority, the Commission has determined that the listing standards of the ISE are substantially similar to those of the Amex, the only Named Market that lists standardized options. Options listed on the ISE are therefore covered securities subject only to Federal regulation.

By exempting options listed on ISE from State law registration requirements, the Commission expects that the listing process will become easier by avoiding duplicative regulation. Moreover, we also expect adoption of the rule to minimize the administrative burden ISE and the OCC face inasmuch as compliance with State registration requirements is preempted.

The Commission also believes that the amendment to Rule 146(b) will permit ISE to compete with other markets whose options are exempt from State registration requirements for new options products and listings. This result has the potential to enhance competition and liquidity, thus benefiting market participants and the public.

The Commission does not believe that there are any significant costs to investors associated with the preemption of State registration requirements for options listed with the ISE. The Commission notes that there may be some cost to investors through the loss of the benefits of State registration and oversight, although the cost is difficult to quantify and, in any event, is unlikely to be significant. Furthermore, we believe that Congress contemplated this potential cost in relation to the economic benefits of exempting covered securities from State regulation. The Commission solicited comment as to the costs and benefits associated with the proposed amendment. No comments were received.

VIII. Regulatory Flexibility Act Certification

In the Proposing Release,[33] the Commission certified, pursuant to section 605(b) of the Regulatory Flexibility Act,[34] that amending Rule 146(b) would not have a significant economic impact on a substantial number of small entities. The Commission solicited comment as to the nature of any impact on small entities, including empirical data to support the extent of such impact costs and benefits associated with the proposed amendment. No comments were received.

[32] 15 U.S.C. 77r(b)(1)(B).

[33] *See supra* note 7.

IX. Statutory Authority

The Commission is amending Rule 146(b) pursuant to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), particularly sections 18(b)(1)(B) and 19(a) (15 U.S.C. 77r(b)(1)(B) and 77s(a)).

List of Subjects in 17 CFR Part 230

Securities.

Text of the Rule

■ For the reasons set forth in the preamble, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 1. The authority citation for part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 79t, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

■ 2. Section 230.146 is amended by revising paragraphs (b)(1)(ii), (b)(1)(iii), and (b)(2) and by adding paragraph (b)(1)(iv) as follows:

§ 230.146 Rules under section 18 of the Act.

* * * * *

(b) * * *

(1) * * *

(i) * * *

(ii) Tier I of the Philadelphia Stock Exchange, Incorporated;

(iii) The Chicago Board Options Exchange, Incorporated; and

(iv) Options listed on the International Securities Exchange, Incorporated.

(2) The designation of securities in paragraphs (b)(1)(i) through (iv) of this section as covered securities is conditioned on such exchanges' listing standards (or segments or tiers thereof) continuing to be substantially similar to those of the NYSE, Amex, or Nasdaq/NMS.

Dated: July 14, 2004.

[34] 5 U.S.C. 605(b).

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–16441 Filed 7–19–04; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 17

[Docket No. 2003N–0308]

Civil Money Penalties Hearings; Maximum Penalty Amounts and Compliance With the Federal Civil Penalties Inflation Adjustment Act

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing a new regulation to adjust for inflation the maximum civil money penalty amounts for the various civil money penalty authorities within our jurisdiction. We are taking this action to comply with the Federal Civil Penalties Inflation Adjustment Act of 1990 (FCPIAA), as amended.

DATES: This rule is effective on September 20, 2004.

FOR FURTHER INFORMATION CONTACT: Philip L. Chao, Office of Policy and Planning (HF–23), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–0587.

SUPPLEMENTARY INFORMATION:

I. Why Are We Revising Our Civil Money Penalty Rules?

In general, the FCPIAA (28 U.S.C. 2461, as amended by the Debt Collection Improvement Act of 1996) requires Federal agencies to issue regulations to adjust for inflation each civil monetary penalty provided by law within their jurisdiction. The FCPIAA directs agencies to adjust the civil monetary penalties by October 23, 1996, and to make additional adjustments at least once every 4 years thereafter. The adjustments are based on changes in the cost of living, and the FCPIAA defines the cost of living adjustment as:

* * * the percentage (if any) for each civil monetary penalty by which—

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law. * * *

The FCPIAA also prescribes a rounding method based on the amount of the calculated increases, but states that the initial adjustment of a civil monetary penalty may not exceed 10 percent of the penalty.

The FCPIAA defines a civil monetary penalty as:

* * * any penalty, fine, or other sanction that—

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal Courts * * *.

Congress enacted the FCPIAA, in part, because it found that the impact of civil monetary penalties had been reduced by inflation and that reducing the impact of civil monetary penalties had weakened their deterrent effect.

In the **Federal Register** of December 1, 2003 (68 FR 67094), we published a proposed rule that identified 14 civil monetary penalties that fall within our jurisdiction and are subject to adjustments under the FCPIAA. The proposal amended our civil money penalties hearing regulations at part 17 (21 CFR part 17) to establish a new § 17.2, entitled ''Maximum penalty amounts'' to show the current maximum civil monetary penalty amounts that were adjusted under the FCPIAA.

The proposal also revised § 17.1 which lists statutory provisions authorizing civil money penalties that were governed by the civil money penalty regulations as of August 28, 1995. The proposed revision simply updated the statutory citations.

II. What Comments Did We Receive on the Proposal?

We received two comments on the proposed rule. A description of those comments and our responses follow. To make it easier to identify comments and our responses, the word ''Comment,'' in parentheses, will appear before the comment's description, and the word ''Response,'' in parentheses, will appear before our response. We have also numbered each comment to help distinguish between different comments. The number assigned to each comment is purely for organizational purposes and does not signify the comment's value or importance or the order in which it was received.

(Comment 1) One comment stated that the adjusted penalties were not severe enough to ''keep crooked manufacturers from stopping their criminal acts which injure the American people.'' The comment said that the penalties should be increased by another 25 percent, and claimed that some drugs have caused more harm than benefits to individuals.

The comment also made remarks concerning compensation afforded to pharmaceutical executives and the drug approval process.

(Response) As we previously stated and in the preamble to the proposed rule, the FCPIAA prescribes a formula for calculating the increase for a civil monetary penalty and states that the initial adjustment of a civil monetary penalty may not exceed 10 percent of the penalty. (See 68 FR at 67094.) Thus, while higher civil monetary penalties might be a better deterrent, the FCPIAA does not authorize increases in penalties greater than 10 percent. Instead, the FCPIAA creates a framework for calculating and limiting the increases to a civil monetary penalty, and so the comment's suggestion to increase the penalties by 25 percent is not consistent with the FCPIAA.

As for the comment's remarks concerning alleged harm from human drug products, executive compensation, and drug approval, such matters are outside the scope of this rulemaking.

(Comment 2) A comment from the General Accounting Office stated that we had miscalculated the increases for several civil monetary penalties and that the correct amounts should be higher. The comment said that four of the proposed adjustments were not consistent with the law regarding inflation increases and explained that the errors were probably due to applying the specified 10-percent cap before rounding instead of after the prescribed rounding. Thus, because all 14 rounded CPI adjustments exceeded the specified 10-percent cap, each penalty should be increased by exactly 10 percent to be consistent with the FCPIAA.

Consequently, the four civil monetary penalty adjustments, as originally proposed and as revised under the comment's interpretation of the FCPIAA's rounding and increase cap formulas, are as follows:

TABLE 1.—FOUR CIVIL MONETARY PENALTIES AS ADJUSTED BY FDA IN THE PROPOSED RULE AND READJUSTED UNDER COMMENT 2 OF SECTION II OF THIS DOCUMENT

U.S. Code Citation	Description of Violation	Current Maximum Penalty Amount (in dollars)	Adjusted Penalty, as Proposed by FDA	Adjusted Penalty, as Recalculated
21 U.S.C.				
333(f)(1)(A)	Violation of certain requirements of the Safe Medical Devices Act	15,000	15,000	16,500
360pp(b)(1)	Violation of certain requirements of the Radiation Control for Health and Safety Act of 1968 (RCHSA)	1,000	1,000	1,100
360pp(b)(1)	Violation of certain requirements of the RCHSA	300,000	325,000	330,000
42 U.S.C.				
263b(h)(3)	Violation of certain requirements of the Mammography Quality Standards Act of 1992 and the Mammography Quality Standards Act of 1998	10,000	10,000	11,000

(Response) We agree with the comment and have revised § 17.2 accordingly.

We also note that proposed § 17.2 contained a table to show the civil monetary penalties, including:

• ''Description of Violation'' to explain what actions could lead to a civil monetary penalty;

• ''Current Maximum Penalty Amount (in dollars)'';

• ''Assessment Method'' to explain how each civil monetary penalty might be applied;

• ''Date of Last Penalty Figure or Adjustment'' because, under the FCPIAA, we are obligated to adjust the maximum penalty amounts periodically; and

• ''Adjusted Maximum Penalty Amount (in dollars)''.

The column for the ''Date of Last Penalty Figure or Adjustment'' was left blank because we did not know when we might issue a final rule. Because we are now issuing this final rule, the ''Date of Last Penalty Figure or Adjustment'' in each column will now be ''2004.''

We have also revised the column that originally read as ''Current Maximum Penalty Amount (in dollars)'' to read as ''Former Maximum Penalty Amount (in dollars).'' We replaced ''Current'' with ''Former'' to eliminate any potential confusion about whether the ''Current Maximum Penalty'' should apply or whether the ''Adjusted Maximum Penalty'' should apply.

III. What Other Changes Did We Make?

Proposed § 17.1 revised the list of statutory civil monetary penalties. In revising the list, we inadvertently omitted two revisions to § 17.1(b), which refers to section 303(g) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 333(g)) and civil money penalties for certain violations of the act that relate to medical devices. The first omission would correct the citation so that it referred to section 303(f)(1)(A) of the act. We accounted for the correct citation in proposed § 17.2(a), but neglected to propose a corresponding citation change in proposed § 17.1(b). The second omission was a reference to section 303(f)(2) of the act, which provides for monetary penalties for certain violations related to pesticide residues. We included a reference to 21 U.S.C. 333(f)(2) in proposed § 17.2, but neglected to make a corresponding change to § 17.1(b).

Consequently, on our own initiative, we have revised § 17.1(b) to delete the reference to section 303(g) of the act and to insert references to section 303(f)(1) and (f)(2) of the act.

Additionally, the introductory text of § 17.1 contains a sentence that reads, in relevant part, ''Listed below are the statutory provisions that as of August 28, 1995, authorize civil money penalties that are governed by these procedures.'' Because we have updated the citations to reflect current laws, the August 28, 1995, date is no longer appropriate. Therefore, this final rule deletes ''August 28, 1995'' and revises the sentence to read as follows: ''Listed below are the statutory provisions that authorize civil money penalties that are governed by these procedures.''

IV. What Does the Final Rule Do?

In brief, the final rule:

• Revises § 17.1 to update the statutory citations regarding various civil monetary penalties and

• Creates a new § 17.2, entitled ''Maximum penalty amounts,'' to show the maximum civil monetary penalties associated with the statutory provisions authorizing civil monetary penalties under the act or the Public Health Service Act (PHS Act).

We remind readers that section 351(d)(2) of the PHS Act (42 U.S.C. 262(d)(2)) authorizes a civil monetary penalty for certain violations of the PHS Act. We omitted section 351(d)(2) of the PHS Act from this rule because, unlike the other civil monetary penalty provisions, section 351(d)(2) of the PHS Act is self-adjusting so that the maximum civil monetary penalty amount increases annually. Section 351(d)(2) of the PHS Act, when first enacted in 1986, provided for a maximum civil penalty of up to $100,000 per day of violation. By using the adjustment formula prescribed in section 351(d)(2) of the PHS Act, we calculate the adjusted maximum civil penalty amount for section 351(d)(2) of the PHS Act to be $151,637.28 per day of violation.

V. Environmental Impact

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

VI. Paperwork Reduction Act 1995

We conclude that the civil monetary penalties adjustments in this final rule are not subject to review by the Office of Management and Budget because they do not constitute a ''collection of

information'' under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The adjustments do not require disclosure of any information to FDA, third parties, or the public.

VII. Federalism

We have analyzed this final rule in accordance with the principles set forth in Executive Order 13132. We have determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, we have concluded that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

VIII. Analysis of Impacts

We have examined the impacts of the final rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). This final rule is consistent with the regulatory philosophy and principles identified in the Executive order. In addition, the final rule is not a significant regulatory action as defined by the Executive order and so is not subject to review under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the final rule simply adjusts the maximum amount of civil monetary penalties administered by FDA, and because the adjustment is required by the FCPIAA, we certify that the final rule will not have a significant economic impact on a substantial number of small entities. Therefore, under the Regulatory Flexibility Act, no further analysis is required.

List of Subjects in 21 CFR Part 17

Administrative practice and procedure, Penalties.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and the Public Health Service Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 17 is amended as follows:

PART 17—CIVIL MONEY PENALTIES HEARINGS

■ 1. The authority citation for 21 CFR part 17 continues to read as follows:

Authority: 21 U.S.C. 331, 333, 337, 351, 352, 355, 360, 360c, 360f, 360i, 360j, 371; 42 U.S.C. 262, 263b, 300aa–28; 5 U.S.C. 554, 555, 556, 557.

■ 2. Section 17.1 is amended by redesignating paragraphs (d) through (f) as paragraphs (e) through (g); by revising the introductory text, paragraphs (a), (b), and newly redesignated paragraphs (e) through (g); and by adding new paragraph (d) to read as follows:

§ 17.1 Scope.

This part sets forth practices and procedures for hearings concerning the administrative imposition of civil money penalties by FDA. Listed below are the statutory provisions that authorize civil money penalties that are governed by these procedures.

(a) Section 303(b)(2) and (b)(3) of the Federal Food, Drug, and Cosmetic Act (the act) authorizing civil money penalties for certain violations of the act that relate to prescription drug marketing practices.

(b) Section 303(f)(1) of the act authorizing civil money penalties for certain violations of the act that relate to medical devices and section 303(f)(2) of the act authorizing civil money penalties for certain violations of the act that relate to pesticide residues.

* * * * *

(d) Section 539(b)(1) of the act authorizing civil money penalties for certain violations of the act that relate to electronic products.

(e) Section 351(d)(2) of the Public Health Service Act (the PHS Act) authorizing civil money penalties for violations of biologic recall orders.

(f) Section 354(h)(3) of the PHS Act, as amended by the Mammography Quality Standards Act of 1992 and the Mammography Quality Standards Act of 1998, authorizing civil money penalties for failure to obtain a certificate and failure to comply with established standards, among other things.

(g) Section 2128(b)(1) of the PHS Act authorizing civil money penalties for intentionally destroying, altering, falsifying, or concealing any record or report required to be prepared, maintained, or submitted by vaccine manufacturers under section 2128 of the PHS Act.

■ 3. Section 17.2 is added to read as follows:

§ 17.2 Maximum penalty amounts.

The following table shows maximum civil monetary penalties associated with the statutory provisions authorizing civil monetary penalties under the act or the Public Service Act.

CIVIL MONETARY PENALTIES AUTHORITIES ADMINISTERED BY FDA AND ADJUSTED MAXIMUM PENALTY AMOUNTS

U.S.C. Section	Description of Violation	Former Maximum Penalty Amount (in dollars)	Assessment Method	Date of Last Penalty	Adjusted Maximum Penalty Amount (in dollars)
(a) 21 U.S.C.					
(1) 333(b)(2)(A)	Violation of certain requirements of the Prescription Drug Marketing Act (PDMA)	50,000	For each of the first two violations in any 10-year period	2004	55,000
(2) 333(b)(2)(B)	Violation of certain requirements of the PDMA	1,000,000	For each violation after the second conviction in any 10-year period	2004	1,100,000
(3) 333(b)(3)	Violation of certain requirements of the PDMA	100,000	Per violation	2004	110,000

CIVIL MONETARY PENALTIES AUTHORITIES ADMINISTERED BY FDA AND ADJUSTED MAXIMUM PENALTY AMOUNTS—Continued

U.S.C. Section	Description of Violation	Former Maximum Penalty Amount (in dollars)	Assessment Method	Date of Last Penalty	Adjusted Maximum Penalty Amount (in dollars)
(4) 333(f)(1)(A)	Violation of certain requirements of the Safe Medical Devices Act (SMDA)	15,000	Per violation	2004	16,000
(5) 333(f)(1)(A)	Violation of certain requirements of the SMDA	1,000,000	For the aggregate of violations	2004	1,100,000
(6) 333(f)(2)(A)	Violation of certain requirements of the Food Quality Protection Act of 1996 (FQPA)	50,000	Per individual	2004	55,000
(7) 333(f)(2)(A)	Violation of certain requirements of the FQPA	250,000	Per "any other person"	2004	275,000
(8) 333(f)(2)(A)	Violation of certain requirements of the FQPA	500,000	For all violations adjudicated in a single proceeding	2004	550,000
(9) 335b(a)	Violation of certain requirements of the Generic Drug Enforcement Act of 1992 (GDEA)	250,000	Per violation for an individual	2004	275,000
(10) 335b(a)	Violation of certain requirements of the GDEA	1,000,000	Per violation for "any other person"	2004	1,100,000
(11) 360pp(b)(1)	Violation of certain requirements of the Radiation Control for Health and Safety Act of 1968 (RCHSA)	1,000	Per violation per person	2004	1,000
(12) 360pp(b)(1)	Violation of certain requirements of the RCHSA	300,000	For any related series of violations	2004	325,000
(b) 42 U.S.C.					
(1) 263b(h)(3)	Violation of certain requirements of the Mammography Quality Standards Act of 1992 and the Mammography Quality Standards Act of 1998	10,000	Per violation	2004	11,000
(2) 300aa–28(b)(1)	Violation of certain requirements of the National Childhood Vaccine Injury Act of 1986	100,000	Per occurrence	2004	110,000

Dated: July 13, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–16388 Filed 7–19–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9140]

RIN 1545–BA90

Transfers To Provide for Satisfaction of Contested Liabilities

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to transfers of money or other property to provide for the satisfaction of contested liabilities. The regulations affect taxpayers that are contesting an asserted liability and that transfer their own stock or indebtedness, the stock or indebtedness of a related party, or a promise to provide services or property in the future, to provide for the satisfaction of the liability prior to the resolution of the contest. The regulations also affect taxpayers that transfer money or other property to a trust, an escrow account, or a court to provide for the satisfaction of a liability for which payment is economic performance.

DATES: *Effective Date:* These regulations are effective July 20, 2004.

Applicability Dates: For dates of applicability, *see* § 1.461–2(g).

FOR FURTHER INFORMATION CONTACT: Norma Rotunno, (202) 622–7900 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR part 1 under section 461(f) of the Internal Revenue Code (Code). On November 21, 2003, temporary regulations (TD 9095) were published in the **Federal Register** (68 FR 65634) relating to the transfer of money or other property to provide for the satisfaction of an asserted liability that a taxpayer is contesting. A notice of proposed

rulemaking (REG–136890–02) cross-referencing the temporary regulations also was published in the **Federal Register** (68 FR 65645) on November 21, 2003. No public hearing was requested or held. One comment was received responding to the notice of proposed rulemaking. After consideration of the comment, the proposed regulations are adopted by this Treasury decision.

Summary of Comment

The temporary regulations clarify that, in general, economic performance does not occur in the taxable year in which a taxpayer transfers money or other property to a trust, escrow account, or court to provide for the satisfaction of an asserted liability under section 461(f) for which payment constitutes economic performance. Rather, economic performance occurs in the taxable year in which a taxpayer transfers money or other property to the person asserting the liability that the taxpayer is contesting, or in the taxable year in which payment from the trust, escrow account, or court registry is made to the person to which the liability is owed. The temporary regulations also indicate that economic performance may be satisfied under section 468B and the regulations thereunder (relating to designated settlement funds and qualified settlement funds).

A commentator suggested that the regulations provide an example of a transfer to a contested liability fund that qualifies for a deduction in the taxable year of transfer because it also satisfies the requirements for a qualified settlement fund under § 1.468B–1. The final regulations do not adopt this comment because the requirements for establishing a qualified settlement fund under § 1.468B–1 are complex and are beyond the scope of these regulations.

Effective Date

In general, these final regulations apply to transfers made in taxable years beginning after December 31, 1953, and ending after August 16, 1954. However, these regulations apply to transfers of any stock of the taxpayer or any stock or indebtedness of a related person on or after November 19, 2003. Additionally, § 1.461–2(e)(2)(i), relating to economic performance, applies to transfers of money or other property after July 18, 1984, the effective date of section 461(h). Section 1.461–2(e)(2)(ii) applies to (1) transfers of money or other property after July 18, 1984, to satisfy workers compensation or tort liabilities, and (2) transfers of money or other property in taxable years beginning after December 31, 1991, the effective date of § 1.461–4(g), to satisfy payment liabilities designated under § 1.461–4(g) (other than liabilities for workers compensation or tort).

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Norma Rotunno of the Office of the Associate Chief Counsel (Income Tax & Accounting). However, other personnel from the IRS and Treasury participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** In § 1.461–2, paragraphs (c)(1), (e)(2), (e)(3) *Example 2*, and (g) are revised to read as follows:

§ 1.461–2 Contested liabilities.

* * * * *

(c) *Transfer to provide for the satisfaction of an asserted liability*—(1) *In general.* (i) A taxpayer may provide for the satisfaction of an asserted liability by transferring money or other property beyond his control to—

(A) The person who is asserting the liability;

(B) An escrowee or trustee pursuant to a written agreement (among the escrowee or trustee, the taxpayer, and the person who is asserting the liability) that the money or other property be delivered in accordance with the settlement of the contest;

(C) An escrowee or trustee pursuant to an order of the United States or of any State or political subdivision thereof or any agency or instrumentality of the foregoing, or of a court, that the money or other property be delivered in accordance with the settlement of the contest; or

(D) A court with jurisdiction over the contest.

(ii) In order for money or other property to be beyond the control of a taxpayer, the taxpayer must relinquish all authority over the money or other property.

(iii) The following are not transfers to provide for the satisfaction of an asserted liability—

(A) Purchasing a bond to guarantee payment of the asserted liability;

(B) An entry on the taxpayer's books of account;

(C) A transfer to an account that is within the control of the taxpayer;

(D) A transfer of any indebtedness of the taxpayer or of any promise by the taxpayer to provide services or property in the future; and

(E) A transfer to a person (other than the person asserting the liability) of any stock of the taxpayer or of any stock or indebtedness of a person related to the taxpayer (as defined in section 267(b)).

* * * * *

(e) * * *

(2) *Application of economic performance rules to transfers under section 461(f).* (i) A taxpayer using an accrual method of accounting is not allowed a deduction under section 461(f) in the taxable year of the transfer unless economic performance has occurred.

(ii) Economic performance occurs for liabilities requiring payment to another person arising out of any workers compensation act or any tort, or any other liability designated in § 1.461–4(g), as payments are made to the person to which the liability is owed. Except as provided in section 468B or the regulations thereunder, economic performance does not occur when a taxpayer transfers money or other property to a trust, an escrow account, or a court to provide for the satisfaction of an asserted workers compensation, tort, or other liability designated under § 1.461–4(g) that the taxpayer is contesting unless the trust, escrow account, or court is the person to which the liability is owed or the taxpayer's payment to the trust, escrow account, or court discharges the taxpayer's liability to the claimant. Rather, economic performance occurs in the taxable year

the taxpayer transfers money or other property to the person that is asserting the workers compensation, tort, or other liability designated under § 1.461–4(g) that the taxpayer is contesting or in the taxable year that payment is made from a trust, an escrow account, or a court registry funded by the taxpayer to the person to which the liability is owed.

(3) * * *

Example 2. Corporation X is a defendant in a class action suit for tort liabilities. In 2002, X establishes a trust for the purpose of satisfying the asserted liability and transfers $10,000,000 to the trust. The trust does not satisfy the requirements of section 468B or the regulations thereunder. In 2004, the trustee pays $10,000,000 to the plaintiffs in settlement of the litigation. Under paragraph (e)(2) of this section, economic performance with respect to X's liability to the plaintiffs occurs in 2004. X may deduct the $10,000,000 payment to the plaintiffs in 2004.

* * * * *

(g) *Effective dates.* (1) Except as otherwise provided, this section applies to transfers of money or other property in taxable years beginning after December 31, 1953, and ending after August 16, 1954.

(2) Paragraph (c)(1)(iii)(E) of this section applies to transfers of any stock of the taxpayer or any stock or indebtedness of a person related to the taxpayer on or after November 19, 2003.

(3) Paragraph (e)(2)(i) of this section applies to transfers of money or other property after July 18, 1984.

(4) Paragraph (e)(2)(ii) and paragraph (e)(3) *Example 2* of this section apply to—

(i) Transfers after July 18, 1984, of money or other property to provide for the satisfaction of an asserted workers compensation or tort liability; and

(ii) Transfers in taxable years beginning after December 31, 1991, of money or other property to provide for the satisfaction of asserted liabilities designated in § 1.461–4(g) (other than liabilities for workers compensation or tort).

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: July 7, 2004.

Gregory F. Jenner,

Acting Assistant Secretary of the Treasury.

[FR Doc. 04–16373 Filed 7–19–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9141]

RIN 1545–AX88

Application of Section 904 to Income Subject to Separate Limitations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final Income Tax Regulations relating to the section 904(d) foreign tax credit limitation and to the exclusion of certain export financing interest from foreign personal holding company income. Changes to the applicable law were made by the Tax Reform Act of 1986, the Technical and Miscellaneous Revenue Act of 1988, the Taxpayer Relief Act of 1997, and the Jobs and Growth Tax Relief Reconciliation Act of 2003. These regulations provide guidance needed to comply with these changes and affect individuals and corporations claiming foreign tax credits and reporting subpart F income.

DATES: *Effective Date:* These regulations are effective July 20, 2004.

Applicability Dates: These regulations generally apply for taxable years beginning on or after July 20, 2004. Section 1.904–4(b)(2)(i) applies with respect to rents and royalties paid or accrued more than 60 days after July 20, 2004. Taxpayers may choose to apply § 1.904(b)–1 and § 1.904(b)–2 to taxable years ending after July 20, 2004.

FOR FURTHER INFORMATION CONTACT: Bethany A. Ingwalson (202) 622–3850 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On January 3, 2001, the Treasury Department and the IRS published in the **Federal Register** (66 FR 319) a notice of proposed rulemaking (REG–104683–00) providing guidance with respect to the application of sections 902 and 904. Several comments were received, and a public hearing was held on April 26, 2001. After consideration of the comments, certain portions of the regulations are withdrawn and the remainder of the regulations are finalized substantially as proposed. The discussion below summarizes the comments received and describes the reasons for withdrawing portions of the proposed regulations and the modifications to the remainder of the regulations. A notice of withdrawal published in the Proposed Rules section in this issue of the **Federal Register** withdraws the proposed amendments to §§ 1.902–0, 1–902–1 and 1.904–4(g).

Summary of Comments Received and Changes Made

I. Effect of Loss of Domestic Corporate Shareholder on Pooling of Earnings and Taxes in Computing Deemed Paid Credits: § 1.902–1

Under the proposed amendments to § 1.902–1(a), the multi-year pooling of a foreign corporation's post-1986 undistributed earnings and foreign income taxes would have terminated if the ownership requirements of section 902(c)(3)(B) were not met as of the end of any taxable year, and such earnings and earnings subsequently accumulated in periods during which the stock ownership requirements of section 902 were not met would have been treated as pre-1987 accumulated profits subject to the annual layering rules of section 902(c)(6). Prop. § 1.902–1(a)(8), (10) and (13). The proposed amendments also provided for the pooling of earnings and taxes to resume in the first subsequent taxable year as of the end of which the foreign corporation again has a qualifying domestic corporate shareholder. The proposed regulations were intended to alleviate the difficulties of reconstructing accumulated earnings and taxes accounts in connection with a U.S. shareholder's acquisition of stock in a foreign corporation previously owned by U.S. shareholders after an intervening period of foreign ownership.

The Treasury Department and the IRS have determined that the potential simplification benefits of the proposed regulations would be outweighed by other administrative difficulties, including those associated with redeterminations of deemed-paid foreign taxes under section 905(c). Accordingly, the Treasury Department and the IRS are withdrawing the proposed amendments to § 1.902–1(a) in a notice of withdrawal published in the Proposed Rules section in this issue of the **Federal Register**.

II. Separate Categories: § 1.904–4

A. The Active Rents and Royalties Exception

The proposed regulations would have expanded the exception from passive income for active rents and royalties to include rents and royalties received from related payors. The proposed regulations provide that this change would apply to rents and royalties paid or accrued more than 60 days after the date that the final regulations are

published in the **Federal Register**. Several comments requested that the amendment to the rents and royalties exception apply retroactively. The Treasury Department and the IRS continue to believe this amendment, which modifies existing final regulations, should apply only prospectively. Therefore, the amendment is adopted without change, and the new final regulations are applicable to rents and royalties paid or accrued more than 60 days after the date that the final regulations are published in the **Federal Register**.

B. Effect of Intervening Period of Noncontrolled or Less-Than-10%-U.S.-Owned Status on Distributions From a Controlled Foreign Corporation or Other Look-Through Corporation

Under section 904(d)(3) and the Treasury regulations thereunder, a U.S. shareholder (as defined in section 951(b)) is allowed look-through treatment for dividends received from a controlled foreign corporation (CFC) if paid out of earnings and profits (E&P) accumulated during periods in which the foreign corporation was a CFC. Section 904(d)(4) allows look-through treatment for dividends paid by a noncontrolled section 902 corporation (10/50 corporation) to a domestic corporation that meets the ownership requirements of section 902(a) from E&P accumulated in a taxable year beginning after December 31, 2002. Section 904(d)(4) provides the Secretary with authority to issue regulations addressing the treatment of dividends paid by a 10/50 corporation out of pre-acquisition E&P.

The proposed regulations would not have provided look-through treatment for a dividend paid by a CFC or 10/50 corporation out of E&P accumulated during a post-2002 period in which the corporation was a CFC or 10/50 corporation if paid after an intervening period during which the corporation was a less-than-10%-U.S.-owned corporation. Prop. § 1.904–4(g)(3)(i)(C)(2). Similarly, the proposed regulations would not have provided look-through treatment for a dividend from a CFC out of E&P accumulated during a pre-2003 period in which the corporation was a CFC if paid after an intervening pre-2003 period in which the CFC was a 10/50 corporation or less-than-10%-U.S.-owned corporation. Prop. § 1.904–4(g)(3)(i)(C)(1) and (2). The proposed regulations also include a transition year rule that treated E&P accumulated and distributions made during the year in which a CFC or 10/50 corporation loses its look-through status (*i.e.*, becomes a non-CFC for pre-2003 tax years or a less-than-10%-U.S.-owned corporation for post-2002 tax years) as E&P accumulated or distributions made after the loss of look-through status. Prop. § 1.904–4(g)(3)(i)(C). The effect of this transition year rule would be to deny look-through treatment for a dividend or an amount treated as a dividend under section 1248(a) from a CFC or 10/50 corporation out of E&P accumulated while the corporation was a look-through entity.

Several comments suggested that the proposed regulations were inconsistent with section 904(d)(2)(E), which provides that a CFC is not treated as a 10/50 corporation with respect to any distribution out of its E&P for periods during which it was a CFC. Comments also criticized the effect of the transition year rule described above. After consideration of the comments, the Treasury Department and the IRS are withdrawing the proposed amendments to § 1.904–4(g) in a notice of withdrawal published in the Proposed Rules section in this issue of the **Federal Register**.

C. High-Taxed Income

The final regulations correct an error in an example relating to the grouping of items of income for purposes of determining whether the items are high-taxed income within the meaning of section 904(d)(2)(F).

III. Capital Gain and Loss Adjustments: § 1.904(b)–1

A. In General

The proposed regulations under section 904(b) provide guidance concerning the application of the capital gain net income limitation of section 904(b)(2)(A) and 904(b)(2)(B)(i). Prop. § 1.904(b)–1(a). The proposed regulations require a taxpayer to reduce foreign source capital gains to the extent the taxpayer's capital gain net income from foreign sources (in the aggregate) exceeded the taxpayer's entire capital gain net income. A taxpayer with a capital gain rate differential for the year and capital gain net income in two or more rate groups within a separate category with capital gain net income would be required to allocate such reduction pro rata to each such rate group in the separate category. The proposed regulations do not provide specific guidance concerning short-term capital gains for these purposes. The final regulations clarify that short-term amounts are treated as a rate group for purposes of § 1.904(b)–1. Specifically, the final regulations clarify that a taxpayer with capital gain net income from foreign sources in a separate category attributable to capital gain net income in the short-term rate group and in one or more long-term rate groups allocates any reduction pursuant to the capital gain net income limitation pro rata to the short-term rate group and each applicable long-term rate group. The final regulations add an example involving short-term capital gain to illustrate this rule.

The proposed regulations also contain a rule limiting net capital gain from foreign sources (in the aggregate) to worldwide net capital gain. Prop. § 1.904(b)–1(a). This rule is intended to limit the amount of capital gains from foreign sources (remaining after application of the capital gain net income limitation of section 904(b)(2)(A) and (b)(2)(B)(i)) subject to the rate differential adjustments of section 904(b)(2)(B)(i) and paragraph (c)(1) of the regulations to the extent a taxpayer has a net long-term capital loss from sources within the United States that does not reduce long-term capital gains from foreign sources pursuant to the capital gain net income limitation. This can occur when a taxpayer has short-term capital gains. The final regulations clarify the operation of the net capital gain limitation. In addition, because the net capital gain limitation applies solely for purposes of determining the amount of capital gains from foreign sources subject to the rate differential adjustments of section 904(b)(2)(B)(i) and paragraph (c)(1) of the regulations, the provisions addressing the net capital gain limitation have been moved to paragraph (c)(1) in the final regulations.

B. Election for Certain Noncorporate Taxpayers

The proposed regulations also provide guidance concerning the rate differential adjustments required by section 904(b)(2)(B). Prop. § 1.904(b)–1(c) and (d). The final regulations add a rule that permits qualifying noncorporate taxpayers to elect not to apply the rate differential adjustments for any taxable year. Under the final regulations, a noncorporate taxpayer that is not subject to tax under section 55 for the taxable year may elect not to apply the rate differential adjustments if the highest rate of tax imposed on the taxpayer's taxable income (excluding net capital gain and qualified dividend income) for the taxable year under section 1 does not exceed the highest rate of tax in effect under section 1(h) for the taxable year and the amount of the taxpayer's net capital gain from foreign sources, plus the amount of the taxpayer's qualified dividend income from foreign sources, is less than $20,000. Under the tax rates currently in

effect, an individual with less than $20,000 of net capital gain and qualified dividend income from foreign sources would be eligible to make the election if the highest rate of tax applicable to such individual's taxable income (excluding net capital gain and qualified dividend income) under section 1 is 28 percent. For example, taxpayers whose filing status is married filing jointly would be eligible to make the election for the 2004 taxable year if their taxable income (excluding net capital gain and qualified dividend income) for 2004 does not exceed $178,650 and the total of their net capital gain and qualified dividend income, from foreign sources, is less than $20,000. A similar election applies to a noncorporate taxpayer subject to the alternative minimum tax for the taxable year. A qualifying taxpayer is presumed to elect out of the rate differential adjustments unless the taxpayer indicates otherwise on its return for the taxable year. The rule is intended to permit taxpayers to avoid the complexity of computing the rate differential adjustments in cases where the failure to make the adjustments does not result in a significant divergence from the results contemplated by section 904(b)(2)(B).

Because capital gains of corporations are not eligible for reduced rates of tax, the eligibility for the election is limited to noncorporate taxpayers.

C. Coordination With Section 904(f)

The proposed regulations contain rules for coordinating the adjustments pursuant to section 904(b)(2) with section 904(f). Prop. § 1.904(b)–1(g). The final regulations provide additional guidance concerning the interaction between section 904(b)(2) and (f). First, the final regulations provide that a capital loss from sources within the United States that reduces capital gains from foreign sources pursuant to section 904(b)(2)(A) (or 904(b)(2)(B)(i)) and paragraph (a) of the regulations is disregarded in determining the amount of a taxpayer's taxable income from sources within the United States for purposes of computing the amount of any additions to the taxpayer's overall foreign loss accounts. This rule is intended to prevent the double-counting of capital losses from sources within the United States. Second, the final regulations provide that a taxpayer's loss from sources in the United States (within the meaning of section 904(f)(5)(D)) is the amount by which the taxpayer's foreign source taxable income (in the aggregate after taking into account adjustments pursuant to section 904(b)(2) and the final regulations) exceeds the taxpayer's entire taxable income (after taking into account adjustments pursuant to section 904(b)(2)(B) and the final regulations). The rule is intended to prevent distortions to the foreign tax credit limitation fraction that would otherwise result when a taxpayer has capital gains or losses from sources within the United States. The final regulations add examples to illustrate the operation of these coordination rules.

D. Qualified Dividend Income

The Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA), Public Law 108–27 (117 Stat. 752), extended the capital gain rates under section 1(h) to qualified dividend income of noncorporate taxpayers. JGTRRA provides that rules similar to the rules of section 904(b)(2)(B) (the rate differential adjustment rules) apply with respect to such qualified dividend income. The final regulations implement the coordination rule contained in JGTRRA by requiring a taxpayer to make rate differential adjustments to the taxpayer's qualified dividend income in a manner similar to the adjustments for a taxpayer's capital gains. The final regulations contain an election for noncorporate taxpayers, similar to the election for capital gains and losses, allowing a qualifying taxpayer to elect out of the rate differential adjustments with respect to the taxpayer's qualified dividend income.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these final regulations is Bethany A. Ingwalson of the Office of Associate Chief Counsel (International), within the Office of Chief Counsel, Internal Revenue Service. However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

■ **Paragraph 1.** The authority citation for part 1 is amended by removing the entries for ''1.904–4 through 1.904–7'' and the entry for ''1.904(b)–3'', and by adding entries in numerical order to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.904–4 also issued under 26 U.S.C. 904(d)(6).

Section 1.904(b)–1 also issued under 26 U.S.C. 1(h)(11)(C)(iv) and 904(b)(2)(C).

Section 1.904(b)–2 also issued under 26 U.S.C. 1(h)(11)(C)(iv) and 904(b)(2)(C).

Section 1.904–5 also issued under 26 U.S.C. 904(d)(6).

Section 1.904–6 also issued under 26 U.S.C. 904(d)(6).

Section 1.904–7 also issued under 26 U.S.C. 904(d)(6). * * *

■ **Par. 2.** Section 1.904–0 is amended as follows:

■ 1. The entries for § 1.904–4 are amended by:

■ a. Revising the entry for paragraph (b)(2)(iii).

■ b. Removing the entry for paragraph (b)(2)(iv).

■ c. Adding an entry for paragraph (m).

■ 2. The entries for §§ 1.904(b)–1 and 1.904(b)–2 are revised.

■ 3. Removing all the entries for §§ 1.904(b)–3 and 1.904(b)–4.

■ 4. Adding entries for § 1.904(j)–1.

The revisions and additions read as follows:

§ 1.904–0 Outline of regulation provisions for section 904.

* * * * *

§ 1.904–4 Separate application of section 904 with respect to certain categories of income.

* * * * *

(b) * * *

(2) * * *

(iii) Example.

* * * * *

(m) Income treated as allocable to an additional separate category.

* * * * *

§ 1.904(b)–1 Special rules for capital gains and losses.

(a) Capital gains and losses included in taxable income from sources outside the United States.

(1) Limitation on capital gain from sources outside the United States when the taxpayer

has net capital losses from sources within the United States.
(i) In general.
(ii) Allocation of reduction to separate categories or rate groups.
(A) In general.
(B) Taxpayer with capital gain rate differential.
(2) Exclusivity of rules; no reduction by reason of net capital loss from sources outside the United States in a different separate category.
(3) Capital losses from sources outside the United States in the same separate category.
(4) Examples.
(b) Capital gain rate differential.
(1) Application of adjustments only if capital gain rate differential exists.
(2) Determination of whether capital gain rate differential exists.
(3) Special rule for certain noncorporate taxpayers.
(c) Rate differential adjustment of capital gains.
(1) Rate differential adjustment of capital gains in foreign source taxable income.
(i) In general.
(ii) Special rule for taxpayers with a net long-term capital loss from sources within the United States.
(iii) Examples.
(2) Rate differential adjustment of capital gains in entire taxable income.
(d) Rate differential adjustment of capital losses from sources outside the United States.
(1) In general.
(2) Determination of which capital gains are offset by net capital losses from sources outside the United States.
(e) Qualified dividend income.
(1) In general.
(2) Exception.
(f) Definitions.
(1) Alternative tax rate.
(2) Net capital gain.
(3) Rate differential portion.
(4) Rate group.
(i) Short-term capital gains or losses.
(ii) Long-term capital gains.
(iii) Long-term capital losses.
(5) Terms used in sections 1(h), 904(b) or 1222.
(g) Examples.
(h) Coordination with section 904(f).
(1) In general.
(2) Examples.
(i) Effective date.

§ 1.904(b)–2 Special rules for application of section 904(b) to alternative minimum tax foreign tax credit.

(a) Application of section 904(b)(2)(B) adjustments.
(b) Use of alternative minimum tax rates.
(1) Taxpayers other than corporations.
(2) Corporate taxpayers.
(c) Effective date.

* * * * *

§ 1.904(j)–1 Certain individuals exempt from foreign tax credit limitation.

(a) Election available only if all foreign taxes are creditable foreign taxes.
(b) Coordination with carryover rules.
(1) No carryovers to or from election year.
(2) Carryovers to and from other years determined without regard to election years.
(3) Determination of amount of creditable foreign taxes.
(c) Examples.
(d) Effective date.

■ **Par. 3.** Section 1.904–4 is amended as follows:
■ 1. Paragraph (a) is amended by removing the period at the end and adding the language ", or in § 1.904–4(m) (additional separate categories)."
■ 2. The first sentence of paragraph (b)(2)(i) is revised.
■ 3. Paragraph (b)(2)(ii) is revised.
■ 4. Paragraph (b)(2)(iii) is removed.
■ 5. Paragraph (b)(2)(iv) is redesignated as paragraph (b)(2)(iii).
■ 6. The last three sentences of the *Example* in newly designated paragraph (b)(2)(iii) are removed and six new sentences are added in their place.
■ 7. The fifth sentence of *Example 4* in paragraph (c)(8) is revised.
■ 8. The language "and" at the end of paragraph (l)(1)(v) is removed.
■ 9. The period at the end of paragraph (l)(1)(vi) is removed and "; and" is added in its place.
■ 10. Paragraph (l)(1)(vii) is added.
■ 11. Paragraph (m) is added.

The revisions and additions read as follows:

§ 1.904–4 Separate application of section 904 with respect to certain categories of income.

* * * * *

(b) * * *

(2) * * * (i) * * * For rents and royalties paid or accrued after September 20, 2004, passive income does not include any rents or royalties that are derived in the active conduct of a trade or business, regardless of whether such rents or royalties are received from a related or an unrelated person. * * *

(ii) *Exception for certain rents and royalties.* Rents and royalties are considered derived in the active conduct of a trade or business by a United States person or by a controlled foreign corporation (or other entity to which the look-through rules apply) for purposes of section 904 (but not for purposes of section 954) if the requirements of section 954(c)(2)(A) are satisfied by one or more corporations that are members of an affiliated group of corporations (within the meaning of section 1504(a), determined without regard to section 1504(b)(3)) of which the recipient is a member. For purposes of this paragraph (b)(2)(ii), an affiliated group includes only domestic corporations and foreign corporations that are controlled foreign corporations in which domestic members of the affiliated group own, directly or indirectly, at least 80 percent of the total voting power and value of the stock. For purposes of this paragraph (b)(2)(ii), indirect ownership shall be determined under section 318 and the regulations under that section.

(iii) * * *

Example. * * * Some of the franchisees are unrelated to S and P. Other franchisees are related to S or P and use the licensed property outside of S's country of incorporation. S does not satisfy, but P does satisfy, the active trade or business requirements of section 954(c)(2)(A) and the regulations thereunder. The royalty income earned by S with regard to both its related and unrelated franchisees is foreign personal holding company income because S does not satisfy the active trade or business requirements of section 954(c)(2)(A) and, in addition, the royalty income from the related franchisees does not qualify for the same country exception of section 954(c)(3). However, all of the royalty income earned by S is general limitation income to S under § 1.904–4(b)(2)(ii) because P, a member of S's affiliated group (as defined therein), satisfies the active trade or business test (which is applied without regard to whether the royalties are paid by a related person). S's royalty income that is taxable to P under subpart F and the royalties paid to P are general limitation income to P under the look-through rules of § 1.904–5(c)(1)(i) and (c)(3), respectively.

* * * * *

(c) * * *

(8) * * *

Example 4. * * * The royalty income is not subject to a withholding tax, and is not taxed by Country X, and the interest and the rental income are subject to a 4 percent and 10 percent withholding tax, respectively. * * *

* * * * *

(l) * * * (1) * * *

(vii) Income that meets the definitions of a separate category described in paragraph (m) of this section and of any other category of separate limitation income described in section 904(d)(1)(A) through (H) will be subject to the separate limitation described in paragraph (m) of this section and will not be treated as general limitation income described in section 904(d)(1)(I).

* * * * *

(m) *Income treated as allocable to an additional separate category.* If section 904(a), (b), and (c) are applied separately to any category of income under the Internal Revenue Code (for example, under section 56(g)(4)(C)(iii)(IV), 245(a)(10), 865(h), 901(j), or 904(g)(10)), that category of income will be treated for all purposes of the Internal Revenue Code and regulations as if it were a separate category listed in section 904(d)(1) and (d)(3)(F)(i).

■ **Par. 4.** In § 1.904–5, paragraph (a)(1) is revised to read as follows:

§ 1.904–5 Look-through rules as applied to controlled foreign corporations and other entities.

(a) * * *

(1) The term *separate category* means, as the context requires, any category of income described in section 904(d)(1)(A), (B), (C), (D), (E), (F), (G), (H), or (I) and in § 1.904–4(b), (d), (e), (f), and (g), any category of income described in § 1.904–4(m), or any category of earnings and profits to which income described in such provisions is attributable.

* * * * *

■ **Par. 5.** In § 1.904–6, paragraph (a)(1)(ii) is amended by adding two sentences at the end to read as follows:

§ 1.904–6 Allocation and apportionment of taxes.

(a) * * * (1) * * *

(ii) * * * If the taxpayer applies the principles of §§ 1.861–8 through 1.861–14T for purposes of allocating expenses at the level of the taxpayer (or at the level of the qualified business unit, foreign subsidiary, or other entity that paid or accrued the foreign taxes) under this paragraph (a)(1)(ii), such principles shall be applied (for such purposes) in the same manner as the taxpayer applies such principles in determining the income or earnings and profits for United States tax purposes of the taxpayer (or of the qualified business unit, foreign subsidiary, or other entity that paid or accrued the foreign taxes, as the case may be). For example, a taxpayer must use the modified gross income method under § 1.861–9T when applying the principles of that section for purposes of this paragraph (a)(1)(ii) to determine the amount of a controlled foreign corporation's income, in each separate category, that is taxed by a foreign country, if the taxpayer applies the modified gross income method under § 1.861–9T(f)(3) when applying § 1.861–9T to determine the income and earnings and profits of the controlled foreign corporation for United States tax purposes.

* * * * *

■ **Par. 6.** Section 1.904(b)–1 is revised to read as follows:

§ 1.904(b)–1 Special rules for capital gains and losses.

(a) *Capital gains and losses included in taxable income from sources outside the United States*—(1) *Limitation on capital gain from sources outside the United States when the taxpayer has net capital losses from sources within the United States*—(i) *In general.* Except as otherwise provided in this section, for purposes of section 904 and this section, taxable income from sources outside the United States (in all of the taxpayer's separate categories in the aggregate) shall include capital gain net income from sources outside the United States (determined by considering all of the capital gain and loss items in all of the taxpayer's separate categories in the aggregate) only to the extent of capital gain net income from all sources. Thus, capital gain net income from sources outside the United States (determined by considering all of the capital gain and loss items in all of the taxpayer's separate categories in the aggregate) shall be reduced to the extent such amount exceeds capital gain net income from all sources.

(ii) *Allocation of reduction to separate categories or rate groups*—(A) *In general.* If capital gain net income from sources outside the United States exceeds capital gain net income from all sources, and the taxpayer has capital gain net income from sources outside the United States in only one separate category, such excess is allocated as a reduction to that separate category. If a taxpayer has capital gain net income from foreign sources in two or more separate categories, such excess must be apportioned on a pro rata basis as a reduction to each such separate category. For purposes of the preceding sentence, pro rata means based on the relative amounts of the capital gain net income from sources outside the United States in each separate category.

(B) *Taxpayer with capital gain rate differential.* If a taxpayer with a capital gain rate differential for the year (within the meaning of paragraph (b) of this section) has capital gain net income from foreign sources in only one rate group within a separate category, any reduction to such separate category pursuant to paragraph (a)(1)(ii)(A) of this section must be allocated to such rate group. If a taxpayer with a capital gain rate differential for the year (within the meaning of paragraph (b) of this section) has capital gain net income from foreign sources in two or more rate groups within a separate category, any reduction to such separate category pursuant to paragraph (a)(1)(ii)(A) of this section must be apportioned on a pro rata basis among such rate groups. For purposes of the preceding sentence, pro rata means based on the relative amounts of the capital gain net income from sources outside the United States in each rate group within the applicable separate category.

(2) *Exclusivity of rules; no reduction by reason of net capital losses from sources outside the United States in a different separate category.* Capital gains from sources outside the United States in any separate category shall be limited by reason of section 904(b)(2)(A) and the comparable limitation of section 904(b)(2)(B)(i) only to the extent provided in paragraph (a)(1) of this section (relating to limitation on capital gain from sources outside the United States when taxpayer has net capital losses from sources within the United States).

(3) *Capital losses from sources outside the United States in the same separate category.* Except as otherwise provided in paragraph (d) of this section, taxable income from sources outside the United States in each separate category shall be reduced by any capital loss that is allocable or apportionable to income from sources outside the United States in such separate category to the extent such loss is allowable in determining taxable income for the taxable year.

(4) *Examples.* The following examples illustrate the application of this paragraph (a) to taxpayers that do not have a capital gain rate differential for the taxable year. See paragraph (g) of this section for examples that illustrate the application of this paragraph (a) to taxpayers that have a capital gain rate differential for the year. The examples are as follows:

Example 1. Taxpayer A, a corporation, has a $3,000 capital loss from sources outside the United States in the general limitation category, a $6,000 capital gain from sources outside the United States in the passive category, and a $2,000 capital loss from sources within the United States. A's capital gain net income from sources outside the United States in the aggregate, from all separate categories, is $3,000 ($6,000 − $3,000). A's capital gain net income from all sources is $1,000 ($6,000 − $3,000 − $2,000). Thus, for purposes of section 904, A's taxable income from sources outside the United States in all of A's separate categories in the aggregate includes only $1,000 of capital gain net income from sources outside the United States. See paragraph (a)(1)(i) of this section. Pursuant to paragraphs (a)(1)(i) and (a)(1)(ii)(A) of this section, A must reduce the $6,000 of capital gain net income from sources outside the United States in the passive category by $2,000 ($3,000 of capital gain net income from sources outside the United States − $1,000 of capital gain net income from all sources). After the adjustment, A has $4,000 of capital gain from sources outside the United States in the passive category and $3,000 of capital loss from sources outside the United States in the general limitation category.

Example 2. Taxpayer B, a corporation, has a $300 capital gain from sources outside the United States in the general limitation category and a $200 capital gain from sources outside the United States in the passive category. B's capital gain net income from sources outside the United States is $500 ($300 + $200). B also has a $150 capital loss from sources within the United States and a $50 capital gain from sources within the

United States. Thus, B's capital gain net income from all sources is $400 ($300 + $200 − $150 + $50). Pursuant to paragraph (a)(1)(ii)(A) of this section, the $100 excess of capital gain net income from sources outside the United States over capital gain net income from all sources ($500 − $400) must be apportioned, as a reduction, three-fifths ($300/$500 of $100, or $60) to the general limitation category and two-fifths ($200/$500 of $100, or $40) to the passive category. Therefore, for purposes of section 904, the general limitation category includes $240 ($300 − $60) of capital gain net income from sources outside the United States and the passive category includes $160 ($200 − $40) of capital gain net income from sources outside the United States.

Example 3. Taxpayer C, a corporation, has a $10,000 capital loss from sources outside the United States in the general limitation category, a $4,000 capital gain from sources outside the United States in the passive category, and a $2,000 capital gain from sources within the United States. C's capital gain net income from sources outside the United States is zero, since losses exceed gains. C's capital gain net income from all sources is also zero. C's capital gain net income from sources outside the United States does not exceed its capital gain net income from all sources, and therefore paragraph (a)(1) of this section does not require any reduction of C's passive category capital gain. For purposes of section 904, C's passive category includes $4,000 of capital gain net income. C's general limitation category includes a capital loss of $6,000 because only $6,000 of capital loss is allowable as a deduction in the current year. The entire $4,000 of capital loss in excess of the $6,000 of capital loss that offsets capital gain in the taxable year is carried back or forward under section 1212(a), and none of such $4,000 is taken into account under section 904(a) or (b) for the current taxable year.

(b) *Capital gain rate differential*—(1) *Application of adjustments only if capital gain rate differential exists.* Section 904(b)(2)(B) and paragraphs (c) and (d) of this section apply only for taxable years in which the taxpayer has a capital gain rate differential.

(2) *Determination of whether capital gain rate differential exists.* For purposes of section 904(b) and this section, a capital gain rate differential is considered to exist for the taxable year only if the taxpayer has taxable income (excluding net capital gain and qualified dividend income) for the taxable year, a net capital gain for the taxable year and—

(i) In the case of a taxpayer other than a corporation, tax is imposed on the net capital gain at a reduced rate under section 1(h) for the taxable year; or

(ii) In the case of a corporation, tax is imposed under section 1201(a) on the taxpayer at a rate less than any rate of tax imposed on the taxpayer by section 11, 511, or 831(a) or (b), whichever applies (determined without regard to the last sentence of section 11(b)(1)), for the taxable year.

(3) *Special rule for certain noncorporate taxpayers.* A taxpayer that has a capital gain rate differential for the taxable year under paragraph (b)(2)(i) of this section and is not subject to alternative minimum tax under section 55 for the taxable year may elect not to apply the rate differential adjustments contained in section 904(b)(2)(B) and paragraphs (c) and (d) of this section if the highest rate of tax imposed on such taxpayer's taxable income (excluding net capital gain and any qualified dividend income) for the taxable year under section 1 does not exceed the highest rate of tax in effect under section 1(h) for the taxable year and the amount of the taxpayer's net capital gain from sources outside the United States, plus the amount of the taxpayer's qualified dividend income from sources outside the United States, is less than $20,000. A taxpayer that has a capital gain rate differential for the taxable year under paragraph (b)(2)(i) of this section and is subject to alternative minimum tax under section 55 for the taxable year may make such election if the rate of tax imposed on such taxpayer's alternative minimum taxable income (excluding net capital gain and any qualified dividend income) under section 55 does not exceed 26 percent, the highest rate of tax imposed on such taxpayer's taxable income (excluding net capital gain and any qualified dividend income) for the taxable year under section 1 does not exceed the highest rate of tax in effect under section 1(h) for the taxable year and the amount of the taxpayer's net capital gain from sources outside the United States, plus the amount of the taxpayer's qualified dividend income from sources outside the United States, is less than $20,000. A taxpayer who makes this election shall apply paragraph (a) of this section as if such taxpayer does not have a capital gain rate differential for the taxable year. An eligible taxpayer shall be presumed to have elected not to apply the rate differential adjustments, unless such taxpayer applies the rate differential adjustments contained in section 904(b)(2)(B) and paragraphs (c) and (d) of this section in determining its foreign tax credit limitation for the taxable year.

(c) *Rate differential adjustment of capital gains*—(1) *Rate differential adjustment of capital gains in foreign source taxable income*—(i) *In general.* Subject to paragraph (c)(1)(ii) of this section, in determining taxable income from sources outside the United States for purposes of section 904 and this section, capital gain net income from sources outside the United States in each long-term rate group in each separate category (separate category long-term rate group), shall be reduced by the rate differential portion of such capital gain net income. For purposes of paragraph (c)(1) of this section, references to capital gain net income are references to capital gain net income remaining after any reduction to such income pursuant to paragraph (a)(1) of this section (*i.e.*, paragraph (a)(1) of this section applies before paragraphs (c) and (d) of this section).

(ii) *Special rule for taxpayers with a net long-term capital loss from sources within the United States.* If a taxpayer has a net long-term capital loss from sources within the United States (*i.e.*, the taxpayer's long-term capital losses from sources within the United States exceed the taxpayer's long-term capital gains from sources within the United States) and also has any short-term capital gains from sources within or without the United States, then capital gain net income from sources outside the United States in each separate category long-term rate group shall be reduced by the rate differential portion of the applicable rate differential amount. The applicable rate differential amount is determined as follows:

(A) *Step 1: Determine the U.S. long-term capital loss adjustment amount.* The U.S. long-term capital loss adjustment amount is the excess, if any, of the net long-term capital loss from sources within the United States over the amount, if any, by which the taxpayer reduced long-term capital gains from sources without the United States pursuant to paragraph (a)(1) of this section.

(B) *Step 2: Determine the applicable rate differential amount.* If a taxpayer has capital gain net income from sources outside the United States in only one separate category long-term rate group, the applicable rate differential amount is the excess of such capital gain net income over the U.S. long-term capital loss adjustment amount. If a taxpayer has capital gain net income from sources outside the United States in more than one separate category long-term rate group, the U.S. long-term capital loss adjustment amount shall be apportioned on a pro rata basis to each separate category long-term rate group with capital gain net income. For purposes of the preceding sentence, pro rata means based on the relative amounts of capital gain net income from sources outside the United States in each separate category long-term rate group. The applicable rate differential amount for each separate category long-term rate group with

capital gain net income is the excess of such capital gain net income over the portion of the U.S. long-term capital loss adjustment amount apportioned to the separate category long-term rate group pursuant to this Step 2.

(iii) *Examples.* The following examples illustrate the provisions of paragraph (c)(1)(ii) of this section. The taxpayers in the examples are assumed to have taxable income (excluding net capital gain and qualified dividend income) subject to a rate of tax under section 1 greater than the highest rate of tax in effect under section 1(h) for the applicable taxable year. The examples are as follows:

Example 1. (i) M, an individual, has $300 of long-term capital gain from foreign sources in the passive category, $200 of which is subject to tax at a rate of 15 percent under section 1(h) and $100 of which is subject to tax at a rate of 28% under section 1(h). M has $150 of short-term capital gain from sources within the United States. M has a $100 long-term capital loss from sources within the United States.

(ii) M's capital gain net income from sources outside the United States ($300) does not exceed M's capital gain net income from all sources ($350). Therefore, paragraph (a)(1) of this section does not require any reduction of M's capital gain net income in the passive category.

(iii) Because M has a net long-term capital loss from sources within the United States ($100) and also has a short-term capital gain from U.S. sources ($150), M must apply the provisions of paragraph (c)(1)(ii) of this section to determine the amount of the $300 of capital gain net income in the passive category that is subject to a rate differential adjustment. Under *Step 1*, the U.S. long-term capital loss adjustment amount is $100 ($100 − $0). Under *Step 2*, M must apportion this amount to each rate group in the passive category pro rata based on the amount of capital gain net income in each rate group. Thus, $66.67 ($200/$300 of $100) is apportioned to the 15 percent rate group and $33.33 ($100/$300 of $100) is apportioned to the 28 percent rate group. The applicable rate differential amount for the 15 percent rate group is $133.33 ($200 − $66.67). Thus, $133.33 of the $200 of capital gain net income in the 15 percent rate group is subject to a rate differential adjustment pursuant to paragraph (c)(1) of this section. The remaining $66.67 is not subject to a rate differential adjustment. The applicable rate differential amount for the 28 percent rate group is $66.67 ($100 − $33.33). Thus, $66.67 of the $100 of capital gain net income in the 28 percent rate group is subject to a rate differential adjustment pursuant to paragraph (c)(1) of this section. The remaining $33.33 is not subject to a rate differential adjustment.

Example 2. (i) N, an individual, has $300 of long-term capital gain from foreign sources in the passive category, all of which is subject to tax at a rate of 15 percent under section 1(h). N has $50 of short-term capital gain from sources within the United States. N has a $100 long-term capital loss from sources within the United States.

(ii) N's capital gain net income from sources outside the United States ($300) exceeds N's capital gain net income from all sources ($250). Pursuant to paragraph (a)(1) of this section, N must reduce the $300 capital gain in the passive category by $50. N has $250 of capital gain remaining in the passive category.

(iii) Because N has a net long-term capital loss from sources within the United States ($100) and also has a short-term capital gain from U.S. sources ($50), N must apply the provisions of paragraph (c)(1)(ii) of this section to determine the amount of the $250 of capital gain in the passive category that is subject to a rate differential adjustment. Under *Step 1*, the U.S. long-term capital loss adjustment amount is $50 ($100 − $50). Under *Step 2*, the applicable rate differential amount is $200 ($250 − $50). Thus, $200 of the capital gain in the passive category is subject to a rate differential adjustment under paragraph (c)(1) of this section. The remaining $50 is not subject to a rate differential adjustment.

Example 3. (i) O, an individual, has a $100 short-term capital gain from foreign sources in the passive category. O has $300 of long-term capital gain from foreign sources in the passive category, all of which is subject to tax at a rate of 15 percent under section 1(h). O has a $100 long-term capital loss from sources within the United States.

(ii) O's capital gain net income from sources outside the United States ($400) exceeds O's capital gain net income from all sources ($300). Pursuant to paragraph (a)(1) of this section, O must reduce the $400 capital gain net income in the passive category by $100. Because C has capital gain net income in two or more rate groups in the passive category, O must apportion such amount, as a reduction, to each rate group on a pro rata basis pursuant to paragraph (a)(1)(ii)(B) of this section. Thus, $25 ($100/$400 of $100) is apportioned to the short-term capital gain and $75 ($300/$400 of $100) is apportioned to the long-term capital gain in the 15 percent rate group. After application of paragraph (a)(1) of this section, O has $75 of short-term capital gain in the passive category and $225 of long-term capital gain in the 15 percent rate group in the passive category.

(iii) Because O has a net long-term capital loss from sources within the United States ($100) and also has a short-term capital gain from foreign sources ($100), O must apply the provisions of paragraph (c)(1)(ii) of this section to determine the amount of the $225 of long-term capital gain in the 15 percent rate group that is subject to a rate differential adjustment. Under *Step 1*, the U.S. long-term capital loss adjustment amount is $25 ($100 − $75). Under *Step 2*, the applicable rate differential amount is $200 ($225 − $25). Thus, $200 of the long-term capital gain is subject to a rate differential adjustment under paragraph (c)(1) of this section. The remaining $25 of long-term capital gain is not subject to a rate differential adjustment.

(2) *Rate differential adjustment of capital gains in entire taxable income.* For purposes of section 904 and this section, entire taxable income shall include gains from the sale or exchange of capital assets only to the extent of capital gain net income reduced by the sum of the rate differential portions of each rate group of net capital gain.

(d) *Rate differential adjustment of capital losses from sources outside the United States*—(1) *In general.* In determining taxable income from sources outside the United States for purposes of section 904 and this section, a taxpayer with a net capital loss in a separate category rate group shall reduce such net capital loss by the sum of the rate differential portions of the capital gain net income in each long-term rate group offset by such net capital loss. A net capital loss in a separate category rate group is the amount, if any, by which capital losses in a rate group from sources outside the United States included in a separate category exceed capital gains from sources outside the United States in the same rate group and the same separate category.

(2) *Determination of which capital gains are offset by net capital losses from sources outside the United States.* For purposes of paragraph (d)(1) of this section, in order to determine the capital gain net income offset by net capital losses from sources outside the United States, the following rules shall apply in the following order:

(i) Net capital losses from sources outside the United States in each separate category rate group shall be netted against capital gain net income from sources outside the United States from the same rate group in other separate categories.

(ii) Capital losses from sources within the United States shall be netted against capital gains from sources within the United States in the same rate group.

(iii) Net capital losses from sources outside the United States in excess of the amounts netted against capital gains under paragraph (d)(2)(i) of this section shall be netted against the taxpayer's remaining capital gains from sources within and outside the United States in the following order, and without regard to any net capital losses, from any rate group, from sources within the United States—

(A) First against capital gain net income from sources within the United States in the same rate group;

(B) Next, against capital gain net income in other rate groups, in the order in which capital losses offset capital gains for purposes of determining the taxpayer's taxable income and without regard to whether such capital gain net income derives from sources within or outside the United States, as follows:

(*1*) A net capital loss in the short-term rate group is used first to offset any capital gain net income in the 28 percent rate group, then to offset capital gain net income in the 25 percent rate group, then to offset capital gain net income in the 15 percent rate group, and finally to offset capital gain net income in the 5 percent rate group.

(*2*) A net capital loss in the 28 percent rate group is used first to offset capital gain net income in the 25 percent rate group, then to offset capital gain net income in the 15 percent rate group, and finally to offset capital gain net income in the 5 percent rate group.

(*3*) A net capital loss in the 15 percent rate group is used first to offset capital gain net income in the 5 percent rate group, and then to offset capital gain net income in the 28 percent rate group, and finally to offset capital gain net income in the 25 percent rate group.

(iv) Net capital losses from sources outside the United States in any rate group, to the extent netted against capital gains in any other separate category under paragraph (d)(2)(i) of this section or against capital gains in the same or any other rate group under paragraph (d)(2)(iii) of this section, shall be treated as coming pro rata from each separate category that contains a net capital loss from sources outside the United States in that rate group. For example, assume that the taxpayer has $20 of net capital losses in the 15 percent rate group in the passive category and $40 of net capital losses in the 15 percent rate group in the general limitation category, both from sources outside the United States. Further assume that $50 of the total $60 net capital losses from sources outside the United States are netted against capital gain net income in the 28 percent rate group (from other separate categories or from sources within the United States). One-third of the $50 of such capital losses would be treated as coming from the passive category, and two-thirds of such $50 would be treated as coming from the general limitation category.

(v) In determining the capital gain net income offset by a net capital loss from sources outside the United States pursuant to this paragraph (d)(2), a taxpayer shall take into account any reduction to capital gain net income from sources outside the United States pursuant to paragraph (a) of this section and shall disregard any adjustments to such capital gain net income pursuant to paragraph (c)(1) of this section.

(vi) If at any time during a taxable year, tax is imposed under section 1(h) at a rate other than a rate of tax specified in this paragraph (d)(2), the principles of this paragraph (d)(2) shall apply to determine the capital gain net income offset by any net capital loss in a separate category rate group.

(vii) The determination of which capital gains are offset by capital losses from sources outside the United States under this paragraph (d)(2) is made solely in order to determine the appropriate rate-differential-based adjustments to such capital losses under this section and section 904(b), and does not change the source, allocation, or separate category of any such capital gain or loss for purposes of computing taxable income from sources within or outside the United States or for any other purpose.

(e) *Qualified dividend income*—(1) *In general.* A taxpayer that has taxable income (excluding net capital gain and qualified dividend income) for the taxable year and that qualifies for a reduced rate of tax under section 1(h) on its qualified dividend income (as defined in section 1(h)(11)) for the taxable year shall adjust the amount of such qualified dividend income in a manner consistent with the rules of paragraphs (c)(1)(i) (first sentence) and (c)(2) of this section irrespective of whether such taxpayer has a net capital gain for the taxable year. For purposes of making adjustments pursuant to this paragraph (e), the special rule in paragraph (c)(1)(ii) of this section for taxpayers with a net long-term capital loss from sources within the United States shall be disregarded.

(2) *Exception.* A taxpayer that makes the election provided for in paragraph (b)(3) of this section shall not make adjustments pursuant to paragraph (e)(1) of this section. Additionally, a taxpayer other than a corporation that does not have a capital gain rate differential for the taxable year within the meaning of paragraph (b)(2) of this section may elect not to apply paragraph (e)(1) of this section if such taxpayer would have qualified for the election provided for in paragraph (b)(3) of this section had such taxpayer had a capital gain rate differential for the taxable year. Such a taxpayer shall be presumed to make the election provided for in the preceding sentence unless such taxpayer applies the rate differential adjustments provided for in paragraph (e)(1) of this section to the qualified dividend income in determining its foreign tax credit limitation for the taxable year.

(f) *Definitions.* For purposes of section 904(b) and this section, the following definitions apply:

(1) *Alternative tax rate.* The term *alternative tax rate* means, with respect to any rate group, the rate applicable to that rate group under section 1(h) (for taxpayers other than corporations) or section 1201(a) (for corporations). For example, the alternative tax rate for unrecaptured section 1250 gain is 25 percent.

(2) *Net capital gain.* For purposes of this section, net capital gain shall not include any qualified dividend income (as defined in section 1(h)(11)). See paragraph (e) of this section for rules relating to qualified dividend income.

(3) *Rate differential portion.* The term *rate differential portion* with respect to capital gain net income from sources outside the United States in a separate category long-term rate group (or the applicable portion of such amount), net capital gain in a rate group, or capital gain net income in a long-term rate group, as the case may be, means the same proportion of such amount as—

(i) The excess of the highest applicable tax rate (as defined in section 904(b)(3)(E)(ii)) over the alternative tax rate; bears to

(ii) The highest applicable tax rate (as defined in section 904(b)(3)(E)(ii)).

(4) *Rate group.* For purposes of this section, the term *rate group* means:

(i) *Short-term capital gains or losses.* With respect to a short-term capital gain or loss, the rate group is the short-term rate group.

(ii) *Long-term capital gains.* With respect to a long-term capital gain, the rate group is the particular rate of tax to which such gain is subject under section 1(h). Such a rate group is a long-term rate group. For example, the 28 percent rate group of capital gain net income from sources outside the United States consists of the capital gain net income from sources outside the United States that is subject to tax at a rate of 28 percent under section 1(h). Such 28 percent rate group is a long-term rate group. If a taxpayer has long-term capital gains that may be subject to tax at more than one rate under section 1(h) and the taxpayer's net capital gain attributable to such long-term capital gains and any qualified dividend income are taxed at one rate of tax under section 1(h), then all of such long-term capital gains shall be treated as long-term capital gains in that one rate group. If a taxpayer has long-term capital gains that may be subject to tax at more than one rate of tax under section 1(h) and the taxpayer's net capital gain attributable to such long-term capital gains and any qualified dividend income are taxed at more than one rate pursuant to section 1(h), the taxpayer shall determine the rate group for such long-term capital gains from sources within or outside the United States (and, to the extent from sources outside the United States, from each separate category) ratably based on the

proportions of net capital gain and any qualified dividend income taxed at each applicable rate. For example, under the section 1(h) rates in effect for tax years beginning in 2004, a long-term capital gain (other than a long-term capital gain described in section 1(h)(4)(A) or (h)(6)) may be subject to tax at 5 percent or 15 percent.

(iii) *Long-term capital losses.* With respect to a long-term capital loss, a loss described in section 1(h)(4)(B)(i) (collectibles loss) or (iii) (long-term capital loss carryover) is a loss in the 28 percent rate group. All other long-term capital losses shall be treated as losses in the highest rate group in effect under section 1(h) for the tax year with respect to long-term capital gains other than long-term capital gains described in section 1(h)(4)(A) or (h)(6). For example, under the section 1(h) rates in effect for tax years beginning in 2004, a long-term capital loss not described in section 1(h)(4)(B)(i) or (iii) shall be treated as a loss in the 15 percent rate group.

(5) *Terms used in sections 1(h), 904(b) or 1222.* For purposes of this section, any term used in this section and also used in section 1(h), section 904(b) or section 1222 shall have the same meaning given such term by section 1(h), 904(b) or 1222, respectively, except as otherwise provided in this section.

(g) *Examples.* The following examples illustrate the provisions of this section. In these examples, the rate differential adjustment is shown as a fraction, the numerator of which is the alternative tax rate percentage and the denominator of which is 35 percent (assumed to be the highest applicable tax rate for individuals under section 1). Finally, all dollar amounts in the examples are abbreviated from amounts in the thousands (for example, $50 represents $50,000). The examples are as follows:

Example 1. (i) AA, an individual, has items from sources outside the United States only in the passive category for the taxable year. AA has $1000 of long-term capital gains from sources outside the United States that are subject to tax at a rate of 15 percent under section 1(h). AA has $700 of long-term capital losses from sources outside the United States, which are not described in section 1(h)(4)(B)(i) or (iii). For the same taxable year, AA has $800 of long-term capital gains from sources within the United States that are taxed at a rate of 28 percent under section 1(h). AA also has $100 of long-term capital losses from sources within the United States, which are not described in section 1(h)(4)(B)(i) or (iii). AA also has $500 of ordinary income from sources within the United States. The highest tax rate in effect under section 1(h) for the taxable year with respect to long-term capital gains other than long-term capital gains described in section 1(h)(4)(A) or (h)(6) is 15 percent. Accordingly, AA's long-term capital losses are in the 15 percent rate group.

(ii) AA's items of ordinary income, capital gain and capital loss for the taxable year are summarized in the following table:

	U.S. source	Foreign source: passive
15% rate group	($100)	$1,000
		(700)
28% rate group	800	
Ordinary income	500	

(iii) AA's capital gain net income from sources outside the United States ($300) does not exceed AA's capital gain net income from all sources ($1,000). Therefore, paragraph (a)(1) of this section does not require any reduction of AA's capital gain net income in the passive category.

(iv) In computing AA's taxable income from sources outside the United States in the numerator of the section 904(a) foreign tax credit limitation fraction for the passive category, AA's $300 of capital gain net income in the 15 rate group in the passive category must be adjusted as required under paragraph (c)(1) of this section. AA adjusts the $300 of capital gain net income using 15 percent as the alternative tax rate, as follows: $300 (15%/35%).

(v) In computing AA's entire taxable income in the denominator of the section 904(a) foreign tax credit limitation fraction, AA combines the $300 of capital gain net income from sources outside the United States and the $100 net capital loss from sources within the United States in the same rate group (15 percent). AA must adjust the resulting $200 ($300 − $100) of net capital gain in the 15 percent rate group as required under paragraph (c)(2) of this section, using 15 percent as the alternative tax rate, as follows: $200 (15%/35%). AA must also adjust the $800 of net capital gain in the 28 percent rate group, using 28 percent as the alternative tax rate, as follows: $800 (28%/35%). AA must also include ordinary income from sources outside the United States in the numerator, and ordinary income from all sources in the denominator, of the foreign tax credit limitation fraction.

(vi) AA's passive category foreign tax credit limitation fraction is $128.58/$1225.72, computed as follows:

$$\frac{\$300\ (15\%/35\%)}{\$500 + \$200\ (15\%/35\%) + \$800\ (28\%/35\%)}$$

Example 2. (i) BB, an individual, has the following items of ordinary income, capital gain, and capital loss for the taxable year:

	U.S. source	Foreign source	
		General	Passive
15% rate group	$300	($500)	$100
25% rate group	200	.....	.....
28% rate group	500	(300)	.....
Ordinary income	1,000	500	500

(ii) BB's capital gain net income from sources outside the United States in the aggregate (zero, since losses exceed gains) does not exceed BB's capital gain net income from all sources ($300). Therefore, paragraph (a)(1) of this section does not require any reduction of BB's capital gain net income in the passive category.

(iii) In computing BB's taxable income from sources outside the United States in the numerators of the section 904(a) foreign tax credit limitation fractions for the passive and general limitation categories, BB must adjust capital gain net income from sources outside the United States in each separate category long-tem rate group and net capital losses from sources outside the United States in each separate category rate group as provided in paragraphs (c)(1) and (d) of this section.

(A) The $100 of capital gain net income in the 15 percent rate group in the passive category is adjusted under paragraph (c)(1) of this section as follows: $100 (15%/35%).

(B) BB must adjust the net capital losses in the 15 percent and 28 percent rate groups in the general limitation category in accordance with the ordering rules contained in paragraph (d)(2) of this section. Under paragraph (d)(2)(i) of this section, BB's net capital loss in the 15 percent rate group is netted against capital gain net income from sources outside the United States in other separate categories in the same rate group. Thus, $100 of the $500 net capital loss in the 15 percent rate group in the general limitation category offsets $100 of capital gain net income in the 15 percent rate group in the passive category. Accordingly, $100 of the $500 net capital loss is adjusted under paragraph (d)(1) of this section as follows: $100 (15%/35%).

(C) Next, under paragraph (d)(2)(iii)(A) of this section, BB's net capital losses from sources outside the United States in any separate category rate group are netted against capital gain net income in the same rate group from sources within the United States. Thus, $300 of the $500 net capital loss in the 15 percent rate group in the general limitation category offsets $300 of capital gain net income in the 15 percent rate group

from sources within the United States. Accordingly, $300 of the $500 net capital loss is adjusted under paragraph (d)(1) of this section as follows: $300 (15%/35%). Similarly, the $300 of net capital loss in the 28 percent rate group in the general limitation category offsets $300 of capital gain net income in the 28 percent rate group from sources within the United States. The $300 net capital loss is adjusted under paragraph (d)(1) of this section as follows: $300 (28%/35%).

(D) Finally, under paragraph (d)(2)(iii)(B) of this section, the remaining net capital losses in a separate category rate group are netted against capital gain net income from other rate groups from sources within and outside the United States. Thus, the remaining $100 of the $500 net capital loss in the 15 percent rate group in the general limitation category offsets $100 of the remaining capital gain net income in the 28 percent rate group from sources within the United States. Accordingly, the remaining $100 of net capital loss is adjusted under paragraph (d)(1) of this section as follows: $100 (28%/35%).

(iv) In computing BB's entire taxable income in the denominator of the section 904(a) foreign tax credit limitation fractions, BB must adjust net capital gain by netting all of BB's capital gains and losses, from sources within and outside the United States, and adjusting any remaining net capital gains, based on rate group, under paragraph (c)(2) of this section. BB must also include foreign source ordinary income in the numerators, and ordinary income from all sources in the denominator, of the foreign tax credit limitation fractions. The denominator of BB's foreign tax credit limitation fractions reflects $2,000 of ordinary income from all sources, $100 of net capital gain taxed at the 28% rate and adjusted as follows: $100 (28%/35%), and $200 of net capital gain taxed at the 25% rate and adjusted as follows: $200 (25%/35%).

(v) BB's foreign tax credit limitation fraction for the general limitation category is $8.56/$2222.86, computed as follows:

$$\frac{\$500 - \$100\ (15\%/35\%) - \$300\ (15\%/35\%) - \$300\ (28\%/35\%) - \$100\ (28\%/35\%)}{\$1000 + \$500 + \$500 + \$100\ (28\%/35\%) + \$200\ (25\%/35\%)}$$

(vi) BB's foreign tax credit limitation fraction for the passive category is $542.86/$2222.86, computed as follows:

$$\frac{\$500 + \$100\ (15\%/35\%)}{\$1000 + \$500 + \$500 + \$100\ (28\%/35\%) + \$200\ (25\%/35\%)}$$

Example 3. (i) CC, an individual, has the following items of ordinary income, capital gain, and capital loss for the taxable year:

	U.S. source	Foreign source	
		General	Passive
15% rate group	$300	($720)	($80)
25% rate group	200		
28% rate group	500	(150)	50
Ordinary income	1,000	1,000	500

(ii) CC's capital gain net income from sources outside the United States (zero, since losses exceed gains) does not exceed CC's capital gain net income from all sources ($100). Therefore, paragraph (a)(1) of this section does not require any adjustment.

(iii) In computing CC's taxable income from sources outside the United States in the numerators of the section 904(a) foreign tax credit limitation fractions for the passive and general limitation categories, CC must adjust capital gain net income from sources outside the United States in each separate category long-tem rate group and net capital losses from sources outside the United States in each separate category rate group as provided in paragraphs (c)(1) and (d) of this section.

(A) CC must adjust the $50 of capital gain net income in the 28 percent rate group in the passive category pursuant to paragraph (c)(1) of this section as follows: $50 (28%/35%).

(B) Under paragraph (d)(2)(i) of this section, $50 of CC's $150 net capital loss in the 28 percent rate group in the general limitation category offsets $50 of capital gain net income in the 28 percent rate group in the passive category. Thus, $50 of the $150 net capital loss is adjusted as follows: $50 (28%/35%). Next, under paragraph (d)(2)(iii)(A) of this section, the remaining $100 of net capital loss in the 28 percent rate group in the general limitation category offsets $100 of capital gain net income in the 28 percent rate group from sources within the United States. Thus, the remaining $100 of net capital loss is adjusted as follows: $100 (28%/35%).

(C) Under paragraphs (d)(2)(iii)(A) and (d)(2)(iv) of this section, the net capital losses in the 15 percent rate group in the passive and general limitation categories offset on a pro rata basis the $300 of capital gain net income in the 15 percent rate group from sources within the United States. The proportionate amount of the $720 net capital loss ($720/$800 of $300, or $270) is adjusted as follows: $270 (15%/35%). The proportionate amount of the $80 net capital loss ($80/$800 of $300, or $30) is adjusted as follows $30 (15%/35%).

(D) Of the remaining $500 of net capital loss in the 15 percent rate group in the general limitation and passive categories, $400 offsets the remaining $400 of capital gain net income in the 28 percent rate group from sources within the United States under paragraph (d)(2)(iii)(B)(*3*) of this section. The proportionate amount of the $720 net capital loss ($720/$800 of $400, or $360) is adjusted as follows: $360 (28%/35%). The proportionate amount of the $80 net capital loss ($80/$800 of $400, or $40) is adjusted as follows: $40 (28%/35%).

(E) Under paragraph (d)(2)(iii)(B)(*3*) of this section, the remaining $100 of net capital loss in the 15 percent rate group in the general limitation and passive limitation categories offsets $100 of capital gain net income in the 25 percent rate group from sources within the United States. The proportionate amount of the $720 net capital loss ($720/$800 of $100, or $90) is adjusted as follows: $90 (25%/35%). The proportionate amount of the $80 net capital loss ($80/$800 of $100 of $10) is adjusted as follows: $10 (25%/35%).

(iv) In computing CC's entire taxable income in the denominator of the section 904(a) foreign tax credit limitation fractions, CC must adjust capital gain net income by netting all of CC's capital gains and losses, from sources within and outside the United States, and adjusting any remaining net

capital gains, based on rate group, under paragraph (c)(2) of this section. The denominator of CC's foreign tax credit limitation fractions reflects $2,500 of ordinary income from all sources and $100 of net capital gain taxed at the 25% rate and adjusted as follows: $100 (25%/35%).

(v) CC's foreign tax credit limitation fraction for the general limitation category is $424.87/$2571.42, computed as follows:

$$\frac{\$1{,}000 - \$50\ (28\%/35\%) - \$100\ (28\%/35\%) - \$270\ (15\%/35\%) - \$360\ (28\%/35\%) - \$90\ (25\%/35\%)}{\$1{,}000 + \$1{,}000 + \$500 + \$100\ (25\%/35\%)}$$

(vi) CC's foreign tax credit limitation fraction for the passive category is $488.00/$2571.42, computed as follows:

$$\frac{\$500 + \$50\ (28\%/35\%) - \$30\ (15\%/35\%) - \$40\ (28\%/35\%) - \$10\ (25\%/35\%)}{\$1{,}000 + \$1{,}000 + \$500 + \$100\ (25\%/35\%)}$$

Example 4. (i) DD, an individual, has the following items of ordinary income, capital gain and capital loss for the taxable year:

	U.S. source	Foreign source	
		General	Passive
15% rate group	($80)	($100)	$300
Short-term		500	100
Ordinary income	500		

(ii) DD's capital gain net income from outside the United States ($800) exceeds DD's capital gain net income from all sources ($720). Pursuant to paragraph (a)(1)(ii)(A) of this section, DD must apportion the $80 of excess of capital gain net income from sources outside the United States between the general limitation and passive categories based on the amount of capital gain net income in each separate category. Thus, one-half ($400/$800 of $100, or $40) is apportioned to the general limitation category and one-half ($400/$800 of $80, or $40) is apportioned to the passive category. The $40 apportioned to the general limitation category reduces DD's $500 short-term capital gain in the general limitation category to $460. Pursuant to paragraph (a)(1)(ii)(B) of this section, the $40 apportioned to the passive category must be apportioned further between the capital gain net income in the short-term rate group and the 15 percent rate group based on the relative amounts of capital gain net income in each rate group. Thus, one-fourth ($100/$400 of $40 or $10) is apportioned to the short-term rate group and three-fourths ($300/$400 of $40 or $30) is apportioned to the 15 percent rate group. DD's passive category includes $90 of short-term capital gain and $270 of capital gain net income in the 15% rate group.

(iii) Because DD has a net long-term capital loss from sources within the United States ($80) and also has short-term capital gains, DD must apply the provisions of paragraph (c)(1)(ii) of this section to determine the amount of DD's $270 of capital gain net income in the 15% rate group that is subject to a rate differential adjustment under paragraph (c)(1) of this section. Under Step 1, the U.S. long-term capital loss adjustment amount is $50 ($80 − $30). Under Step 2, the applicable rate differential amount is the excess of the remaining capital gain net income over the U.S. long-term adjustment amount. Thus, the applicable rate differential amount is $220 ($270 − $50). In computing DD's taxable income from sources outside the United States in the numerator of the section 904(a) foreign tax credit limitation fraction for the passive category, DD must adjust this amount as follows: $220 (15%/35%). DD does not adjust the remaining $50 of capital gain net income in the 15% rate group.

(iv) The amount of capital gain net income in the 15% rate group in the passive category, taking into account the adjustment pursuant to paragraph (a)(1) of this section and disregarding the adjustment pursuant to paragraph (c)(1) of this section, is $270. Under paragraphs (d)(2)(i) and (d)(2)(v) of this section, DD's $100 net capital loss in the 15% rate group in the general limitation category offsets capital gain net income in the 15% rate group in the passive category. Accordingly, the $100 of net capital loss is adjusted as follows: $100 (15%/35%).

(v) In computing DD's entire taxable income in the denominator of the section 904(a) foreign tax credit limitation fractions, DD must adjust capital gain net income by netting all of DD's capital gains and losses from sources within and outside the United States, and adjusting the remaining net capital gain in each rate group pursuant to paragraph (c)(2) of this section. The denominator of DD's foreign tax credit limitation fraction reflects $500 of ordinary income from all sources, $600 of short-term capital gain and $120 of net capital gain in the 15 percent rate group adjusted as follows: $120 (15%/35%).

(vi) DD's foreign tax credit limitation fraction for the general limitation category is $417.14/$1151.43, computed as follows:

$$\frac{\$460 - \$100\ (15\%/35\%)}{\$500 + \$600 + \$120\ (15\%/35\%)}$$

(vii) DD's foreign tax credit limitation fraction for the passive category is $234.29/$1151.43, computed as follows:

$$\frac{\$90 + \$220\ (15\%/35\%) + \$50}{\$500 + \$600 + \$120\ (15\%/35\%)}$$

Example 5. (i) EE, an individual, has the following items of ordinary income, capital gain and capital loss for the taxable year:

	U.S. source	Foreign source
		Passive
15% rate group	($150)	$300
28% rate group		200
Short-term	30	100
Ordinary income	500	

(ii) EE's capital gain net income from sources outside the United States ($600) exceeds EE's capital gain net income from all sources ($480). Pursuant to paragraph (a)(1)(ii) of this section, the $120 of excess capital gain net income from sources outside the United States is allocated as a reduction to the passive category and must be apportioned pro rata to each rate group within the passive category with capital gain net income. Thus, $20 ($100/$600 of $120) is apportioned to the short-term rate group, $60 ($300/$600 of $120) is apportioned to the 15 percent rate group and $40 ($200/$600 of

$120) is apportioned to the 28 percent rate group. After application of paragraph (a)(1) of this section, EE has $80 of capital gain net income in the short-term rate group, $240 of capital gain net income in the 15 percent rate group and $160 of capital gain net income in the 28 percent rate group.

(iii) Because EE has a net long-term capital loss from sources within the United States ($150) and also has short-term capital gains, EE must apply the provisions of paragraph (c)(1)(ii) of this section to determine the amount of EE's remaining $400 ($240 + $160) of capital gain net income in long-term rate groups in the passive category that is subject to a rate differential adjustment. Under Step 1, the U.S. long-term capital loss adjustment amount is $50 ($150 − $100). Under Step 2, EE must apportion this amount pro rata to each long-term rate group within the passive category with capital gain net income. Thus, $30 ($240/$400 of $50) is apportioned to the 15 percent rate group and $20 ($160/$400 of $50) is apportioned to the 28 percent rate group. The applicable rate differential amount for the 15 percent rate group is $210 ($240 − $30). The applicable rate differential amount for the 28 percent rate group is $140 ($160 − $20).

(iv) Pursuant to paragraph (c)(1)(ii) of this section, EE must adjust $210 of the $240 capital gain in the 15 percent rate group as follows: $210 (15%/35%). EE does not adjust the remaining $30. Pursuant to paragraph (c)(1)(ii) of this section, EE must adjust $140 of the $160 capital gain in the 28 percent rate group as follows: $140 (28%/35%). EE does not adjust the remaining $20.

(v) In computing EE's entire taxable income in the denominator of the section 904(a) foreign tax credit limitation fractions, EE must adjust capital gain net income by netting all of EE's capital gains and losses from sources within and outside the United States, and adjusting the remaining net capital gain in each rate group pursuant to paragraph (c)(2) of this section. The denominator of EE's foreign tax credit limitation fraction reflects $500 of ordinary income from all sources, $130 of short-term capital gain, $150 of net capital gain in the 15 percent rate group adjusted as follows: $150 (15%/35%), and $200 of net capital gain in the 28 percent rate group adjusted as follows: $200 (28%/35%).

(vi) EE's foreign tax credit limitation fraction for the passive category is $332/$854.29, computed as follows:

$$\frac{\$80 + \$210\ (15\%/35\%) + \$30 + \$140\ (28\%/35\%) + \$20}{\$500 + \$130 + \$150\ (15\%/35\%) + \$200\ (28\%/35\%)}$$

(h) *Coordination with section 904(f)*—(1) *In general.* Section 904(b) and this section shall apply before the provisions of section 904(f) as follows:

(i) The amount of a taxpayer's separate limitation income or loss in each separate category, the amount of overall foreign loss, and the amount of any additions to or recapture of separate limitation loss or overall foreign loss accounts pursuant to section 904(f) shall be determined after applying paragraphs (a), (c)(1), (d) and (e) of this section to adjust capital gains and losses and qualified dividend income from sources outside the United States in each separate category.

(ii) To the extent a capital loss from sources within the United States reduces a taxpayer's foreign source taxable income under paragraph (a)(1) of this section, such capital loss shall be disregarded in determining the amount of a taxpayer's taxable income from sources within the United States for purposes of computing the amount of any additions to the taxpayer's overall foreign loss accounts.

(iii) In determining the amount of a taxpayer's loss from sources in the United States under section 904(f)(5)(D) (section 904(f)(5)(D) amount), the taxpayer shall make appropriate adjustments to capital gains and losses from sources within the United States to reflect adjustments pursuant to section 904(b)(2) and this section. Therefore, for purposes of section 904, a taxpayer's section 904(f)(5)(D) amount shall be equal to the excess of the taxpayer's foreign source taxable income in all separate categories in the aggregate for the taxable year (taking into account any adjustments pursuant to paragraphs (a)(1), (c)(1), (d) and (e) of this section) over the taxpayer's entire taxable income for the taxable year (taking into account any adjustments pursuant to paragraphs (c)(2) and (e) of this section).

(2) *Examples.* The following examples illustrate the application of paragraph (h) of this section:

Example 1. (i) W, an individual, has the following items of ordinary income, capital gain, and capital loss for the taxable year:

	U.S. source	Foreign source	
		General	Passive
15% rate group	$500	$100	($400)
Ordinary income	900	100	.....

(ii) In computing W's taxable income from sources outside the United States for purposes of section 904 and this section, W must adjust the capital gain net income and net capital loss in each separate category as provided in paragraphs (c)(1) and (d) of this section. Thus, W must adjust the $100 of capital gain net income in the general limitation category and the $400 of net capital loss in the passive category as follows: $100 (15%/35%) and $400 (15%/35%).

(iii) After the adjustment to W's net capital loss in the passive category, W has a $171.43 separate limitation loss in the passive category. After the adjustment to W's capital gain in the general limitation category, W has $142.86 of foreign source taxable income in the general limitation category. Thus, $142.86 of the separate limitation loss reduces foreign source taxable income in the general limitation category. See section 904(f)(5)(B). W adds $142.86 to the separate limitation loss account for the passive category. The remaining $28.57 of the separate limitation loss reduces income from sources within the United States. See section 904(f)(5)(A). Thus, W adds $28.57 to the overall foreign loss account for the passive category.

Example 2. (i) X, a corporation, has the following items of ordinary income, ordinary loss, capital gain and capital loss for the taxable year: foreign source:

	U.S. source	Foreign source: general
Capital gain	($500)	$700
Ordinary income	1100	(1000)

(ii) X's capital gain net income from sources outside the United States ($700) exceeds X's capital gain net income from all sources ($200). Pursuant to paragraph (a)(1) of this section, X must reduce the $700 capital gain in the general limitation category by $500. After the adjustment, X has $200 of capital gain net income remaining in the general limitation category. Thus, X has an overall foreign loss attributable to the general limitation category of $800.

(iii) For purposes of computing the amount of the addition to X's overall foreign loss account for the general limitation category, the $500 capital loss from sources within the United States is disregarded and X's taxable income from sources within the United States is $1100. Accordingly, X must increase its overall foreign loss account for the general limitation category by $800.

Example 3. (i) Y, a corporation, has the following items of ordinary income, ordinary loss, capital gain and capital loss for the taxable year:

	U.S. source	Foreign source: passive
Capital gain	($100)	$200
Ordinary income	(200)	500

(ii) Y's capital gain net income from sources outside the United States ($200) exceeds Y's capital gain net income from all sources ($100). Pursuant to paragraph (a)(1) of this section, Y must reduce the $200 capital gain in the passive category by $100. Y has $100 of capital gain net income remaining in the passive category.

(iii) Y is not required to make adjustments pursuant to paragraph (c), (d) or (e) of this section. See paragraphs (b) and (e) of this section. Y's foreign source taxable income in the passive category after the adjustment pursuant to paragraph (a)(1) of this section is $600. Y's entire taxable income for the taxable year is $400.

(iv) Y's section 904(f)(5)(D) amount is the excess of Y's foreign source taxable income in all separate categories in the aggregate for the taxable year after taking into account the adjustment pursuant to paragraph (a)(1) of this section ($600) over Y's entire taxable income for the taxable year ($400). Therefore, Y's section 904(f)(5)(D) amount is $200 and Y's foreign source taxable income in the passive category is reduced to $400. See section 904(f)(5)(D).

Example 4. (i) Z, an individual, has the following items of ordinary income, ordinary loss and capital gain for the taxable year:

	U.S. source	Foreign source:	
		General	Passive
15% rate group	$100		
Ordinary income	(200)	$300	$300

(ii) Z's foreign source taxable income in all of Z's separate categories in the aggregate for the taxable year is $600. (There are no adjustments to Z's foreign source taxable income pursuant to paragraph (a)(1), (c)(1), (d) or (e) of this section.)

(iii) In computing Z's entire taxable income in the denominator of the section 904(d) foreign tax credit limitation fractions, Z must adjust the $100 of net capital gain in the 15 percent rate group pursuant to paragraph (c)(2) of this section as follows: $100 (15%/35%). Thus, Z's entire taxable income for the taxable year, taking into account the adjustment pursuant to paragraph (c)(2) of this section, is $442.86.

(iv) Z's section 904(f)(5)(D) amount is the excess of Z's foreign source taxable income in all separate categories in the aggregate for the taxable year ($600) over Z's entire taxable income for the taxable year after the adjustment pursuant to paragraph (c)(2) of this section ($442.86). Therefore, Z's section 904(f)(5)(D) amount is $157.32. This amount must be allocated pro rata to the passive and general limitation categories in accordance with section 904(f)(5)(D).

Example 5. (i) O, an individual, has the following items of ordinary income, ordinary loss and capital gain for the taxable year:

	U.S. source	Foreign source	
		General	Passive
15% rate group	$1100	($500)	
Ordinary income	(1000)	1000	$500

(ii) In determining O's taxable income from sources outside the United States, O must reduce the $500 capital loss in the general limitation category to $214.29 ($500 × 15%/35%) pursuant to paragraph (d) of this section. Taking this adjustment into account, O's foreign source taxable income in all of O's separate categories in the aggregate is $1285.71 ($1000 − $214.29 + $500).

(iii) In computing O's entire taxable income in the denominator of the section 904(a) foreign tax credit limitation fraction, O must reduce the $600 of net capital gain for the year to $257.14 ($600 × 15%/35%) pursuant to paragraph (c)(2) of this section. Taking this adjustment into account, O's entire taxable income for the year is $757.14 ($500 + $257.14).

(iv) Therefore, O's section 904(f)(5)(D) amount is $528.57 ($1285.71 − $757.14). This amount must be allocated pro rata to O's $500 of income in the passive category and O's $785.71 of adjusted income in the general limitation category in accordance with section 904(f)(5)(D).

(i) *Effective date.* This section shall apply to taxable years beginning after July 20, 2004. Taxpayers may choose to apply this section and § 1.904(b)–2 to taxable years ending after July 20, 2004.

■ **Par. 7.** Section 1.904(b)–2 is revised to read as follows:

§ 1.904(b)–2 Special rules for application of section 904(b) to alternative minimum tax foreign tax credit.

(a) *Application of section 904(b)(2)(B) adjustments.* Section 904(b)(2)(B) shall apply for purposes of determining the alternative minimum tax foreign tax credit under section 59 (regardless of whether or not the taxpayer has made an election under section 59(a)(4)).

(b) *Use of alternative minimum tax rates*—(1) *Taxpayers other than corporations.* In the case of a taxpayer other than a corporation, for purposes of determining the alternative minimum tax foreign tax credit under section 59—

(i) Section 904(b)(3)(D)(i) shall be applied by using the language ''section 55(b)(3)'' instead of ''subsection (h) of section 1'';

(ii) Section 904(b)(3)(E)(ii)(I) shall be applied by using the language ''section 55(b)(1)(A)(i)'' instead of ''subsection (a), (b), (c), (d), or (e) of section 1 (whichever applies)''; and

(iii) Section 904(b)(3)(E)(iii)(I) shall be applied by using the language ''the alternative rate of tax determined under section 55(b)(3)'' instead of ''the alternative rate of tax determined under section 1(h)''.

(2) *Corporate taxpayers.* In the case of a corporation, for purposes of determining the alternative minimum tax foreign tax credit under section 59, section 904(b)(3)(E)(ii)(II) shall be applied by using the language ''section 55(b)(1)(B)'' instead of ''section 11(b)''.

(c) *Effective date.* This section shall apply to taxable years beginning after July 20, 2004. See § 1.904(b)–1(i) for a rule permitting taxpayers to choose to apply § 1.904(b)–1(i) and this § 1.904(b)–2 to taxable years ending after July 20, 2004.

§§ 1.904(b)–3 and 1.904(b)–4 [Removed]

■ **Par. 8.** Sections 1.904(b)–3 and 1.904(b)–4 are removed.

■ **Par. 9.** Section 1.904(j)–1 is added to read as follows:

§ 1.904(j)–1 Certain individuals exempt from foreign tax credit limitation.

(a) *Election available only if all foreign taxes are creditable foreign taxes.* A taxpayer may elect to apply section 904(j) for a taxable year only if all of the taxes for which a credit is allowable to the taxpayer under section 901 for the taxable year (without regard

to carryovers) are creditable foreign taxes (as defined in section 904(j)(3)(B)).

(b) *Coordination with carryover rules*—(1) *No carryovers to or from election year.* If the taxpayer elects to apply section 904(j) for any taxable year, then no taxes paid or accrued by the taxpayer during such taxable year may be deemed paid or accrued under section 904(c) in any other taxable year, and no taxes paid or accrued in any other taxable year may be deemed paid or accrued under section 904(c) in such taxable year.

(2) *Carryovers to and from other years determined without regard to election years.* The amount of the foreign taxes paid or accrued, and the amount of the foreign source taxable income, in any year for which the taxpayer elects to apply section 904(j) shall not be taken into account in determining the amount of any carryover to or from any other taxable year. However, an election to apply section 904(j) to any year does not extend the number of taxable years to which unused foreign taxes may be carried under section 904(c) and § 1.904–2(b). Therefore, in determining the number of such carryover years, the taxpayer must take into account years to which a section 904(j) election applies.

(3) *Determination of amount of creditable foreign taxes.* Otherwise allowable carryovers of foreign tax credits from other taxable years shall not be taken into account in determining whether the amount of creditable foreign taxes paid or accrued by an individual during a taxable year exceeds $300 ($600 in the case of a joint return) for purposes of section 904(j)(2)(B).

(c) *Examples.* The following examples illustrate the provisions of this section:

Example 1. In 2006, X, a single individual using the cash basis method of accounting for income and foreign tax credits, pays $100 of foreign taxes with respect to general limitation income that was earned and included in income for United States tax purposes in 2005. The foreign taxes would be creditable under section 901 but are not shown on a payee statement furnished to X. X's only income for 2006 from sources outside the United States is qualified passive income, with respect to which X pays $200 of creditable foreign taxes shown on a payee statement. X may not elect to apply section 904(j) for 2006 because some of X's foreign taxes are not creditable foreign taxes within the meaning of section 904(j)(3)(B).

Example 2. (i) In 2009, A, a single individual using the cash basis method of accounting for income and foreign tax credits, pays creditable foreign taxes of $250 attributable to passive income. Under section 904(c), A may also carry forward to 2009 $100 of unused foreign taxes paid in 2005 with respect to passive income, $300 of unused foreign taxes paid in 2005 with respect to general limitation income, $400 of unused foreign taxes paid in 2006 with respect to passive income, and $200 of unused foreign taxes paid in 2006 with respect to general limitation income. In 2009, A's only foreign source income is passive income described in section 904(j)(3)(A)(i), and this income is reported to A on a payee statement (within the meaning of section 6724(d)(2)). If A elects to apply section 904(j) for the 2009 taxable year, the unused foreign taxes paid in 2005 and 2006 are not deemed paid in 2009, and A therefore cannot claim a foreign tax credit for those taxes in 2009.

(ii) In 2010, A again is eligible for and elects the application of section 904(j). The carryforwards from 2005 expire in 2010. The carryforward period established under section 904(c) is not extended by A's election under section 904(j). In 2011, A does not elect the application of section 904(j). The $600 of unused foreign taxes paid in 2006 on passive and general limitation income are deemed paid in 2011, under section 904(c), without any adjustment for any portion of those taxes that might have been used as a foreign tax credit in 2009 or 2010 if A had not elected to apply section 904(j) to those years.

(d) *Effective date.* Section 1.904(j)–1 applies to taxable years beginning after July 20, 2004.

■ **Par. 10.** Section 1.954–2 is amended by:

■ 1. Revising paragraph (b)(2)(iv), *Example 2.*

■ 2. Removing paragraph (b)(2)(iv), *Example 3.*

The revision reads as follows:

§ 1.954–2 Foreign personal holding company income.

* * * * *

(b) * * *

(2) * * *

(iv) * * *

Example 2. (i) DS, a domestic corporation, wholly owns two controlled foreign corporations organized in Country A, CFC1 and CFC2. CFC1 purchases from DS property that DS manufactures in the United States. CFC1 uses the purchased property as a component part of property that CFC1 manufactures in Country A within the meaning of § 1.954–3(a)(4). CFC2 provides loans described in section 864(d)(6) to unrelated persons in Country A for the purchase of the property that CFC1 manufactures in Country A.

(ii) The interest accrued from the loans by CFC2 is not export financing interest as defined in section 904(d)(2)(G) because the property sold by CFC1 is not manufactured in the United States under § 1.927(a)–1T(c). No portion of the interest is export financing interest as defined in this paragraph (b)(2). The full amount of the interest is, therefore, included in foreign personal holding company income under paragraph (b)(1)(ii) of this section.

* * * * *

Mark E. Matthews,

Deputy Commissioner of Services and Enforcement.

Approved: June 16, 2004.

Gregory F. Jenner,

Acting Assistant Secretary for Tax Policy.

[FR Doc. 04–16374 Filed 7–19–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 9139]

RIN 1545–BD24

Deemed Election To Be an Association Taxable as a Corporation for a Qualified Electing S Corporation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulation.

SUMMARY: This document contains a temporary regulation that deems certain eligible entities that file timely S corporation elections to have elected to be classified as associations taxable as corporations. This regulation affects certain eligible entities filing timely elections to be S corporations on or after July 20, 2004. The text of this temporary regulation also serves as the text of the proposed regulations set forth in a notice of proposed rulemaking (REG–131786–03) on this subject published elsewhere in this issue of the **Federal Register**.

DATES: *Effective Date:* These regulations are effective July 20, 2004.

FOR FURTHER INFORMATION CONTACT: Rebekah A. Myers, (202) 622–3050 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

Section 301.7701–3(a) provides that an eligible entity with two or more owners may elect to be classified as an association (and thus a corporation under § 301.7701–2(b)(2)) or a partnership, and an eligible entity with a single owner may elect to be classified as an association or to be disregarded as an entity separate from its owner. Section 301.7701–3(b) provides that, unless the entity elects otherwise, a domestic eligible entity is a partnership if it has two or more owners or is disregarded as an entity separate from its owner if it has a single owner.

Section 301.7701–3(c) describes the time and place for filing an entity classification election. Section 301.7701–3(c)(1)(i) provides that an eligible entity may elect to be classified as other than its default classification or to change its classification by filing Form 8832, ''Entity Classification Election'', with the service center designated on the form.

A taxpayer whose default classification is a partnership or a disregarded entity may seek to be classified as an S corporation. In these cases, the taxpayer must elect to be classified as an association under § 301.7701–3(c)(1)(i) by filing Form 8832 and must elect to be an S corporation under section 1362(a) by filing Form 2553, ''Election by a Small Business Corporation.'' In some cases, an entity may timely file the Form 2553 but fail to file the Form 8832. The entity must then submit a letter ruling request for an extension of time under § 301.9100 to file a late entity classification election. The temporary regulation provides relief for these entities. In other cases, the Form 2553 and the Form 8832 are filed late, and the entity must submit a ruling request under § 301.9100 to file a late entity classification election and under section 1362(b)(5) to file a late S corporation election. Rev. Proc. 2004–48, I.R.B. 2004–32, provides relief for these entities.

Explanation of Provisions

Requiring eligible entities to file two elections in order to be classified as S corporations creates a burden on those entities and on the Internal Revenue Service (IRS). The temporary regulation simplifies these paperwork requirements by eliminating, in certain cases, the requirement that the entity elect to be classified as an association. Instead, an eligible entity that makes a timely and valid election to be classified as an S corporation will be deemed to have elected to be classified as an association taxable as a corporation.

The temporary regulation amends § 301.7701–3(c)(1)(v) to provide that, if an eligible entity makes a timely and valid election to be an S corporation under section 1362(a)(1), it is treated as having made an election to be classified as an association under § 301.7701–3. However, if the eligible entity's election is not timely and valid, the default classification rules provided in § 301.7701–3(b) will apply to the entity unless the Service provides late S corporation election relief or inadvertent invalid election relief. If the late or invalid election is not perfected, the default rules will maintain the passthrough taxation treatment by classifying the entity as a partnership or a disregarded entity.

Effective Date

The regulations apply to elections to be an S corporation filed on or after July 20, 2004. However, eligible entities that timely filed S elections before July 20, 2004, may also rely on the provisions of the regulation.

Special Analysis

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore a regulatory assessment is not required. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analysis section of the preamble to the Notice of proposed rulemaking on this subject published elsewhere in this issue of the **Federal Register**.

Drafting Information

The principal author of this regulation is Rebekah A. Myers, Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate and excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

■ **Paragraph 1.** The authority citation for part 301 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 301.7701–3 is amended by adding paragraphs (c)(1)(v)(C) and (h)(3) to read as follows:

§ 301.7701–3 Classification of certain business entities.

(c) * * *

(1) * * *

(v) * * *

(C) *S corporations. [Reserved] For further guidance, see § 301.7701–3T(c)(1)(v)(C).*

* * * * *

(h) * * *

(3) *Deemed elections for S corporations.* [Reserved] For further guidance, see § 301.7701–3T(h)(3).

■ **Par. 3.** Section 301.7701–3T is revised to read as follows:

§ 301.7701–3T Classification of certain business entities (temporary).

(a) through (c)(1)(v)(B) [Reserved] For further guidance, see § 301.7701–3(a) through (c)(1)(v)(B).

(c)(1)(v) (C) *S corporations.* An eligible entity that timely elects to be an S corporation under section 1362(a)(1) is treated as having made an election under this section to be classified as an association, provided that (as of the effective date of the election under section 1362(a)(1)) the entity meets all other requirements to qualify as a small business corporation under section 1361(b). Subject to § 301.7701–3(c)(1)(iv), the deemed election to be classified as an association will apply as of the effective date of the S corporation election and will remain in effect until the entity makes a valid election, under § 301.7701–3(c)(1)(i), to be classified as other than an association.

(c)(2) through (h)(2)(iii) [Reserved] For further guidance, see § 301.7701–3(c)(2) through (h)(2)(iii).

(3) *Deemed elections for S corporations.* Paragraph (c)(1)(v)(C) of this section applies to timely S corporation elections under section 1362(a) filed on or after July 20, 2004. Eligible entities that filed timely S elections before July 20, 2004, may also rely on the provisions of the regulation.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: July 6, 2004.

Gregory F. Jenner,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 04–16232 Filed 7–19–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 61

[DoD Directive 6000.6]

Medical Malpractice Claims Against Military and Civilian Personnel of the Armed Forces

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This document removes information in Title 32 of the Code of Federal Regulations concerning Medical Malpractice Claims Against Military and Civilian Personnel of the Armed Forces. This part has served the purpose for

which it was intended in the CFR and is no longer necessary.

DATES: *Effective Date:* July 20, 2004.

FOR FURTHER INFORMATION CONTACT: L.M. Bynum (703) 601–4722.

SUPPLEMENTARY INFORMATION: The revised DoD Directive 6000.6 is available at *http://www.dtic.mil/whs/directives/corres/dir2.html.*

List of Subjects in 32 CFR Part 61

Government employees, health professions, Military personnel.

PART 61—[REMOVED]

■ Accordingly, by the authority of 10 U.S.C. 301, 32 CFR part 61 is removed.

Dated: July 13, 2004.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–16396 Filed 7–19–04; 8:45 am]

BILLING CODE 5001–06–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R05–OAR–2004–OH–0001; FRL–7789–2]

Approval and Promulgation of Maintenance Plan Revisions; Ohio

AGENCY: Environmental Protection Agency (EPA)

ACTION: Direct final rule.

SUMMARY: The EPA is approving Ohio's submittal of a revision to the Ohio portion of the Cincinnati 1-Hour ozone maintenance plan. Ohio held a public hearing on the submittal on March 30, 2004. This maintenance plan revision establishes a new transportation conformity motor vehicle emissions budget (MVEB) for the year 2010. EPA is approving the allocation of a portion of the safety margin for oxides of nitrogen (NO_X) to the area's 2010 MVEB for transportation conformity purposes. This allocation will still maintain the total emissions for the area at or below the attainment level required by the transportation conformity regulations. The transportation conformity budget for volatile organic compounds will remain the same as previously approved in the maintenance plan. EPA is not at this time addressing any request to redesignate the Ohio portion of the Cincinnati area to attainment for the 1-Hour ozone National Ambient Air Quality Standard (NAAQS). The rationale for the approval and other information are provided in this rulemaking action.

DATES: This ''direct final'' rule is effective on September 20, 2004, unless EPA receives adverse written comments by August 19, 2004. If adverse comment is received, EPA will publish a timely withdrawal of the rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit comments, identified by Docket ID No. R05–OAR–2004–OH–0001 by one of the following methods: Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

E-mail: *bortzer.jay@epa.gov.*

Fax: (312) 886–5824.

Mail: You may send written comments to: J. Elmer Bortzer, Chief, Air Programs Branch, (AR–18J), Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Hand delivery: Deliver your comments to: J. Elmer Bortzer, Chief, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, 18th floor, Chicago, Illinois 60604.

Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. R05–OAR–1994–OH–0001. EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov, or e-mail. The federal regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I of the **SUPPLEMENTARY INFORMATION** section of the related proposed rule which is published in the Proposed Rules section of this **Federal Register**.

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, *i.e.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. (We recommend that you telephone Patricia Morris, Environmental Scientist, at (312) 353–8656 before visiting the Region 5 office.) This Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: Patricia Morris, Environmental Scientist, Criteria Pollutant Section, Air Programs Branch (AR–18J), EPA Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312)353–8656. *morris.patricia@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information
- A. Does this action apply to me?
- B. How can I get copies of this document and other related information?
- C. How and to whom do I submit comments?

II. Background
- A. When did Ohio hold a public hearing and officially submit the revision request?
- B. What change is Ohio requesting?

III. Transportation Conformity Budgets
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- E. Why is this request approvable?

IV. Statutory and Executive Order Review

I. General Information

A. Does This Action Apply to Me?

This action is rulemaking on a non-regulatory planning document intended to ensure the maintenance of air quality in the Cincinnati Area.

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

1. The Regional Office has established an electronic public rulemaking file available for inspection on EDOCKET and a hard copy file which is available for inspection at the Regional Office. EPA has established an official public rulemaking file for this action under Docket ID No. R05–OAR–2004–OH–0001. The official public file consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public rulemaking file does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public rulemaking file is the collection of materials that is available for public viewing at the Air Programs Branch, Air and Radiation Division, EPA Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604. EPA requests that if at all possible, you contact the person listed in the For Further Information Contact section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the regulations.gov Web site located at *http://www.regulations.gov* where you can find, review, and submit comments on Federal rules that have been published in the **Federal Register**, the Government's legal newspaper, and are open for comment.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at the EPA Regional Office, as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in the official public rulemaking file. The entire printed comment, including the copyrighted material, will be available at the Regional Office for public inspection.

B. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate rulemaking identification number by including the text ''Public comment on proposed rulemaking Region 5 Air Docket ''R05–OAR–2004–OH–0001'' in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

For detailed instructions on submitting public comments and on what to consider as you prepare your comments see the **ADDRESSES** section and the section I General Information of the **SUPPLEMENTARY INFORMATION** section of the related proposed rule which is published in the Proposed Rules section of this **Federal Register**.

II. Background

A. When Did Ohio Hold a Public Hearing and Officially Submit the Revision Request?

Ohio held a public hearing on the State Implementation Plan (SIP) revision request on March 30, 2004, in Cincinnati, Ohio. The formal comment period extended until April 2, 2004, to allow a full 30 days for public comment. No adverse comments were received. Ohio submitted transcripts of the public hearing and copies of the announcement of the 30 day public comment period to EPA. Ohio sent a letter dated March 15, 2004, which requested that EPA initiate review of the existing data and proceed to parallel process the request. The official submittal with all documentation including transcripts of the hearing were submitted in a letter dated April 19, 2004. Only one comment was received and that comment was in support of the revision request.

B. What Change Is Ohio Requesting?

Ohio is requesting a change to the transportation conformity budget in the approved 1-Hour ozone maintenance plan for Cincinnati. The Cincinnati-Hamilton ozone nonattainment/maintenance area is a bi-state area. The Ohio Counties include Hamilton, Butler, Clermont and Warren and the Kentucky Counties include Boone, Campbell and Kenton. The currently approved maintenance plan was approved by EPA on June 19, 2000, (65 FR 37879–37900). In the June 19, 2000, notice, EPA approved the maintenance plan and also a redesignation request to redesignate the Cincinnati area to attainment/maintenance for the 1-Hour ozone standard. The redesignation was challenged and subsequently vacated; however, the maintenance plan approval was upheld.

In this submittal, Ohio is requesting a change to the transportation conformity budget. The approved maintenance plan has a ''safety margin'' of emissions which can be allocated to the MVEB. The requested change only changes the NO_X budget for transportation conformity.

III. Transportation Conformity Budgets

A. What Are Transportation Conformity Budgets?

A transportation conformity budget is the projected level of controlled emissions from the transportation sector (mobile sources) that is estimated in the State Implementation Plan (SIP). The SIP controls emissions through regulations, for example, on fuels and exhaust levels for cars. The emissions budget concept is further explained in the preamble to the November 24, 1993, transportation conformity rule (58 FR 62188). The preamble also describes how to establish the MVEB in the SIP and how to revise the emissions budget. The transportation conformity rule allows the MVEB to be changed as long as the total level of emissions from all sources remains below the attainment level.

B. What Is a Safety Margin?

A ''safety margin'' is the difference between the attainment level of emissions (from all sources) and the projected level of emissions (from all sources) in the maintenance plan. The attainment level of emissions is the level of emissions during one of the years in which the area met the air quality health standard. For example: Cincinnati first attained the one hour ozone standard during the 1996–1999 time period. The State uses 1996 as the attainment level of emissions for the Cincinnati area. The emissions from point, area and mobile sources in 1996 equaled 212.7 tons per day of VOC and 411.2 tons per day of NO_X. The Ohio Environmental Protection Agency projected emissions out to the year 2010 and projected a total of 195.9 tons per day of VOC and 363.7 tons per day of NO_X from all sources in the Ohio portion of the Cincinnati area. The safety margin for the Ohio portion of the Cincinnati area is calculated to be the difference between these amounts or 16.8 tons per day of VOC and 46.5 tons

per day of NO_X. Detailed information on the estimated emissions from each source category is summarized in the proposed approval of the maintenance plan at 65 FR 3638 published on January 24, 2000. Ohio has requested to allocate 10 tons per day of the NO_X safety margin to the mobile source emission budgets for NO_X. With the added safety margin in the motor vehicle emission estimate for 2010 the total NO_X emissions for the area continue to be below the 1996 attainment year. Ohio is not asking to use the entire safety margin in the maintenance plan. Even with the allocation of 10 tons per day of NO_X to mobile sources, it leaves the area with 36.5 tons per day NO_X safety margin.

The emissions are projected to maintain the area's air quality consistent with the air quality health standard. The safety margin credit can be allocated to the transportation sector. The total emission level, even with this allocation will be below the attainment level or safety level and thus is acceptable. The safety margin is the extra safety points that can be allocated as long as the total level is maintained.

C. How Does This Action Change the Maintenance Plan?

This action changes the budget for mobile sources. The maintenance plan is designed to provide for future growth while still maintaining the ozone air quality standard. Growth in industries, population, and traffic is offset with reductions from cleaner cars and other emission reduction programs. Through the maintenance plan the State and local agencies can manage and maintain air quality while providing for growth.

In the submittal, Ohio requested to allocate a portion of the NO_X safely margin to the 2010 MVEB. The VOC MVEB will remain the same as approved and only the NO_X budget is requested to change. The NO_X MVEB will change from 52.3 tons of NO_X to 62.3 tons of NO_X. This budget would be the constraining number for mobile sources and transportation conformity. The Transportation Plan and Transportation Improvement Program for Cincinnati will need to be below the MVEB to demonstrate conformity. These requirements are detailed in the transportation conformity regulations which were approved as part of the Ohio SIP on May 16, 1996 (61 FR 24702) and approved as amended in a **Federal Register** notice dated May 30, 2000 (65 FR 34395).

D. What Are Subarea Budgets?

Ohio is submitting these budgets as subarea budgets which are only applicable to the Ohio portion of the Cincinnati area. Subarea budgets will allow conformity to be determined for Ohio and Kentucky separately. Kentucky currently has approved 2010 mobile source budgets. In separate actions, both States (Ohio and Kentucky) are formally electing to use subarea budgets per 40 CFR 93.124(d) for the purpose of determining transportation conformity in the areas within their individual state. Subarea budgets will still require the Cincinnati area to conduct transportation conformity for the entire area (both Ohio and Kentucky portions). However, subarea budgets will allow transportation projects in each State to be implemented if and only if the budget test is met for that particular State.

E. Why Is the Request Approvable?

The emissions from point, area and mobile sources in 1996 equaled 212.7 tons per day of VOC and 411.2 tons per day of NO_X. This is the level of emissions which allow attainment of the one hour ozone standard. The Ohio Environmental Protection Agency projected emissions out to the year 2010 and projected a total of 195.9 tons per day of VOC and 363.7 tons per day of NO_X from all sources in the Ohio portion of the Cincinnati area. The allocation of the safety margin will keep the total emissions below the attainment level. Thus, the emissions are projected to maintain the area's air quality consistent with the air quality health standard. After review of the SIP revision request, EPA finds that the allocation of the 10 tons per day from the safety margin to the 2010 NO_X MVEB for the Cincinnati Ohio area is approvable because the new MVEB for NO_X will maintain the total emissions at or below the attainment year inventory level as required by the transportation conformity regulations.

IV. Statutory and Executive Order Reviews

Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget.

Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001).

Regulatory Flexibility Act

This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Unfunded Mandates Reform Act

Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 13132: Federalism

This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the National government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act.

Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

National Technology Transfer Advancement Act

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Congressional Review Act

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 20, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Volatile organic compounds, Ozone.

Dated: July 8, 2004.

Norman Niedergang,

Acting Regional Administrator, Region 5.

■ Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart KK—Ohio

■ 2. Section 52.1885 is amended by adding paragraph (b)(12) to read as follows:

§ 52.1885 Control strategy: Ozone.

* * * * *

(b) * * *

(12) Approval—On April 19, 2004, Ohio submitted a revision to the ozone maintenance plan for the Cincinnati, Ohio area. The revision consists of allocating a portion of the area's NO_X safety margin to the transportation conformity motor vehicle emissions budget. The motor vehicle emissions budget for NO_X for the Cincinnati, Ohio area is now 62.7 tons per day for the year 2010. This approval only changes the NO_X transportation conformity emission budget for Cincinnati, Ohio.

* * * * *

[FR Doc. 04–16333 Filed 7–19–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 61

[OAR–2002–0082; FRL 7789–5]

National Emission Standards for Hazardous Air Pollutants for Asbestos

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; amendments.

SUMMARY: On September 18, 2003 (68 FR 54790), EPA issued amendments to the national emission standards for hazardous air pollutants (NESHAP) for asbestos under section 112 of the Clean Air Act (CAA). This action corrects typographical errors in Table 1 to the amendments that were promulgated on September 18, 2003.

Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. We have determined that there is good cause for making this action final without prior proposal and opportunity for comment because the corrections to the final rule do not change the requirements of the final rule. They are minor technical corrections and are not controversial. Thus, notice and public procedure are unnecessary. We find that this constitutes good cause under 5 U.S.C. 553(b)(B) (see also the final sentence of section 307(d)(1) of the Clean Air Act (CAA), 42 U.S.C. 7607(d)(1), indicating that the good cause provisions of the APA continue to apply to this type of rulemaking under the CAA).

DATES: The final rule is effective on August 19, 2004.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. OAR 2002–0082. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, *i.e.*, confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the EPA Air Docket. This Docket Facility is open from 8:30 a.m. to 4:30 p.m. e.s.t., Monday through Friday, excluding legal holidays. The EPA Air Docket is located at the EPA Docket Center, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Ms. Susan Fairchild, U.S. EPA, Minerals and Inorganic Chemicals Group (C–504–05), Emission Standards Division, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, telephone number (919) 541–5167, facsimile number (919) 541–5600, electronic mail address: *fairchild.susan@epa.gov*.

SUPPLEMENTARY INFORMATION: *Regulated Entities:* Entities potentially regulated by this action include:

Category	NAICS	Examples of regulated entities
Industrial	23	Construction.
Industrial	23594	Wrecking and Demolition Contractors.
Industrial	562112	Hazardous Waste Collection.
Industrial	562211	Hazardous Waste Treatment and Disposal.
Industrial	5629	Remediation and Other Waste Management Services.
Industrial	56191	Packaging and Labeling Services.
Industrial	332992	Small Arms Ammunition Manufacturing.
Industrial	33634	Motor Vehicle Systems Manufacturing.
Industrial	327	Nonmetallic Mineral Product Manufacturing.
Industrial	3279	Other Nonmetallic Mineral Product Manufacturing.
Industrial	32791	Abrasive Product Manufacturing.
Industrial	32799	All Other Nonmetallic Mineral Product Manufacturing.

World wide Web (WWW). In addition to being available in the docket, an electronic copy of this action will also be available on the WWW through the Technology Transfer Network (TTN). Following signature, a copy of this action will be posted on EPA's TTN policy and guidance page for newly proposed or promulgated rules: *http://www.epa.gov/ttn/oarpg*. The TTN at EPA's web site provides information and technology exchange in various areas of air pollution control.

I. Background

On November 20, 1990, the **Federal Register** published EPA's revision of the National Emission Standards for Hazardous Air Pollutants for Asbestos (asbestos NESHAP), 40 CFR part 61, subpart M, (55 FR 48406). That rule contained regulatory provisions for the labeling of asbestos waste that cited to regulations then in place from the Occupational Safety and Health Administration (OSHA) for proper labeling of asbestos waste. Subsequent to the publication of that rule, OSHA renumbered the provisions cited in the asbestos NESHAP.

On September 18, 2003, the **Federal Register** published EPA's amendments to the National Emission Standards for Hazardous Air Pollutants for Asbestos (asbestos NESHAP), 40 CFR part 61, subpart M, (55 FR 48406). Those amendments correctly identify the current OSHA regulatory citations for properly labeling asbestos waste that is managed under the asbestos NESHAP. However, typographical errors occurred in Table 1: Cross Reference to Other Asbestos Regulations in the **Federal Register** publication of that notice and today's final rule amendments correct the errors.

II. Final Rule Amendments to the Asbestos NESHAP

The current OSHA permissible exposure limit (PEL) is 0.1 fibers per cubic centimeter (f/cc). However, Table 1 found at 40 CFR 61.156 erroneously identifies the OSHA PEL as 0.2 f/cc. Today's action corrects Table 1 at 40 CFR 61.156, to reference the OSHA regulation but the NESHAP will not reference the current level of the PEL. Therefore, the section of Table 1 which is being corrected now reads as follows:

TABLE 1.—CROSS-REFERENCE TO OTHER ASBESTOS REGULATIONS

Agency	CFR citation	Comment
OSHA	29 CFR 1910.1001	Worker protection measures—engineering controls, worker training, labeling, respiratory protection, bagging of waste, permissible exposure level.
	29 CFR 1926.1101	Worker protection measures for all construction work involving asbestos, including demolition and renovation-work practices, worker training, bagging of waste, permissible exposure level.

We find for good cause under 5 U.S.C. 553(b)(B) that notice and comment procedures are unnecessary, and we are not soliciting comments on the amendments. The corrections are nonsubstantive in nature and do not affect the requirements for subject persons under the regulations. The regulations will continue to cite to the same OSHA regulations, and merely revise commentary statements accompanying the citations. In addition, the changes are noncontroversial and simply correct two typographical errors. Finally, the final rule amendments raise no new substantive issues beyond those raised in the previous direct final rule and notice of proposed rulemaking published on September 18, 2003. The EPA received no adverse comments regarding those notices, so an additional period of public comment is unnecessary.

III. Statutory and Executive Order Reviews

Under Executive Order 12866, Regulatory Planning and Review (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and is, therefore, not subject to review by the Office of Management and Budget. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). The final rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Because EPA has made a ''good cause'' finding that this action is not subject to notice and comment requirements under the APA or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). In addition, this action does not significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of

the Unfunded Mandates Reform Act. The final rule does not have substantial direct effects on the States, or on the relationship between the national government and the States, as specified in Executive Order 13132, Federalism (64 FR 43255, August 10, 1999). Today's action also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (65 FR 67249, November 6, 2000). Also, the final rule is not subject to Executive Order 13045, Protection of Children from Environmental Health and Safety Risks (62 FR 1985, April 23, 1997) because it is not economically significant. The final rule is not subject to Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866. The final rule does not involve changes to the technical standards related to test methods or monitoring methods; thus the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) do not apply. Also, the final rule does not involve special consideration of environmental justice-related issues as required by Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994). The EPA has complied with Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights (Takings) (53 FR 8859, March 15, 1988) by examining the takings implications of the final rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the Executive Order. In issuing the final rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct, as required by section 3 of Executive Order 12988, Civil Justice Reform (61 FR 4729, February 7, 1996). The Congressional Review Act (5 U.S.C. 801 *et seq.*), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing the final rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. The final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 61

Environmental protection, Asbestos, Air pollution control, Hazardous substances.

Dated: July 13, 2004.

Robert Brenner,

Acting Assistant Administrator, Office of Air and Radiation.

■ For the reasons stated in the preamble, title 40, chapter I, part 61 is amended as follows:

■ 1. The authority citation for part 61 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 2. Section 61.156 is amended by revising Table 1 to read as follows:

§ 61.156 Cross-reference to other asbestos regulations.

* * * * *

TABLE 1.—CROSS-REFERENCE TO OTHER ASBESTOS REGULATIONS

Agency	CFR citation	Comment
EPA	40 CFR part 763, subpart E	Requires schools to inspect for asbestos and implement response actions and submit asbestos management plans to States. Specifies use of accredited inspectors, air sampling methods, and waste disposal procedures.
	40 CFR part 427	Effluent standards for asbestos manufacturing source categories.
	40 CFR part 763, subpart G	Protects public employees performing asbestos abatement work in States not covered by OSHA asbestos standard.
OSHA	29 CFR 1910.1001	Worker protection measures-engineering controls, worker training, labeling, respiratory protection, bagging of waste, permissible exposure level.
	29 CFR 1926.1101	Worker protection measures for all construction work involving asbestos, including demolition and renovation-work practices, worker training, bagging of waste, permissible exposure level.
MSHA	30 CFR part 56, subpart D	Specifies exposure limits, engineering controls, and respiratory protection measures for workers in surface mines.
	30 CFR part 57, subpart D	Specifies exposure limits, engineering controls, and respiratory protection measures for workers in underground mines.
DOT	49 CFR parts 171 and 172	Regulates the transportation of asbestos-containing waste material. Requires waste containment and shipping papers.

* * * * *

[FR Doc. 04–16447 Filed 7–19–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 93

[FRL–7789–6]

RIN 2060–AL73
RIN 2060–AI56

Transportation Conformity Rule Amendments for the New 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards and Miscellaneous Revisions for Existing Areas; Transportation Conformity Rule Amendments: Response to Court Decision and Additional Rule Changes; Correction to the Preamble

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction.

SUMMARY: EPA issued a final rule on July 1, 2004 (69 FR 40004) that amended the transportation conformity rule to include criteria and procedures for the new 8-hour ozone and fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS or ''standards''). The final rule also addressed a March 2, 1999 ruling by the U.S. Court of Appeals for the District of Columbia Circuit (*Environmental Defense Fund* v. *EPA, et al.*, 167 F. 3d 641, D.C. Cir. 1999). The preamble to the final rule contains two errors. This notice is intended to correct these errors. All other preamble and regulatory text printed in the July 1, 2004 final rule is correct.

The Department of Transportation (DOT) is EPA's federal partner in implementing the transportation conformity regulation. We have consulted with DOT on the development of these corrections, and DOT concurs.

DATES: *Effective Date:* August 2, 2004.

FOR FURTHER INFORMATION CONTACT: Meg Patulski, State Measures and Conformity Group, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105, *patulski.meg@epa.gov*, (734) 214–4842; Rudy Kapichak, State Measures and Conformity Group, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105, *kapichak.rudolph@epa.gov*, (734) 214–4574; or Laura Berry, State Measures and Conformity Group, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105, *berry.laura@epa.gov*, (734) 214–4858.

SUPPLEMENTARY INFORMATION: EPA issued a final rule on July 1, 2004 (69 FR 40004) that amended the transportation conformity rule to include criteria and procedures for the new 8-hour ozone and fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS or ''standards''). The final rule also addressed a March 2, 1999 ruling by the U.S. Court of Appeals for the District of Columbia Circuit (*Environmental Defense Fund* v. *EPA, et al.*, 167 F. 3d 641, D.C. Cir. 1999). The preamble to the July 1, 2004 final rule contains two errors. This notice is intended to correct these errors.

First, the table in Section II. D. What Parts of the Final Rule Apply to Me? (69 FR 40006–7), which lists the issues addressed in the final rule, is incomplete and contains a number of incorrect references to other sections of the rule. The table provides a roadmap for determining whether a specific final rule revision included in the July 1, 2004 rulemaking would apply in your area. The table illustrates which parts of the final rule are relevant for various pollutants and standards.

The following is the corrected table:

Type of area	Issue addressed in final rule	Preamble section	Regulatory section
8-hour ozone	Conformity grace period	III.A	§ 93.102(d)
	Revocation of 1-hour ozone standard	III.B	Not applicable.
	General implementation of new standards	III.C	Not applicable.
	Early Action Compacts	III.D	Not applicable.
	Baseline year test	IV.B	§ 93.119(b)
	Build/no-build test (marginal classification and subpart 1 areas [1]).	IV.C	§ 93.119(b)(2), § 93.119(g)(2)
	Regional conformity tests (moderate and above classifications).	IV.D	§ 93.119(b)(1)
	Regional conformity tests (areas without 1-hour ozone budgets).	V	§ 93.109(d)
	Regional conformity tests (areas with 1-hour ozone budgets).	VI	§ 93.109(e)
	Federal projects during a lapse	XIV	§ 93.102(c), § 93.104(d)
	Adequacy process of submitted SIPs	XV	§ 93.118(e)
		XXIII.G	§ 93.118(f)
	Non-federal projects during a lapse	XVI	§ 93.121(a)
	Consequences of SIP disapprovals	XVII	§ 93.120(a)(2)
	Safety margins	XVIII	Deletes § 93.124(b) of previous rule.
	Frequency	XIX	§ 93.104(c), § 93.104(e)
	Latest planning assumptions	XX	§ 93.110(a)
	Relying on a previous analysis	XXII	§ 93.122(g), § 93.104(b), § 93.104(c)
	Definitions	XXIII.A	§ 93.101
	Insignificance	XXIII.B	§ 93.109(k), § 93.121(c)
	Transportation plan and modeling requirements (moderate and above classifications).	XXIII.D	§ 93.106(b), § 93.122(c)
	Non-federal projects (for isolated rural areas only).	XXIII.F	§ 93.121(b)(1)
	Implementation of budget test	XXIII.H	§ 93.118(b)
		XXIII.I	§ 93.118(d)

[1] ''Subpart 1 areas'' are areas that are designated nonattainment under subpart 1 of part D of title 1 of the Clean Air Act. EPA also referred to these areas as ''basic'' nonattainment areas in its April 30, 2004 final designations rule for the 8-hour ozone standard (69 FR 23862).

Type of area	Issue addressed in final rule	Preamble section	Regulatory section
	Exempt projects	XXIII.J	§ 93.126
	Conformity SIPs	XXV	Not applicable.
$PM_{2.5}$	Applicability	III.A	§ 93.102(b)(1)
	Conformity grace period	III.A	§ 93.102(d)
	General implementation of new standards	III.C	Not applicable.
	Baseline year test	IV.B	§ 93.119(e)
	Build/no-build test	IV.C	§ 93.119(e), § 93.119(g)(2)
	Regional conformity tests	VII	§ 93.109(i)
	Direct $PM_{2.5}$ in regional analyses from tail-pipe, brake wear, tire wear.	VIII	§ 93.102(b)(1)
	Precursors in regional analyses	VIII	No regulatory text being finalized at this time.
	Re-entrained road dust in regional analyses	IX	§ 93.102(b)(3), § 93.119(f)
	Construction-related fugitive dust in regional analyses.	X	§ 93.122(f)
	Compliance with SIP control measures	XI	§ 93.117
	Hot-spots	XII	No regulatory text being finalized at this time.
	Federal projects during a lapse	XIV	§ 93.102(c), § 93.104(d)
	Adequacy process of submitted SIPs	XV	§ 93.118(e)
		XXIII.G	§ 93.118(f)
	Non-federal projects during a lapse	XVI	§ 93.121(a)
	Consequences of SIP disapprovals	XVII	§ 93.120(a)(2)
	Safety margins	XVIII	Deletes § 93.124(b) of previous rule.
	Frequency	XIX	§ 93.104(c), § 93.104(e)
	Latest planning assumptions	XX	§ 93.110(a)
	Relying on a previous analysis	XXII	§ 93.122(g), § 93.104(b), § 93.104(c)
	Definitions	XXIII.A	§ 93.101
	Insignificance	XXIII.B	§ 93.109(k), § 93.121(c)
	Non-federal projects (for isolated rural areas only).	XXIII.F	§ 93.121(b)(1)
	Implementation of budget test	XXIII.H	§ 93.118(b)
		XXIII.I	§ 93.118(d)
	Exempt projects	XXIII.J	§ 93.126
	Conformity SIPs	XXV	Not applicable.
1-hour ozone	Revocation of 1-hour ozone standard	III.B	Not applicable.
	Regional conformity tests	III.B	§ 93.109(c)
	Build/no-build test (marginal and below classifications).	IV.C	§ 93.119(b)(2), § 93.119(g)(2)
	Regional conformity tests (moderate and above classifications).	IV.D	§ 93.119(b)(1)
	Federal projects during a lapse	XIV	§ 93.102(c), § 93.104(d)
	Adequacy process of submitted SIPs	XV	§ 93.118(e)
		XXIII.G	§ 93.118(f)
	Non-federal projects during a lapse	XVI	§ 93.121(a)
	Consequences of SIP disapprovals	XVII	§ 93.120(a)(2)
	Safety margins	XVIII	Deletes § 93.124(b) of previous rule.
	Frequency	XIX	§ 93.104(c), § 93.104(e)
	Latest planning assumptions	XX	§ 93.110(a)
	Relying on a previous analysis	XXII	§ 93.122(g), § 93.104(b), § 93.104(c)
	Definitions	XXIII.A	§ 93.101
	Insignificance	XXIII.B	§ 93.109(k), § 93.121(c)
	Limited maintenance plans	XXIII.C	§ 93.101 § 93.109(j), § 93.121(c)
	Transportation plan and modeling requirements (moderate and above classifications).	XXIII.D	§ 93.106(b), § 93.122(c)
	Non-federal projects (for isolated rural areas only).	XXIII.F	§ 93.121(b)(1)
	Implementation of budget test	XXIII.H	§ 93.118(b)
		XXIII.I	§ 93.118(d)
	Exempt projects	XXIII.J	§ 93.126
	Conformity SIPs	XXV	Not applicable.
PM_{10}	Build/no-build test	IV.C	§ 93.119(d), § 93.119(g)(2)
	Hot-spots	XIII	No new or revised regulatory text being finalized at this time.
	Federal projects during a lapse	XIV	§ 93.102(c), § 93.104(d)
	Adequacy process of submitted SIPs	XV	§ 93.118(e)
		XXIII.G	§ 93.118(f)
	Non-federal projects during a lapse	XVI	§ 93.121(a)
	Consequences of SIP disapprovals	XVII	§ 93.120(a)(2)
	Safety margins	XVIII	Deletes § 93.124(b) of previous rule.
	Frequency	XIX	§ 93.104(c), § 93.104(e)
	Latest planning assumptions	XX	§ 93.110(a)
	Horizon years in hot-spot analyses	XXI	§ 93.116
	Relying on a previous analysis	XXII	§ 93.122(g), § 93.104(b), § 93.104(c)
	Definitions	XXIII.A	§ 93.101

Type of area	Issue addressed in final rule	Preamble section	Regulatory section
	Insignificance	XXIII.B	§ 93.109(k), § 93.121(c)
	Limited maintenance plans	XXIII.C	§ 93.101, § 93.109(j), § 93.121(c)
	Clarification to Precursors	XXIII.E	§ 93.102(b)(2)(iii), § 93.119(f)(5)
	Non-federal projects (for isolated rural areas only).	XXIII.F	§ 93.121(b)(1)
	Implementation of budget test	XXIII.H	§ 93.118(b)
		XXIII.I	§ 93.118(d)
	Exempt projects	XXIII.J	§ 93.126
	Conformity SIPs	XXV	Not applicable.
CO	Build/no-build test (lower CO classifications)	IV.C	§ 93.119(c), § 93.119(g)(2)
	Regional conformity tests (higher CO classifications).	IV.D	§ 93.119(c)(1)
	Federal projects during a lapse	XIV	§ 93.102(c), § 93.104(d)
	Adequacy process of submitted SIPs	XV	§ 93.118(e)
		XXIII.G	§ 93.118(f)
	Non-federal projects during a lapse	XVI	§ 93.121(a)
	Consequences of SIP disapprovals	XVII	§ 93.120(a)(2)
	Safety margins	XVIII	Deletes § 93.124(b) of previous rule.
	Frequency	XIX	§ 93.104(c), § 93.104(e)
	Latest planning assumptions	XX	§ 93.110(a)
	Horizon years in hot-spot analyses	XXI	§ 93.116
	Relying on a previous analysis	XXII	§ 93.122(g), § 93.104(b), § 93.104(c)
	Definitions	XXIII.A	§ 93.101
	Insignificance	XXIII.B	§ 93.109(k), § 93.121(c)
	Limited maintenance plans	XXIII.C	§ 93.101, § 93.109(j), § 93.121(c)
	Transportation plan and modeling requirements (moderate and serious classificatons).	XXIII.D	§ 93.106(b), § 93.122(c)
	Non-federal projects (for isolated rural areas only).	XXIII.F	§ 93.121(b)(1)
	Implementation of budget test	XXIII.H	§ 93.118(b), § 93.118(d)
		XXIII.I	
	Exempt projects	XXIII.J	§ 93.126
	Conformity SIPs	XXV	Not applicable.
NO_2	Build/no-build test	IV.C	§ 93.119(d), § 93.119(g)(2)
	Federal projects during a lapse	XIV	§ 93.102(c), § 93.104(d)
	Adequacy process of submitted SIPs	XV	§ 93.118(e)
		XXIII.G	§ 93.118(f)
	Non-federal projects during a lapse	XVI	§ 93.121(a)
	Consequences of SIP disapprovals	XVII	§ 93.120(a)(2)
	Safety margins	XVIII	Deletes § 93.124(b) of previous rule.
	Frequency	XIX	§ 93.104(c), § 93.104(e)
	Latest planning assumptions	XX	§ 93.110(a)
	Relying on a previous analysis	XXII	§ 93.122(g), § 93.104(b), § 93.104(c)
	Definitions	XXIII.A	§ 93.101
	Insignificance	XXIII.B	§ 93.109(k), § 93.121(c)
	Non-federal projects (for isolated rural areas only).	XXIII.F	§ 93.121(b)(1)
	Implementation of budget test	XXIII.H	§ 93.118(b)
		XXIII.I	§ 93.118(d)
	Exempt projects	XXIII.J	§ 93.126
	Conformity SIPs	XXV	Not applicable.

Second, a paragraph was omitted from the end of Section XXIII.G. Use of Adequate and Approved Budgets in Conformity (69 FR 40066). The missing paragraph was intended to explain that we are not changing all of the PM_{10} requirements in § 93.109(g). We are reprinting the entire paragraph in the regulatory section of the July 1, 2004 final rule to ensure that the Code of Federal Regulations is updated correctly.

The following paragraph should be inserted at the end of Section XXIII.G.:

The final rule includes some of the existing conformity rule's text for PM_{10} requirements in § 93.109(g) to ensure that the Code of Federal Regulations is updated correctly. For example, § 93.109(g)(3)(ii) is not being changed in this final rule, but is affected by the reorganization of paragraph (g) in this section. EPA notes that this and other such parts of paragraph (g) have been addressed through past rulemakings and are not being reopened through this final rule.

No changes are being made to the final rule language or other preamble language published on July 1, 2004. EPA finds good cause to make this correction notice effective less than 30 days after publication in the **Federal Register**. The final rule published July 1 will become effective August 2, 2004. Today's correction notice does not make any changes to the final rule. This correction notice only clarifies explanatory text in the preamble to the final rule which were intended to aid conformity implementors in implementing the rule. Therefore EPA concludes that it will be in the public interest to have this correction notice also become effective on August 2, 2004.

Authority: 42 U.S.C. 7401–7671q.

Dated: July 13, 2004.

Robert D. Brenner,

Acting Assistant Administrator for Office of Air and Radiation.

[FR Doc. 04–16449 Filed 7–19–04; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

46 CFR Part 296

[Docket No. MARAD–2004–18489]

RIN 2133–AB62

Maritime Security Program

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Interim final rule and request for comments.

SUMMARY: The Maritime Administration (MARAD) is issuing this interim final rule to provide procedures to implement provisions of the National Defense Authorization Act for Fiscal Year 2004, the Maritime Security Act of 2003 (MSA 2003). The MSA 2003 authorizes the creation of a new Maritime Security Program (MSP) that establishes a fleet of active, commercially viable, privately owned vessels to meet national defense and other security requirements and to maintain a United States presence in international commercial shipping. This interim final rule establishes the new MSP and provides, among other things, application procedures and deadlines for enrollment of vessels in the MSP.

DATES: *Effective Date:* This interim final rule is effective on October 1, 2004.

Comment Date: MARAD will consider comments received not later than August 19, 2004.

Application Due Date: Applications for enrollment of vessels in the MSP are due by October 15, 2004, to the address listed in the **ADDRESSES** section below.

ADDRESSES: *Comment Submission:* You may submit comments [identified by DOT DMS Docket Number MARAD–2004–18489] by any of the following methods:

- Web site: *http://dms.dot.gov*. Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1–202–493–2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number for this rulemaking. Note that all comments received will be posted without change to *http://dms.dot.gov* including any personal information provided. Please see the *Privacy Act* heading under Regulatory Notices.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Application Submission: Submit applications for enrollment of vessels in the MSP to the Secretary, Maritime Administration, Room 7218, Maritime Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, D.C. 20590.

FOR FURTHER INFORMATION CONTACT: Taylor E. Jones II, Director, Office of Sealift Support, Maritime Administration, Telephone 202–366–2323. For legal questions, call Murray Bloom, Chief, Division of Maritime Programs, Maritime Administration, 202–366–5320. For military utility questions, call LTC Todd Robbins, U.S. Transportation Command, 618–229–1451/1529.

SUPPLEMENTARY INFORMATION:

Background

On October 8, 1996 the President signed the Maritime Security Act of 1996 establishing the Maritime Security Program (MSP) for FYs 1996 through 2005 to provide financial assistance of up to $2.1 million per vessel per year to operators of U.S.-flag vessels with approved MSP Operating Agreements. The MSP is funded at $100 million per year for each year from FY 1996 through FY 2005, which covers a maximum of 47 vessels.

On November 24, 2003, the President signed the National Defense Authorization Act for Fiscal Year 2004, which contained the MSA 2003 creating a new MSP for FY 2006 through FY 2015. This program also provides financial assistance to operators of U.S.-flag vessels that meet certain qualifications. The MSA 2003 requires that the Secretary of Transportation, in consultation with the Secretary of Defense, establish a fleet of active, commercially viable, militarily useful, privately-owned vessels to meet national defense and other security requirements. Section 53111 of the MSA 2003 authorizes $156 million annually for FYs 2006, 2007, and 2008; $174 million annually for FYs 2009, 2010, and 2011; and $186 million annually for FYs 2012, 2013, 2014, and 2015 to support the operation of up to 60 U.S.-flag vessels in the foreign commerce of the United States. Payments to participating operators are limited to $2.6 million per ship per year for FYs 2006 through 2008, $2.9 million per ship per year for FYs 2009 through 2011, and $3.1 million per ship per year for FYs 2012 through 2015. Payments are subject to annual appropriations. Participating operators are required to make their commercial transportation resources available upon request by the Secretary of Defense during times of war or national emergency.

Subtitle A, section 3517 of the MSA 2003 provides for a pilot program under which the Secretary of Transportation may enter into an agreement(s) to reimburse MSP vessel operators up to 80 percent of the cost of performing maintenance and repairs in U.S. shipyards versus the cost of performing this work in a geographic region in which the MSP vessel generally operates. Funding to perform qualified maintenance and repair work in the United States on MSP vessels is authorized to be appropriated in the amount of $19.5 million for each of fiscal years 2006 through 2011.

Military Utility

The U.S. Transportation Command, on behalf of the Secretary of Defense, will issue a press release or another form of announcement within 20 days after the issuance of this regulation describing the current operational requirements of the Department of Defense for determining the award of operating agreements within a priority. Current requirements may be stated in terms of capability to perform a particular mission or in terms of vessel characteristics (militarily useful square footage, deck height, deck strength, draft, ammunition certification, etc.) or in other operational terms.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review), and Department of Transportation (DOT) Regulatory Policies; Pub. L. 104–121

This rulemaking is considered to be an economically significant regulatory action under section 3(f) of Executive

Order 12866. This interim final rule is also considered a major rule for purposes of Congressional review under Pub. L. 104–121. Since the program is designed to support up to 60 vessels in FY 2006, each receiving up to $2.6 million annually, the Maritime Administrator finds that the program may have an annual effect on the economy of $100 million or more. Thus, it is considered to be a significant rule under Executive Order 12866 and DOT's Regulatory Policies and Procedures (44 FR 11034, February 26, 1979), and has been reviewed by OMB. Changes made in response to OMB suggestions or recommendations will be documented in the public record. Under Executive Order 12866, MARAD is required to provide an analysis of information developed as part of its decisionmaking process, including the benefits anticipated from the regulatory action, the costs anticipated from the action, and an assessment of the costs and benefits of potentially effective and reasonably feasible alternatives to the regulatory action. MARAD's regulatory analysis follows.

Background

The Maritime Security Act of 1996 (MSA) was passed with strong bipartisan support in Congress and was signed into law on October 8, 1996. The MSA outlined, in detail, the establishment of a fleet of vessels, pursuant to agreement, engaged in U.S. foreign commerce and available for use by the Department of Defense during times of war or national emergency. Based on the success of the program under the original MSA, Congress, as part of the recently enacted Maritime Security Act of 2003 (MSA 2003), created a new program that permits an increase in both the number of participant vessels as well as the payment amounts such vessels will receive under the program.

Benefits

The major benefit of the MSA 2003 is that it will provide the Department of Defense (DOD) with assured access of up to 60 vessels that may be used during times of war or national emergency. The existing MSP fleet of 47 vessels consists primarily of containerships, which are mainly designed for the sustainment phase of sealift operations that support military operations. In Operation Iraqi Freedom, 35 MSP vessels were employed in support of military operations. In addition, the MSP provides necessary support to help maintain a U.S.-flag presence in international commerce. The MSP vessels are a major component of the U.S.-flag capability that contributes to the U.S. mariner base for utilization on both commercial and DOD organic fleet.

Costs

From the inception of the program, Congress set strict limits, not subject to the Secretary of Transportation's discretion, on the number of participant vessels and the annual payment per vessel. The MSA 2003 will permit an increase in the number of participant vessels from 47 authorized under the original MSA (for FYs 1996–2005) to 60 (authorized for FYs 2006–2015). Similarly, the payments per vessel may be increased from $2.1 million (under the original MSA for FYs 1997–2005) to $2.6 million (for FYs 2006–2008); $2.9 million (for FYs 2009–2011); and $3.1 million (for FYs 2012–2015). The maximum programmatic payment that Congress directed through the MSA 2003 is $156 million, $174 million, and $186 million per year for FYs 2006–2008, 2009–2011, and 2012–2015 respectively, subject to appropriation.

Analysis of Alternatives

The MSA 2003 expands the MSP program that was originally established by Congress in 1996 by increasing the number of participant vessels, annual funding amounts, and expenditure amounts for the new MSP program. However, beyond the increased size of the new MSP program under the MSA 2003, the underlying statutes are substantially similar, and envision a new MSP program that is essentially a continuation of the prior MSP program under the original MSA. Under both the original MSA and the MSA 2003, Congress prescribed the salient details of the MSP program, including ship ownership, vessel eligibility, vessel documentation, program duration, the number of participants, the amount of funding, and, under the MSA 2003, guidelines regarding the composition of the fleet. Since the MSA 2003 provides detailed requirements for continuing the MSP program, MARAD has little discretion to propose regulatory options. In fact, given the highly prescriptive nature of both the original MSA and MSA 2003, MARAD believes that no viable regulatory alternatives exist in lieu of implementing these regulations, which continue and expand the current MSP program.

Administrative Procedure Act

Pursuant to authority granted by section 3533 of the MSA 2003, which provides an exception from compliance with the notice and comment requirements of section 553 of Title 5, United States Code, MARAD is publishing this rule as an interim final rule. This will facilitate establishment of the new MSP as early as possible. A final rule will be published in the **Federal Register** after MARAD has had an opportunity to consider all comments on this interim final rule. Section 3533 provides that all interim rules under that section that are not superseded earlier by final rules shall expire no later than 270 days after the effective date of Subtitle C, or October 1, 2004. Accordingly, these interim regulations shall no longer be effective after June 27, 2005.

Executive Order 13132

We have analyzed this rulemaking in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism'') and have determined that it does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement. The regulations have no substantial effects on the States, the current Federal-State relationship, or the current distribution of power and responsibilities among various local officials. Therefore, consultation with State and local officials was not necessary.

Executive Order 13175

MARAD does not believe that this interim final rule will significantly or uniquely affect the communities of Indian tribal governments when analyzed under the principles and criteria contained in Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments). Therefore, the funding and consultation requirements of this Executive Order do not apply.

Regulatory Flexibility

Because no notice of proposed rulemaking is required for this interim final rule, as set forth in section 3533 of Subtitle C, Title XXXV, of the National Defense Authorization Act for Fiscal Year 2004, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. However, the Maritime Administrator certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities. We anticipate that few, if any, small entities will participate in this program due to the nature of the shipping industry and the capital costs associated with ships that are eligible for the program.

Unfunded Mandates Reform Act of 1995

This interim final rule will not impose an unfunded mandate under the Unfunded Mandates Reform Act of

1995. It will not result in costs of $100 million or more, in the aggregate, to any of the following: State, local, or Native American tribal governments, or the private sector. This interim final rule is the least burdensome alternative that achieves this objective of U.S. policy.

Environmental Assessment

We have analyzed this interim final rule for purposes of compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and we have concluded that, under the categorical exclusions provision in section 4.05 of Maritime Administrative Order (MAO) 600–1, ''Procedures for Considering Environmental Impacts,'' 50 FR 11606 (March 22, 1985), neither the preparation of an Environmental Assessment, an Environmental Impact Statement, nor a Finding of No Significant Impact for this rulemaking is required. This interim final rule does not change the environmental effects of the current MSP, which has been operational since FY 1997, and thus no further analysis under NEPA is required. The vessels eligible for the MSP under the MSA 2003 (1) will continue to operate under the U.S. flag, and will continue to be governed by U.S.-flag state control while operating in the foreign commerce of the United States; and (2) are and will continue to be designed, constructed, equipped and operated in accordance with stringent United States Coast Guard and International Maritime Organization standards for maritime safety and maritime environmental protection.

Paperwork Reduction

MARAD has requested that the Office of Management and Budget revise its approval of an information collection under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507 *et seq.*). The title of the information collection is Application and Reporting Elements for Participation in the Maritime Security Program, OMB #2133–0525.

This information collection requires vessel operators to continue to submit initial applications, amendments to applications (if necessary), and monthly and annual reports. We estimate that the number of annual respondents under the new MSP program will increase from 12.5 to 15, the average total number of annual responses will increase from 132 to 198.5, and that the average annual recordkeeping and reporting burden program total will increase from 152 hours to 224 hours. We estimate that the total average annual cost burden associated with this information collection will be $10,726.65, or $715.11 per respondent.

In accordance with the Paperwork Reduction Act, MARAD published a 60-day notice in the **Federal Register** seeking public comment on the information collection on May 28, 2004 (69 FR 30744).

Privacy Act

Anyone is able to search the electronic form of all comments received into any of 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 Act 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.*

List of Subjects in 46 CFR Part 296

Assistance payments, Maritime carriers, Reporting and record keeping requirements.

■ Accordingly, Part 296 is added to 46 CFR Chapter II, Subchapter C, to read as follows:

PART 296—MARITIME SECURITY PROGRAM (MSP)

Subpart A—Introduction

Sec.
296.1 Purpose.
296.2 Definitions.
296.3 Applications.
296.4 Waivers.

Subpart B—Eligibility

296.10 Citizenship requirements of owners, charterers and operators.
296.11 Vessel requirements.
296.12 Applicants.

Subpart C—Priority for Granting Applications

296.20 Tank vessels.
296.21 Participating Fleet Vessels.
296.22 Other vessels.

Subpart D—Maritime Security Program Operating Agreements

296.30 General conditions.
296.31 MSP assistance conditions.
296.32 Reporting requirements.

Subpart E—Payment and Billing Procedures

296.40 Billing procedures.
296.41 Payment procedures.

Subpart F—Appeals Procedures

296.50 Administrative determinations.

Subpart G—Maintenance and Repair Reimbursement Pilot Program

296.60 Applications.

Authority: Pub. L. 108–136, 117 Stat. 1392; 46 App. U.S.C. 1114(b), 49 CFR 1.66.

Subpart A—Introduction

§ 296.1 Purpose.

This part prescribes regulations implementing the provisions of Subtitle C, Maritime Security Fleet Program, Title XXXV of the National Defense Authorization Act for Fiscal Year 2004, the Maritime Security Act of 2003 (MSA 2003), governing Maritime Security Program (MSP) payments for vessels operating in the foreign trade or mixed foreign and domestic commerce of the United States allowed under a registry endorsement issued under 46 U.S.C. 12105. The MSA 2003 provides for joint responsibility between the Department of Defense (DOD) and the Department of Transportation (DOT) for administering the law. These regulations provide the framework for the coordination between DOD and DOT in implementing the MSA 2003. Implementation of the MSA 2003 has been delegated by the Secretary of Transportation to the Maritime Administrator, U.S. Maritime Administration and by the Secretary of Defense to the Commander, U.S. Transportation Command, respectively.

§ 296.2 Definitions.

For the purposes of this part:

Act means the Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1101 *et seq.*).

Administrator means the Maritime Administrator, U.S. Maritime Administration (MARAD), U.S. DOT, who is authorized by the Secretary of Transportation to administer the MSA 2003, in consultation with the Commander, U.S. Transportation Command (USTRANSCOM).

Agreement Vessel means a vessel covered by an MSP Operating Agreement.

Applicant means an applicant for an MSP Operating Agreement.

Bulk Cargo means cargo that is loaded and carried in bulk without mark or count.

Chapter 121 means the vessel documentation provisions of chapter 121 of title 46, United States Code.

Citizen of the United States means an individual who is a United States citizen, or a corporation, partnership or association as determined under section 2 of the Shipping Act, 1916, as amended (46 App. U.S.C. 802).

Commander means Commander, USTRANSCOM, who is authorized by the Secretary of Defense to administer the MSA 2003, in consultation with the Administrator.

Contracting Officer means the Associate Administrator for National Security, MARAD.

Contractor means the owner or operator of a vessel that enters into an

MSP Operating Agreement for the vessel with the Secretary of Transportation (acting through MARAD) pursuant to section 53103 of the MSA 2003.

Documentation Citizen means an entity able to document a vessel under 46 U.S.C. chapter 121. This definition includes a trust.

DOD means the U.S. Department of Defense.

Domestic Trade means trade between two or more ports and/or points in the United States.

Eligible Vessel means a vessel that meets the requirements of section 53102(b) of the MSA 2003.

Emergency Preparedness Agreement (EPA) means the agreement, required by section 53107 of the MSA 2003, between a Contractor and the Secretary of Transportation (acting through MARAD) to make certain commercial transportation resources available during time of war or national emergency or whenever determined by the Secretary of Defense to be necessary for national security or contingency operation.

Enrollment means the entry into an MSP Operating Agreement with MARAD to operate a vessel(s) in the MSP Fleet in accordance with § 296.30.

Fiscal Year means any annual period beginning on October 1 and ending on September 30.

Fleet means the Maritime Security Program Fleet established under section 53102(a) of the MSA 2003.

Foreign Commerce means:

(1) For any vessel other than a liquid or a dry bulk carrier, a cargo freight service, including direct and relay service, operated exclusively in the foreign trade or in mixed foreign and domestic trade allowed under a registry endorsement under section 12105 of title 46, United States Code, where the origination point or the destination point of cargo carried is the United States, regardless of whether the vessel provides direct service between the United States and a foreign country, or commerce or trade between foreign countries; and

(2) For liquid and dry bulk cargo carrying services, trading between foreign ports in accordance with normal commercial bulk shipping practices in such manner as will permit United States-documented vessels to freely compete with foreign-flag bulk carrying vessels in their operation or in competing for charters.

LASH Vessel means a lighter aboard ship vessel.

Militarily Useful is defined, in terms of minimum military capabilities, according to DOD Joint Strategic Planning Capabilities Plan (JSCAP) guidance.

MSP Fleet means the fleet of vessels operating under MSP Operating Agreements.

MSP Operating Agreement means the agreement between a Contractor and MARAD that provides for MSP payments.

MSP Payments means the payments made for the operation of U.S.-flag vessels in the foreign commerce.

Noncontiguous Domestic Trade means transportation of cargo between a point in the contiguous 48 states and a point in Alaska, Hawaii, or Puerto Rico, other than a point in Alaska north of the Arctic Circle.

Operating Day means any calendar day during which a vessel is operated in accordance with the terms and conditions of the MSP Operating Agreement.

Operator is a person that either owns a vessel or charters in a vessel at a financial risk through a demise charter that transfers virtually all the rights and obligations of the vessel owner to the vessel operator, such as that of crewing, supplying, maintaining, insuring and navigating the vessel.

Owner means an entity that has title and/or beneficial ownership of a vessel. Only an owner that is a person is eligible to enter into an MSP Operating Agreement.

Participating Fleet Vessel means any vessel that:

(1) On October 1, 2005—

(i) Meets the citizenship requirements of paragraph (1), (2), (3), or (4) of section 53102(c) of the MSA 2003;

(ii) Is less than 25 years of age, or is less than 30 years of age in the case of a LASH vessel; and

(2) On December 31, 2004, is covered by an MSP Operating Agreement.

Person includes corporations, limited liability companies, partnerships, and associations existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country. A trust is not a person.

Roll-on/Roll-off Vessel means a vessel that has ramps allowing cargo to be loaded and discharged by means of wheeled vehicles so that cranes are not required.

SecDef means Secretary of Defense acting through the Commander USTRANSCOM.

Secretary means the Secretary of Transportation acting through the Maritime Administrator.

Section 2 Citizen means a United States citizen within the meaning of section 2 of the Shipping Act, 1916, 46 U.S.C. 802, without regard to any statute that ''deems'' a vessel to be owned and operated by a Section 2 citizen.

Tank Vessel means, as stated in 46 U.S.C. 2101(38), a self-propelled tank vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue. In addition, the vessel must be double hulled and capable of carrying simultaneously more than two separated grades of refined petroleum products.

Transfer of an MSP Operating Agreement includes any sale, assignment or transfer of the MSP Operating Agreement, either directly or indirectly, or through any sale, reorganization, merger, or consolidation of the MSP Contractor.

United States includes the 50 U.S. states, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, Guam, American Samoa, and the Virgin Islands.

United States Citizen Trust means:

(1) Subject to paragraph (3), a trust that is qualified under this definition.

(2) A trust is qualified only if:

(i) Each of the trustees is a citizen of the United States under section 2 of the Shipping Act, 1916, as amended; and

(ii) The application for documentation of the vessel under 46 U.S.C. chapter 121, includes the affidavit of each trustee stating that the trustee is not aware of any reason involving a beneficiary of the trust that is not a citizen of the United States, or involving any other person that is not a citizen of the United States, as a result of which the beneficiary or other person would hold more than 25 percent of the aggregate power to influence or limit the exercise of the authority of the trustee with respect to matters involving any ownership or operation of the vessel that may adversely affect the interests of the United States.

(3) If any person that is not a citizen of the United States has authority to direct or participate in directing a trustee for a trust in matters involving any ownership or operation of the vessel that may adversely affect the interests of the United States or in removing a trustee for a trust without cause, either directly or indirectly through the control of another person, the trust instrument provides that persons who are not citizens of the United States may not hold more than 25 percent of the aggregate authority to so direct or remove a trustee.

(4) This definition shall not be considered to prohibit a person who is not a citizen of the United States from holding more than 25 percent of the beneficial interest in a trust.

United States Documented Vessel means a vessel documented under 46 U.S.C. chapter 121.

§ 296.3 Applications.

(a) *Action by MARAD.—Time deadlines.* Applications for enrollment of vessels in the MSP are due by October 15, 2004 to the Secretary, Maritime Administration, Room 7218, Maritime Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, D.C. 20590. If, for any reason, after the award of an Operating Agreement, the Contractor is unwilling or unable to enter into an MSP Operating Agreement, MARAD may award that contract to an Applicant having an eligible vessel that applied but was not awarded an MSP Operating Agreement. MARAD may also open a new round of applications at a later date. Any applications received before October 15, 2004 shall be deemed to have been submitted on October 15, 2004. Within 90 days after receipt of a completed application, the Secretary shall approve the application, in conjunction with the SecDef, or provide in writing the reason for denial of that application. Execution of a standard MSP Operating Agreement shall take place reasonably soon after approval of the application.

(b) *Action by the applicant.* Each applicant for an MSP Operating Agreement shall submit an application under OMB control number 2133–0525 to the Secretary, Maritime Administration in the manner prescribed on that form. Applicants may request an application form from MARAD's Office of Sealift Support, or the application form can be downloaded from the MARAD Web site, *www.marad.dot.gov*, and completed using Microsoft Word. Completed forms must be received by MARAD no later than close of business (5 p.m. Eastern Time) on October 15, 2004, and may be submitted in person, by U.S. mail, Federal Express, United Parcel Service, or DHL. Information required shall include:

(1) An *affidavit of U.S. citizenship* that comports with the requirements of 46 CFR part 355, if applying as a Section 2 citizen. Otherwise, an affidavit which demonstrates that the applicant is qualified to document a vessel under 46 U.S.C. chapter 121. If the applicant is a vessel operator and proposes to employ a vessel manager, then an affidavit of U.S. citizenship meeting the same requirements as applicable to the operator is required from the vessel manager;

(2) *Certificate of Incorporation;*

(3) *Copies of by-laws or other governing instruments;*

(4) *Maritime related affiliations;*

(5) *Financial data:*

(i) Provide an audited financial statement or a completed MARAD Form MA–172 dated within 120 days after the close of the most recent fiscal period; and

(ii) Provide estimated annual forecast of maritime operations for the next five years showing revenue and expense, including explanations of any significant increase or decrease of these items;

(6) *Intermodal network:*

(i) If applicable, a statement describing the applicant's operating and transportation assets, including vessels, container stocks, trucks, railcars, terminal facilities, and systems used to link such assets together;

(ii) The number of containers and their twenty-foot equivalent units (TEUs) by size and type owned and/or long-term leased by the applicant distinguishing those that are owned from those that are leased; and

(iii) The number of chassis by size and type owned and/or long-term leased by the applicant distinguishing those that are owned from those that are leased;

(7) *Diversity of trading patterns:* A list of countries and trade routes serviced along with the types and volumes of cargo carried;

(8) *Applicant's record of owning and/or operating vessels:* Provide number of ships owned and/or operated, specifying flag, in the last ten years, trades involved, number of employees in your ship operations department, vessel or ship managers utilized in the operation of your vessels, and any other information relevant to your record of owning or operating vessels;

(9) *Bareboat charter arrangements,* if applicable;

(10) *Vessel data including vessel type, size, and construction date;*

(11) *Military Utility:* An assessment of the value of the vessel to DOD sealift requirements. Provide characteristics which indicate the value of the vessels to DOD including items of specific value, *e.g.*, ramp strengths, national defense sealift features;

(12) *Special Security Agreements:* If applicable, provide a copy of your Special Security Agreement;

(13) If applicable, *Certification from documentation citizen who is the demise charterer of the MSP vessel:* In a letter submitted at the time of the application addressed to the Administrator and the Commander from the Chief Executive Officer, or equivalent, of a documentation citizen that is the proposed Contractor of an MSP Operating Agreement, provide a statement that there are no treaties, statutes, regulations, or other laws of the foreign country of the parent, that would prohibit the proposed Contractor from performing its obligations under an MSP Operating Agreement. The statement should be substantially in the following format:

> ''I, _____, Chief Executive Officer of _____, certify to you that there are no treaties, statutes, regulations, or other laws of the foreign country(ies) of _____'s ultimate foreign parent or intermediate parents that would prohibit _____ from performing its obligations under an Operating Agreement with the Maritime Administration pursuant to the Maritime Security Act of 2003.'';

(14) *Agreement from the ultimate foreign parent of the documentation citizen:* An agreement to be signed and submitted at the time of application from the equivalent of the Chief Executive Officer of the ultimate foreign parent of a documentation citizen not to influence the operation of the MSP vessel in a manner that will adversely affect the interests of the United States. The Agreement should be substantially in the following format:

> ''I, _____, am the Chief Executive Officer [or equivalent] of _____, the ultimate foreign parent of _____, a documentation citizen of the United States that is applying for an MSP Operating Agreement. I agree on behalf of the ''foreign parent'' that neither _____ (the ultimate foreign parent) nor any representative of _____ (the ultimate foreign parent) will in any way influence the operation of the MSP vessel in a manner that will adversely affect the interests of the United States.'';

(15) *Replacement vessel plan and age waiver:* If applicable, an applicant must submit a replacement vessel plan along with an age waiver request if the applicant seeks an age waiver for an existing vessel(s). Arrangements to obtain replacements for over-age vessel(s) must be approved by the Secretary at the same time as the application for an MSP Operating Agreement. The age restriction for over-age vessels shall not apply to a Participating Fleet Vessel during the 30-month period beginning on the date the vessel begins operating under an MSP Operating Agreement under the MSA 2003 provided that the Secretary has determined that the Contractor has entered into an arrangement for a replacement vessel that will be eligible to be included in an MSP Operating Agreement, and;

(16) *Anti-Lobbying Certificate:* A certificate as required by 49 CFR part 20

stating that no funds provided under MSP have been used for lobbying to obtain an Operating Agreement.

(Approved by the Office of Management and Budget under Control Number 2133–0525)

§ 296.4 Waivers.

In general. In special circumstances, and for good cause shown, the procedures prescribed in this part may by waived in writing by the Secretary, by mutual agreement of the Secretary in consultation with the SecDef, and the Contractor, so long as the procedures adopted are consistent with the MSA 2003 and with the objectives of these regulations.

Subpart B—Eligibility

§ 296.10 Citizenship requirements of owners, charterers and operators.

Citizenship requirements are deemed to have been met if during the period of an operating agreement under this chapter that applies to the vessel, all of the conditions of any of the paragraphs (a), (b), (c), or (d) of this section are met, and subject to conditions in paragraph (e):

(a) A vessel to be included in an MSP Operating Agreement is owned and operated by one or more persons that are citizens of the United States under section 2 of the Shipping Act, 1916 (46 App. U.S.C. 802)(Section 2 citizens).

(b) A vessel to be included in an MSP Operating Agreement is owned by a person that is a Section 2 citizen or a United States Citizen Trust, and the vessel is demise chartered to a person—

(1) That is eligible to document the vessel under 46 U.S.C. chapter 121;

(2) Whose chairman of the board of directors, chief executive officer, and a majority of the members of the board of directors are Section 2 citizens; and are appointed and subjected to removal only upon approval by the Secretary as follows:

(i) Proposed changes to the chairman of the board, chief executive officer, and membership of the board of directors must be submitted to the Administrator 60 days before scheduled to take effect; and

(ii) MARAD must approve or disapprove changes within 30 days of receiving the proposed changes;

(3) That certifies to the Secretary in a format substantially similar to the format at § 296.3(b)(13) that there are no treaties, statutes, regulations, or other laws that would prohibit the Contractor from performing its obligations under an Operating Agreement at the time of application for an MSP Operators Agreement; and

(4) The ultimate foreign parent of that person proffers, at the time of application for an MSP Operating Agreement, an agreement in a format substantially similar to the format at § 296.3(b)(14) not to influence the vessel's operation in a way that is detrimental to the United States.

(c) A vessel to be included in an MSP Operating Agreement is owned by a defense contractor who is a person that:

(1) Is eligible to document the vessel under 46 U.S.C. chapter 121;

(2) Operates or manages other United States-documented vessels for the SecDef, or charters other vessels to the SecDef;

(3) Has entered into a special security agreement with the SecDef;

(4) Certifies to the Secretary, at the time of application, in a format substantially similar to the format of § 296.3(b)(13), that there are no treaties, statutes, regulations, or other laws that would prohibit the Contractor from performing its obligations under an Operating Agreement; and

(5) Has its ultimate foreign parent proffer, at the time of application for an MSP Operating Agreement, an agreement in a format substantially similar to the format of § 296.3(b)(14) not to influence the vessel's operation in a way that is detrimental to the United States.

(d) The vessel is owned by a documentation citizen and demise chartered to a Section 2 citizen.

(e) Where applicable, the Secretary and the SecDef shall notify the Senate Committees on Armed Services, and Commerce, Science, and Transportation and the House of Representatives Committee on Armed Services that they concur with the certifications by the documentation citizens under § 296.3(b)(13) and that they have reviewed the agreements proffered by the ultimate foreign parent under § 296.3(b)(14), and agree that there are no other legal, operational, or other impediments that would prohibit the contractors for the vessels from performing their obligations under MSP Operating Agreements.

§ 296.11 Vessel requirements.

(a) *Eligible vessel.* A vessel is eligible to be included in an MSP Operating Agreement if:

(1) The vessel is:

(i) Determined by the SecDef to be suitable for use by the United States for national defense or military purposes in time of war or national emergency; and

(ii) Determined by the Secretary to be commercially viable;

(2) The vessel is operated or, in the case of a vessel to be purchased or constructed, will be operated to provide transportation in the foreign commerce of the United States;

(3) The vessel is self-propelled and is:

(i) A Roll-on/Roll-off vessel with a carrying capacity of at least 80,000 square feet or 500 twenty-foot equivalent units and is 15 years of age or less on the date the vessel is included in the MSP;

(ii) A tank vessel that is constructed in the United States after November 24, 2003;

(iii) A tank vessel that is 10 years of age or less on the date the vessel is included in the MSP Fleet;

(iv) A LASH vessel that is 25 years of age or less on the date the vessel is included in the fleet; or

(v) Any other type of vessel that is 15 years of age or less on the date the vessel is included in the fleet;

(4) The vessel is:

(i) A United States documented vessel under 46 U.S.C. chapter 121; or

(ii) Not a United States-documented vessel under 46 U.S.C. chapter 121, but the owner of the vessel has demonstrated an intent to have the vessel documented under 46 U.S.C. chapter 121 at the time the vessel is to be included in the MSP fleet; and

(5) The vessel is eligible for a certificate of inspection if the Secretary of the Department in which the United States Coast Guard is operating determines that:

(i) The vessel is classed and designed in accordance with the rules of the American Bureau of Shipping (ABS) or another classification society accepted by such Secretary;

(ii) The vessel complies with applicable international agreements and associated guidelines as determined by the country in which the vessel was documented immediately before becoming a U.S.-flag vessel; and

(iii) The flag country has not been identified by such Secretary as inadequately enforcing international vessel regulations.

(b) *Waiver of age restriction of vessels.* The SecDef, in conjunction with the Secretary, may waive the age restriction in paragraph (a) of this section if the Secretaries jointly determine that the waiver:

(1) Is in the national interest;

(2) Is appropriate to allow the maintenance of the economic viability of the vessel and any associated operating network; and

(3) Is necessary due to the lack of availability of other vessels and operators that comply with the requirements of the MSA 2003.

§ 296.12 Applicants.

Applicant. Owners or operators of an eligible vessel may apply to MARAD for inclusion of that vessel in the MSP Fleet

pursuant to the provisions of the MSA 2003. Applications shall be addressed to the Secretary, Maritime Administration, Room 7218, Maritime Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

Subpart C—Priority for Granting Applications

§ 296.20 Tank vessels.

(a) First priority for the award of MSP Operating Agreements under MSA 2003 shall be granted to a tank vessel that is constructed in the United States after October 1, 2004.

(b) First priority for the award of MSP Operating Agreements under the MSA 2003 may be granted to a tank vessel that is less than ten years of age on the date it enters an MSP Operating Agreement:

(1) Provided that a binding contract for a replacement vessel to be operated under the MSP Operating Agreement and to be built in the United States has been executed and approved by the Secretary not later than nine months after the first date appropriated funds are available for construction assistance; and

(2) No payment can be made for an existing tank vessel granted priority one status after the earlier of:

(i) Four years after the first date appropriated funds are available to carry out the construction of a tanker in the United States; or

(ii) The date of delivery of the replacement tank vessel.

(c) A tank vessel under this section must be eligible to be included in the MSP under § 296.11(a);

(d) A tank vessel under this section must be owned and operated during the period of the operating agreement by one or more persons that are citizens of the United States under section 2 of the Shipping Act of 1916 (46 App. U.S.C. 802); and

(e) The Secretary will not enter into more than five Operating Agreements for tank vessels under this priority. If the five tank vessel Operating Agreement slots are not fully subscribed, the Secretary, in consultation with the SecDef, may award the non-subscribed slots to lower priority vessels, if deemed appropriate. If the Secretary determines that no funds are, or are likely to be, allocated for any tank vessel construction in the United States, the five slots may be awarded permanently to non-tank vessels. The Secretary may temporarily award a slot reserved for a tank vessel under construction to a lower priority vessel during the construction period of that vessel if an existing tank vessel offered by the tank vessel Contractor is not eligible for priority for that slot. If no existing tank vessel is offered by the tank vessel Contractor, the Secretary may temporarily award an MSP Operating Agreement to a non-tank vessel of another Contractor until a new tank vessel's construction is completed in the United States. Such temporary agreements shall be terminated at the convenience of the Secretary under terms set forth in the temporary MSP Operating Agreement.

§ 296.21 Participating Fleet Vessels.

(a) *Priority.* To the extent that appropriated funds are available after applying the first priority, tank vessels, in § 296.20, the second priority is applicable to Participating Fleet Vessels.

(b) *Number of Operating Agreements.* MARAD will not enter into more than 47 Operating Agreements for Participating Fleet Vessels.

(c) *Reduction of Participating Fleet Vessel Operating Agreements.* The number of Operating Agreements available to Participating Fleet Vessels shall be reduced by one for:

(1) Each Participating Fleet Vessel for which an application for enrollment in the MSP is not received by the Secretary, Maritime Administration on October 15, 2004; or

(2) Each Participating Fleet Vessel for which an application for enrollment in the MSP is received by the Secretary, Maritime Administration on October 15, 2004, but the application is not approved by the Secretary of Transportation and the SecDef by January 12, 2005.

(d) *Authority to enter into an Operating Agreement.* (1) Applications for inclusion of a Participating Fleet Vessel under the priority in paragraph (a) of this section will be accepted only from a person that has authority to enter into an MSP Operating Agreement for the vessel with respect to the full term of the Operating Agreement. Applicants must certify that they have the requisite authority and provide the basis on which they rely for such certification, such as a copy of a vessel title of ownership or a demise charter.

(2) The full term of the Operating Agreement is the period from October 1, 2005 through September 30, 2015. If a vessel proposed to be included in the MSP will become ineligible for the program prior to September 30, 2015, due to vessel age restrictions, then the full term of the Operating Agreement for that vessel for purposes of paragraph (d)(1) of this section is the period the vessel meets the applicable age restrictions. MARAD may still award an operating agreement through September 30, 2015, to an applicant having authority to enter into an MSP Operating Agreement for a vessel whose age eligibility expires before that date, provided an appropriate replacement vessel is approved by MARAD.

(3) For the purposes of paragraph (d)(1) of this section, in the case of a vessel that is subject to a demise charter that terminates by its terms on September 30, 2005 (without giving effect to any extension provided therein for completion of a voyage or to effect the actual redelivery of the vessel), or that is terminable at will by the owner of the vessel after such date, only the owner of the vessel (provided the owner of the vessel is a ''person'' as defined in § 296.2) shall be treated as having the authority referred to in paragraph (d)(1) of this section.

(4) If two or more applicants claim authority for the same vessel, the Secretary may request additional information bearing on the issue of which party has authority to enter into an Operating Agreement, and the Secretary shall, in his/her sole discretion, decide the matter as he/she deems appropriate.

(e) During the 30-month period commencing October 1, 2005, the age restrictions set forth under § 296.11(a) and § 296.41(c) do not apply to a Participating Fleet Vessel operating under an MSP Operating Agreement, provided:

(1) The Contractor has entered into an arrangement to obtain and operate under that MSP Operating Agreement a replacement vessel for that Participating Fleet Vessel; and

(2) The Secretary determines that the replacement vessel will be eligible to be included in the MSP Fleet under § 296.11(a).

§ 296.22 Other vessels.

(a) *Third priority.* To the extent that appropriated funds are available after applying the first priority, tank vessels, in § 296.20, and the second priority, Participating Fleet Vessels, in § 296.21, the third priority is for any other vessel that is eligible to be included in an MSP Operating Agreement under § 296.11(a), and that, during the period of that Agreement, will be:

(1) Owned and operated by one or more persons that are citizens of the United States under section 2 of the Shipping Act, 1916 (46 App. U.S.C. 802); or

(2) Owned by a person that is eligible to document the vessel under 46 U.S.C. chapter 121 and operated by a person that is a citizen of the United States

under section 2 of the Shipping Act, 1916 (46 App. U.S.C. 802).

(b) *Fourth priority.* To the extent that appropriations are available after applying the first priority in § 296.20, the second priority in § 296.21, and the third priority in paragraph (a) of this section, the fourth priority is for any other vessel that is eligible to be included in an MSP Operating Agreement under § 296.11(a).

(c) *Discretion within priority.* The Secretary—

(1) Subject to paragraph (c)(2) of this section, may award operating agreements within each priority as the Secretary considers appropriate; and

(2) Shall award Operating Agreements within a priority—

(i) In accordance with operational requirements specified by the SecDef;

(ii) In the cases of the priorities listed in paragraphs (a) and (b) of this section, according to the applicants' records of owning and operating vessels; and

(iii) Subject to the approval of the SecDef.

Subpart D—Maritime Security Program Operating Agreements

§ 296.30 General conditions.

(a) *Approval.* (1) The Secretary, in conjunction with the SecDef, may approve applications to enter into an MSP Operating Agreement and make MSP Payments with respect to vessels that are determined by the Secretary to be commercially viable and those that are deemed by the SecDef to be militarily useful for meeting the sealift needs of the United States in time of war or national emergencies. The Secretary will announce an initial award of no more than 60 MSP Operating Agreements and announce those applications deemed ineligible by January 12, 2005. In addition, the Secretary will advise those applicants found to be eligible but not included in the initial award that those applicants will be wait-listed for an award of an MSP Operating Agreement if additional slots become available.

(2) The Commander will establish general evaluation criteria for operational requirements for considering replacement vessels described in § 296.21(e), and for vessels eligible under the third and fourth priorities described in § 296.22. These general evaluation criteria will be made available by the Commander in sufficient time for preparing applications.

(b) *Effective date.* (1) *General rule.* Unless otherwise provided, the effective date of an MSP Operating Agreement is October 1, 2005.

(2) *Exceptions.* In the case of an Eligible Vessel to be included in an MSP Operating Agreement that is on charter to the U.S. Government, other than a charter under the provisions of an Emergency Preparedness Program Agreement provided by section 53107 of the MSA 2003, unless an earlier date is requested by the applicant, the effective date for an MSP Operating Agreement shall be:

(i) The expiration or termination date of the Government charter covering the vessel; or

(ii) Any earlier date on which the vessel is withdrawn from that charter, but not before October 1, 2005.

(c) *Replacement vessels.* A Contractor may replace an MSP vessel under an MSP Operating Agreement with another vessel that is eligible to be included in the MSP under § 296.11(a), if the Secretary, in conjunction with the SecDef, approves the replacement vessel. The replacement vessel must qualify with the same or with more militarily useful capability as the MSP vessel to be replaced for operational requirements as determined by the Commander.

(d) *Termination by the Secretary.* If the Contractor materially fails to comply with the terms of the MSP Operating Agreement:

(1) The Secretary shall notify the Contractor and provide a reasonable opportunity for the Contractor to comply with the MSP Operating Agreement;

(2) The Secretary shall terminate the MSP Operating Agreement if the Contractor fails to achieve such compliance; and

(3) Upon such termination, any funds obligated by the relevant MSP Operating Agreement shall be available to the Secretary to carry out this chapter.

(e) *Early termination by Contractor, generally.* An MSP Operating Agreement shall terminate on a date specified by the Contractor if the Contractor notifies the Secretary not later than 60 days before the effective date of the proposed termination that the Contractor intends to terminate the Agreement. The Contractor shall be bound by the provisions relating to vessel documentation and national security commitments, and by its Emergency Preparedness Agreement for the full term, from October 1, 2005 through September 30, 2015, of the MSP Operating Agreement.

(f) *Early termination by Contractor, with available replacement.* An MSP Operating Agreement shall terminate without further obligation on the part of the Contractor upon the expiration date of the three-year period beginning on the date a vessel begins operating under the MSP, if:

(1) The Contractor notifies the Secretary, by not later than two years after the date the vessel begins operation under an MSP Operating Agreement, that the Contractor intends to terminate the Agreement; and

(2) The Secretary, in conjunction with the SecDef, determines that:

(i) An application for an MSP Operating Agreement has been received for a replacement vessel that is acceptable to the Secretaries; and

(ii) During the period of an MSP Operating Agreement that applies to the replacement vessel, the replacement vessel will be:

(A) Owned and operated by one or more persons that are citizens of the United States under section 2 of the Shipping Act, 1916 (46 App. U.S.C. 802); or

(B) Owned by a person that is a Documentation Citizen and operated by a person that is a citizen of the United States under section 2 of the Shipping Act, 1916 (46 App. U.S.C. 802).

(g) *Non-renewal for lack of funds.* If, by the first day of a fiscal year, sufficient funds have not been appropriated under the authority of MSA 2003 for that fiscal year, the Secretary shall notify the Senate's Committees on Armed Services and Commerce, Science, and Transportation, and the House of Representatives' Committee on Armed Services, that MSP Operating Agreements for which sufficient funds are not available, will not be renewed for that fiscal year if sufficient funds are not appropriated by the 60th day of that fiscal year. If only partial funding is appropriated by the 60th day of such fiscal year, then the Secretary, in consultation with the SecDef, shall select the vessels to retain under MSP Operating Agreements, based on the Secretaries' determinations of the most militarily useful and commercially viable vessels. In the event that no funds are appropriated, then all MSP Operating Agreements shall be terminated and, each Contractor shall be released from its obligations under the MSP Operating Agreement. Final payments under the terminated agreements shall be made in accordance with § 296.41. To the extent that funds are appropriated in a subsequent fiscal year, former operating agreements may be reinstated if mutually acceptable to the Administrator and the Contractor provided the MSP vessel remains eligible.

(h) *Release of vessels from obligations:* If an MSP Operating Agreement is terminated by the Contractor, with available replacement

under paragraph (f) of this section, or if sufficient funds are not appropriated for payments under an MSP Operating Agreement for any fiscal year by the 60th day of that fiscal year, then—

(1) Each vessel covered by the terminated MSP Operating Agreement is released from any further obligation under the MSP Operating Agreement;

(2) The owner and operator of a non-tank vessel may transfer and register the applicable vessel under a foreign registry deemed acceptable by the Secretary and the SecDef, notwithstanding section 9 of the Shipping Act, 1916 (46 App. U.S.C. 808) and 46 CFR part 221;

(3) The owner and operator of a tank vessel must formally apply to MARAD pursuant to section 9 of the Shipping Act, 1916 to transfer and register the vessel under a foreign registry; and

(4) If section 902 of the Act is applicable to a vessel that has been transferred to a foreign registry due to a terminated MSP Operating Agreement, then that vessel is available to be requisitioned by the Secretary pursuant to section 902 of the Act.

(5) Paragraph (h) of this section is not applicable to vessels under MSP Operating Agreements that have been terminated for any other reason.

(i) *Foreign transfer of vessel.* A Contractor may transfer a non-tank vessel to a foreign registry, without approval of the Secretary, if the Secretary, in conjunction with the SecDef, determines that the contractor will provide a replacement vessel:

(1) Of equal or greater military capability or of a capacity that is equivalent or greater as measured in deadweight tons, gross tons, or container equivalent units, as appropriate;

(2) That is a documented vessel under 46 U.S.C. chapter 121 by the owner of the vessel to be placed under a foreign registry; and

(3) That is not more than 10 years of age on the date of that documentation.

(j) *Transfer of Operating Agreements.* A Contractor subject to an MSP Operating Agreement may transfer that Agreement (including all rights and obligations under that Agreement) to any person eligible to enter into an Operating Agreement under § 296.10 provided that prior approval to transfer the Agreement is granted by the Secretary and the SecDef. The Contractor should allow at least 90 days for processing of a transfer request.

§ 296.31 MSP assistance conditions.

(a) *Term of MSP Operating Agreement.* MSP Operating Agreements are authorized for ten years, starting on October 1, 2005 and ending on September 30, 2015, but payments to Contractors are subject to annual appropriations each fiscal year. MARAD may enter into MSP Operating Agreements for a period less than the full term authorized under the MSA 2003.

(b) *Terms under a Continuing Resolution (CR).* In the event funds are available under a CR, the terms and conditions of the MSP Operating Agreements shall be in force provided sufficient funds are available to fully meet obligations under MSP Operating Agreements, and only for the period stipulated in the applicable CR. If funds are not appropriated at sufficient levels for any portion of a fiscal year, the Secretary shall determine to which MSP Operating Agreement to apply the available funds. With regard to an MSP Operating Agreement that does not receive funds, the terms and conditions of any applicable MSP Operating Agreement may be voided and the Contractor may request termination of the MSP Operating Agreement.

(c) *National security requirements.* Each MSP Operating Agreement shall require the owner or operator of an Eligible Vessel included in that agreement to enter into an EPA pursuant to section 53107 of the MSA 2003. The EPA shall be a document incorporating the terms of the Voluntary Intermodal Sealift Agreement (VISA), as approved by the Secretary and the SecDef, or other agreement approved by the Secretaries.

(d) *Vessel operating agreements.* The MSP Operating Agreement shall require that during the period an Eligible Vessel is included in that Agreement, the Eligible Vessel shall:

(1) *Documentation:* Be documented as a U.S.-flag vessel under 46 U.S.C. chapter 121;

(2) *Operation:* Be operated exclusively in the U.S.-foreign trade or in mixed foreign and domestic trade allowed under a registry endorsement issued under 46 U.S.C. 12105, except for tankers, which may be operated in foreign-to-foreign commerce, and shall not otherwise be operated in the coastwise trade of the United States; and

(3) *Noncontiguous domestic trade:* Not receive MSP payments during a period in which the Contractor participates in noncontiguous domestic trade unless the Contractor is a citizen within the meaning of section 2(c) of the Shipping Act, 1916.

(e) *Obligation of the U.S. Government.* The amounts payable as MSP payments under an MSP Operating Agreement shall constitute a contractual obligation of the United States Government to the extent of available appropriations.

(f) *U.S. Merchant Marine Academy cadets.* The MSP Operator shall agree to carry two U.S. Merchant Marine Academy cadets, if available, on each voyage.

§ 296.32 Reporting requirements.

The Contractor shall submit to the Director, Office of Financial and Rate Approvals, Maritime Administration, 400 Seventh St., SW., Washington, DC 20590, one of the following reports, including management footnotes where necessary to make a fair financial presentation:

(a) *Form MA–172:* Not later than 120 days after the close of the Contractor's semiannual accounting period, a Form MA–172 on a semiannual basis, in accordance with 46 CFR 232.6; or

(b) *Financial Statement:* Not later than 120 days after the close of the Contractor's annual accounting period, an audited financial statement in accordance with 46 CFR 232.6 and the most recent vessel operating cost data submitted as part of its Emergency Preparedness Agreement.

(Approved by the Office of Management and Budget under Control Number 2133–0005.)

Subpart E—Billing and Payment Procedures

§ 296.40 Billing procedures.

Submission of voucher. For contractors operating under more than one MSP Operating Agreement, the contractor may submit a single monthly voucher applicable to all its agreements. Each voucher submission shall include a certification that the vessel(s) for which payment is requested were operated in accordance with § 296.31(d) and applicable MSP Operating Agreements with MARAD, and consideration shall be given to reductions in amounts payable as set forth in § 296.41(b) and (c). All submissions shall be forwarded to the Director, Office of Accounting, MAR–330, Room 7325, Maritime Administration, 400 Seventh Street, SW., Washington, DC 20590. Payments shall be paid and processed under the terms and conditions of the Prompt Payment Act, 31 U.S.C. 3901.

§ 296.41 Payment procedures.

(a) *Amount payable.* An MSP Operating Agreement shall provide, subject to the availability of appropriations and to the extent the agreement is in effect, for each Agreement Vessel, an annual payment of up to $2,600,000 for FY 2006, FY 2007, FY 2008; $2,900,000 for FY 2009,

FY 2010, FY 2011; and $3,100,000 for FY 2012, FY 2013, FY 2014, FY 2015. This amount shall be paid in equal monthly installments at the end of each month. The annual amount payable shall not be reduced except as provided in paragraphs (b) and (c) of this section.

(b) *Reductions in amount payable.* (1) The annual amount otherwise payable under an MSP Operating Agreement shall be reduced on a *pro rata* basis for each day less than 320 in a fiscal year that an Agreement Vessel:

(i) Is not operated exclusively in the U.S.-foreign trade or in mixed foreign and domestic trade allowed under a registry endorsement issued under 46 U.S.C. 12105, except for tank vessels, which may be operated in foreign-to-foreign commerce;

(ii) Is operated in the coastwise trade; or

(iii) Is not documented under 46 U.S.C. chapter 121.

(2) To the extent that a Contractor operates MSP vessels less than 320 days under the provisions of § 296.31(d), payments will be reduced for each day less than 320 days.

(c) *No payment.* (1) Regardless of whether the Contractor has or will operate for 320 days in a fiscal year, a Contractor shall not be paid:

(i) For any day that an MSP Agreement Vessel is engaged in transporting more than 7,500 tons (using the U.S. English standard of short tons, which converts to 6,696.75 long tons, or 6,803.85 metric tons) of civilian bulk preference cargoes pursuant to section 901(a), 901(b), or 901b of the Act, provided that it is bulk cargo;

(ii) During a period in which the Contractor participates in noncontiguous domestic trade, unless that Contractor is a citizen of the United States within the meaning of section 2 of the Shipping Act, 1916 (46 App. U.S.C. 802(c));

(iii) While under charter to the United States Government other than a charter pursuant to an Emergency Preparedness Agreement under section 53107 of the MSA 2003. A voyage charter that is essentially a contract of affreightment will not be considered to be a charter;

(iv) For a vessel in excess of 25 years of age, except for a LASH vessel in excess of 30 years of age or a tank vessel which is limited to 20 years of age, unless the vessel is a participating fleet vessel meeting the requirements of § 296.21(e);

(v) For days in excess of 30 days in a fiscal year in which a vessel is drydocked or undergoing survey, inspection, or repair unless prior to the expiration of the vessel's 30-day period, approval is obtained from MARAD for an extension beyond 30 days. Drydocking, survey, inspection, or repair periods of 30 days or less are considered operating days; and

(vi) If the contracted vessel is not operated or maintained in accordance with the terms of the MSP Operating Agreement.

(2) To the extent that non-payment days under paragraph (c) of this section are known, Contractor payments shall be reduced at the time of the current billing. The daily reduction amounts shall be based on the annual amounts in paragraph (a) of this section divided by 365 days (366 days in leap years) and rounded to the nearest cent. Daily reduction amounts shall be applied.

(3) MARAD may require, for good cause, that a portion of the funds payable under this section be withheld if the provisions of § 296.31(d) have not been met.

(4) Amounts owed to MARAD for reductions applicable to a prior billing period shall be electronically transferred using MARAD's prescribed format, or a check may be forwarded to the Maritime Administration, P.O. Box 845133, Dallas, Texas 75284–5133, or the amount owed can be credited to MARAD by offsetting amounts payable in future billing periods.

Subpart F—Appeals Procedures

§ 296.50 Administrative determinations.

(a) *Policy.* A Contractor who disagrees with the findings, interpretations or decisions of the Contracting Officer with respect to the administration of this part may submit an appeal to the Administrator. Such appeals shall be made in writing to the Secretary, within 60 days following the date of the document notifying the Contractor of the administrative determination of the Contracting Officer. Such an appeal should be addressed to the Maritime Administrator, Attn.: MSP Contract Appeals, Maritime Administration, 400 Seventh St., SW., Washington, DC 20590.

(b) *DOD determinations.* The MSA 2003 assigns joint and separate roles and responsibilities to the Secretary and to the SecDef. The Administrator and the Commander will enter into an agreement describing the interagency process for making joint and separate findings, interpretations, and decisions necessary to implement the MSA 2003. A Contractor who disagrees with the initial findings, interpretations or decisions regarding the implementation of the MSA 2003—whether joint or separate in nature—shall communicate such disagreement to the Contracting Officer. Pursuant to the interagency agreement or other agreement of the Administrator and the Commander, any disagreement or dispute of a Contractor may, where appropriate, be transferred to the Director, Policy and Plans, U.S. Transportation Command (Director), for resolution. A Contractor who disagrees with the findings, interpretations, or decisions of the Director, with respect to the administration of this part, may submit an appeal to the Commander. Such an appeal shall be made in writing to the Commander within 60 days following the date of the document notifying the Contractor of the administrative determination of the Director. Such an appeal should be addressed to the Commander, U.S. Transportation Command, 508 Scott Drive, Scott Air Force Base, IL 62225–5357.

(c) *Process.* The Administrator, or the Commander in the case of a DOD determination, may require the person making the request to furnish additional information, or proof of factual allegations, and may order any proceeding appropriate in the circumstances. The decision of the Administrator, or the Commander in the case of a DOD determination, shall be final.

Subpart G—Maintenance and Repair Reimbursement Pilot Program

§ 296.60 Applications.

Section 3517, Subtitle A of Title XXXV establishes a five-year pilot program for MSP vessels to perform maintenance and repair (M&R) work in United States shipyards.

(a) The M&R pilot program is authorized at $19.5 million per year for FYs 2006–2011.

(b) The M&R pilot program is a voluntary program and MSP operators are not required to participate.

(c) Subject to available funding, expenses are reimbursable at 80 percent of the difference between the fair and reasonable costs of the repairs in a foreign shipyard in the geographic region in which the MSP vessel operates and the fair and reasonable costs of performing the repairs in a United States shipyard.

(1) An MSP operator must apply at least 180 days in advance of anticipated M&R work.

(2) The application must include estimates of M&R costs in the United States and outside the United States in the geographic region in which the MSP vessel operates.

(d) MARAD has 60 days to notify the M&R applicant if the repair work meets the requirements of the M&R pilot program, if there is a shipyard in the

United States that can perform the approved repairs, and whether funds are available.

(e) Qualified M&R work includes any required inspection and any M&R work determined in the course of an inspection that is necessary to comply with the laws of the United States.

(f) Qualified M&R work does not include routine M&R or emergency M&R that is necessary to enable a vessel to return to a port in the United States.

Dated: July 15, 2004.

By Order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 04–16454 Filed 7–19–04; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 030630163–4205–03, I.D. 052303F]

RIN 0648–AR15

Authorization for Commercial Fisheries under the Marine Mammal Protection Act of 1972; Zero Mortality Rate Goal

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

ACTION: Final rule.

SUMMARY: The Marine Mammal Protection Act (MMPA) was enacted in 1972 with the ideal of eliminating mortality and serious injury of marine mammals incidental to commercial fishing operations. In 1994, Congress amended the MMPA and established a requirement for fisheries to reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero rate. This requirement is commonly referred to as the Zero Mortality Rate Goal (ZMRG). To implement the ZMRG, NMFS must establish a threshold level for mortality and serious injury to meet this requirement. This final rule establishes an insignificance threshold as 10 percent of the Potential Biological Removal level (PBR) of a stock of marine mammals.

DATES: Effective August 19, 2004.

ADDRESSES: A copy of the Environmental Assessment prepared for this action may be obtained by writing P. Michael Payne, Chief, Marine Mammal Conservation Division, Office of Protected Resources, NMFS (PR2), 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Tom Eagle, Office of Protected Resources, NMFS, Silver Spring, MD (301) 713–2322, ext. 105, or email *Tom.Eagle@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Electronic Access

Information related to this final rule, including the associated environmental assessment (EA), public comments on related actions, guidelines for differentiating serious and non-serious injury, and the guidelines for preparing marine mammal stock assessment reports, is available on the Internet at *http://www.nmfs.noaa.gov/pr/* (see ''Recent News and Hot Topics'').

Background

On July 9, 2003 (68 FR 40888), NMFS published an advance notice of proposed rulemaking (ANPR) describing options for defining provisions of the ZMRG, including the requirement under the MMPA for commercial fisheries to reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate. On April 29, 2004, NMFS issued a proposed rule (69 FR 23477) defining an insignificance threshold as the upper limit of annual incidental mortality and serious injury of marine mammal stocks by commercial fisheries considered to be insignificant levels approaching a zero mortality and serious injury rate. An insignificance threshold is estimated as 10 percent of the PBR for a stock of marine mammals. If certain parameters (e.g., maximum net productivity rate or the recovery factor in the calculation of the stock's PBR) can be estimated or otherwise modified from default values, the Assistant Administrator for Fisheries (Assistant Administrator) may use a modification of the number calculated from the simple formula for the insignificance threshold. The Assistant Administrator may also use a modification of the simple formula when information is insufficient to estimate the level of mortality and serious injury having an insignificant effect on the affected population stock and provide a rationale for using the modification. The preamble to the proposed rule described the ZMRG under MMPA section 118(b), in simple form, to include the following:

(1) A target for reducing incidental mortality and serious injury and a deadline by which the target is to be achieved;

(2) A statement to exclude fisheries achieving and maintaining such levels of incidental mortality from the requirement to further reduce incidental mortality and serious injury;

(3) A requirement for submitting a report to Congress describing fisheries' progress toward the target and noting fisheries for which additional information is required to assess levels of incidental mortality and serious injury; and

(4) A mechanism (the TRP process) to reduce levels of incidental mortality and serious injury for fisheries not meeting the target. The economics of the fishery, availability of existing technology, and existing fishery management plans must be taken into account in the long-term goal of a TRP to reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero morality and serious injury rate.

The preamble to the proposed rule also addressed key issues related to the implementation of the ZMRG. The key issues were summarized under headings posing the following questions:

(1) What is an insignificant level of incidental mortality and serious injury;

(2) Why is the deadline important;

(3) How will incidental mortality and serious injury levels approach a zero rate; and

(4) Would a fishery be closed if it missed the target mortality and serious injury level by the deadline?

Details of the options NMFS considered for implementing the ZMRG and a detailed description of the implementation of the ZMRG are included in the ANPR and proposed rule. The ANPR summarized the legislative history of the ZMRG within the MMPA. These descriptions are not repeated in the preamble to this final rule.

Comments and Responses

NMFS received letters with comments from 12 organizations or agencies, five of which were from the conservation community, five were from the fishing industry, and two were from governmental agencies. Several of the letters appended comments on the ANPR. Comments on the ANPR were summarized, and responses to these summary comments were included, in the preamble to the proposed rule; these comments and responses are not repeated here.

Comment 1: We support the proposed threshold of 10 percent of the PBR level as the most effective means to meet the ZMRG.

Response: NMFS has used the proposed threshold of 10 percent of PBR in this final rule.

Comment 2: In addition to limiting incidental mortality and serious injury to levels no higher than 10 percent of a stock's PBR, the definition of ZMRG should limit takes to levels no higher than current levels.

Response: As NMFS explained in the proposed rule in response to comment 68, setting allowable mortality levels no higher than current levels assumes the reported or estimated number of takes represents all incidental mortality and serious injury. Observer data are available only for a few selected fisheries; therefore, current levels of incidental mortality and serious injury cannot be verified independently and may exceed current estimates. In addition, the MMPA states once a fishery has achieved target levels of incidental mortality and serious injury, the fishery does not have to further reduce such mortality and serious injury. If target levels were a sliding scale, a fishery could have achieved its target in one year, and in a later year, when the target had been reduced, the fishery would again be above target mortality and serious injury levels. Such an approach does not lend itself to feasible implementation. Although NMFS does not propose a sliding scale to ratchet down stock-specific insignificant thresholds over time, insignificance thresholds could change as a result of new abundance or productivity estimates. (See 69 FR 23477, 23489, April 29, 2004.)

Comment 3: NMFS should periodically revisit the definition of ZMRG for each population to ensure takes continue at insignificant levels approaching a zero mortality and serious injury rate.

Response: NMFS will continue to periodically review and revise the stock assessment reports as required by the MMPA. Among other things, stock assessment reports must include an analysis whether the rate of incidental mortality and serious injury is insignificant and approaching a zero mortality and serious injury rate.

Comment 4: A restrictive definition of the ZMRG insignificance threshold is biologically unnecessary.

Response: The biological necessity of the ZMRG is not an issue for this rulemaking. The ZMRG is a requirement of the MMPA; therefore, NMFS must implement it. The stock-specific insignificance threshold quantifies the target contained in MMPA section 118.

Comment 5: The PBR is itself a conservative methodology for computing acceptable levels of removal.

Response: The PBR calculations are appropriately conservative as a basis for management decisions considering the levels of uncertainty typically found in the data supporting marine mammal-fishery interactions. PBR is not, however, an acceptable long-term goal for reducing mortality and serious injury of marine mammals incidental to commercial fishing operations because MMPA section 118 states such a long-term goal should be insignificant levels approaching a zero mortality and serious injury rate.

Comment 6: The proposed ZMRG threshold is unnecessary for marine mammal stocks to achieve OSP and should be redrafted by the agency as a stimulant for technology, rather than a conservative, rigidly defined point-specific objective.

Response: The insignificance threshold represents a target level of mortality and serious injury of marine mammals incidental to commercial fishing to implement the ZMRG as required under the MMPA. Accordingly, it serves as a stimulus for the development of new technologies and fishing practices through the TRP process.

Comment 7: NMFS should avoid a formulaic approach to establishing ZMRG and should reserve discretion to avoid imposing requirements to develop take reduction plans when available scientific information do not support this process.

Response: In accordance with MMPA section 118(b)(1), the ZMRG includes a target level of mortality and serious injury incidental to commercial fishing. Because abundances and trends of marine mammal stocks vary widely, a formula is the most simple and robust approach to defining the target. The process to achieve target levels of incidental mortality and serious injury (i.e., TRPs under MMPA section 118(f)) must take into consideration the best scientific information available from the stock assessment reports, any substantial new information, as well as other considerations. Therefore, NMFS will apply these standards in developing and implementing TRPs to reduce incidental mortality and serious injury.

Comment 8: The proposed definition of ZMRG as a fixed numerical point is inconsistent with the legislative history of this provision of law.

Response: The commenter does not explain how the proposed definition is inconsistent with the legislative history. However, the proposed definition of the insignificance threshold to implement the ZMRG is a formula rather than a fixed numerical point. Consequently, the threshold can be updated as new information becomes available (e.g., new abundance estimates, information allowing a stock-specific estimate, rather than a generally applied default, for the maximum net productivity rate, or precise, unbiased mortality estimates allowing the recovery factor to be changed from a default value) ; thus, it is consistent with principles of adaptive management as well as the MMPA provisions and legislative history related to the ZMRG.

Comment 9: Any human-caused marine mammal mortality is undesirable, and the ideal objective of any fisheries management plan should be to work to eliminate such loss. We are concerned NMFS seems to take a contradictory stance in allowing the ZMRG to become an upwardly moving target if and when marine mammal populations increase.

Response: NMFS agrees eliminating incidental mortality and serious injury is an ideal goal of the MMPA. However, as NMFS explained in the proposed rule in response to comment 43, NMFS realizes the number of deaths of marine mammals incidental to commercial fishing could increase as numbers of marine mammals increase. As long as the mortality and serious injury rate (as a function of population size) decreases, an increase in the number of marine mammal deaths per year would still be consistent with the MMPA's goal of ''approaching a zero mortality and serious injury rate.'' A rate based upon mortality and serious injury as a function of PBR (which, in turn, is based largely upon the abundance of the stock) addresses the impact of the mortality and serious injury on the affected stock of marine mammals and, therefore, is biologically relevant. NMFS is using a rate based upon population size or annual production (which is a function of population size) within the ZMRG. (See 69 FR 23477, 23466, April 29, 2004.)

Comment 10: If a fishery has achieved ZMRG target levels of incidental mortality and serious injury, further reduction in mortality rates should not be precluded. Thus, achieving zero mortality and serious injury rates would remain the ideal objective.

Response: NMFS agrees the elimination of mortality and serious injury of marine mammals remains the ideal goal. As long as fishery-caused mortality and serious injury remain below the insignificance thresholds for stocks of marine mammals, then the affected fisheries will not be required to further reduce mortality and serious injury (see MMPA section 118(b)(2)). However, NMFS will continue to work

with the fishing industry through incentive and improvement of available technologies and methods even after mortality and serious injury in a particular fishery is reduced to the insignificance thresholds for stocks of marine mammals.

Comment 11: NMFS correctly interpreted the MMPA's mandate of technology and economic factors should not being considered in setting ZMRG under MMPA section 118(b)(1) or in establishing the 6–month requirement for TRPs to reduce mortality and serious injury in strategic stocks to PBR levels. We realize technology and economic factors may be taken into account when determining the appropriate measures to implement a TRP to reduce mortality and serious injury to insignificant levels approaching a zero rate.

Response: NMFS agrees with this comment. The second sentence is based on the requirement to reduce, within 5 years of its implementation, mortality and serious injury of marine mammals incidental to commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate, taking into account the economics of the fishery, the availability of existing technology, and existing state and regional fishery management plans.

Comment 12: In contrast to the ANPR, the proposed rule seems to have appropriately moved the analysis of the ''feasible economics'' of the fishery to the TRT process rather than the initial determination of whether ZMRG has been reached by the fishery. While we believe this is an improvement upon the approach outlined in the ANPR, we remain concerned the current proposal fails to include ''approaching zero'' within its definition of ZMRG.

Response: As noted in the proposed rule in responses to comments received on the ANPR, the ZMRG does not contain a 2–part target for reducing incidental mortality and serious injury (i.e., insignificant levels and approaching a zero rate). Rather, ''approaching a zero mortality and serious injury rate'' modifies the term ''insignificant levels''. See the response to comment 42 in the proposed rule (69 FR 23477, 23485, April 29, 2004).

Comment 13: We agree accounting for available technology and economic feasibility should occur during the TRP process rather than in determining whether a given level of incidental mortality and serious injury is, indeed, insignificant to the affected marine mammal population. If given a clear goal, experience has demonstrated take reduction teams can work cooperatively to devise the necessary technologies and secure the funds to implement those technologies.

Response: NMFS agrees.

Comment 14: A review of the legislative history of the ZMRG concept shows any NMFS rule using ZMRG as a regulatory standard designed to return marine mammal populations to their pristine levels is contrary to Congressional intent. Congress did not intend to significantly curtail or shut down fisheries as long as fisheries are using the best available technology. Although Congress sought to encourage the development of new technology to reduce incidental interactions with marine mammals, Congress has also stated in no uncertain terms ZMRG is satisfied by the use of the best available technology technologically and economically feasible to employ.

Response: The insignificance thresholds for stocks of marine mammals are the target level of mortality and serious injury. Any subsequent regulatory action would come as the result of a TRP (see MMPA section 118(b)(4)), for which the long-term goal must take into account economics of the affected fisheries and available technologies (see MMPA section 118(f)(2)). In 1981, Congress adopted a ''best available technology'' standard for the purse seine fishery for yellow-fin tuna in the eastern tropical Pacific Ocean (ETP), but Congress did not modify the ZMRG for other commercial fisheries. The House Committee report recognized other fisheries had not developed new techniques and equipment for reducing incidental mortality (H.R. Rep. No 97–228 at 17–18 (1981)). Furthermore, Congress has used total dolphin mortality limits historically in the ETP and in 1997 established an annual cap of 5,000 dolphin deaths and stock-specific mortality limits of 0.1 percent of the minimum abundance estimate of the stock. This stock-specific mortality limit is the mathematical equivalent of 10 percent of PBRs for the affected stocks of dolphins in the ETP. A more complete discussion of the legislative history of the ZMRG may be found in the ANPR (68 FR 40888, July 9, 2003) under the heading ''History of the ZMRG''.

Comment 15: Consistent with the original intent and policy of Congress in 1972, the ZMRG threshold should not be used to shut down or significantly curtail the activities of commercial fishing.

Response: By defining an insignificance threshold in this final rule, NMFS has established a target level of mortality and serious injury of marine mammals incidental to commercial fishing operations. MMPA section 118(b)(4) requires, where incidental mortality and serious injury exceed this level, NMFS to take appropriate action under MMPA section 118(f), which describes the development and implementation of TRPs. In the long-term goal of TRPs to reduce incidental mortality and serious injury to levels consistent with the ZMRG, NMFS must take into account fishery economics and existing technology. Thus, the ZMRG threshold is not defined in such a manner to shut-down or significantly curtail the activities of commercial fishing simply because a fishery exceeds the threshold.

The insignificance thresholds for stocks of marine mammals are the lower limit to which fisheries can be regulated to reduce incidental mortality and serious injury of marine mammals (see MMPA section 118(b)(2)). An examination of the criteria used to classify fisheries and the current list of fisheries shows most fisheries (those in Category III) have already met the requirements of the ZMRG and are not required to further reduce incidental mortality and serious injury.

Comment 16: We propose ZMRG should be satisfied for species that are not endangered, threatened, or depleted if the fishery is employing the best available technology that is economically and technologically feasible, provided incidental mortality and serious injury in the fishery does not exceed the PBR. This proposed definition is fully consistent with the MMPA.

Response: MMPA section 118(b)(1) requires commercial fisheries to reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate. MMPA section 118(f)(2) provides the short-term goal of TRPs to reduce incidental mortality and serious injury of marine mammals to levels less than PBR and a separate, long-term goal to reduce incidental mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate, taking into account listed factors. Therefore, the approach proposed in this comment is inconsistent with the MMPA.

Comment 17: With the International Dolphin Conservation Program Act (IDCPA), Congress not only established an overall dolphin mortality limit, it also set stock-specific dolphin mortality limits. These limits were put into place, and became binding, irrespective of the current state of technological development.

Response: NMFS agrees.

Comment 18: In passing the IDCPA, Congress distanced itself from a definition of ZMRG solely equated with technological advances, and NMFS should not restrict the proposed definition of ZMRG for US commercial fisheries on the basis of ''feasible technology''.

Response: As previously provided in responses to other comments, NMFS does not use feasible technology in the determination of whether incidental mortality and serious injury exceed the insignificance threshold, but the availability of existing technology remains a consideration in the long-term goal of TRPs as provided in MMPA section 118(f)(2).

Comment 19: Congress would not wish to see the ZMRG used as a target from which there will be no improvement, rather the ZMRG should serve as an initial mechanism by which mortality and serious injury levels can be improved. ZMRG should be used within the TRPs to encourage the development of risk-averse fishing techniques, and it should not allow for any increase in levels of mortality and serious injury in a given fishery. Therefore, the proposed ''upward sliding scale'' for ZMRG is at odds with Congressional intent.

Response: As noted in the response to comment 10, a stock's insignificance threshold identifies the limit to which fisheries would be subject to TRPs and resulting regulation for reducing mortality and serious injury of marine mammals. Additional reductions could occur through incentive and outreach. Incidental mortality and serious injury at or below levels identified by stocks' insignificance thresholds would be insignificant to the affected stock of marine mammals and would be a rate (mortality and serious injury as a function of population size) so small as to be ''approaching a zero mortality and serious injury rate''. Thus, this final rule is consistent with the MMPA and with Congressional intent.

Comment 20: Although NMFS included an option within the ANPR to take economic feasibility and the availability of technology into account in determining whether mortality and serious injury were below the insignificance threshold, the proposed rule did not include this option. NMFS should make this point explicit in the final rule.

Response: NMFS explicitly describes how these factors are used in the responses to comments and under the heading ''The Final Rule''.

Comment 21: We have concerns with NMFS' proposed definition because it leaves considerable discretion in the hands of the Assistant Administrator. If this provision is limited to making changes in the default PBR variables and is based upon better scientific data, such flexibility may be lawful. If this provision is used to mis-categorize a fishery's attainment of ZMRG based on political or other non-scientific data, it would be unlawful.

Response: The insignificance threshold is to be determined based on an estimate of the PBR level for a stock of marine mammals; however, the threshold can be modified when such a modification is biologically sound and consistent with the MMPA to do so. The definition of insignificance threshold provides the Assistant Administrator with discretion if certain parameters in determining the PBR level can be estimated or otherwise modified from default values based on available scientific information. In most cases, this discretion would likely result in a decrease of the insignificance threshold in cases such as a small or declining stock of marine mammals. For example, scientists have developed a population model for Hawaiian monk seals more sophisticated and based upon more data than the simple PBR approach. Therefore, the use of the more sophisticated model to assess the significance of human-caused mortality would be more appropriate than the use of the PBR model. Hawaiian monk seals are a small, declining population, and known human-caused mortality and serious injury is insufficient to cause the decline. Therefore, one of the basic assumptions of the PBR approach (i.e., the population would grow if human-caused mortality and serious injury was below the calculated PBR) is violated. Consequently, a PBR-based approach for estimating an insignificant level of fishery-caused mortality and serious injury would be inappropriate and misleading.

In addition, the insignificance threshold provides the Assistant Administrator discretion when information is insufficient to estimate the level of mortality and serious injury having an insignificant effect on the affected stock. The approach of comparing mortality and serious injury estimates to PBR, which is based on abundance estimates, assumes NMFS has adequate reliable information to estimate mortality and serious injury as well as abundance. The approach is consistent with MMPA section 118(b)(3), in which Congress recognized determinations under the ZMRG cannot be made without adequate reliable information. This subsection provides a requirement for submitting a report to Congress describing fisheries' progress toward the target of reducing incidental mortality and serious injury and requires NMFS to ''note any commercial fishery for which additional information is required to accurately assess the level of incidental morality and serious injury of marine mammals in the fishery.''

Comment 22: We are pleased NMFS is aware of the logistic model's limits and its application to small and declining populations and support making an adjustment to the simple calculation for declining or small populations.

Response: Comment noted. See response to previous comment.

Comment 23: The proposal to allow NMFS to modify the ZMRG formula is legally unsupportable and further violates Congressional intent.

Response: See response to comment 21. The insignificance threshold provides the Assistant Administrator with discretion to deviate from a rote application of a simple formula under circumstances in which it would be biologically sound and consistent with the MMPA to do so.

Comment 24: Stating observer coverage is available for only a few fisheries, NMFS concedes ''current levels of incidental mortality and serious injury cannot be verified independently and may exceed current estimates.'' NMFS may not rely on its failure to collect data necessary to manage fisheries and protect the environment as an excuse from its duties to collect the data. When the type and amount of bycatch is unknown, a recent study recommended at least 20–percent observer coverage is needed when the bycatch is a commonly caught species and 50 percent is necessary for species caught rarely to accurately and precisely determine the total bycatch.

Response: NMFS can design and implement monitoring programs only to the extent resources allow. Congress anticipated funds would be insufficient to collect all pertinent data immediately and established priorities for observer programs in MMPA section 118(d)(4). Congress also established priorities for developing and implementing TRPs (see MMPA section 118(f)(3)). Since 1994, NMFS has used these priorities to design and implement observer programs to support TRP development and implementation (for strategic stocks, including stocks listed under the ESA) and to collect additional information where mortality and serious injury of marine mammals are uncertain but are suspected to be highest. Thus, NMFS has implemented MMPA section 118 to the fullest extent resources would allow.

Comment 25: Due to a lack of resources, there are a number of

fisheries about which we know little. Adequate information upon which to base a TRP and to evaluate it success is a vital part of the regime to govern interactions between marine mammals and commercial fishing operations. We hope we can help NMFS seek adequate funding for its work in this area.

Response: Comment noted.

Comment 26: The information available on the current level of incidental mortality and serious injury in Alaska fisheries is minimal and, thus, must be increased to provide more accurate estimates of incidental mortality. Specifically, this will require increased observer coverage for those fisheries having the greatest potential to cause incidental mortality and serious injury of marine mammals, and we strongly encourage NMFS to increase coverage as soon as possible.

Response: NMFS' appropriations for implementing MMPA sections 117 and 118 are fully used in existing programs based on statutory priorities. Existing observer programs are tied directly to existing take reduction plans. NMFS will continue to allocate resources based on statutory priorities. However, NMFS will not be able to implement large, new observer programs within the constraints of existing resources.

Comment 27: Two factors should be thoroughly evaluated prior to the establishment of a take reduction team and development of a TRP: (1) Outdated estimates of incidental mortality and serious injury and (2) substantial uncertainty in the estimate of population abundance for marine mammals, particularly when a stock's insignificance threshold is in the single digits.

Response: In accordance with the MMPA, each TRP shall include a review of the information in the final stock assessment report and any substantial new information. Reasonably accurate, reliable information on marine mammal abundance and stock structure and on mortality and serious injury incidental to commercial fisheries must be available to make the TRP process most effective and efficient. Such information also provides a basis for developing effective measures for the reduction of incidental mortality and serious injury.

Comment 28: NMFS must consider the reliability of the available information. For example, NMFS is not required to implement a TRP based on highly unreliable estimates of marine mammal population sizes and fishery interaction rates. It would be arbitrary and capricious for NMFS to subject the Hawaii longline fishery to such a plan due to the lack of reliable information and the prevailing contrary scientific opinions.

Response: See response to comment 27. Under MMPA section 117, each stock assessment report must be based on the ''best scientific information available.'' Therefore, NMFS must base development and implementation of TRPs on the best scientific information available in the stock assessment reports as well as substantial new information. In addition, NMFS has at this point proposed elevation of the Hawaii longline fishery in the 2004 List of Fisheries (LOF) from a Category III to a Category I fishery (69 FR 19365, April 13, 2004), and it has not published a final 2004 LOF to complete the proposed change. Upon completing the LOF, if the Hawaii longline fishery classification is elevated, NMFS must decide what priority to give development and implementation of a TRP for this fishery based on MMPA section 118(f)(3).

Comment 29: NMFS must reconsider and re-calibrate its mortality policy. NMFS' stock assessment report for the Hawaiian stock of false killer whales references unpublished 1998 guidelines apparently directing NMFS to classify in every instance of ingesting a hook, of hooking in the mouth or other body part, or of entanglement and release trailing gear for small cetaceans, as likely to result in mortality.

Response: NMFS convened a workshop of experts in marine mammal biology and fishing technologies in April 1997. The results of this workshop included guidelines for differentiating serious and non-serious injury of marine mammals incidental to commercial fishing operations, which were published as a NOAA Technical Memorandum. The publication process included scientific peer review. These guidelines represent a compilation of the best scientific information available at the time and have not been updated since 1997. Additional data, particularly on large whales, has been collected since the workshop was convened. When these additional data have been compiled and analyzed, NMFS will update the guidelines. The report of the workshop is available on the Internet (see Electronic Access).

Comment 30: NMFS' population estimates are subject to a very high level of uncertainty. For example, numerous flaws in extrapolating from the limited population data known about the Hawaiian stock of false killer whales has been acknowledged for some time. The 2002 survey was conducted in Hawaiian waters between August and November, and anecdotal information indicates false killer whales exhibit seasonal behavior with peak abundance in Hawaiian waters believed to occur between June and August coincident with the peak in yellowfin tuna abundance. Accordingly, species and stock-specific information reliably indicates it is probable a fall survey would underestimate actual abundance of false killer whales.

Response: There is no scientific documentation of seasonality in false killer whale abundance near Hawaii. Sighting data from observers on longline fishing vessels based in Hawaii showed no apparent seasonal fluctuations; however, those data included all areas covered by the fishery and are not specific to the Hawaiian Islands. Boat-based surveys near the main Hawaiian Islands during all months except July and August resulted in 14 false killer whales sightings distributed throughout the year. Accordingly, there is no scientific information supporting the assertion of the 2002 survey underestimating the abundance or density of false killer whales in the Hawaiian EEZ. In the past, NMFS acknowledged limitations of abundance estimates for certain cetaceans in the Hawaiian EEZ because these estimates were based upon aerial surveys within 25 nautical miles of the main Hawaiian Islands. The 2002 surveys included line transects throughout the EEZ and are not subject to the same limitations.

Comment 31: In reality the Hawaiian population of false killer whales is not confined to the Hawaiian Exclusive Economic Zone (EEZ) as is predetermined by NMFS' regulatory definition of the stock; however, the extent of its distribution beyond the Hawaiian EEZ is unknown, as is the relative abundance of the population within the nearshore and open ocean areas of the EEZ.

Response: Genetic analysis of samples from false killer whales in the North Pacific Ocean indicates false killer whales found off Hawaii are reproductively isolated from those in the ETP, but geographic boundaries of the various populations cannot yet be identified. In the latest final stock assessment report, NMFS recognizes a stock containing false killer whales in the EEZ surrounding Hawaii and other US territories in the Pacific Ocean. This report was based on the best scientific information available at the time the report was prepared and on the requirement in MMPA section 117 to prepare stock assessment reports for each stock of marine mammals occurring in waters under the jurisdiction of the United States. As new scientific information is obtained, NMFS will review such information and

incorporate it into future revisions of the stock assessment reports as required by MMPA section 117. NMFS agrees the distribution of false killer whales beyond the Hawaiian EEZ and the relative abundances of false killer whales in nearshore and open ocean areas have not been the subject of specifically-designed research. However, numerous reports and studies, designed for other purposes, contribute information related to false killer whale distribution and abundances, and all relevant sources of information are incorporated into NMFS' scientific analyses and conclusions related to false killer whales and other marine mammals in assessing their status and in developing and implementing conservation programs. Also see response to comment 33.

Comment 32: In the case of false killer whales, NMFS has defined the animals taken in the Hawaii EEZ as a strategic stock, based on genetic evidence suggesting false killer whales between the central North Pacific (Hawaii) are separate, reproductively isolated populations. However, the degree of separation of these false killer whales is not known, and the geographic boundaries for the populations cannot yet be identified. False killer whales have been taken by the longline fishery in an area ranging from the north of the Hawaii EEZ to the equator. Are all of these false killer whales from the same population or from separate isolated populations? If from the same population, then the designation of a strategic stock in the Hawaii EEZ would be questionable.

Response: See response to comment 31. In addition, even if the actual boundaries of the Hawaiian stock of false killer whales extended beyond the EEZ, the strategic status of the stock would not be changed. NMFS' guidelines for preparing marine mammal stock assessment reports contain specific instructions for calculating PBR of transboundary stocks. (The guidelines are available in electronic form; see Electronic Access.) In cases such as false killer whales in the Hawaiian EEZ, where the stock could extend into international waters, the PBR would be based on the abundance of animals within the EEZ. This guideline was established to prevent underestimating the effects of mortality and serious injury incidental to US fisheries in international waters where unknown levels of additional human-caused mortality and serious injury (e.g., incidental to foreign fisheries in the same waters) may also be affecting the stock.

Comment 33: The abundance estimate of the Hawaii stock of false killer whales resulting from the 2002 survey must be viewed with suspicion and its utility questioned in relation to implementing the ZMRG.

Response: The protocols for designing, conducting, and analyzing the 2002 survey have been used frequently in the past and have been subjected to scientific review. In addition, the report of this survey, including the resulting abundance estimates, has been peer-reviewed. The levels of uncertainty in the estimates from the 2002 survey are similar to those for many other stocks of offshore cetaceans, and the resulting abundance estimates conform to guidelines for preparing marine mammal stock assessment reports. Therefore, the survey results may be used reliably for applications related to the abundance, distribution, and density of false killer whales and other cetaceans within the Hawaiian EEZ.

Comment 34: The MMPA's goal is to maintain marine mammal populations at their OSP levels.

Response: NMFS agrees maintaining marine mammal populations within their OSP levels is one of the goals of the MMPA. The MMPA also requires reduction of mortality and serious injury of marine mammals incidental to commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate, which is commonly referred to as the ZMRG.

Comment 35: The proposed rule admits as long as human induced mortality does not exceed PBR levels, then a marine mammal stock will achieve OSP, which is the goal of the MMPA.

Response: NMFS agrees this is one goal of the MMPA. However, NMFS also recognizes reducing fishery-related mortality and serious injury of marine mammals to PBR is a short-term goal of TRPs under the MMPA, and the long-term goal requires reducing such mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate.

Comment 36: The proposed rule never explains why NMFS abandons any pretext of ecosystem-based management when it comes to marine mammals.

Response: NMFS' approach to ecosystem-based management must be consistent with the MMPA and other applicable law. One of the provisions of the MMPA requires commercial fisheries to reduce their incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate. Thus, NMFS is issuing this final rule to implement the provisions of the MMPA related to the ZMRG.

Comment 37: We agree there are no provisions within the MMPA to develop and implement TRPs for non-strategic stocks interacting with Category II fisheries and urge NMFS to examine and devise mechanisms to reduce the bycatch from those fisheries for which the MMPA does not currently require TRPs. Toward this end, NMFS should take immediate steps to partner with the conservation community and the fishing industry to conduct workshops to explore the feasibility of transferring existing technologies deemed successful in reducing marine mammal bycatch in other fisheries and to investigate new technologies to reduce bycatch.

Response: NMFS has been partnering with many parties in investigating new technologies to reduce bycatch within the TRP context. Currently, funds for implementing MMPA section 118 are fully subscribed in existing activities to address statutory priorities (e.g., TRPs for all strategic stocks of marine mammals interacting with Category I or II fisheries). NMFS will consider effective and efficient mechanisms to reduce mortality and serious injury of non-strategic marine mammals incidental to commercial fishing, such as the workshop suggested in this comment, to the extent resources and priorities allow.

Comment 38: The proposed insignificance threshold will result in yet another layer of arbitrary regulation upon commercial fisheries in Hawaii, subjecting such fisheries to additional regulatory burdens, legal costs, and economic uncertainties.

Response: The definition of ''insignificance threshold'' will allow NMFS to implement one of the requirements of the MMPA. Rather than increase the regulatory burden on commercial fisheries in Hawaii or elsewhere, this rule establishes a lower limit to the extent to which commercial fisheries are required to reduce incidental mortality and serious injury of marine mammals. The insignificance threshold is consistent with the criterion for classification as a Category III fishery. Prior to this rule, the limit to reducing mortality and serious injury was not defined.

Comment 39: In the case of endangered whales, such as the Atlantic northern right whale, with only a few hundred individuals left in the population, there can be no question about requiring fisheries to literally zero-out interactions. However, false killer whales are not endangered, they are a circum-global species found in all

the world's oceans at tropical and subtropical latitudes. According to the evidence to date, there may be genetic isolation between eastern stocks and those in Hawaii, but the isolation of the false killer whales in the EEZ around Hawaii from those in the immediate adjacent waters is still an open question. NMFS needs to address how vulnerable the Hawaii fishery will be to closure or other constraints if it cannot achieve the ZMRG.

Response: NMFS addressed the extent to which fisheries would be subject to closure or other constraints under the ZMRG in the proposed rule (see 69 FR 23477, 23480, April 29, 2004, under the heading ''Would a Fishery Be Closed if It Missed the Target Mortality and Serious Injury Level by the Deadline?''). The MMPA requires NMFS to take action to reduce mortality and serious injury to levels consistent with the ZMRG through a TRP, which must take into account the economics of the affected fishery, the availability of existing technology, and existing state and regional fishery management plans.

Comment 40: We interpret this rulemaking as limited to defining ZMRG as used in MMPA sections 101(a)(2) and 118 of the MMPA. We do not see this rulemaking as having any bearing on the implementation of the International Dolphin Conservation Program (MMPA sections 301–307).

Response: The comment is an accurate interpretation of the application of this final rule. As provided in response to comment 14, there are separate requirements applicable to the International Dolphin Conservation Program.

Comment 41: A single definition for ''insignificant levels approaching a zero mortality and serious injury rate'' is sufficient, and 10 percent of PBR is the most appropriate definition. However, large or increasing populations, even when incidental mortality and serious injury has been reduced to the insignificance threshold, may still have a large number of deaths. For example, the PBR of California sea lions is 6,591 animals, and 10 percent of its PBR is 659 sea lions. Although this level of mortality is insignificant and can be tolerated at the populations level, NMFS and the fishing industry should do everything possible to further reduce the mortality and serious injury of individual marine mammals to the lowest level practicable.

Response: Although 659 sea lions may seem a relatively large number (compared to single digits), annual mortality at this level would have an insignificant effect on the sea lion population. Furthermore, 659, as a function of the sea lion population size, is so small it approaches a zero rate. Therefore, the insignificance threshold for California sea lions is consistent with the MMPA's goal of reducing mortality and serious injury of marine mammals incidental to commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate. However, as provided in response to comment 10, NMFS will continue to work with the fishing industry through incentive and improvement of available technologies and methods even after incidental mortality and serious injury in any particular fishery is reduced to the insignificance thresholds for stocks of marine mammals.

The Final Rule

The regulatory text in this final rule is identical to the proposed rule and establishes the default target level of mortality and serious injury satisfying target levels under the ZMRG as 10 percent of any stock's PBR. These targets result in upper limits ranging from two animals per 10,000 animals in the population stock for endangered whales to six animals per 1,000 in the population for robust pinniped stocks. Incidental mortality and serious injury limited to these thresholds would have an insignificant effect on stocks of marine mammals and would be so small as to be approaching a zero mortality and serious injury rate. These initial target levels of incidental mortality and serious injury are generally estimated as 10 percent of any stock's PBR. However, the Assistant Administrator has discretion to modify this simple formula if certain parameters (e.g., maximum net production rate or the recovery factor in the calculation of the stock's PBR level) can be estimated or otherwise modified from default values or when information is insufficient to estimate the level of mortality and serious injury having an insignificant effect on the affected population stock.

The insignificance threshold, which is the stock-specific target level of incidental mortality and serious injury under the ZMRG, includes only a consideration of the maximum number of individuals in a stock of marine mammals killed or seriously injured incidental to commercial fishing and still be considered insignificant levels approaching a zero mortality and serious injury rate. In this regard, it expresses a biological estimate and does not include consideration of the economics of affected fisheries, the availability of existing technology, or existing state or regional fishery management plans. These factors are taken into account in the long-term goal of the TRP process to develop and implement measures to reduce incidental mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate (see MMPA section 118(f)(2)).

Classification

NMFS prepared an EA to analyze the impacts on the human environment of alternatives for establishing an insignificance threshold to implement the ZMRG. The draft EA was available for public review and comment along with the proposed rule, and no comments were received on the draft EA. Based upon the analyses in the EA, NMFS has determined the establishment of an insignificance threshold as 10 percent of a marine mammal stock's PBR would not have a significant impact on the human environment.

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866.

At the proposed rule stage, the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration this action, if adopted, would not have a significant economic impact on a substantial number of small entities. No comments were received regarding this certification or the economic impact of the rule, which was described in a preliminary regulatory impact review incorporated into the draft EA. As a result, no regulatory flexibility analysis is required, and none has been prepared.

This final rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act of 1980. This final rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 13132.

List of Subjects in 50 CFR Part 229

Administrative practice and procedure, Confidential business information, Fisheries, Marine mammals, Reporting and record keeping requirements.

Dated: July 14, 2004.

Rebecca Lent,

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

■ For the reasons set out in the preamble, 50 CFR part 229 is amended as follows:

PART 229—AUTHORIZATION FOR COMMERCIAL FISHERIES UNDER THE MARINE MAMMAL PROTECTION ACT OF 1972

■ 1. The authority citation for part 229 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. In § 229.2, the definition for ''Insignificance threshold'' is added in alphabetical order to read as follows:

§ 229.2 Definitions.

* * * * *

Insignificance threshold means the upper limit of annual incidental mortality and serious injury of marine mammal stocks by commercial fisheries that can be considered insignificant levels approaching a zero mortality and serious injury rate. An insignificance threshold is estimated as 10 percent of the Potential Biological Removal level for a stock of marine mammals. If certain parameters (e.g., maximum net productivity rate or the recovery factor in the calculation of the stock's potential biological removal level) can be estimated or otherwise modified from default values, the Assistant Administrator may use a modification of the number calculated from the simple formula for the insignificance threshold. The Assistant Administrator may also use a modification of the simple formula when information is insufficient to estimate the level of mortality and serious injury that would have an insignificant effect on the affected population stock and provide a rationale for using the modification.

* * * * *

[FR Doc. 04–16355 Filed 7–19–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 040429134–4135–01; I.D. 071304A]

Fisheries Off West Coast States and in the Western Pacific; West Coast Salmon Fisheries; Inseason Actions #5 - Adjustments of the Commercial Fishery from the U.S.-Canada Border to Cape Falcon, Oregon

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

ACTION: Modification of fishing season; request for comments.

SUMMARY: NMFS announces that the commercial fishery in the area from the U.S.-Canada Border to Cape Falcon, OR was modified to open July 8 and close at midnight on July 12, 2004, then to reopen on July 16 through midnight on July 19, 2004, with the provision that no vessel may possess, land, or deliver more than 100 chinook for each open period. This action was necessary to conform to the 2004 management goals. The intended effect of this action was to allow the fishery to operate within the seasons and quotas specified in the 2004 annual management measures.

DATES: Adjustment of the area from the U.S.-Canada Border to Cape Falcon, OR effective 0001 hours local time (l.t.), July 8, 2004, until 2359 hours l.t., July 19, 2004; after which the fishery will remain closed until opened through an additional inseason action for the west coast salmon fisheries, which will be published in the **Federal Register**, or until the effective date of the next scheduled open period announced in the 2004 annual management measures. Comments will be accepted through August 4, 2004.

ADDRESSES: Comments on these actions must be mailed to D. Robert Lohn, Regional Administrator, Northwest Region, NMFS, NOAA, 7600 Sand Point Way N.E., Bldg. 1, Seattle, WA 98115–0070; or faxed to 206–526–6376; or Rod McInnis, Acting Regional Administrator, Southwest Region, NMFS, NOAA, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802–4132; or faxed to 562–980–4018. Comments can also be submitted via e-mail at the *2004salmonIA5.nwr@noaa.gov* address, or through the internet at the Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments, and include [docket number and/or RIN number] in the subject line of the message. Information relevant to this document is available for public review during business hours at the Office of the Regional Administrator, Northwest Region, NMFS.

FOR FURTHER INFORMATION CONTACT: Christopher Wright, 206–526–6140.

SUPPLEMENTARY INFORMATION: The Regional Administrator (RA) modified the season for the commercial fishery in the area from the U.S.-Canada Border to Cape Falcon, OR to open July 8 and close at midnight on July 12, 2004, then reopen on July 16 through July 19, with the provision that no vessel may possess, land, or deliver more than 100 chinook for each open period. On July 2 the Regional Administrator had determined available catch and effort data indicated that the effort predicted preseason was low and that restricting the fishery to slow the catch of chinook would allow additional time for fishers to access more of the coho quota. The fishery was scheduled to be reevaluated by an inseason conference call on July 14, and any further adjustments announced.

All other restrictions remain in effect as announced for 2004 ocean salmon fisheries. This action was necessary to conform to the 2004 management goals. Modification of fishing seasons is authorized by regulations at 50 CFR 660.409(b)(1)(i) and (ii).

In the 2004 annual management measures for ocean salmon fisheries (69 FR 25026, May 5, 2004), NMFS announced the commercial fishery for all salmon in the area from the U.S.-Canada Border to Cape Falcon, OR would open July 8 through the earlier of September 15, or a 14,700–chinook preseason guideline, or a 67,500–coho quota. The 67,500–coho quota included a subarea quota of 8,000 coho for the area between the U.S.-Canada border and the Queets River, WA. The fishery was scheduled to be open Thursday through Monday prior to August 11, and Wednesday through Sunday thereafter, with the restriction that no vessel may possess, land, or deliver more than 125 chinook for each 5–day open period.

On July 2, 2004, the RA consulted with representatives of the Pacific Fishery Management Council, Washington Department of Fish and Wildlife, and Oregon Department of Fish and Wildlife by conference call. Information related to catch to date, the chinook catch rate, and effort data indicated that the effort predicted preseason was low and that restricting the fishery to slow the catch of chinook would allow additional time for fishers to access more of the coho quota. As a result, on July 2 the states recommended, and the RA concurred, that the area from the U.S.-Canada Border to Cape Falcon, OR open July 8 and close at midnight l.t. on July 12, 2004 (5 days open), then reopen on July 16 through midnight l.t. on July 19, 2004 (4 days open), with the provision that no vessel may possess, land, or deliver more than 100 chinook for each open period. All other restrictions that apply to this fishery remain in effect as announced in the 2004 annual management measures.

The RA determined that the best available information indicated that the catch and effort data, and projections, supported the above inseason action recommended by the states. The states manage the fisheries in state waters adjacent to the areas of the U.S.

exclusive economic zone in accordance with these Federal actions. As provided by the inseason notice procedures of 50 CFR 660.411, actual notice to fishers of the already described action was given, prior to the time the action was effective, by telephone hotline number 206–526–6667 and 800–662–9825, and by U.S. Coast Guard Notice to Mariners broadcasts on Channel 16 VHF-FM and 2182 kHz.

This action does not apply to other fisheries that may be operating in other areas.

Classification

The Assistant Administrator for Fisheries, NOAA (AA), finds that good cause exists for this notification to be issued without affording prior notice and opportunity for public comment under 5 U.S.C. 553(b)(B) because such notification would be impracticable. As previously noted, actual notice of this action was provided to fishers through telephone hotline and radio notification. This action complies with the requirements of the annual management measures for ocean salmon fisheries (69 FR 25026, May 5, 2004), the West Coast Salmon Plan, and regulations implementing the West Coast Salmon Plan 50 CFR 660.409 and 660.411. Prior notice and opportunity for public comment was impracticable because NMFS and the state agencies had insufficient time to provide for prior notice and the opportunity for public comment between the time the fishery catch and effort data were collected to determine the extent of the fisheries, and the time the fishery modifications had to be implemented in order to allow fishers access to the available fish at the time the fish were available. The AA also finds good cause to waive the 30–day delay in effectiveness required under U.S.C. 553(d)(3), as a delay in effectiveness of these actions would unnecessarily limit fishers appropriately controlled access to available fish during the scheduled fishing season.

This action is authorized by 50 CFR 660.409 and 660.411 and are exempt from review under Executive Order 12866.

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

Dated: July 14, 2004.

Alan D. Risenhoover,

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

[FR Doc. 04–16356 Filed 7–19–04; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 69, No. 138
Tuesday, July 20, 2004

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

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Chap. I

[Docket No. 04–18]

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

12 CFR Chap. II

[Docket No. R–1206]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Chap. III

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Chap. V

[No. 2004–35]

Request for Burden Reduction Recommendations; Consumer Protection: Account/Deposit Relationships and Miscellaneous Consumer Rules; Economic Growth and Regulatory Paperwork Reduction Act of 1996 Review

AGENCIES: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); and Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice of regulatory review; request for comments.

SUMMARY: The OCC, Board, FDIC, and OTS (''we'' or ''the Agencies'') are reviewing our regulations to identify outdated, unnecessary, or unduly burdensome regulatory requirements pursuant to the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA). Today, we request your comments and suggestions on ways to reduce burden in rules we have categorized as Consumer Protection: Account/Deposit Relationships and Miscellaneous Consumer Rules, consistent with our statutory obligations. All comments are welcome. We specifically invite comment on the following issues: Whether statutory changes are needed; whether the regulations contain requirements that are not needed to serve the purposes of the statutes they implement; the extent to which the regulations may adversely affect competition; the cost of compliance associated with reporting, recordkeeping, and disclosure requirements, particularly on small institutions; whether any regulatory requirements are inconsistent or redundant; and whether any regulations are unclear.

We will analyze the comments received and propose burden-reducing changes to our regulations where appropriate. Some of your suggestions for burden reduction might require legislative changes. Where legislative changes would be required, we will consider your suggestions in recommending appropriate changes to Congress.

DATES: Written comments must be received no later than October 18, 2004.

ADDRESSES: You may submit comments by any of the following methods:

EGRPRA Web site: http://www.EGRPRA.gov.

• Comments submitted at the Agencies' joint Web site will automatically be distributed to all the Agencies upon receipt. Comments received at the EGRPRA Web site and by other means will be posted on the Web site to the extent possible.

Individual agency addresses: You are also welcome to submit comments to the Agencies at the following contact points (due to delays in paper mail delivery in the Washington area, commenters may prefer to submit their comments by alternative means):

OCC: You may submit comments, identified by [docket 0418], by any of the following methods:

• *E-mail: regs.comments@occ.treas.gov.* Include [docket 0418] in the subject line of the message.

• *Fax:* (202) 874–4448.

• *Mail:* Public Information Room, Office of the Comptroller of the Currency,250 E Street, SW., Mailstop 1–5,Washington, DC 20219,Attention: Docket ##.

Public Inspection: You may inspect and photocopy comments at the Public Information Room. You can make an appointment to inspect the comments by calling (202) 874–5043.

Board: You may submit comments, identified by Docket Number R–1206, by any of the following methods:

• *Agency Web site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *E-mail: regs.comments@federalreserve.gov.* Include docket number in the subject line of the message.

• *Fax:* (202) 452–3819 or (202) 452–3102.

• *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System,20th Street and Constitution Avenue, NW.,Washington, DC 20551.

All public comments are available from the Board's Web site at *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, except as necessary for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FDIC: You may submit comments, identified as EGRPRA burden reduction comments, by any of the following methods:

• *http://www.fdic.gov/regulations/laws/federal/propose.html.*

• *E-mail: comments@fdic.gov.* Include ''EGRPRA burden reduction comment'' in the subject line of the message.

• *Mail:* Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation,550 17th Street, NW.,Washington, DC 20429.

• *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Public Inspection: You may inspect comments at the FDIC Public

Information Center, Room 100, 801 17th Street, NW., between 9 a.m. and 4:30 p.m. on business days.

OTS: You may submit comments, identified by ''No. 2004–35.'' by any of the following methods:

• *E-Mail: regs.comments@ots.treas.gov.* Include ''No. 2004–35'' in the subject line of the message, and provide your name and telephone number.

• *Fax:* (202) 906–6518.

• *Mail:* Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision,1700 G Street, NW.,Washington, DC 20552.

• *Hand Delivery:* Comments may be hand delivered to the Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office.

Public Inspection: OTS will post comments and the related index on the OTS Internet site at *http://www.ots.treas.gov.* In addition, you may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a fax to (202) 906–7755. (Please identify the material you would like to inspect to assist us in serving you.)

FOR FURTHER INFORMATION CONTACT:

OCC:

• *Stuart Feldstein,* Assistant Director, Legislative and Regulatory Activities Division, (202) 874–5090.

• *Heidi Thomas,* Special Counsel, Legislative and Regulatory Activities Division, (202) 874–5090.

• *Lee Walzer,* Counsel, Legislative and Regulatory Activities Division, (202) 874–5090.

Board:

• *Patricia A. Robinson,* Managing Senior Counsel, Legal Division, (202) 452–3005.

• *Michael J. O'Rourke,* Counsel, Legal Division, (202) 452–3288.

• *John C. Wood,* Counsel, Division of Consumer and Community Affairs, (202) 452–2412.

• *Arleen Lustig,* Supervisory Financial Analyst, Division of Banking Supervision and Regulation, (202) 452–5259.

• For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

FDIC:

• *Claude A. Rollin,* Special Assistant to the Vice Chairman, (202) 898–8741.

• *Steven D. Fritts,* Associate Director, Division of Supervision and Consumer Protection, (202) 898–3723.

• *Ruth R. Amberg,* Senior Counsel, Legal Division, (202) 898–3736.

• *Thomas Nixon,* Counsel, Legal Division, (202) 898–8766.

OTS:

• *Robyn Dennis,* Manager, Thrift Policy, Supervision Policy, (202) 906–5751.

• *Josephine Battle,* Program Analyst, Thrift Policy, Supervision Policy, (202) 906–6870.

• *Karen Osterloh,* Special Counsel, Regulations and Legislation Division, Chief Counsel's Office, (202) 906–6639.

SUPPLEMENTARY INFORMATION:

I. Overview of the EGRPRA Review and the Steps Taken So Far

The Agencies [1] are asking for your comments and suggestions on ways in which we can reduce regulatory burdens consistent with our statutory obligations. Today, we request your input to help us identify which regulatory requirements in the category ''Consumer Protection: Account/Deposit Relationships and Miscellaneous Consumer Rules' are outdated, unnecessary, or unduly burdensome. We list the rules in this category in a chart at the end of this notice. Please send us your recommendations at our Web site, *http://www.EGRPRA.gov,* or to one of the listed addresses.

Today's request for comment is the third notice in our multi-year review of regulations for burden reduction required by section 2222 of EGRPRA.[2] We described the EGRPRA review's requirements in our first EGRPRA notice. In summary, EGRPRA requires us to:

• Categorize our regulations by type.

• Publish the regulations by category to request comments on which regulations contain requirements that are:

• Outdated,
• Unnecessary, or
• Unduly burdensome.

• Publish a summary of those comments.

• Eliminate unnecessary regulations to the extent appropriate.

• Report to Congress:

• Summarizing the significant issues raised and their relative merits
• Analyzing whether legislative change is required to reduce burden.

The first publication cycle must be complete by September 2006.

We have identified 13 categories of rules to implement our EGRPRA review. The categories are: Applications and Reporting; Banking Operations; Capital; Community Reinvestment Act; Consumer Protection: Lending Related Rules; Consumer Protection: Account/Deposit Relationships and Miscellaneous Consumer Rules; Directors, Officers and Employees; International Operations; Money Laundering; Powers and Activities; Rules of Procedure; Safety and Soundness; and Securities. You may see the categories and the rules placed within them at our Web site *http://www.EGRPRA.gov.*

We previously requested public comment about possible burden reduction in four categories of rules. Our June 16, 2003, notice requested comment on three categories: Applications and Reporting, Powers and Activities, and International Operations. Our January 21, 2004, notice requested comment on Consumer Protection: Lending Related Rules. Today, we request comment on Consumer Protection: Account/Deposit Relationships and Miscellaneous Consumer Rules.

We plan to publish one or more categories of rules approximately every six months between 2003 and 2006 and provide a 90-day comment period for each publication. As noted earlier, we must publish all our covered categories of rules for comment and review them by the end of September 2006.

In addition to soliciting written comments, we held banker outreach meetings in Orlando, St. Louis, Denver, San Francisco, New York City, Nashville and Seattle to hear directly from the industry about ways the Agencies could reduce regulatory burden. More than 300 representatives from the industry have attended the outreach meetings. On February 20, 2004, the Agencies also held a conference in the Washington, DC area for consumer groups to obtain their input on regulatory burden reduction. Another consumer group meeting was held in San Francisco on June 24, 2004. These meetings have helped focus our regulatory burden reduction efforts. We anticipate holding additional outreach events this year. You may learn more about the meetings and related recommendations at our EGRPRA Web site (*http://www.EGRPRA.gov*).

We received 19 comments in response to the first notice and over 590 to the second notice. The Agencies appreciate the response to our notices and the outreach meetings. The written comments and remarks at the meetings came from individuals, banks, savings

[1] The National Credit Union Administration has participated in planning the EGRPRA review but has issued, and will issue, requests for comment separately.

[2] Public Law 104–208, Sept. 30, 1996, 12 U.S.C. 3311. We published our first notice in the **Federal Register** on June 16, 2003, at 68 FR 35589. We published our second notice on January 21, 2004, at 69 FR 2852. You may view the notices at our Web site: *http://www.EGRPRA.gov.*

associations, holding companies, industry trade groups, and consumer and community groups. You may view the comments at our EGRPRA Web site (*http://www.EGRPRA.gov*). We are actively reviewing the feedback received about specific ways to reduce regulatory burden, as well as conducting our own analyses.

On May 12, 2004, FDIC Vice Chairman John M. Reich testified about burden reduction before the Subcommittee on Financial Institutions and Consumer Credit of the House Committee on Financial Services. On June 22, 2004, Agency and industry leaders testified about regulatory reform before the Senate Committee on Banking, Housing and Urban Affairs. Agency leaders included Federal Reserve Board Governor Donald Kohn, FDIC Vice Chairman John M. Reich, NCUA Chairman JoAnn Johnson, OCC First Senior Deputy Comptroller and Chief Counsel Julie L. Williams, and OTS Chief Counsel John Bowman. We will continue to post information about our burden reduction efforts at our Web site.

II. Request for Comment on Consumer Protection: Account/Deposit Relationships and Miscellaneous Consumer Rules

Today, we are asking the public to identify the ways in which the Consumer Protection: Account/Deposit Relationships and Miscellaneous Consumer Rules may be outdated, unnecessary, or unduly burdensome. We chose this category for publication relatively early in the series of requests for comment based on earlier comments from some industry representatives that the requirements imposed by the consumer protection regulations are among the most burdensome. As shown on the chart at the end of this notice, there are 11 regulations in this category.

We encourage comments that address not only individual rules or requirements but also pertain to certain product lines. For example, in the case of a particular deposit product, are any disclosure requirements under one regulation inconsistent with or duplicative of requirements under another regulation? Do the rules require that you keep unnecessary records? A product line approach is consistent with EGRPRA's focus on how rules interact, and may be especially helpful in exposing redundant or potentially inconsistent regulatory requirements. We recognize that commenters using a product line approach may want to make recommendations about rules that are not in our current request for comment. They should do so since we designed the EGRPRA categories to stimulate creative approaches rather than limiting them.

Specific issues to consider: While all comments are welcome, we specifically invite comment on the following issues:

A. Need for statutory change. (1) Do any statutory requirements underlying the rules impose unnecessary, redundant, conflicting or unduly burdensome requirements? (2) Are there less burdensome alternatives?

B. Need and purpose of the regulations. (1) Are the regulations consistent with the purposes of the statutes that they implement? (2) Have circumstances changed so that a rule is no longer necessary? (3) Do changes in the financial products and services offered to consumers suggest a need to revise certain regulations (or statutes)? (4) Do any of the regulations impose compliance burdens not required by the statutes they implement?

C. General approach/flexibility. (1) Would a different general approach to regulating achieve statutory goals with less burden? (2) Do any of these rules impose unnecessarily inflexible requirements?

D. Effect of the regulations on competition. Do any of the regulations or statutes create competitive disadvantages for insured depository institutions compared to the rest of the financial services industry or competitive disadvantages for one type of insured depository institution over another?

E. Reporting, recordkeeping and disclosure requirements. (1) Which reporting, recordkeeping, or disclosure requirements impose the most compliance burdens? (2) Are any of the reporting or recordkeeping requirements unnecessary to demonstrate compliance with the law?

F. Consistency and redundancy. (1) Are any of the requirements under one regulation inconsistent with or duplicative of requirements under another regulation? (2) If so, are the inconsistencies not warranted by the purposes of the regulations?

G. Clarity. Are any of the regulations drafted unclearly?

H. Burden on small insured institutions. We have particular interest in minimizing burden on small insured institutions (those with assets of $150 million or less). How could we amend these rules to minimize adverse economic impact on small insured institutions?

The Agencies appreciate the efforts of all interested parties to help us eliminate outdated, unnecessary, or unduly burdensome regulatory requirements.

BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P; 6720–01–P

Rules for which we are requesting comment now
Consumer Protection: Account / Deposit Relationships and Miscellaneous Consumer Rules

Subject	National Banks	State Member Banks	State Non-Member Banks	Thrifts	Holding Companies Bank[3] -------- Thrift
Consumer Protection: Account/Deposit Relationships & Miscellaneous					
Interagency Regulations					
Consumer Protection in Sales of Insurance	12 CFR Part 14	12 CFR Part 208, Subpart H [Reg. H]	12 CFR Part 343	12 CFR Part 536	
Privacy of Consumer Financial Information	12 CFR Part 40	12 CFR Part 216 [Reg. P]	12 CFR Part 332	12 CFR Part 573	12 CFR Part 216 [Reg. P] ----------
Prohibition Against Use of Interstate Branches Primarily for Deposit Production	12 CFR Part 25, Subpart E	12 CFR 208.7 [Reg. H]	12 CFR Part 369		12 CFR 208.7 [Reg. H] ----------
Safeguarding Customer Information	12 CFR Part 30, App. B	12 CFR Part 208, App. D-2 [Reg. H]	12 CFR Part 364, App. B	12 CFR Part 570, App. B	12 CFR 225.4(h); 12 CFR Part 225, App. F ----------
Board Regulations					
Electronic Fund Transfers	12 CFR Part 205 [Reg. E]	12 CFR Part 205 [Reg. E]	12 CFR Part 205 [Reg. E]	12 CFR Part 205 [Reg. E]	
Truth in Savings	12 CFR Part 230 [Reg. DD]	12 CFR Part 230 [Reg. DD]	12 CFR Part 230 [Reg. DD]	12 CFR Part 230 [Reg. DD]	
FDIC Regulations					
Advertisement of Membership	12 CFR Part 328	12 CFR Part 328	12 CFR Part 328	12 CFR Part 328	
Deposit Insurance Coverage	12 CFR Part 330	12 CFR Part 330	12 CFR Part 330	12 CFR Part 330	
Notification of Changes of Insured Status	12 CFR Part 307	12 CFR Part 307	12 CFR Part 307		
OTS Regulations					
Advertising				12 CFR 563.27	
Tying Restriction Exception				12 CFR 563.36	---------- 12 CFR 563.36

[3] Foreign banking organizations that conduct banking operations in the U.S., either directly through branches and agencies or indirectly through U.S. bank subsidiaries or commercial lending company subsidiaries, generally are subject to the same regulatory regime as domestic bank holding companies.

BILLING CODE 4810–33–C; 6210–01–C; 6714–01–C; 6720–01–C

Dated: July 14, 2004.

John D. Hawke, Jr.,

Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System on July 6, 2004.

Robert deV. Frierson,

DeputySecretary of the Board.

Dated in Washington, DC, this 28 day of June, 2004.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

Dated: June 24, 2004.

James E. Gilleran,

Director, Office of Thrift Supervision.

[FR Doc. 04–16401 Filed 7–19–04; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P; 6720–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 312, 314, 600, and 601

[Docket No. 2004N–0267]

Applications for Approval to Market a New Drug; Complete Response Letter; Amendments to Unapproved Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend our regulations on new drug applications (NDAs) and abbreviated new drug applications (ANDAs) for approval to market new drugs and generic drugs. We propose to discontinue the use of approvable letters and not approvable letters when taking action on marketing applications. Instead, we intend to use complete response letters to indicate that the review cycle is complete and that the application is not ready for approval. We also are proposing to revise the regulations on extending the review cycle due to the submission of an amendment to an unapproved application and starting a new cycle after a resubmission following receipt of a complete response letter. In addition, we are proposing to add to the regulations on biologics license applications (BLAs) a provision on the issuance of complete response letters to BLA applicants. We are taking these actions to implement the user fee performance goals referenced in the Prescription Drug User Fee Amendments of 2002 that address procedures and establish target timeframes for reviewing human drug applications.

DATES: Submit written or electronic comments by October 18, 2004. See section VIII of this document for the proposed effective date of a final rule based on this document.

ADDRESSES: You may submit comments, identified by [Docket No. 2004N–0267], by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web Site: *http://www.fda.gov/dockets/ecomments*. Follow the instructions for submitting comments on the agency Web site.
- E-mail: *fdadockets@oc.fda.gov*. Include [Docket No. 2004N–0267] in the subject line of your e-mail message.
- Fax: 301–827–6870.
- Mail/Hand delivery/Courier [For paper, disk, or CD–ROM submissions]: Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the agency name and [Docket No. 2004N–0267] for this rulemaking. All comments received will be posted without change to *http://www.fda.gov/dockets/ecomments*, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Request for Comments'' heading in the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.fda.gov/dockets/ecomments* and/or the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

The Office of Management and Budget (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: Brian L. Pendleton, Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–5523.

SUPPLEMENTARY INFORMATION:

I. Background

A. User Fee Performance Goals and Complete Response Letters

In conjunction with the Prescription Drug User Fee Act of 1992 (PDUFA) (Public Law 102–571), we committed to meet certain goals for reviewing and acting on human drug applications, as defined in section 735(1) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 379g(1)). For example, we promised that by September 30, 1997, we would review and act on at least 90 percent of standard NDAs within 12 months after the submission date (H. Rep. No. 895, 102d Cong., 2d. sess. 32 (1992) (letter from David A. Kessler, M.D., Commissioner of Food and Drugs, to Representatives John Dingell and Norman Lent, House Committee on Energy and Commerce (September 14, 1992))).

FDA's drug application review performance goals were revised with the enactment of the Food and Drug Administration Modernization Act of 1997 (Public Law 105–115) (the user fee provisions of this act are known as ''PDUFA II''). The goals were further revised in conjunction with the enactment of the Prescription Drug User Fee Amendments of 2002 (PDUFA III), set forth in title V, subtitle A, of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Public Law 107–188). Section 502 of PDUFA III states that user fees will be dedicated to expediting the drug development process and the process for the review of human drug applications in accordance with the new performance goals, which are set forth in an enclosure to letters from Tommy Thompson, Secretary of Health and Human Services, to the Chairman of the House Committee on Energy and Commerce and the Ranking Member of the Senate Committee on Health, Education, Labor and Pensions (June 4, 2002) (Goals Letter).

Under the user fee performance goals, the term ''review and act on'' is defined as the issuance of a complete action letter after the complete review of a complete application that we have accepted for filing (Goals Letter at 15). An action letter, if not an approval, states the specific deficiencies of the application, and where appropriate, the actions necessary to place the application in condition for approval (id.).

As part of the user fee performance goals (first in PDUFA II and again in PDUFA III), FDA's Center for Drug Evaluation and Research (CDER) and

Center for Biologics Evaluation and Research (CBER) agreed to revise their regulations and procedures to provide for the issuance of either an approval or a ''complete response'' action letter at the completion of the review cycle for an application (Goals Letter at 15). We are now proposing to revise our regulations on human drugs in part 314 (21 CFR part 314) to replace two types of action letters currently used, approvable letters (§ 314.110) and not approvable letters (§ 314.120), with complete response letters. Because there are no provisions on action letters in the biological product regulations in parts 600 through 680 (21 CFR parts 600 through 680), CBER had only to change their standard operating procedures to incorporate the use of a complete response letter at the end of a review cycle for a biological product. Although CBER has already done this, we are now proposing to add a regulation (proposed § 601.3) on the issuance of complete response letters concerning BLAs and BLA supplements.

In replacing approvable and not approvable letters with complete response letters, our intent is to adopt a consistent and more neutral mechanism to convey that we cannot approve a drug marketing application in its current form. Historically, FDA issued a not approvable letter when deficiencies were major (e.g., no adequate and well-controlled studies, failure to demonstrate effectiveness, and a major safety concern). However, the distinction between approvable and not approvable letters became somewhat blurred. For example, in some cases, the absence of a second study supporting the effectiveness of a proposed drug product for a particular indication might have led to a not approvable letter; in other cases, FDA might have issued an approvable letter stating the need for additional evidence. Thus, issuance of an approvable letter might mean that an application needed only minor changes, such as a revision of labeling, or much more substantial changes. In addition, we subsequently approved many applications for which we had first issued a not approvable letter. Issuance of complete response letters will ensure a consistent approach to informing sponsors of needed changes before we can approve an application, with no implication as to the ultimate approvability of the application.

We also intend to incorporate into the regulations for NDAs the terminology based on the user fee performance goals regarding Class 1 and Class 2 resubmissions. A ''Class 1 resubmission'' is defined for performance goal purposes as an application resubmitted after receipt of an approvable or not approvable letter that includes only certain items such as draft or final printed labeling, safety or stability updates, or other minor clarifying information. A ''Class 2 resubmission'' is one that addresses any other items, including any item that would require presentation to an advisory committee. A Class 1 resubmission has a performance goal of 2 months and a Class 2 resubmission has a performance goal of 6 months. In accordance with the user fee goals, we are proposing to apply this terminology to original NDAs as well as to efficacy supplements (supplements to approved applications to make certain significant changes to product labeling). As a result, efficacy supplements would be treated like original NDAs with regard to resubmissions. We are proposing to apply different rules to resubmissions of other types of NDA supplements.

B. ANDAs

Although the user fee performance goals do not apply to ANDAs, the current regulations regarding approvable and not approvable letters in §§ 314.110 and 314.120 apply to both NDAs and ANDAs (with a few exceptions). As a result, any proposed change to the regulations for NDAs must take into account the impact on ANDAs. Because we intend to change the regulations for NDAs and we believe that these changes make sense for other applications, we have decided to propose similar changes for ANDAs.

C. Amendments to Unapproved Applications

The PDUFA performance goals also state that a major amendment to an unapproved application submitted within 3 months of the goal date (i.e., the end of the initial review cycle) extends the goal date by 3 months. We are proposing to incorporate this provision into our regulations by revising § 314.60 on amendments to unapproved applications. In accordance with the user fee goals, we are proposing to apply this provision to efficacy supplements and resubmissions of applications and efficacy supplements as well, but not to ANDAs.

II. Highlights of the Proposed Rule

A. Complete Response Letters

In accordance with the PDUFA performance goals and in response to the concerns previously discussed, we are proposing to substitute complete response letters for approvable and not approvable letters at the completion of the review cycle for an NDA or ANDA. Under proposed § 314.110, we will send a complete response letter if we determine that we will not approve an application or abbreviated application in its present form. The complete response letter usually would describe all of the specific deficiencies in the application or abbreviated application. If we determine, after an application is filed or an abbreviated application is received, that the data submitted are inadequate to support approval, we might issue a complete response letter without first conducting required inspections and/or reviewing proposed product labeling.

Table 1 of this document summarizes the changes that we propose to make in substituting complete response letters for approvable and not approvable letters:

TABLE 1.—SUMMARY OF PROPOSED CHANGES REGARDING SUBSTITUTION OF COMPLETE RESPONSE LETTER FOR APPROVABLE AND NOT APPROVABLE LETTERS

Current Regulations	Proposed Regulations
Approvable Letter for NDA	*Complete Response Letter*
• States that NDA is basically approvable if certain issues are resolved.	• States that FDA will not approve NDA or ANDA in its present form.
• Indicates that NDA substantially meets requirements of part 314 (21 CFR part 314) and FDA can approve it if applicant submits additional information or agrees to specific conditions (e.g., labeling changes).	• Describes all specific deficiencies, except when issued without conducting required inspections or labeling review because data found to be inadequate to support approval.
Approvable Letter for ANDA	

TABLE 1.—SUMMARY OF PROPOSED CHANGES REGARDING SUBSTITUTION OF COMPLETE RESPONSE LETTER FOR APPROVABLE AND NOT APPROVABLE LETTERS—Continued

Current Regulations	Proposed Regulations
• Indicates that ANDA substantially meets requirements of part 314 and is approvable if minor deficiencies are corrected.	• Reflects complete review of data in NDA or ANDA as well as amendments for which review cycle was extended.
• Describes deficiencies and states when applicant must respond.	• Where appropriate, describes actions necessary to place NDA or ANDA in condition for approval.
Not Approvable Letter for NDA or ANDA	
• States that NDA cannot be approved for one of reasons in § 314.125 or ANDA cannot be approved for one of reasons in § 314.127.	
• Describes deficiencies in NDA or ANDA.	

For products for which approval of a BLA is required for marketing, we are proposing to adopt a new regulation, § 601.3, stating that FDA will send a BLA a complete response letter if we determine that we will not approve the BLA or BLA supplement in its present form.

B. Resubmissions

We also propose to revise the current provisions in §§ 314.110 and 314.120 on extension of the review period due to resubmission of an NDA or ANDA after receipt of an approvable or not approvable letter (to be replaced by a complete response letter). We propose that a Class 2 resubmission of an NDA following receipt of a complete response letter would start a new 6-month review cycle, as is the case with an ''amendment'' following receipt of a not approvable letter under current § 314.120(a)(1). A Class 1 resubmission of an NDA following receipt of a complete response letter would start a new 2-month review cycle.

The proposed rules on Class 1 and Class 2 resubmissions would also apply to efficacy supplements to NDAs, in accordance with the user fee performance goals. We believe that this is appropriate because efficacy supplements, like original applications, contain varying amounts of data. Where extensive data requiring significant agency resources for review are provided, the current 6-month review cycle should apply. But as with some NDA resubmissions, it would be appropriate to consider some smaller resubmissions of efficacy supplements as Class 1 resubmissions. We propose to apply different rules and terminology to other types of NDA supplements, including supplements dealing with chemistry, manufacturing, and controls (CMC) and labeling supplements for which no clinical data are needed. For NDA supplements other than efficacy supplements, a resubmission would start a new 6-month review cycle.

A ''major'' resubmission of an ANDA following receipt of a complete response letter would start a new 6-month review cycle, as is the case with an ''amendment'' following receipt of a not approvable letter under current § 314.120(a)(1). A ''minor'' resubmission of an ANDA would start a new review cycle of an unspecified length; the period might last from 30 days to a few months, depending on the issues involved. Under the relevant current CDER guidance document, entitled ''Major, Minor, and Telephone Amendments to Abbreviated New Drug Applications'' (December 2001), a minor resubmission usually would start a new review cycle of between 30 to 60 days.

The proposed changes to our regulations on applicants' responses to action letters are summarized in the following table 2.

TABLE 2.—SUMMARY OF PROPOSED CHANGES TO REGULATIONS REGARDING APPLICANT'S RESPONSE TO AGENCY ACTION LETTER (RESUBMISSIONS)

Current Regulations	Proposed Regulations
Applicant's Response to Approvable Letter or Not Approvable Letter for NDA (or NDA Supplement)	*NDA or ANDA Applicant's Response to Complete Response Letter*
Within 10 days of date of letter, NDA applicant must do one of following:	Review period is extended until applicant takes one of following actions:
• Amend application or notify FDA of intent to file amendment.	• Resubmit NDA or ANDA, addressing identified deficiencies.
• Withdraw application.	—Class 1 resubmission of NDA or efficacy supplement starts new, 2-month cycle
• Request opportunity for hearing.	—Class 2 resubmission of NDA or efficacy supplement starts new, 6-month cycle
• Agree to extend review period to decide which of above actions to take.	—Resubmission of NDA supplement other than efficacy supplement starts new, 6-month cycle
Response to Approvable Letter for ANDA (or ANDA Supplement)	
• Correct deficiencies by specified date or FDA will refuse to approve ANDA or ANDA supplement.	—Major resubmission of ANDA or ANDA supplement starts new, 6-month cycle

TABLE 2.—SUMMARY OF PROPOSED CHANGES TO REGULATIONS REGARDING APPLICANT'S RESPONSE TO AGENCY ACTION LETTER (RESUBMISSIONS)—Continued

Current Regulations	Proposed Regulations
• Request opportunity for hearing within 10 days.	—Minor resubmission of ANDA or ANDA supplement starts new cycle of variable length
Response to Not Approvable Letter for ANDA (or ANDA Supplement)	
• Same as for NDAs except that 10-day period does not apply (with exception of request for opportunity for hearing).	• Withdraw NDA or ANDA.
• FDA may regard failure to respond within 180 days as request to withdraw.	• Request opportunity for hearing.

These proposed changes with respect to NDAs are consistent with our user fee performance goals for resubmissions of human drug applications following receipt of an action letter. The proposed provisions for ANDAs are similar, although not identical, to those for NDAs.

C. Amendments to Unapproved Applications

In accordance with our user fee goals, we are proposing to revise our regulations on extending the review cycle following the submission of an amendment to an unapproved NDA. Under current § 314.60, the submission of a major amendment to an unapproved NDA (such as one that contains significant new data from a previously unreported study or detailed new analyses of earlier data) may extend the review period by up to 180 days. Under the user fee goals, a major amendment to an original NDA submitted within 3 months of the goal date extends the goal date by 3 months (Goals Letter at 15). Therefore, we propose to revise § 314.60 to state that submission of a major amendment to an original NDA within 3 months of the end of the initial review cycle constitutes an agreement to extend the review cycle by 3 months. The proposed regulation states that FDA may instead defer review of such an amendment until the subsequent review cycle.

Under the proposal, the submission of a major amendment to an NDA more than 3 months before the close of the initial review cycle, or the submission of a minor amendment during the initial review cycle, would not extend the review cycle. FDA might, at its discretion, review such an amendment during the initial review cycle or defer review until the subsequent review cycle. This proposed change to § 314.60 would codify for all NDAs our current policy on extending the review cycle for amendments to unapproved NDAs that are subject to user fees.

Also in accordance with the user fee goals, we are proposing to revise the regulations to provide that submission of a major amendment to an efficacy supplement to an approved application within 3 months of the end of the initial review cycle constitutes an agreement to extend the review cycle for the supplement by 3 months (although we could defer review to the subsequent cycle). It is appropriate to treat major amendments to efficacy supplements the same way as major amendments to original applications because their review requires significant agency resources. Amendments to other types of NDA supplements, however, will not extend the review cycle.

An additional change that is consistent with the user fee goals would provide that the submission of a major amendment to a resubmission of an application or efficacy supplement within 3 months of the end of the initial review cycle constitutes an agreement to extend the review cycle by 3 months (again, we could elect to defer review). Because major amendments to these resubmissions generally require the review of substantial data, it is appropriate to treat them the same way as major amendments to original applications or efficacy supplements.

We propose to make only minor revisions to the regulations on submitting amendments to unapproved ANDAs in § 314.96. The proposed rule would clarify that an amendment to an ANDA submitted before the end of the initial review cycle that contains significant data or information could extend the initial review cycle by as many as 180 days.

Table 3 of this document summarizes the proposed changes to our regulations on amendments submitted before an action letter:

TABLE 3.—SUMMARY OF PROPOSED CHANGES TO REGULATIONS ON AMENDMENTS SUBMITTED PRIOR TO ACTION LETTER

Current Regulations	Proposed Regulations
Amendments to Unapproved NDAs and NDA Supplements	*Amendments to Unapproved NDAs and Efficacy Supplements*
• Submission of major amendment constitutes agreement to extend deadline for FDA decision.	• Submission of major amendment within 3 months of end of initial review cycle constitutes agreement to extend cycle by 3 months; FDA may instead defer review to subsequent cycle.
• FDA may not extend review period more than 180 days.	• Initial review cycle may be extended only once for major amendment.
• Submission of nonmajor amendment will not extend review period.	• Submission of major amendment more than 3 months before end of initial review cycle will not extend cycle.
Amendments to Unapproved ANDAs and ANDA Supplements	• Submission of minor amendment will not extend review cycle.
• Submission of amendment containing significant data or information constitutes agreement to extend review period up to 180 days.	

TABLE 3.—SUMMARY OF PROPOSED CHANGES TO REGULATIONS ON AMENDMENTS SUBMITTED PRIOR TO ACTION LETTER—Continued

Current Regulations	Proposed Regulations
• Same for amendments to unapproved ANDA supplements.	
	Amendments to Unapproved NDA Supplements Other Than Efficacy Supplements
	• Submission of any amendment will not extend the initial review cycle.
	Amendments to Resubmissions of Applications and Efficacy Supplements
	• Submission of major amendment within 3 months of end of initial review cycle constitutes agreement to extend cycle by 3 months; FDA may instead defer review to subsequent cycle.
	Amendments to Unapproved ANDAs and ANDA Supplements
	• Unchanged

III. Description of the Proposed Rule

The proposed rule would make the following five types of revisions and additions to the regulations: (1) Revisions to remove the use of approvable and not approvable letters for NDAs and ANDAs and to incorporate the use of complete response letters and use of the term ''review cycle'', (2) addition of provisions on the issuance of complete response letters concerning BLAs and BLA supplements, (3) revisions related to resubmissions of NDAs and ANDAs after receipt of complete response letters, (4) miscellaneous technical revisions related to the use of complete response letters for NDAs and ANDAs, and (5) revisions related to amendments to unapproved NDAs and ANDAs.

A. The Complete Response Letter and the Review Cycle for NDAs and ANDAs

1. Definitions (Proposed § 314.3)

Current § 314.3(b) defines ''approvable letter'' and ''not approvable letter.'' We propose to revise § 314.3(b) by removing these definitions and adding a definition of ''complete response letter.'' A complete response letter would be defined as a written communication to an applicant from FDA usually identifying all of the deficiencies in an application or abbreviated application that must be satisfactorily addressed before it can be approved. (Under current § 314.3, ''application'' refers to an NDA and ''abbreviated application'' refers to an ANDA.)

We also propose to revise § 314.3(b) by adding a definition of ''original application.'' An original application would be defined as a pending application for which we have never issued a complete response letter or approval letter or an application that was submitted again after we had refused to file it or after it was withdrawn without being approved.

We also propose to add definitions of ''Class 1 resubmission'' and ''Class 2 resubmission'' for resubmissions of NDAs. A ''Class 1 resubmission'' would be defined as the resubmission of an application (i.e., an NDA), following receipt of a complete response letter, that contains final printed labeling, draft labeling, certain safety updates, stability updates to support provisional or final dating periods, commitments to perform Phase 4 studies (including proposals for such studies), assay validation data, final release testing on the last lots used to support approval, minor reanalyses of previously submitted data, and other comparatively minor information.[1] A ''Class 2 resubmission'' would be defined as the resubmission of an application, following receipt of a complete response letter, that includes any item not specified in the definition of ''Class 1 resubmission,'' including any item that would require presentation to an advisory committee. These definitions of Class 1 and Class 2 resubmissions of NDAs reflect those stated in the Goals Letter and will not be applied to ANDAs.

[1] This definition of Class 1 resubmission matches the definition stated in the user fee Goals Letter, except that the latter refers to ''other minor clarifying information'' and states that ''[o]ther specific items may be added later as the Agency gains experience with the scheme and will be communicated via guidance documents to industry'' (Goals Letter at 16). The proposed definition would allow resubmissions that contain unspecified information of a comparatively minor nature to be treated as Class 1 resubmissions. FDA might address specific types of such resubmissions in agency guidance.

In addition, we propose to revise § 314.3(b) to add a definition of ''efficacy supplement.'' An ''efficacy supplement'' would be defined as a supplement to an approved NDA to make one or more of the following changes to product labeling: (1) Add or modify an indication for use, (2) revise the dose or dose regimen, (3) provide for a new route of administration, (4) make a comparative efficacy claim naming another drug product, (5) significantly alter the intended patient population, (6) change the marketing status from prescription to over-the-counter use, (7) complete the traditional approval of a product originally approved under subpart H of part 314, or (8) incorporate other information based on at least one adequate and well-controlled clinical study.

2. Timeframes for Review (Proposed § 314.100)

Current § 314.100 addresses the timeframes for reviewing applications and abbreviated applications. Section 314.100(a) states that within 180 days of receipt of an application for a new drug under section 505(b) of the act (21 U.S.C. 355(b)) or of an abbreviated application for a new drug under section 505(j) of the act, FDA will review it and send the applicant either an approval letter under § 314.105, an approvable letter under § 314.110, or a not approvable letter under § 314.120. This 180-day period is called the review clock.

We propose to revise § 314.100(a) by creating two separate provisions reflecting different review cycles for applications that are subject to user fees and those that are not subject to such fees. Proposed § 314.100(a)(1) states that, except as provided in

§ 314.100(a)(2), within 180 days of receipt of an application for a new drug under section 505(b) of the act or of an abbreviated application for a new drug under section 505(j) of the act, FDA will review it and send the applicant either an approval letter under § 314.105 or a complete response letter under § 314.110. We propose to rename this 180-day period the ''initial review cycle'' to be consistent with the term we currently use.

Proposed § 314.100(a)(2) states that, for applications that are human drug applications, as defined in section 735(1)(A) and (B) of the act (NDAs), or supplements to such applications, as defined in section 735(2) of the act, the initial review cycle will be adjusted to be consistent with our user fee performance goals for reviewing such applications and supplements. We are making this change to reflect that, under the user fee performance goals, we are not expected to review and act on all applications that are subject to user fees within 180 days of receipt of such applications. Rather, we have committed to take action on certain percentages of applications within different time periods, depending on the type of application (e.g., standard, priority, supplement, resubmission) and the relevant fiscal year (see Goals Letter at 1, 2, and 3). In some cases, such as CMC supplements that require prior approval, we have committed to taking action in less than 180 days. Consequently, proposed § 314.100(a)(2) reflects that the initial review cycle for human drug applications and supplements to such applications may in some cases be shorter or longer than 180 days.

Current § 314.100(b) states that, during the review period, an applicant may withdraw an application under § 314.65 or an abbreviated application under § 314.99 and later resubmit it. We will treat the subsequent submission as a new original application or abbreviated application. Current § 314.100(b) uses the term ''review period'' rather than ''review clock'' because it is intended to address withdrawals made at any time while an application or abbreviated application is pending before the agency (i.e., filed but not yet approved), not simply withdrawals made while the review clock is running. (Although not defined in the regulations, the ''review period'' means the period from filing of an NDA or receipt of an ANDA to the ultimate disposition of the application, either by approval, refusal to approve the NDA under § 314.125 or the ANDA under § 314.127, or withdrawal of the application.) Rather than use the term ''review period'' or ''review clock,'' we propose to clarify § 314.100(b) by stating that, at any time before approval, an applicant may withdraw an application under § 314.65 or an abbreviated application under § 314.99 and later submit it again for consideration. We propose to substitute the phrase ''submit it again'' for ''resubmit it'' because we want to limit the terms ''resubmit'' and ''resubmission'' in part 314 to resubmissions after receipt of a complete response letter.

Current § 314.100(c) states that the review clock may be extended by mutual agreement between FDA and an applicant or as provided in §§ 314.60 or 314.96, as the result of a major amendment. To be consistent with proposed § 314.100(a)(1), we propose to revise this provision by substituting ''initial review cycle'' for ''review clock.''

3. Filing an NDA and Receiving an ANDA (Proposed § 314.101)

Current § 314.101(f)(1) states that within 180 days after the date of filing of an NDA, plus the period of time the review period was extended (if any), FDA will either approve the application or issue a notice of opportunity for hearing if the applicant asked FDA to provide it an opportunity for a hearing on an application in response to an approvable letter or a not approvable letter.

Consistent with our proposed revision of § 314.100(a), we are proposing to add a new § 314.101(f)(2) (redesignating current § 314.101(f)(2) and (f)(3) as § 314.101(f)(3) and (f)(4), respectively). The new section states that for applications that are human drug applications, as defined in section 735(1)(A) and (B) of the act, and supplements to such applications, as defined in section 735(2) of the act, the 180-day period specified in § 314.101(f)(1) will be adjusted to be consistent with the agency's user fee performance goals for reviewing such applications and supplements. We also propose to replace references in current § 314.101(f) to approvable and/or not approvable letters with references to complete response letters.

4. Approvable and Not Approvable Letters (Proposed §§ 314.110 and 314.120)

Current § 314.110 sets forth provisions on the issuance of and response to approvable letters. Section 314.110(a) states that it may be appropriate for FDA to issue an approvable letter at the end of a review period to inform an applicant that its application or abbreviated application is basically approvable if the applicant resolves certain issues. It also states that an approvable letter signifies that we believe that we can approve the application or abbreviated application if the applicant submits specific additional information or material or agrees to specific conditions (e.g., changes in labeling). Section 314.110(a) further states that as a practical matter, an approvable letter in most instances serves as a mechanism for resolving outstanding issues on drugs that are about to be approved and marketed.

Current § 314.120 addresses the agency's issuance of not approvable letters to applicants and applicants' responses to such letters. Section 314.120(a) states that we will send an applicant a not approvable letter if we believe that the application may not be approved for one of the reasons given in § 314.125, or that an abbreviated application may not be approved for one of the reasons given in § 314.127.

We propose to revise § 314.110 (and to remove and reserve § 314.120) by replacing references to approvable letters and not approvable letters with references to complete response letters.

a. *Issuance of complete response letters.* Proposed § 314.110 is entitled ''Complete response letter to the applicant.'' Proposed § 314.110(a) states that we will send the applicant a complete response letter if we determine that we will not approve the application or abbreviated application in its present form for one or more of the reasons given in § 314.125 or § 314.127, respectively.

Proposed § 314.110(a)(1) states that a complete response letter will describe all of the specific deficiencies in the application or abbreviated application, except as stated in proposed § 314.110(a)(3). (Under current procedures, we might also notify the applicant of deficiencies in certain parts of the application or abbreviated application before issuance of a complete response letter.)

Following issuance of a complete response letter, we would not expect to identify any additional deficiencies in an NDA or ANDA. However, it is possible that we might find additional deficiencies in an application following review of: (1) Data submitted in an amendment not reviewed before issuance of the complete response letter, (2) a resubmission containing new data or analyses, or (3) additional safety data obtained from any source. These additional deficiencies might be based wholly on the newly submitted data or might reflect new analyses of previous data prompted by the new data. Finally, it is also possible that we might find

additional deficiencies in previously reviewed data on the basis of advice from an advisory committee.

Proposed § 314.110(a)(2) states that the complete response letter reflects FDA's complete review of the data submitted in an original application or abbreviated application (or, where appropriate, a resubmission) and any amendments for which the review cycle was extended. It adds that the complete response letter will identify any amendments for which the review cycle was not extended that we have not yet reviewed.

Proposed § 314.110(a)(3) states that if we determine, after an application is filed or an abbreviated application is received, that the data submitted are inadequate to support approval, we might issue a complete response letter without first conducting required inspections and/or reviewing proposed product labeling.

Proposed § 314.110(a)(4) states that, where appropriate, a complete response letter will describe the actions necessary to place the application or abbreviated application in condition for approval.

b. *Responses to complete response letters.* Current § 314.110(a) states that within 10 days after the date of an approvable letter, the sponsor of an NDA must respond in one of the following several ways: (1) Amend the application (or notify us of an intent to do so), (2) withdraw the application (failure to respond within 10 days to an approvable letter is regarded as a request to withdraw the application), (3) ask us to provide the applicant with an opportunity for a hearing on whether there are grounds for denying the approval of the application under section 505(d) of the act, or (4) notify us that the applicant agrees to extend the review period under section 505(c) of the act so that the applicant can determine whether to take one of the previously listed actions.

Current § 314.110(b) addresses the issuance of approvable letters to ANDA applicants. Under § 314.110(b), we will send an ANDA applicant an approvable letter only if the abbreviated application substantially meets the requirements of part 314 and we believe that we can approve it if minor deficiencies (e.g., regarding labeling) are corrected. The approvable letter describes the deficiencies in the ANDA and states a date by which the applicant must respond. Unless the applicant corrects the deficiencies within the specified period, FDA will refuse to approve the ANDA. Within 10 days of the date of the approvable letter, the applicant may request an opportunity for a hearing.

In proposed § 314.110(b), we direct both NDA and ANDA applicants to take one of three actions following receipt of a complete response letter, eliminating (except with respect to resubmissions) the separate provisions for ANDAs in current § 314.110(b). We also propose to delete the requirement that NDA applicants take action within 10 days.

The first option for the recipient of a complete response letter, stated in proposed § 314.110(b)(1), is to resubmit the application or abbreviated application, addressing all deficiencies identified in the letter. For purposes of § 314.110, a resubmission would mean the submission by an applicant of all materials needed to fully address all deficiencies identified in the complete response letter.

Under proposed § 314.110(b)(1)(i), a resubmission of an NDA or an efficacy supplement that we classify as a Class 1 resubmission would constitute an agreement by the applicant to start a new 2-month review cycle beginning on the date we receive the resubmission. Under proposed § 314.110(b)(1)(ii), a resubmission of an NDA or an efficacy supplement that we classify as a Class 2 resubmission would constitute an agreement by the applicant to start a new 6-month review cycle beginning on the date we receive the resubmission.

For NDA supplements other than efficacy supplements, such as a supplement for a change in CMC or a labeling supplement that does not require clinical data, we propose to retain the current practice of not applying the Class 1 and Class 2 terminology and review cycle lengths. Thus, under proposed § 314.110(b)(1)(iii), a resubmission of an NDA supplement other than an efficacy supplement would constitute an agreement by the applicant to start a new 6-month review cycle beginning on the date we receive the resubmission.

For resubmissions of ANDAs, we propose to continue the current practice of categorizing them as ''major'' or ''minor.'' Under proposed § 314.110(b)(1)(iv), a major resubmission of an ANDA would constitute an agreement by the applicant to start a new 6-month review cycle beginning on the date we receive the resubmission. Under proposed § 314.110(b)(1)(v), a minor resubmission of an ANDA would constitute an agreement to start a new review cycle (length unspecified) beginning on the date we receive the resubmission. The actual length of the cycle would depend on the contents of the resubmission. As noted in section II.C of this document, CDER's guidance on ''Major, Minor, and Telephone Amendments to Abbreviated New Drug Applications'' provides guidance on how the agency handles these resubmissions. The guidance states that CDER attempts to review most minor amendments within 30 to 60 days, and we intend to apply this to minor resubmissions of ANDAs. Under the proposed rule, resubmissions of supplements to approved ANDAs would continue to be treated the same as ANDA resubmissions in accordance with § 314.97.

The second option for the recipient of a complete response letter, stated in proposed § 314.110(b)(2), is to withdraw the application or abbreviated application. A decision to withdraw an application or abbreviated application would be without prejudice to a subsequent submission.

The third option for the recipient of a complete response letter, stated in proposed § 314.110(b)(3), is to ask us to provide the applicant an opportunity for a hearing on the question of whether there are grounds for denying approval of the application or abbreviated application under section 505(d) or (j)(4) of the act, respectively. Within 60 days of the date of a request for an opportunity for a hearing, or within a different time period to which we and the applicant agree, we would take either of the following actions: (1) Approve the application or abbreviated application under § 314.105 or (2) refuse to approve the NDA under § 314.125 or the ANDA under § 314.127 and give the applicant written notice of an opportunity for a hearing under § 314.200 and section 505(c)(1)(B) or (j)(5)(C) of the act on the question of whether there are grounds for denying approval of the application.

Under proposed § 314.110(c), an applicant agrees to extend the review period under section 505(c)(1) of the act until it takes any of the actions listed in proposed § 314.110(b). Section 505(c)(1) of the act directs FDA, within 180 days after the filing of an application under section 505(b) of the act or an additional period agreed upon by the applicant and the agency, to either approve the application (if we find that none of the grounds for denying approval stated in section 505(d) of the act applies) or give the applicant an opportunity for a hearing under section 505(d) on the question of whether such application is approvable. Thus, the addition of the provision on agreement to extend the review period in proposed § 314.110(c) would ensure that, if we do not approve an application, the applicant is provided a notice of opportunity for a hearing within the time specified by section 505(c)(1) of the act.

Proposed § 314.110(c) further states that we may consider an NDA applicant's failure to take any of the actions listed in § 314.110(b) within 1 year after receiving a complete response letter to be a request by the applicant to withdraw the application. However, regarding ANDAs, proposed § 314.110(c) states that we may consider an applicant's failure to take any of the listed actions within 6 months after receiving a complete response letter to be a request by the applicant to withdraw the abbreviated application. We believe that the shorter time period for ANDAs is appropriate because an ANDA resubmission is not likely to involve generation of clinical data and deficiencies normally could be addressed within 6 months.

Because we propose to revise current § 314.110 to state the provisions on complete response letters, we propose to delete current § 314.120 on not approvable letters and to reserve this section for future use.

B. Complete Response Letter for BLAs

To incorporate into the biologics regulations the use of complete response letters for BLAs, we are proposing to add a definition of ''complete response letter'' to § 600.3 and to add § 601.3 on complete response letters.

1. Definition (Proposed § 600.3)

We propose to add to current § 600.3, paragraph (jj) to define a complete response letter. Under proposed § 600.3(jj), a complete response letter would be defined as a written communication to an applicant from FDA usually identifying all of the deficiencies in a biologics license application or supplement that must be satisfactorily addressed before it can be approved. (Current § 600.3(gg) defines a ''supplement'' as a request to the Director, Center for Biologics Evaluation and Research, to approve a change in an approved license application.)

2. Complete Response Letter to the Applicant (Proposed § 601.3)

To incorporate current CBER policy into the regulations, we are proposing to establish a new § 601.3 on complete response letters. Under proposed § 601.3(a), FDA will send the biologics license applicant or supplement applicant a complete response letter if we determine that we will not approve the biologics license application or supplement in its present form.

Under proposed § 601.3(b), a biologics license applicant or supplement applicant must take one of two actions after receiving a complete response letter. Under proposed § 601.3(b)(1), the license or supplement applicant may resubmit the application or supplement, addressing all deficiencies identified in the complete response letter. Under proposed § 601.3(b)(2), the license or supplement applicant may withdraw the application or supplement; a decision to withdraw would be without prejudice to a subsequent submission.

Finally, under proposed § 601.3(c), FDA may consider a biologics license applicant or supplement applicant's failure to either resubmit or withdraw the application or supplement within 1 year after receiving a complete response letter to be a request by the applicant to withdraw the application or supplement.

C. Miscellaneous Revisions Related to Adoption of Complete Response Letters for NDAs and ANDAs

To reflect FDA's use of complete response letters for NDAs and ANDAs, the agency proposes to make the following additional revisions to its regulations:

1. Content and Format of Applications (Proposed § 314.50)

Current § 314.50 specifies the content and format of NDAs. Section 314.50(d) describes the technical sections required in each application. Section 314.50(d)(5)(vi)(b) states that an applicant periodically must update its pending application with new safety information that might affect the statement of contraindications, warnings, precautions, and adverse reactions in the draft labeling. The applicant must file these safety update reports 4 months after the initial submission, after receiving an approvable letter, and when otherwise requested by FDA.

We propose to revise § 314.50(d)(5)(vi)(b) by replacing the requirement to submit a safety update report following receipt of an approvable letter with a requirement to submit a safety update report in a resubmission following receipt of a complete response letter. This would ensure that we have more extensive safety information than was available at the time of the original submission. In addition, we could, if appropriate, require submission of a safety update report immediately before issuing an approval letter under the current provision that allows us to require submission of a report ''at other times as requested by FDA.''

2. Withdrawal by the Applicant of an Unapproved Application (Proposed § 314.65)

Current § 314.65 states that an applicant may at any time withdraw an application that is not yet approved by notifying us in writing. It further states that we will consider an applicant's failure to respond within 10 days to an approvable letter under § 314.110 or a not approvable letter under § 314.120 to be a request by the applicant to withdraw the application.

We propose to revise § 314.65 to delete the reference to responding within 10 days to an approvable or not approvable letter, consistent with proposed § 314.110. In addition, we propose to add a statement that if, by the time we receive a notice of withdrawal, we have identified any deficiencies in the application, we will list those deficiencies in the letter we send the applicant acknowledging the withdrawal.

3. Communications Between FDA and Applicants (Proposed § 314.102)

Current § 314.102 addresses communications between FDA and applicants. Section 314.102(b) states that FDA reviewers shall make every reasonable effort to communicate promptly to applicants easily correctable deficiencies found in an application or an abbreviated application when those deficiencies are discovered, particularly deficiencies concerning CMC issues. This early communication is intended to permit applicants to correct readily identified deficiencies relatively early in the review process and to submit an amendment before the review period has elapsed. Section 314.102(b) further states that such early communication would not ordinarily apply to major scientific issues; instead, major scientific issues will ordinarily be addressed in an action letter.

We propose to revise § 314.102(b) to clarify that major scientific issues will ordinarily be addressed in a complete response letter, even though they may have been addressed earlier in a discipline review letter in accordance with user fee performance goals.

Current § 314.102(d) discusses end-of-review conferences. It states that at the conclusion of our review of an application or abbreviated application as designated by the issuance of an approvable or not approvable letter, we will provide applicants with an opportunity to meet with agency reviewing officials. The purpose of the meeting will be to discuss what further steps need to be taken by the applicant

before the application or abbreviated application can be approved. Section 314.102(d) further states that this meeting will be available on all applications or abbreviated applications, with priority given to applications for new chemical entities and major new indications for marketed drugs and for the first duplicates for such drugs. Requests for such meetings must be directed to the director of the division responsible for reviewing the application or abbreviated application.

We propose to revise § 314.102(d) by replacing ''an approvable or not approvable letter'' with ''a complete response letter.'' In addition, we propose to delete the references to abbreviated applications because the Office of Generic Drugs, which reviews such applications, does not routinely provide end-of-review conferences for ANDAs. Finally, because we virtually always agree to requests for end-of-review conferences for NDAs and do not prioritize the scheduling of such conferences for particular types of NDAs, we propose to remove the reference to priority status for certain types of NDAs.

4. Approval (Proposed § 314.105)

Current § 314.105(b), concerning approval of applications and abbreviated applications, states that FDA will approve an application and issue the applicant an approval letter (rather than an approvable letter under § 314.110) on the basis of draft labeling if only minor labeling deficiencies remain. We propose to delete the reference to approvable letters. Substituting a reference to complete response letters would not be appropriate because issuance of such a letter would not necessarily signify that we believe that an application is basically approvable provided that certain issues are resolved or that the application substantially meets the requirements of part 314, as is the case with approvable letters issued under current § 314.110.

5. Public Disclosure of Existence of Applications (Proposed § 314.430)

Current § 314.430(b) states that we will not publicly disclose the existence of an application or abbreviated application before we send an approvable letter to the applicant unless the existence of the application or abbreviated application has been previously publicly disclosed or acknowledged. The provision further states that CDER will maintain and make available for public disclosure a list of applications or abbreviated applications for which we have sent an approvable letter to the applicant.

We propose to revise § 314.430(b) to allow for FDA disclosure of the existence of an NDA or ANDA after issuance of an approval letter or tentative approval letter. Proposed § 314.430 (b) states that we will not publicly disclose the existence of an application or abbreviated application before we send the applicant an approval letter under § 314.105 or a tentative approval letter under § 314.107, unless the existence of the application or abbreviated application has been previously publicly disclosed or acknowledged. We do not believe that it is necessary to include a provision stating that the agency will maintain and make available for public disclosure a list of approved applications and abbreviated applications because we already make this information available by routinely announcing the approval of NDAs and ANDAs within days of their approval and publishing an annual list (with monthly supplements) of ''Approved Drug Products With Therapeutic Equivalence Evaluations'' (known as the ''Orange Book'').

We issue a tentative approval letter when an application meets the scientific and technical requirements for approval under section 505(b) or (j) of the act but marketing exclusivity (e.g., pediatric exclusivity, orphan drug exclusivity) or patent rights prevent final approval of the drug product. As stated in § 314.107(b)(3)(v), tentative approval of an application does not constitute an approval of an application and cannot, absent a final approval letter from the agency, result in an effective approval of an application. However, because we only issue tentative approval letters when an application has met the scientific and technical approval requirements, tentative approval letters do not present the same disclosure concerns as correspondence regarding other unapproved applications. Therefore, we intend to follow our past practice of acknowledging the existence of applications that have received tentative approval letters and making those letters publicly available.

Because current § 314.107(b)(3) does not explicitly refer to our practice of issuing a letter notifying an applicant of a tentative approval, we propose to revise § 314.107(b)(3)(v) to state that we will issue a tentative approval letter when tentative approval is appropriate in accordance with § 314.107 (b)(3).

The changes that we are proposing to the disclosure provisions would mean that FDA disclosure of the existence of an NDA or ANDA might result in later disclosure than sometimes occurs under the current regulation (i.e., with respect to those applications for which FDA now issues approvable letters). However, we believe that this effect would be limited because most applicants (at least for NDAs) publicly reveal the existence of their applications before agency issuance of an approval letter. Moreover, the proposed change would be consistent with the agency's long-standing presumption that, before approval (and absent evidence to the contrary), the existence of an application is confidential commercial information under 21 CFR 20.61. For example, under § 601.51, FDA will not disclose the existence of a biological product file before a BLA has been approved unless it has previously been publicly disclosed or acknowledged.

However, we specifically invite comment on whether it would be appropriate for FDA to disclose the existence of an NDA or ANDA following issuance of a complete response letter and if so, what conditions, if any, should be placed on such disclosure. For example, one alternative to the proposed approach would be that FDA would publicly disclose the existence of an NDA or ANDA following issuance of a complete response letter unless the applicant notified the agency (by some specified deadline) that the applicant had not publicly disclosed or acknowledged the existence of the application or abbreviated application. This approach would allow applicants to prevent agency disclosure of the existence of an application despite the issuance of a complete response letter. However, it also would create the potential for inadvertent disclosure and necessitate the establishment of a system to record and track applicants' positions regarding disclosure. This could be burdensome to applicants and the agency.

6. Other Technical Revisions (Proposed §§ 312.84, 314.103, 314.125, and 314.440)

We are proposing to revise other sections of the regulations to replace references to approvable and/or not approvable letters with references to complete response letters. These revisions would be made to § 312.84 (Risk-benefit analysis in review of marketing applications for drugs to treat life-threatening and severely-debilitating illnesses), § 314.103 (Dispute resolution), § 314.125 (Refusal to approve an application), and § 314.440 (Addresses for applications and abbreviated applications). (The proposed rule also revises this section by providing the current address to

which an NDA must be submitted and the address for applications regarding certain products reviewed by CBER.)

D. Amendments to Unapproved NDAs, ANDAs, and Unapproved Supplements to Approved NDAs

The other principal purpose of this proposed rule, besides the adoption of complete response letters and related changes to resubmissions, is to revise the regulations in §§ 314.60 and 314.96 on amendments to unapproved NDAs and ANDAs, respectively.

1. Amendments to Unapproved NDAs, Supplements, and Resubmissions (Proposed § 314.60)

Amendments to unapproved NDAs are addressed in § 314.60. Current § 314.60(a) states that except as provided in § 314.60 (b), the applicant may submit an amendment to an application that is filed under § 314.100, but not yet approved. (The reference to § 314.100 is in error; § 314.101 not § 314.100 addresses the filing of applications.) Section 314.60(a) further states that the submission of a major amendment (e.g., one that contains significant new data from a previously unreported study or detailed new analyses of earlier data) constitutes an agreement by the applicant under section 505(c) of the act to extend the date by which we are required to decide on the application. The section adds that we ordinarily will extend the review period but only for the time needed to review the new information, and we may not extend the period for more than 180 days. If we extend the review period for the application, the director of the division responsible for reviewing the application will notify the applicant of the length of the extension. The submission of an amendment that is not a major amendment will not extend the review period.

We propose to revise § 314.60(a) to state that we generally assume that when an original application (i.e., original NDA) supplement to an approved application or resubmission of an application or supplement is submitted to the agency for review, the applicant believes that we can approve the application, supplement, or resubmission as submitted. However, the applicant may submit an amendment to an application or supplement that has been filed under § 314.101 but is not yet approved.

In place of the provisions in current § 314.60(a), we propose to add new § 314.60(b). Under proposed § 314.60(b)(1), submission of a major amendment to an original application, efficacy supplement, or resubmission of an application or efficacy supplement within 3 months of the end of the initial review cycle constitutes an agreement by the applicant under section 505(c) of the act to extend the review cycle by 3 months. However, the proposed regulation states that we may instead defer review of such an amendment until the subsequent review cycle. The subsequent review cycle would run from the resubmission of the application, efficacy supplement, or resubmission following receipt of the complete response letter to the issuance of either a second complete response letter or an approval letter. Under proposed § 314.60(b)(1), if we extend the initial review cycle for an original application, efficacy supplement, or resubmission of an application or efficacy supplement under this paragraph (b)(1), the division responsible for reviewing the application, supplement, or resubmission will notify the applicant of the extension. Proposed § 314.60(b)(1) further states that the initial review cycle for an original application, efficacy supplement, or resubmission of an application or efficacy supplement may be extended only once due to submission of a major amendment. Finally, proposed § 314.60(b)(1) states that we may, at our discretion, review any subsequent major amendment during the initial review cycle (as extended) or defer review until the subsequent review cycle.

Under proposed § 314.60(b)(2), submission of a major amendment to an original application, efficacy supplement, or resubmission of an application or efficacy supplement more than 3 months before the end of the initial review cycle will not extend the cycle. We may, at our discretion, review such an amendment during the initial review cycle or defer review until the subsequent review cycle.

Under proposed § 314.60(b)(3), submission of a minor amendment to an original application, efficacy supplement, or resubmission of an application or efficacy supplement will not extend the initial review cycle. We may, at our discretion, review such an amendment during the initial review cycle or defer review until the subsequent review cycle.

Under proposed § 314.60(b)(4), submission of an amendment to a supplement other than an efficacy supplement will not extend the initial review cycle. We may, at our discretion, review such an amendment during the initial review cycle or defer review until the subsequent review cycle.

Proposed § 314.60 (b)(5) specifies that a major amendment may not include data to support an indication for a use that was not included in the original application, supplement, or resubmission.

These proposed regulations would codify for all NDAs, efficacy supplements, and resubmissions of NDAs and efficacy supplements, our current policy on extending the review period for human drug applications when a major amendment is submitted before FDA issuance of an action letter. As stated in the previous paragraphs, we believe that it is appropriate to treat amendments to unapproved efficacy supplements and amendments to resubmissions of applications and efficacy supplements, the same as amendments to unapproved NDAs. Amendments to ANDAs submitted before FDA issuance of an action letter are addressed in § 314.96, discussed in section III.D.3 of this document.

2. Procedures for Submission of a Supplement to an Approved Application (Proposed § 314.71)

The references to different types of supplemental applications in proposed §§ 314.60 and 314.110 necessitate a change to § 314.71, which addresses procedures for submission of supplements to approved applications. Current § 314.71(c) states that all procedures and actions that apply to applications under part 314, including actions by applicants and the agency, also apply to supplements. Under proposed §§ 314.60 and 314.110, a certain type of NDA supplement (i.e., efficacy supplements) will be treated the same as an NDA, while other types will be treated differently. To reflect this different treatment of certain supplements, we propose to revise § 314.71(c) to clarify that all procedures and actions that apply to applications under part 314 also apply to supplements ''except as specified otherwise in this part.''

3. Amendments to Unapproved ANDAs (Proposed § 314.96)

Our regulations on submitting amendments to unapproved abbreviated applications are set forth in § 314.96. Current § 314.96(a)(2) states that submission of an amendment containing significant data or information constitutes an agreement to extend the review period only for the time necessary to review the information and for no more than 180 days. Under § 314.96(a)(3), the submission of an amendment containing significant data or information to resolve deficiencies specified in a not approvable letter will extend the date by which we must reach a decision on the abbreviated

application only for the time necessary to review the information and for no more than 180 days.

We propose to revise § 314.96(a)(2) to substitute the term ''initial review cycle'' for ''review period.'' Our proposed revision would also clarify that an amendment to an ANDA submitted before the end of the initial review cycle that contains significant data or information could extend the initial review cycle for as many as 180 days. Thus, we are proposing to retain the Office of Generic Drugs' current approach to amendments to ANDAs.

We propose to delete § 314.96(a)(3) because the submission of an amendment to an abbreviated application following receipt of a complete response letter (i.e., a resubmission of an abbreviated application) is addressed in proposed § 314.110.

IV. Analysis of Economic Impacts

FDA has examined the impacts of the proposed rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this proposed rule is not a significant regulatory action as defined by the Executive order.

The Regulatory Flexibility Act requires agencies to prepare a Regulatory Flexibility Analysis for each rule unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.

We believe that this proposed rule is consistent with the regulatory philosophy and principles identified in Executive Order 12866. Because the proposed rule does not impose mandates on State, local, or tribal governments, or the private sector, that would result in an expenditure in any one year of $100,000,000 or more, we are not required to perform a cost-benefit analysis under the Unfunded Mandates Reform Act of 1995.

With respect to the Regulatory Flexibility Act, we do not believe that this proposed rule would have a significant economic impact on a substantial number of small entities. We are taking this action to amend our regulations governing applications for approval to market new drugs, generic drugs, and biological products. This action is necessary to meet a user fee performance goal to replace approvable and not approvable letters with complete response letters. The proposed rule also would revise regulations governing amendments to unapproved applications and codify terminology used in user fee performance goals affecting resubmissions of applications. As discussed in greater detail in the following paragraphs, the economic impact of these regulatory changes is not expected to be significant for any affected entity.

A. Impact of the Proposed Rule

As described in detail in sections II and III of this document, the proposed rule would do the following: (1) For NDAs and ANDAs, replace the two types of action letters currently used (approvable and not approvable letters) with complete response letters; (2) for BLAs, incorporate into the regulations an existing policy on complete response letters; (3) incorporate into regulations the terminology and procedures used in the user fee performance goals regarding NDA resubmissions; and (4) revise regulations governing extension of the initial review cycle in response to major amendments to unapproved applications, supplements, and resubmissions. For NDAs (with respect to resubmissions and amendments) and BLAs, the proposed rule largely would codify current agency practices. For ANDAs, the proposed rule would revise regulations to be consistent with current practice or, where appropriate, with the provisions governing NDAs. The most significant impact of the proposed rule would be on efficacy supplements to approved NDAs and on resubmissions of applications and efficacy supplements. The impact of specific provisions of this proposed rule on NDAs, ANDAs, efficacy supplements, and resubmissions is described in greater detail in the following paragraphs.

1. Complete Response Letter

We are proposing regulatory changes that would replace approvable and not approvable letters with complete response letters. Both approvable and not approvable letters indicate that an NDA or ANDA is not approvable in its current form, and that changes are necessary or that we require additional information. A complete response letter would describe the deficiencies in an NDA or ANDA and, where appropriate, the actions necessary to place the application in condition for approval. In the past, some drug manufacturers have expressed concern that a not approvable letter sends an unintended message that a marketing application will never be approved, which could adversely affect a company's ability to raise capital. Thus, in addition to allowing us to meet our commitments under the user fee performance goals, this regulatory change addresses industry comments by adopting a more neutral mechanism to convey that an NDA or ANDA cannot be approved in its current form. (We have already adopted a policy of issuing complete response letters for BLAs, and the proposed rule would simply codify this policy.) Because this regulatory change is primarily administrative in nature and is being made in response to the user fee performance goals, it is expected to have little or no economic impact.

2. Resubmissions

We also are proposing regulatory changes to implement the user fee performance goals and to codify new terminology associated with the resubmission of drug marketing applications. A Class 2 resubmission (incorporating major changes or a significant amount of additional data) would start a new 6-month review cycle, whereas a Class 1 resubmission (incorporating minor changes or a limited amount of additional data) would begin a new 2-month review cycle. These changes would codify agency practices regarding NDA resubmissions in place since 1998.

We are proposing to apply the Class 1 and Class 2 provisions to resubmissions of efficacy supplements as well. We agreed to make this policy change in PDUFA III because efficacy supplements, like original NDAs, contain varying amounts of data requiring different review times. We began to implement this change in October 2002. The proposed application of the Class 1 and Class 2 provisions to resubmissions of efficacy supplements would represent a regulatory change because under PDUFA II, all resubmissions of efficacy supplements would start a new 6-month review cycle. Under the proposed rule, a Class 1 resubmission of an efficacy supplement would extend the review

cycle by only 2 months, rather than 6 months, as occurred under PDUFA II. Review times for Class 2 efficacy supplement resubmissions would be largely unaffected by the proposed change. Based on data from 1996 to 2000 (the most recent 5-year period for which complete data were available), an average of 16 efficacy supplements (approximately 40 percent) resubmitted annually would be reviewed in 2 months rather than the current 6 months. The proposed rule generally would maintain current agency practice (review within 6 months) with respect to the review of other types of NDA supplements, i.e., for CMC or labeling changes (although under PDUFA III, our goal is to review within 4 months resubmissions of certain CMC supplements for which prior approval is required). For ANDA resubmissions, the proposal would codify the current practice of 6-month review.

3. Amendments to Unapproved Drug Marketing Applications

We also are proposing to revise our regulations on extending the initial review cycle following the submission of an amendment to an unapproved drug marketing application. Current regulations state, for unapproved NDAs and efficacy supplements, that submission of a major amendment extends the review cycle for the amount of time necessary to review the new information but not by more than 180 days. The proposed rule generally would extend the review cycle by 3 months if a major amendment to an application, efficacy supplement, or resubmission of an application or efficacy supplement were submitted within 3 months of the end of the initial review cycle. (The proposed rule states that we may defer review until a subsequent review cycle.) If a major amendment were submitted more than 3 months before the end of the initial review cycle, the review cycle would not be extended. These changes would codify the practice for NDAs that has been in place since 1998. However, we have recently begun to apply this policy to efficacy supplements. Before October 2002, under the user fee performance goals, we did not extend the review cycle for a major amendment to an efficacy supplement. Therefore, as with the proposed change regarding resubmissions of efficacy supplements, we believe that it is appropriate to treat the proposed change regarding amendments to unapproved efficacy supplements as a regulatory change for purposes of this analysis.

These provisions of the proposed rule might slightly increase review times for efficacy supplements for which at least one major amendment was received during the initial review cycle. Based on data from 1996 to 2000, these regulatory changes could affect as many as 11 percent of all efficacy supplements filed or an average of 15 per year. The effect of this change is dependent on the timing of future filings and the number of instances in which we might exercise our review discretion.

With respect to amendments to ANDAs, the proposed changes to regulations would codify FDA's current approach.

B. Summary of Impacts

Based on the preceding analysis, the proposed changes to provisions governing resubmissions could result in reduced review times for up to 40 percent of efficacy supplements resubmitted annually. However, the proposed provisions governing major amendments could slightly increase review times for up to 11 percent of efficacy supplements (for which at least one major amendment was received during the initial review cycle) filed annually. The full impact of this rule would be affected by the number of future submissions and the extent to which we might exercise our discretion to defer review until the next cycle. ANDAs will not be significantly affected by the proposed changes to regulations.

Because this proposed rule generally amends current regulations governing applications for approval to market new drugs and generic drugs to reflect user fee terminology and performance goals that have already been incorporated into FDA policies (except with respect to complete response letters, as previously noted), we certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. Therefore, no further analysis is required under the Regulatory Flexibility Act.

V. Environmental Impact

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

VI. Paperwork Reduction Act of 1995

This proposed rule does not contain new information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520). The proposed rule would substitute complete response letters for approvable and not approvable letters (in current §§ 314.110 and 314.120, respectively) when we take action on marketing applications. The proposed rule would retain the provisions requiring the recipient of the action letter (a complete response letter under the proposed rule) to either amend the application (resubmit it), withdraw it, or ask us to provide an opportunity for a hearing on whether there are grounds for denying approval of the application. The proposed rule also would revise the regulations (§§ 314.60, 314.96, 314.110, and 314.120) on extending the review cycle due to the submission of amendments before we issue an action letter and due to resubmissions, but would not change the information required in such amendments and resubmissions. OMB has approved the information collection previously discussed concerning responses to action letters under OMB control number 0910–0001, which expires on March 31, 2005.

The proposed rule would also establish regulations on the issuance of complete response letters to biologics license applicants and supplement applicants. The proposed rule would codify current agency practice on the issuance of complete response letters to these applicants and on applicant actions in response to these letters (resubmission or withdrawal of the application or supplement). OMB has already approved the information collection concerning responses to complete response letters for BLAs and BLA supplements under OMB control number 0910–0338, which expires on August 31, 2005.

FDA tentatively concludes that this proposed rule contains no new collection of information. Therefore, OMB clearance under the PRA is not required.

VII. Federalism

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. We have determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, we have concluded that the rule does not contain policies that have federalism implications as defined in the order and, consequently, a federalism summary impact statement is not required.

VIII. Proposed Effective Date

We propose that any final rule that may issue based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

IX. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments on this proposal. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects

21 CFR Part 312

Drugs, Exports, Imports, Investigations, Labeling, Medical research, Reporting and recordkeeping requirements, Safety.

21 CFR Part 314

Administrative practice and procedure, Confidential business information, Drugs, Reporting and recordkeeping requirements.

21 CFR Part 600

Biologics, Reporting and recordkeeping requirements.

21 CFR Part 601

Administrative practice and procedure, Biologics, Confidential business information.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR parts 312, 314, 600, and 601 be amended as follows:

PART 312—INVESTIGATIONAL NEW DRUG APPLICATION

1. The authority citation for 21 CFR part 312 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 371; 42 U.S.C. 262.

2. Section 312.84 is amended in paragraph (c) by revising the first sentence to read as follows:

§ 312.84 Risk-benefit analysis in review of marketing applications for drugs to treat life-threatening and severely-debilitating illnesses.

* * * * *

(c) If FDA concludes that the data presented are not sufficient for marketing approval, FDA will issue a complete response letter under § 314.110 of this chapter (for a drug) or § 601.3 of this chapter (for a biologic). * * *

* * * * *

PART 314—APPLICATIONS FOR FDA APPROVAL TO MARKET A NEW DRUG

3. The authority citation for 21 CFR part 314 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 355a, 356, 356a, 356b, 356c, 371, 374, 379e.

4. Section 314.3 is amended in paragraph (b) by removing the definitions for ''*Approvable letter*'' and ''*Not approvable letter*'' and by adding the following definitions in alphabetical order:

§ 314.3 Definitions.

* * * * *

(b) * * *

Class 1 resubmission means the resubmission of an application, following receipt of a complete response letter, that contains final printed labeling, draft labeling, certain safety updates, stability updates to support provisional or final dating periods, commitments to perform Phase 4 studies (including proposals for such studies), assay validation data, final release testing on the last lots used to support approval, minor reanalyses of previously submitted data, and other comparatively minor information.

Class 2 resubmission means the resubmission of an application, following receipt of a complete response letter, that includes any item not specified in the definition of ''*Class 1 resubmission*,'' including any item that would require presentation to an advisory committee.

Complete response letter means a written communication to an applicant from FDA usually identifying all of the deficiencies in an application or abbreviated application that must be satisfactorily addressed before it can be approved.

* * * * *

Efficacy supplement means a supplement to an approved application to make one or more of the following changes to product labeling:

(1) Add or modify an indication for use;

(2) Revise the dose or dose regimen;

(3) Provide for a new route of administration;

(4) Make a comparative efficacy claim naming another drug product;

(5) Significantly alter the intended patient population;

(6) Change the marketing status from prescription to over-the-counter use;

(7) Complete the traditional approval of a product originally approved under subpart H of this part or;

(8) Incorporate other information based on at least one adequate and well-controlled clinical study.

* * * * *

Original application means a pending application for which FDA has never issued a complete response letter or approval letter, or an application that was submitted again after FDA had refused to file it or after it was withdrawn without being approved.

* * * * *

§ 314.50 [Amended]

5. Section 314.50 is amended in paragraph (d)(5)(vi)(*b*) in the fourth sentence by removing the phrase ''following receipt of an approvable letter'' and by adding in its place the phrase ''in a resubmission following receipt of a complete response letter''.

6. Section 314.60 is amended as follows:

a. By revising the section heading;

b. By revising paragraph (a);

c. By redesignating paragraphs (b) and (c) as paragraphs (c) and (d), respectively;

d. By adding new paragraph (b); and

e. By revising newly redesignated paragraphs (c)(1)(iii) and (c)(1)(iv), and the first sentence of paragraph (c)(2) to read as follows:

§ 314.60 Amendments to an unapproved application, supplement, or resubmission.

(a) FDA generally assumes that when an original application, supplement to an approved application, or resubmission of an application or supplement is submitted to the agency for review, the applicant believes that the agency can approve the application, supplement, or resubmission as submitted. However, the applicant may submit an amendment to an application that has been filed under § 314.101 but is not yet approved.

(b)(1) Submission of a major amendment to an original application, efficacy supplement, or resubmission of an application or efficacy supplement within 3 months of the end of the initial review cycle constitutes an agreement by the applicant under section 505(c) of the act to extend the initial review cycle by 3 months. FDA may instead defer review of the amendment until the subsequent review cycle. If the agency extends the initial review cycle for an original application, efficacy supplement, or resubmission under this paragraph, the division responsible for reviewing the application, supplement,

or resubmission will notify the applicant of the extension. The initial review cycle for an original application, efficacy supplement, or resubmission of an application or efficacy supplement may be extended only once due to submission of a major amendment. FDA may, at its discretion, review any subsequent major amendment during the initial review cycle (as extended) or defer review until the subsequent review cycle.

(2) Submission of a major amendment to an original application, efficacy supplement, or resubmission of an application or efficacy supplement more than 3 months before the end of the initial review cycle will not extend the cycle. FDA, may, at its discretion, review such an amendment during the initial review cycle or defer review until the subsequent review cycle.

(3) Submission of an amendment to an original application, efficacy supplement, or resubmission of an application or efficacy supplement that is not a major amendment will not extend the initial review cycle. FDA may, at its discretion, review such an amendment during the initial review cycle or defer review until the subsequent review cycle.

(4) Submission of an amendment to a supplement other than an efficacy supplement will not extend the initial review cycle. FDA may, at its discretion, review such an amendment during the initial review cycle or defer review until the subsequent review cycle.

(5) A major amendment may not include data to support an indication for a use that was not included in the original application, supplement, or resubmission.

(c)(1) * * *

(iii) The applicant has not obtained a right of reference to the investigation described in paragraph (c)(1)(ii) of this section; and

(iv) The report of the investigation described in paragraph (c)(1)(ii) of this section would be essential to the approval of the unapproved application.

(2) The submission of an amendment described in paragraph (c)(1) of this section will cause the unapproved application to be deemed to be withdrawn by the applicant under § 314.65 on the date of receipt by FDA of the amendment.* * *

* * * * *

7. Section 314.65 is amended by revising the second sentence to read as follows:

§ 314.65 Withdrawal by the applicant of an unapproved application.

* * * If, by the time it receives such notice, the agency has identified any deficiencies in the application, we will list such deficiencies in the letter we send the applicant acknowledging the withdrawal.* * *

§ 314.71 [Amended]

8. Section 314.71 is amended in paragraph (c) by adding the phrase ''except as specified otherwise in this part'' at the end of the sentence.

§ 314.96 [Amended]

9. Section 314.96 is amended by revising paragraph (a)(2) and by removing paragraph (a)(3) to read as follows:

§ 314.96 Amendments to an unapproved abbreviated application.

(a) * * *

(2) Submission of an amendment containing significant data or information before the end of the initial review cycle constitutes an agreement between FDA and the applicant to extend the initial review cycle only for the time necessary to review the significant data or information and for no more than 180 days.

* * * * *

10. Section 314.100 is revised to read as follows:

§ 314.100 Timeframes for reviewing applications and abbreviated applications.

(a)(1) Except as provided in paragraph (a)(2) of this section, within 180 days of receipt of an application for a new drug under section 505(b) of the act or an abbreviated application for a new drug under section 505(j) of the act, FDA will review it and send the applicant either an approval letter under § 314.105 or a complete response letter under § 314.110. This 180-day period is called the ''initial review cycle.''

(2) For applications that are human drug applications, as defined in section 735(1)(A) and (B) of the act, or supplements to such applications, as defined in section 735(2) of the act, the initial review cycle will be adjusted to be consistent with the agency's user fee performance goals for reviewing such applications and supplements.

(b) At any time before approval, an applicant may withdraw an application under § 314.65 or an abbreviated application under § 314.99 and later submit it again for consideration.

(c) The review cycle may be extended by mutual agreement between FDA and an applicant or as provided in §§ 314.60 and 314.96, as the result of a major amendment.

11. Section 314.101 is amended as follows:

a. By revising paragraph (f)(1)(ii);

b. By redesignating paragraphs (f)(2) and (f)(3) as paragraphs (f)(3) and (f)(4), respectively;

c. By adding new paragraph (f)(2); and

d. By revising the second sentence of newly redesignated paragraph (f)(3) to read as follows:

§ 314.101 Filing an application and receiving an abbreviated new drug application.

* * * * *

(f)(1) * * *

(ii) Issue a notice of opportunity for hearing if the applicant asked FDA to provide it an opportunity for a hearing on an application in response to a complete response letter.

(2) For applications that are human drug applications, as defined in section 735(1)(A) and (B) of the act, or supplements to such applications, as defined in section 735(2) of the act, the 180-day period specified in paragraph (f)(1) of this section will be adjusted to be consistent with the agency's user fee performance goals for reviewing such applications and supplements.

(3) * * * If FDA disapproves the abbreviated new drug application, FDA will issue a notice of opportunity for hearing if the applicant asked FDA to provide it an opportunity for a hearing on an abbreviated new drug application in response to a complete response letter.

* * * * *

12. Section 314.102 is amended in the last sentence in paragraph (b) by removing the phrase ''an action'' and adding in its place the phrase ''a complete response'' and by revising paragraph (d) to read as follows:

§ 314.102 Communications between FDA and applicants.

* * * * *

(d) *End-of-review conference.* At the conclusion of FDA's review of an NDA as designated by the issuance of a complete response letter, FDA will provide the applicant with an opportunity to meet with agency reviewing officials. The purpose of the meeting will be to discuss what further steps need to be taken by the applicant before the application can be approved. Requests for such meetings must be directed to the director of the division responsible for reviewing the application.

* * * * *

§ 314.103 [Amended]

13. Section 314.103 is amended in paragraph (c)(1) in the first sentence by removing the phrase ''an approvable or not approvable'' and adding in its place the phrase ''a complete response'' and

by removing the phrase ''or § 314.120, respectively''.

§ 314.105 [Amended]

14. Section 314.105 is amended in paragraph (b) in the first sentence by removing the phrase ''(rather than an approvable letter under § 314.110)''.

15. Section 314.107 is amended by adding a new sentence at the beginning of paragraph (b)(3)(v) to read as follows:

§ 314.107 Effective date of approval of a 505(b)(2) application or abbreviated new drug application under section 505(j) of the act.

* * * * *

(b) * * *

(3) * * *

(v) FDA will issue a tentative approval letter when tentative approval is appropriate in accordance with paragraph (b)(3) of this section.* * *

* * * * *

16. Section 314.110 is revised to read as follows:

§ 314.110 Complete response letter to the applicant.

(a) *Complete response letter.* FDA will send the applicant a complete response letter if the agency determines that we will not approve the application or abbreviated application in its present form for one or more of the reasons given in § 314.125 or § 314.127, respectively.

(1) *Description of specific deficiencies.* A complete response letter will describe all of the specific deficiencies in an application or abbreviated application, except as stated in paragraph (a)(3) of this section.

(2) *Complete review of data.* A complete response letter reflects FDA's complete review of the data submitted in an original application or abbreviated application (or, where appropriate, a resubmission) and any amendments for which the review cycle was extended. The complete response letter will identify any amendments for which the review cycle was not extended that FDA has not yet reviewed.

(3) *Inadequate data.* If FDA determines, after an application is filed or an abbreviated application is received, that the data submitted are inadequate to support approval, the agency might issue a complete response letter without first conducting required inspections and/or reviewing proposed product labeling.

(4) *Description of actions necessary for approval.* Where appropriate, a complete response letter will describe the actions necessary to place the application or abbreviated application in condition for approval.

(b) *Applicant actions.* After receiving a complete response letter, the applicant must take one of following actions:

(1) *Resubmission.* Resubmit the application or abbreviated application, addressing all deficiencies identified in the complete response letter. For purposes of this section, a resubmission means submission by the applicant of all materials needed to fully address all deficiencies identified in the complete response letter.

(i) A resubmission of an application or efficacy supplement that FDA classifies as a Class 1 resubmission constitutes an agreement by the applicant to start a new 2-month review cycle beginning on the date FDA receives the resubmission.

(ii) A resubmission of an application or efficacy supplement that FDA classifies as a Class 2 resubmission constitutes an agreement by the applicant to start a new 6-month review cycle beginning on the date FDA receives the resubmission.

(iii) A resubmission of an NDA supplement other than an efficacy supplement constitutes an agreement by the applicant to start a new 6-month review cycle beginning on the date FDA receives the resubmission.

(iv) A major resubmission of an abbreviated application constitutes an agreement by the applicant to start a new 6-month review cycle beginning on the date FDA receives the resubmission.

(v) A minor resubmission of an abbreviated application constitutes an agreement by the applicant to start a new review cycle beginning on the date FDA receives the resubmission.

(2) *Withdrawal.* Withdraw the application or abbreviated application. A decision to withdraw an application or abbreviated application is without prejudice to a subsequent submission.

(3) *Request opportunity for hearing.* Ask the agency to provide the applicant an opportunity for a hearing on the question of whether there are grounds for denying approval of the application or abbreviated application under section 505(d) or (j)(4) of the act, respectively. The applicant must submit the request to the Associate Director for Policy, Center for Drug Evaluation and Research (HFD–5), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Within 60 days of the date of the request for an opportunity for a hearing, or within a different time period to which FDA and the applicant agree, the agency will either approve the application or abbreviated application under § 314.105, or refuse to approve the application under § 314.125 or abbreviated application under § 314.127 and give the applicant written notice of an opportunity for a hearing under § 314.200 and section 505(c)(1)(B) or (j)(5)(c) of the act on the question of whether there are grounds for denying approval of the application under section 505(d) or (j)(4) of the act.

(c) *Failure to take action.* An applicant agrees to extend the review period under section 505(c)(1) of the act until it takes any of the actions listed in paragraph (b) of this section. For an application, FDA may consider an applicant's failure to take any of such actions within 1 year after receiving a complete response letter to be a request by the applicant to withdraw the application. For an abbreviated application, FDA may consider an applicant's failure to take any of the actions listed in paragraph (b) of this section within 6 months after receiving a complete response letter to be a request by the applicant to withdraw the abbreviated application.

§ 314.120 [Removed and Reserved]

17. Section 314.120 is removed and reserved.

§ 314.125 [Amended]

18. Section 314.125 is amended in paragraph (a)(1) by removing the phrase ''an approvable or a not approvable'' and adding in its place the phrase ''a complete response''; and by removing the phrase ''or § 314.120''.

§ 314.430 [Amended]

19. Section 314.430 is amended by in paragraph (b) in the first sentence by removing the phrase ''approvable letter is sent to the applicant under § 314.110'' and adding in its place the phrase ''approval letter is sent to the applicant under § 314.105 or tentative approval letter is sent to the applicant under § 314.107''; and by removing the last sentence.

20. Section 314.440 is amended in paragraph (a)(1) by removing the phrase ''Document and Records Section, 5901–B Ammendale Rd., Beltsville, MD 20705–1266'' and by adding in its place the phrase ''Central Document Room, 12229 Wilkins Ave., Rockville, MD 20852–1833''; in paragraph (a)(3) by removing the phrase ''or § 314.120''; and by revising the introductory text of paragraph (b) to read as follows:

§ 314.440 Addresses for applications and abbreviated applications.

* * * * *

(b) Applicants must send applications and other correspondence relating to matters covered by this part for the drug products listed below to the Center for Biologics Evaluation and Research (HFM–99), Food and Drug

Administration, 1401 Rockville Pike, Rockville, MD 20852, except applicants must send a request for an opportunity for a hearing under § 314.110 on the question of whether there are grounds for denying approval of an application to the Director, Center for Biologics Evaluation and Research (HFM–1), at the same address.

* * * * *

PART 600—BIOLOGICAL PRODUCTS: GENERAL

21. The authority citation for 21 CFR part 600 continues to read as follows:

Authority: 21 U.S.C. 321, 351, 352, 353, 355, 360, 360i, 371, 374; 42 U.S.C. 216, 262, 263, 263a, 264, 300aa-25.

22. Section 600.3 is amended by revising paragraph (jj) to read as follows:

§ 600.3 Definitions.

* * * * *

(jj) *Complete response letter* means a written communication to an applicant from FDA usually identifying all of the deficiencies in a biologics license application or supplement that must be satisfactorily addressed before it can be approved.

* * * * *

PART 601—LICENSING

23. The authority for 21 CFR part 601 continues to read as follows:

Authority: 15 U.S.C. 1451-1561; 21 U.S.C. 321, 351, 352, 353, 355, 356b, 360, 360c-360f, 360h-360j, 371, 374, 379e, 381; 42 U.S.C. 216, 241, 262, 263, 264; sec 122, Pub. L. 105-115, 111 Stat. 2322 (21 U.S.C. 355 note).

24. Section 601.3 is added to subpart A to read as follows:

§ 601.3 Complete response letter to the applicant.

(a) Complete response letter. The Food and Drug Administration will send the biologics license applicant or supplement applicant a complete response letter if the agency determines that it will not approve the biologics license application or supplement in its present form.

(b) *Applicant actions.* After receiving a complete response letter, the biologics license applicant or supplement applicant must take either of the following actions:

(1) *Resubmission.* Resubmit the application or supplement, addressing all deficiencies identified in the complete response letter.

(2) *Withdrawal.* Withdraw the application or supplement. A decision to withdraw the application or supplement is without prejudice to a subsequent submission.

(c) *Failure to take action.* FDA may consider a biologics license applicant or supplement applicant's failure to either resubmit or withdraw the application or supplement within 1 year after receiving a complete response letter to be a request by the applicant to withdraw the application or supplement.

Dated: July 9, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–16476 Filed 7–19–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–104683–00]

RIN 1545–AX88

Partial Withdrawal of Proposed Regulations Relating to the Application of Section 904 to Income Subject To Separate Limitations and Computation of Deemed-Paid Credit Under Section 902

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Partial withdrawal of notice of proposed rulemaking.

SUMMARY: This document withdraws a portion of a notice of proposed rulemaking published on January 3, 2001, relating to the application of the foreign tax credit limitation under section 904 and the deemed-paid credit under section 902.

DATES: The withdrawal of proposed §§ 1.902–0, 1.902–1 and 1.904–4(g) is made on July 20, 2004.

FOR FURTHER INFORMATION CONTACT: Bethany A. Ingwalson, (202) 622–3850 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On January 3, 2001, the Treasury Department and the IRS published in the **Federal Register** (66 FR 319) a notice of proposed rulemaking (REG–104683–00) providing guidance with respect to the application of sections 902 and 904. Written comments were received and a public hearing on the proposed regulations was held on April 26, 2001. After consideration of the comments received, the Treasury Department and the IRS are withdrawing the portions of the proposed regulations that would have amended §§ 1.902–1 and 1.904–4(g). The amendments to § 1.902–1 would have terminated the pooling of a foreign corporation's post-1986 undistributed earnings and foreign income taxes if the ownership requirements of section 902(c)(3)(B) were not met as of the end of any taxable year. The amendments to § 1.904–4(g) would have disallowed look-through treatment for a dividend paid by a CFC or noncontrolled section 902 corporation out of E&P accumulated while the corporation was a look-through entity (*i.e.*, the corporation was a CFC or, for tax years beginning after December 31, 2002, a noncontrolled section 902 corporation) if paid after an intervening period during which the corporation was a non-look-through entity (*i.e.*, a less-than-10%-U.S.-owned corporation or, for tax years beginning on or before December 31, 2002, a noncontrolled section 902 corporation).

Final regulations adopting the remaining portions of the proposed regulations are being published in the Rules and Regulations section in this issue of the **Federal Register**. See the preamble to the final regulations for a discussion of the reasons §§ 1.902–1 and 1.904–4(g) are being withdrawn.

Drafting Information

The principal author of this withdrawal notice is Bethany A. Ingwalson, Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in its development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Partial Withdrawal of a Notice of Proposed Rulemaking

Accordingly, under the authority of 26 U.S.C. 7805, §§ 1.902–0, 1.902–1 and 1.904–4(g) of the notice of proposed rulemaking published in the **Federal Register** (66 FR 319) on January 3, 2001 are withdrawn.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 04–16375 Filed 7–19–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–124405–03]

RIN 1545–BC13

Optional 10-Year Writeoff of Certain Tax Preferences

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the optional 10-year writeoff of certain tax preference items under section 59(e) of the Internal Revenue Code (Code). These proposed regulations provide guidance on the time and manner of making an election under section 59(e). The regulations also provide guidance on revoking an election under section 59(e). The regulations reflect changes to the law made by the Tax Reform Act of 1986, the Technical and Miscellaneous Revenue Act of 1988, and the Omnibus Budget Reconciliation Act of 1989.

DATES: Written or electronic comments and requests for a public hearing must be received by October 18, 2004.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–124405–03), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–124405–03), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC or sent electronically via the IRS Internet site at *http://www.irs.gov/regs* or via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS and REG–124405–03).

FOR FURTHER INFORMATION CONTACT: Concerning these proposed regulations, Eric B. Lee, (202) 622–3120; concerning submissions of comments and requests for a public hearing, LaNita VanDyke, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by September 20, 2004. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in this proposed regulation is in § 1.59–1(b). This collection of information is required by the IRS to verify compliance with section 59(e). This information will be used to determine whether the amount of tax has been calculated correctly. The collection of information is required to obtain a benefit. The respondents are certain taxpayers who pay or incur expenditures described in section 59(e)(2).

Taxpayers provide the information on a statement that is attached to their federal income tax return for the taxable year the section 59(e) election is effective.

The estimated burden for the collection of information in § 1.59–1(b) is as follows:

Estimated total annual reporting burden: 10,000 hours.

Estimated annual burden per respondent: 1 hour.

Estimated number of respondents: 10,000.

Estimated annual frequency of responses: On occasion.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

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.

Background

This document contains proposed amendments to 26 CFR part 1 under section 59(e) of the Code. Section 59(e)(1) allows taxpayers to elect to deduct any qualified expenditure ratably over a 10-year period (3-year period in the case of circulation expenditures described in section 173) beginning with the taxable year in which the expenditure was made (or, in the case of a *qualified expenditure* under section 263(c), over the 60-month period beginning with the month in which such expenditure was paid or incurred). Section 59(e)(2) defines *qualified expenditure* as any amount which, but for an election under section 59(e), would have been allowed as a deduction (determined without regard to section 291) for the taxable year in which paid or incurred under section 173 (relating to circulation expenditures), section 174 (relating to research and experimental expenditures), section 263(c) (relating to intangible drilling and development expenditures), section 616(a) (relating to development expenditures), or section 617(a) (relating to mining exploration expenditures).

Section 59(e)(4)(A) states that an election under section 59(e) (section 59(e) election) may be made with respect to any portion of any qualified expenditure. The legislative history of section 59(e) suggests that this allows a section 59(e) election to be made ''dollar for dollar.'' See H.R. Rep. 99–426, 99th Cong., 1st Sess. 327 (1985), 1986–3 (Vol. 2) C.B. 1, 327; S. Rep. No. 99–313, 99th Cong., 2d Sess. 539 (1986), 1986–3 (Vol. 3) C.B. 1, 539.

Section 59(e)(4)(B) states that a section 59(e) election may only be revoked with the consent of the Secretary.

Provisions similar to those currently contained in section 59(e) were originally enacted as section 58(i) under the Tax Equity and Fiscal Responsibility Act of 1982, (Public Law 97–248; 96 Stat. 324). Under section 58(i)(1), the optional 10-year writeoff was available only to individuals. Section 58(i)(5)(C) directed the Secretary to promulgate regulations governing the time and manner for making an election under section 58(i) (section 58(i) election). Section 5f.0(a)(2)(i)(A) and (B) of the temporary Income Tax Regulations that were promulgated under section 58(i) required that a section 58(i) election be made by the later of the due date

(including extensions) of the income tax return for the taxable year for which the election was to be effective, or April 15, 1983. TD 7870, 48 FR 1486. Section 5f.0(a)(3) provided that a section 58(i) election was made by attaching a statement to the income tax return (or amended return) for the taxable year in which the election was made. Section 5f.0 was redesignated as § 301.9100–5T by TD 8435, 57 FR 43893 on October 15, 1992.

Section 59(e) was enacted as part of the Tax Reform Act of 1986 (Public Law 99–514; 100 Stat. 2085) and, unlike section 58(i), is not limited to individuals. While both the Senate Finance Committee Report and the House Ways and Means Committee Report state that the time and manner of the election would be governed by regulations, Congress did not include a provision similar to former section 58(i)(5)(C) directing the Secretary to promulgate regulations governing the time and manner for making a section 59(e) election. See H.R. Rep. No. 99–426, 99th Cong., 1st Sess. 327 (1985), 1986–3 (Vol. 2) C.B. 1, 327; S. Rep. No. 99–313, 99th Cong., 2d Sess. 539 (1986), 1986–3 (Vol. 3) C.B. 1, 539.

Explanation of Provisions

The proposed regulations provide that a section 59(e) election shall only be made on a statement attached to the taxpayer's income tax return (or amended return) for the taxable year in which the amortization of the qualified expenditures subject to the section 59(e) election begins. A taxpayer must make a separate election for each specific activity or project with respect to which qualified expenditures are paid or incurred. The statement must be filed no later than the date prescribed by law for filing the taxpayer's original income tax return (including any extensions of time) for the taxable year in which the amortization of the qualified expenditures subject to the section 59(e) election begins. The statement must contain: (i) The taxpayer's name, address, and taxpayer identification number; (ii) the type and amount, for each activity or project, of qualified expenditures identified in section 59(e)(2) the taxpayer elects to deduct ratably over the applicable period described in section 59(e)(1); and (iii) a description of each specific activity or project to which the qualified expenditures relate. For example, if a taxpayer makes a section 59(e) election with respect to research and experimental expenditures incurred during the taxable year for three separate projects, the election statement must provide for each research project the amount of qualified expenditures subject to the election and a description of the research project. Additionally, the election must be made in terms of a specific dollar amount of qualified expenditure and cannot be made with reference to a formula.

The proposed regulations also provide that a section 59(e) election may be revoked for any project or activity only with the consent of the Commissioner and that such consent will only be granted in rare and unusual circumstances. A taxpayer must request the Commissioner's consent to revoke a section 59(e) election prior to the end of the taxable year in which the applicable amortization period described in section 59(e)(1) ends. The revocation, if granted, will be effective retroactively to the first taxable year the section 59(e) election was applicable. However, if the period of limitations for the first taxable year the section 59(e) election was applicable has expired, the revocation, if granted, will be effective in the earliest taxable year for which the period of limitations has not expired. For example, if a calendar year taxpayer makes a section 59(e) election for the taxpayer's 2003 taxable year with respect to three different projects and on June 30, 2005, requests consent to revoke the election with respect to one project, the revocation, if granted by the Commissioner prior to the expiration of the period of limitations for the taxpayer's 2003 taxable year, is effective for the taxpayer's 2003 taxable year. The amount of the qualified expenditures subject to the section 59(e) election with respect to the one project will be deductible in the taxpayer's 2003 taxable year (subject to the requirements of any other provision under the Code, regulations, or any other published guidance) and the taxpayer will be required to amend any income tax returns affected by the revocation.

The proposed regulations apply to a section 59(e) election made for a taxable year ending, or a request to revoke a section 59(e) election submitted, on or after the date the final regulations are published in the **Federal Register**. Additionally, an otherwise valid section 59(e) election filed for a tax year ending prior to the date final regulations are published in the **Federal Register** will not be challenged by the IRS merely because the election was made later than the date prescribed by law for filing the taxpayer's original income tax return (including any extensions of time) for the taxable year in which the amortization of the qualified expenditures subject to the section 59(e) begins.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that the reporting burden, as discussed earlier in this preamble, is expected to be insignificant. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and 8 copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how the proposed rules can be made easier to understand and comply with. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Eric B. Lee of the Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

Paragraph 1. The authority citation for part 1 reads, in part, as follows:

Authority: 26 U.S.C. 7805.

Par. 2. Section 1.59–1 is added to read as follows:

§ 1.59–1 Optional 10-year writeoff of certain tax preferences.

(a) *In general.* Section 59(e) allows any qualified expenditure to which an election under section 59(e) applies to be deducted ratably over the 10-year period (3-year period in the case of circulation expenditures described in section 173) beginning with the taxable year in which the expenditure was made (or, in the case of intangible drilling and development costs deductible under section 263(c), over the 60-month period beginning with the month in which the expenditure was paid or incurred).

(b) *Election*—(1) *Time and manner of election.* An election under section 59(e) shall only be made by attaching a statement to the taxpayer's income tax return (or amended return) for the taxable year in which the amortization of the qualified expenditures subject to the section 59(e) begins. A taxpayer must make a separate election for each specific activity or project with respect to which qualified expenditures are paid or incurred. The statement must be filed no later than the date prescribed by law for filing the taxpayer's original income tax return (including any extensions of time) for the taxable year in which the amortization of the qualified expenditures subject to the section 59(e) begins. Additionally, the statement must include the following information—

(i) The taxpayer's name, address, and taxpayer identification number;

(ii) The type and amount, for each activity or project, of qualified expenditures identified in section 59(e)(2) the taxpayer elects to deduct ratably over the applicable period described in section 59(e)(1); and

(iii) A description of each specific activity or project to which the qualified expenditures identified in paragraph (b)(1)(ii) of this section relate.

(2) *Elected amount.* A taxpayer may make an election under section 59(e) with respect to any portion of any qualified expenditure paid or incurred by the taxpayer in the taxable year to which the election applies. An election under section 59(e) must be for a specific dollar amount and the amount subject to an election under section 59(e) may not be made by reference to a formula.

(c) *Revocation*—(1) *In general.* An election under section 59(e) may be revoked for any project or activity only with the consent of the Commissioner. Such consent will only be granted in rare and unusual circumstances. The revocation, if granted, will be effective in the first taxable year in which the section 59(e) election was applicable. However, if the period of limitations for the first taxable year the section 59(e) election was applicable has expired, the revocation, if granted, will be effective in the earliest taxable year for which the period of limitations has not expired.

(2) *Time and manner for requesting consent.* A taxpayer requesting the Commissioner's consent to revoke a section 59(e) election must submit the request prior to the end of the taxable year the applicable amortization period described in section 59(e)(1) ends. The application for consent to revoke the election must be submitted to the Internal Revenue Service in the form of a letter ruling request.

(3) *Information to be provided.* A request to revoke a section 59(e) election must contain all of the information necessary to support why the Commissioner's consent should be granted and must specify the project activity to which the revocation shall apply.

(4) *Treatment of unamortized costs.* The unamortized balance of the qualified expenditures subject to the revoked section 59(e) election as of the first day of the taxable year the revocation is effective is deductible in the year the revocation is effective (subject to the requirements of any other provision under the Code, regulations, or any other published guidance) and the taxpayer will be required to amend any income tax returns affected by the revocation.

(d) *Effective date.* These regulations apply to a section 59(e) election made for a taxable year ending, or a request to revoke a section 59(e) election submitted, on or after the date the final regulations are published in the **Federal Register**.

Mark Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 04–16474 Filed 7–19–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG–131786–03]

RIN 1545–BC32

Deemed Election To Be an Association Taxable as a Corporation for a Qualified Electing S Corporation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross reference to temporary regulations.

SUMMARY: In the rules and regulations portion of this issue of the **Federal Register**, the IRS is issuing temporary regulations that deem certain eligible entities that file timely S corporation elections to have elected to be classified as associations taxable as corporations. The text of those temporary regulations also serves as the text of these proposed regulations. These regulations affect certain eligible entities filing timely elections to be S corporations on or after July 20, 2004.

DATES: A request for a public hearing and written or electronic comments must be received by October 18, 2004.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–131786–03), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC, 20044. Submissions may be hand delivered between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–131786–03), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically, via the IRS Internet site at: *www.irs.gov/regs* or via the Federal E-Rulemaking Portal at *www.regulations.gov* (IRS and REG–131786–03).

FOR FURTHER INFORMATION CONTACT: Rebekah A. Myers at (202) 622–3050 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Temporary regulations published elsewhere in this issue of the **Federal Register** amend § 301.7701–3T(c)(1)(v)(C) to provide that certain eligible entities that file timely S corporation elections are deemed to have elected to be classified as associations taxable as corporations. The text of the temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations.

Special Analysis

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore a regulatory assessment is not required. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that the purpose of the regulation is to decrease the number of entities required to file an entity classification election, Form 8832. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this Notice of proposed regulation will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of this regulation is Rebekah A. Myers, Office of Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate and excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 301.7701–3 is amended by adding paragraphs (c)(1)(v)(C) and (h)(3) to read as follows:

§ 301.7701–3 Classification of certain business entities.

[The text of the proposed amendment is the same as the text of § 301.7701–3T published elsewhere in this issue of the **Federal Register**].

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 04–16233 Filed 7–19–04; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R05–OAR–2004–OH–0001; FRL–7789–3]

Approval and Promulgation of Implementation Plans; Ohio

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve Ohio's submittal of a revision to the Ohio portion of the Cincinnati 1-Hour ozone maintenance plan under the Clean Air Act. Ohio held a public hearing on the submittal on March 30, 2004. This maintenance plan revision establishes a new transportation conformity motor vehicle emissions budget (MVEB) for the area for the year 2010. EPA is approving the allocation of a portion of the safety margin for oxides of nitrogen (NO_X) to the area's 2010 MVEB for transportation conformity purposes. This allocation will still maintain the total emissions for the area at or below the attainment level required by the transportation conformity regulations. The transportation conformity budget for volatile organic compounds will remain the same as previously approved in the maintenance plan.

In the final rules section of this **Federal Register**, EPA is approving the SIP revision as a direct final rule without prior proposal, because EPA views this as a noncontroversial revision and anticipate no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this proposed rule, no further activity is contemplated in relation to this proposed rule. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time.

DATES: Written comments must be received on or before August 19, 2004.

ADDRESSES: Submit comments, identified by Docket ID No. R05–OAR–2004–OH–0001 by one of the following methods: Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

E-mail: *bortzer.jay@epa.gov*.

Fax: (312)886–5824.

Mail: You may send written comments to: J. Elmer Bortzer, Chief, Air Programs Branch, (AR–18J), Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Hand delivery: Deliver your comments to: J. Elmer Bortzer, Chief, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, 18th floor, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. R05–OAR–1994–OH–0001. EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *regulations.gov*, or e-mail. The Federal *regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA

recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, *i.e.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. (We recommend that you telephone Patricia Morris, Environmental Scientist, at (312) 353–8656 before visiting the Region 5 office.) This Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: Patricia Morris, Environmental Scientist, Criteria Pollutant Section, Air Programs Branch (AR–18J), EPA Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312)353–8656. *morris.patricia@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

No, this action is rulemaking on a non-regulatory planning document intended to ensure the maintenance of air quality in the Cincinnati Area.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through EDOCKET, *regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

b. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

d. Describe any assumptions and provide any technical information and/or data that you used.

e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

f. Provide specific examples to illustrate your concerns, and suggest alternatives.

g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

h. Make sure to submit your comments by the comment period deadline identified.

II. Additional Information

For additional information, see the Direct Final Rule which is located in the Rules section of this **Federal Register**. Copies of the request and the EPA's analysis are available electronically at EDOCKET or in hard copy at the above address. (Please telephone Patricia Morris at (312) 353–8656 before visiting the Region 5 Office.)

Dated: July 8, 2004.

Norman Niedergang,

Acting Regional Administrator, Region 5.

[FR Doc. 04–16334 Filed 7–19–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 60

[SIP NO. R08–OAR–2004–MT–0001; FRL–7790–1]

Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Montana; Revisions to the Administrative Rules of Montana; New Source Performance Standards for Montana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule and NSPS delegation.

SUMMARY: EPA is proposing to partially approve and partially disapprove State Implementation Plan (SIP) revisions submitted by the State of Montana on April 18, 2003 and August 20, 2003. The revisions modify the open burning rules, definitions and references to Federal regulations and other materials in the Administrative Rules of Montana. The intended effect of this action is to make federally enforceable those provisions that EPA is proposing to approve and to disapprove those provisions that are not approvable. We are also announcing that on January 9, 2004, we updated the delegation of authority for the implementation of the New Source Performance Standards (NSPS) to the State of Montana. This action is being taken under sections 110 and 111 of the Clean Air Act.

DATES: Comments must be received on or before August 19, 2004.

ADDRESSES: Submit your comments, identified by Docket ID No. R08–OAR–2004–MT–0001, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- Agency Web site: *http://docket.epa.gov/rmepub/index.jsp.* Regional Materials in EDOCKET (RME), EPA's electronic public docket and comment system for regional actions, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- E-mail: *long.richard@epa.gov* and *ostrand.laurie@epa.gov.*
- Fax: (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- Mail: Richard R. Long, Director, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 999 18th Street, Suite 300, Denver, Colorado 80202–2466.

• Hand Delivery: Richard R. Long, Director, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 999 18th Street, Suite 300, Denver, Colorado 80202–2466. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:55 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. R08–OAR–2004–MT–0001. EPA's policy is that all comments received will be included in the public docket without change and may be made available at *http://docket.epa.gov/rmepub/index.jsp*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA's Regional Materials in EDOCKET and Federal regulations.gov Web site are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET online or see the **Federal Register** of May 31, 2002 (67 FR 38102). For additional instructions on submitting comments, go to Section I. General Information of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the Regional Materials in EDOCKET index at *http://docket.epa.gov/rmepub/index.jsp.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in Regional Materials in EDOCKET or in hard copy at the Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202–2466. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Laurie Ostrand, Air and Radiation Program, Mailcode 8P–AR, Environmental Protection Agency (EPA), Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202–2466, (303) 312–6437, *ostrand.laurie@EPA.gov.*

SUPPLEMENTARY INFORMATION:

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Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA*, *we*, *us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *SIP* mean or refer to State Implementation Plan.

(iv) The words *State* or *Montana* mean the State of Montana, unless the context indicates otherwise.

I. General Information

A. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through Regional Materials in EDOCKET, regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

b. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

d. Describe any assumptions and provide any technical information and/or data that you used.

e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

f. Provide specific examples to illustrate your concerns, and suggest alternatives.

g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

h. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. April 18, 2003 Submittal

On April 18, 2003, the Governor submitted a SIP revision that contains amendments to open burning rules at the Administrative Rules of Montana (ARM) 17.8.601, 17.8.604, 17.8.605, 17.8.606, 17.8.610, 17.8.612 and 17.8.614 and an amendment to the incorporation by reference at 17.8.302(f). The amendments allow certain minor open burning to occur in the winter that had previously been prohibited; change the timeframe a landfill burn permit is valid from 30 days to one year and add the requirement that the department or its designated representative inspect burn piles at licensed landfills prior to every burn to ensure that no prohibited materials are in the piles; allow the open burning of the detonation of unexploded ordnance; clarify the materials prohibited from open burning; revise the conditional open burning permit requirements and make minor editorial and grammatical changes. The

submittal also contains amendments to ARM 17.8.302(f)—Incorporation by Reference. The Montana Board of Environmental Review (Board) adopted the amendments on December 6, 2002.

B. August 20, 2003 Submittal

On August 20, 2003, the Governor submitted a SIP revision that contains amendments to definitions and incorporation by reference of current Federal regulations and other material into air quality rules at ARM 17.8.101, 17.8.102, 17.8.103, 17.8.106, 17.8.110, 17.8.302, 17.8.401, 17.8.402, 17.8.801, 17.8.802, 17.8.818, 17.8.819, 17.8.821, 17.8.901, 17.8.902, 17.8.905, 17.8.1002. The amendments update Federal citations, make clerical amendments, and eliminate the duplication of statutory language in definitions by citing to the definitions in the statute. The Board adopted the amendments on March 28, 2003.

III. EPA's Review of the State of Montana's April 18, 2003 and August 20, 2003 Submittals

A. April 18, 2003 Submittal

1. Changes to Sub-Chapter 6—Open Burning

a. Review of changes to ARM 17.8.601—Definitions: The State is revising the definition of ''best available control technology (BACT)'' in ARM 17.8.601(1). As discussed in the review of changes to ARM 17.8.605 and 606, the State is revising the open burning rules to allow the open burning of additional source categories year round. The definition of BACT is being revised to indicate that BACT, for the additional source categories, includes only burning during time periods specified by the department, which may be determined by calling the department. The State is also revising the definition of ''open burning'' in ARM 17.8.601(7) to indicate that open burning does not include the detonation of unexploded ordnance. We were originally concerned that adding this exclusion to the definition might be considered a SIP relaxation. However, the State has indicated that the detonation of unexploded ordnance was never considered open burning, because unexploded ordnance may pose an imminent threat to public safety and health. Additionally, the detonation of unexploded ordnance is also subject to permitting required under Montana's Hazardous Waste Management Rules. Therefore, even though the detonation of unexploded ordnance may not be subject to the open burning regulations it would likely be subject to hazardous waste permitting requirements. Finally, the State is making administrative changes to the definition of ''trade wastes'' in ARM 17.8.601(10). We are proposing to approve these changes.

b. Review of changes to ARM 17.8.604—Materials Prohibited From Open Burning: The State is revising ARM 17.8.604(1) to clarify the material that may not be disposed of by open burning. We do not believe the changes impact the stringency of the rule. However, with the changes, the State is adding a department discretion provision. Specifically, ARM 17.8.604(1)(a) indicates that waste moved from the premises where is was generated may not be disposed of by open burning except as provided by other provisions in the rule or ''or unless approval is granted by the department on a case-by-case basis.'' The phrase ''or unless approval is granted by the department on a case-by-case basis'' is considered a department discretion. A department discretion provision allows the Department to revise the SIP without completing a formal SIP revision. We cannot approve department discretion provisions because they are inconsistent with section 110(i) of the Act. Therefore, we are proposing to approve the changes to ARM 17.8.604(1) except that we are proposing to disapprove the phrase ''or unless approval is granted by the department on a case-by-case basis'' in ARM 17.8.604(1)(a).

c. Review of changes to ARM 17.8.605—Special Burning Periods: The State is revising ARM 17.8.605(1) to add the following categories that may burn during the entire year: conditional air quality open burning, commercial film production open burning, Christmas tree waste open burning, and any minor open burning that is not prohibited by ARM 17.8.604 or that is allowed by ARM 17.8.606. Initially we were concerned that allowing the open burning during the entire year for these additional categories would be considered a relaxation of the SIP and could interfere with attainment of the national ambient air quality standards (NAAQS) or reasonable further progress. The State explained ''that allowing open burning to take place during periods when it is currently prohibited does not increase the total amount of burning that takes place. The burning that is going to take place is merely spread throughout the entire year. This reduces emissions during the fall and spring. Allowing minor open burning to occur under favorable conditions during the winter months will not endanger ambient air quality standards since the burning would be allowed only at times and in places where the ventilation is sufficient to protect ambient standards.''

Additionally, for conditional air quality open burning, commercial film production open burning and Christmas tree waste open burning, the states rules require that department only issue a permit under its rules if the open burning will not cause or contribute to a violation of the NAAQS and that the open burn conform to BACT (see ARM 17.8.612, 614 and 613, respectively). Among other things, BACT also requires that these additional categories to only burn during the time periods specified by the department (see ARM 17.8.601(1)). We are no longer concerned that the changes to ARM 17.8.605(1) will jeopardize the NAAQS and we are proposing to approve these changes.

d. Review of changes to ARM 17.8.606—Minor Open Burning Source Requirements: The State is revising ARM 17.8.606(3) and (4) to clarify that minor open burning sources need to call the department during certain times of the year to determine if there are any burning restrictions. We are proposing to approve these changes.

e. Review of changes to ARM 17.8.610—Major Open Burning Source Restrictions: The State is making some minor editorial changes to ARM 17.8.610(4). We are proposing to approve these changes.

f. Review of changes to ARM 17.8.612—Conditional Air Quality Open Burning Permits: The State is making changes to ARM 17.8.612(4) and (5) to make the open burning requirements consistent with State and Federal solid waste rules that regulate such burning. We are proposing to approve these changes.

g. Review of changes to ARM 17.8.614—Commercial Film Production Open Burning Permits: The State is making some minor editorial changes to ARM 17.8.614(1). We are proposing to approve these changes.

2. Changes to Sub-Chapter 3—Emission Standards

a. Review of changes to ARM 17.8.302—Incorporation by Reference: The State is revising ARM 17.8.302(f) to update a citation to a Federal rule. We are proposing to approve these changes.

B. August 20, 2003 Submittal

1. Changes to Sub-Chapter 1—General Provisions.

a. Review of changes to ARM 17.8.101—Definitions: The State is updating citations, making minor clerical amendments and eliminating the duplication of statutory language in definitions by citing the definition in the statute; in lieu of repeating

definitions that are contained in the statute, otherwise known as the Montana Code Annotated (MCA), the State is referencing the definition in the MCA. The definitions in ARM 17.8.101 that are being replaced with a reference to the MCA, at this time, are the same. We were originally concerned that the MCA could be revised and that in effect would change the SIP without going through a formal SIP revision. However, ARM 17.8.102—Incorporation by Reference—Publication Dates and Availability of Referenced Documents—references the specific edition (or date) of MCA that is referenced in the rules. As the MCA is updated, the specific edition (or date) will also be updated in the SIP. Updating the specific edition of the MCA is the mechanism that the definitions in the SIP (in ARM 17.8.101) will be updated when the MCA definitions are amended. We are including in the docket for this action a copy of the section 75–2–103 of the MCA (2001 edition) to show the definitions the State intended to be in the SIP with this submittal. We will evaluate any changes to definitions when the State submits SIP revisions that update the editions (or date) of the MCA in ARM 17.8.102. With this submittal, the State also deleted the definition contained in ARM 17.8.101(43). The specific sections the State is revising include: ARM 17.8.101(2), (8), (9), (12), (19), (20), (22), (23), (30) and (36). We are proposing to approve these changes.

b. Review of changes to ARM 17.8.102—Incorporation by Reference—Publication Dates and Availability of Referenced Documents: The State is updating the date of referenced documents. We are proposing to approve these changes.

c. Review of changes to ARM 17.8.103—Incorporation by Reference: The State is updating citations, making wording consistent throughout and changing the order of subsections to a more logical sequence in ARM 17.8.103(1). We are proposing to approve these changes.

d. Review of changes to ARM 17.8.106—Source Testing Protocol: The State is making minor clerical amendments and revising the numbering to conform to State requirements. We are proposing to approve these changes.

e. Review of changes to ARM 17.8.110—Malfunctions: The State is deleting an outdated telephone number and making a minor clerical correction in ARM 17.8.110(2). We are proposing to approve these changes.

2. Changes to Sub-Chapter 3—Emission Standards

a. Review of changes to ARM 17.8.302—Incorporation by Reference: The State is updating citations, making wording consistent throughout and changing the order of subsections to a more logical sequence in ARM 17.8.302(1). We are proposing to approve these changes.

3. Changes to Sub-Chapter 4—Stack Heights and Dispersion Techniques

a. Review of changes to ARM 17.8.401—Definitions: The State is making minor clerical changes and revising the numbering to conform to State requirements. We are not acting on these changes at this time for the same reasons stated on our August 13, 2001 action (66 FR 42427 at 42434).

b. Review of changes to ARM 17.8.402—Requirements: The State is making minor clerical changes. We are not acting on these changes at this time for the same reasons stated on our August 13, 2001 action (66 FR 42427 at 42434).

4. Changes to Sub-Chapter 8—Prevention of Significant Deterioration of Air Quality

a. Review of changes to ARM 17.8.801—Definitions: The State is making minor clerical changes, updating citations and revising the numbering to conform to State requirements. The specific sections the State is revising include: ARM 17.8.801(1), (3), (4), (6), (20), (21), (22), (24), (27) and (28). We are proposing to approve these changes.

b. Review of changes to ARM 17.8.802—Incorporation by Reference: The State is updating citations, making wording consistent throughout and changing the order of subsections to a more logical sequence in ARM 17.8.802(1). We are proposing to approve these changes.

c. Review of changes to ARM 17.8.818—Review of Major Stationary Sources and Major Modifications—-Source Applicability and Exemptions: The State is updating citations in ARM 17.8.818(2), (3), and (6). We are proposing to approve these changes.

d. Review of changes to ARM 17.8.819—Control Technology Review: The State is updating a citation in ARM 17.8.819(3). We are proposing to approve these changes.

e. Review of changes to ARM 17.8.821—Air Quality Models: The State is updating citations. We are proposing to approve these changes.

5. Changes to Sub-Chapter 9—Permit Requirements for Major Stationary Sources or Major Modifications Locating Within Nonattainment Areas

a. Review of changes to ARM 17.8.901—Definitions: The State is making minor clerical changes, updating citations and revising the numbering to conform to State requirements. The specific sections the State is revising include: ARM 17.8.901(1), (11), (12) and (14). We are proposing to approve these changes.

b. Review of changes to ARM 17.8.902—Incorporation by Reference: The State is updating citations, making wording consistent throughout and changing the order of subsections to a more logical sequence in ARM 17.8.902(1). We are proposing to approve these changes.

c. Review of changes to ARM 17.8.905—Additional Conditions of Air Quality Preconstruction: The State is updating citations in ARM 17.8.905(1)(c). We are proposing to approve these changes.

6. Changes to Sub-Chapter 10—Preconstruction Permit Requirements for Major Stationary Sources or Major Modifications Locating Within Attainment or Unclassified Areas

a. Review of changes to ARM 17.8.1002—Incorporation by Reference: The State is updating citations, making wording consistent throughout and changing the order of subsections to a more logical sequence in ARM 17.8.1002(1). We are proposing to approve these changes.

IV. Announcement of NSPS Delegation

EPA is announcing that on January 9, 2004, pursuant to section 111(c) of the Act, we delegated the authority to the State of Montana to implement and enforce the NSPS. The January 9, 2004 letter follows:

Ref: 8P–AR

Honorable Judy Martz, Governor of Montana, State Capitol, Helena, Montana 59620–0801.

Dear Governor Martz: On August 20, 2003, the State submitted a revision to the Administrative Rules of Montana (ARM) 17.8.102. Specifically, the State revised its rules to incorporate the July 1, 2002 Code of Federal Regulations. This revision, in effect, updates the citation of the incorporated Federal New Source Performance Standards (NSPS) to July 1, 2002.

Subsequent to States adopting NSPS regulations, EPA delegates the authority for the implementation and enforcement of those NSPS, so long as the State's regulations are equivalent to the Federal regulations. EPA reviewed the pertinent statutes and regulations of the State of Montana and determined that they provide an adequate

and effective procedure for the implementation and enforcement of the NSPS by the State of Montana. Therefore, pursuant to Section 111(c) of the Clean Air Act (Act), as amended, and 40 CFR Part 60, EPA hereby delegates its authority for the implementation and enforcement of the NSPS to the State of Montana as follows:

(A) Responsibility for all sources located, or to be located, in the State of Montana subject to the standards of performance for new stationary sources promulgated in 40 CFR Part 60. The categories of new stationary sources covered by this delegation are all NSPS subparts in 40 CFR Part 60, as in effect on July 1, 2002. *Note this delegation does not include the emission guidelines in subparts Cb, Cc, Cd, Ce, BBBB and DDDD. These subparts require state plans which are approved under a separate process pursuant to Section 111(d) of the Act.*

(B) Not all authorities of NSPS can be delegated to States under Section 111(c) of the Act, as amended. The EPA Administrator retains authority to implement those sections of the NSPS that require: (1) Approving equivalency determinations and alternative test methods, (2) decision making to ensure national consistency, and (3) EPA rulemaking to implement. Therefore, of the NSPS of 40 CFR Part 60 being delegated in this letter, the enclosure lists examples of sections in 40 CFR Part 60 that cannot be delegated to the State of Montana.

(C) The DEQ and EPA will continue a system of communication sufficient to guarantee that each office is always fully informed and current regarding compliance status of the subject sources and interpretation of the regulations.

(D) Enforcement of the NSPS in the State will be the primary responsibility of the DEQ. If the DEQ determines that such enforcement is not feasible and so notifies EPA, or where the DEQ acts in a manner inconsistent with the terms of this delegation, EPA may exercise its concurrent enforcement authority pursuant to section 113 of the Act, as amended, with respect to sources within the State of Montana subject to NSPS.

(E) The State of Montana will at no time grant a variance or waiver from compliance with NSPS regulations. Should DEQ grant such a variance or waiver, EPA will consider the source receiving such relief to be in violation of the applicable Federal regulation and initiate enforcement action against the source pursuant to section 113 of the Act. The granting of such relief by the DEQ shall also constitute grounds for revocation of delegation by EPA.

(F) If at anytime there is a conflict between a State regulation and a Federal regulation (40 CFR Part 60), the Federal regulation must be applied if it is more stringent than that of the State. If the State does not have the authority to enforce the more stringent Federal regulation, this portion of the delegation may be revoked.

(G) If the Regional Administrator determines that a State procedure for enforcing or implementing the NSPS is inadequate, or is not being effectively carried out, this delegation may be revoked in whole or part. Any such revocation shall be effective as of the date specified in a Notice of Revocation to the DEQ.

(H) Acceptance of this delegation of presently promulgated NSPS does not commit the State of Montana to accept delegation of future standards and requirements. A new request for delegation will be required for any standards not included in the State's request of August 20, 2003.

(I) Upon approval of the Regional Administrator of EPA Region VIII, the Director of DEQ may subdelegate his/her authority to implement and enforce the NSPS to local air pollution control authorities in the State when such authorities have demonstrated that they have equivalent or more stringent programs in force.

(J) The State of Montana must require reporting of all excess emissions from any NSPS source in accordance with 40 CFR 60.7(c).

(K) Performance tests shall be scheduled and conducted in accordance with the procedures set forth in 40 CFR Part 60 unless alternate methods or procedures are approved by the EPA Administrator. Although the Administrator retains the exclusive right to approve equivalent and alternate test methods as specified in 40 CFR 60.8(b)(2) and (3), the State may approve minor changes in methodology provided these changes are reported to EPA Region VIII. The Administrator also retains the right to change the opacity standard as specified in 40 CFR 60.11(e).

(L) Determinations of applicability such as those specified in 40 CFR 60.5 and 60.6 shall be consistent with those which have already been made by the EPA.

(M) Alternatives to continuous monitoring procedures or reporting requirements, as outlined in 40 CFR 60.13(i), may be approved by the State with the prior concurrence of the Regional Administrator.

(N) If a source proposes to modify its operation or facility which may cause the source to be subject to NSPS requirements, the State shall notify EPA Region VIII and obtain a determination on the applicability of the NSPS regulations.

(O) Information shall be made available to the public in accordance with 40 CFR 60.9. Any records, reports, or information provided to, or otherwise obtained by, the State in accordance with the provisions of these regulations shall be made available to the designated representatives of EPA upon request.

(P) All reports required pursuant to the delegated NSPS should not be submitted to the EPA Region VIII office, but rather to the DEQ.

(Q) As 40 CFR Part 60 is updated, Montana should revise its regulations accordingly and in a timely manner and submit to EPA requests for updates to its delegation of authority.

EPA is approving Montana's request for NSPS delegation for all areas within the State except for the following: Lands within the exterior boundaries of the Northern Cheyenne, Rocky Boys, Blackfeet, Crow, Flathead, Fort Belknap, and Fort Peck Indian Reservations; and any other areas which are Indian Country within the meaning of 18 U.S.C. 1151.

Since this delegation is effective immediately, there is no need for the State to notify the EPA of its acceptance. Unless we receive written notice of objections from you within ten days of the date on which you receive this letter, the State of Montana will be deemed to accept all the terms of this delegation. EPA will publish an information notice in the **Federal Register** in the near future to inform the public of this delegation, in which this letter will appear in its entirety.

If you have any questions on this matter, please contact me or have your staff contact Richard Long, Director of our Air and Radiation Program. We can both be reached at (800) 227–8917.

Sincerely yours,
Robert E. Roberts,
Regional Administrator.

Enclosure.

cc: Jan Sensibaugh, Director, Montana Department of Environmental Quality.
John Wardell, 8MO.

Enclosure to Letter Delegating NSPS in 40 CFR Part 60, Effective Through July 1, 2002, to the State of Montana.

EXAMPLES OF AUTHORITIES IN 40 CFR PART 60 WHICH CANNOT BE DELEGATED

40 CFR subparts	Section(s)
A	60.8(b)(2) and (b)(3), and those sections throughout the standards that reference 60.8(b)(2) and (b)(3); 60.11(b) and (e).
Da	60.45a.
Db	60.44b(f), 60.44b(g) and 60.49b(a)(4).
Dc	60.48c(a)(4).
Ec	60.56c(i), 60.8.
J	60.105(a)(13)(iii) and 60.106(i)(12).
Ka	60.114a.
Kb	60.111b(f)(4), 60.114b, 60.116b(e)(3)(iii), 60.116b(e)(3)(iv), and 60.116b(f)(2)(iii).
O	60.153(e).
S	60.195(b).

EXAMPLES OF AUTHORITIES IN 40 CFR PART 60 WHICH CANNOT BE DELEGATED—Continued

40 CFR subparts	Section(s)
DD	60.302(d)(3).
GG	60.332(a)(3) and 60.335(a).
VV	60.482–1(c)(2) and 60.484.
WW	60.493(b)(2)(i)(A) and 60.496(a)(1).
XX	60.502(e)(6).
AAA	60.531, 60.533, 60.534, 60.535, 60.536(i)(2), 60.537, 60.538(e) and 60.539.
BBB	60.543(c)(2)(ii)(B).
DDD	60.562–2(c).
GGG	60.592(c).
III	60.613(e).
JJJ	60.623.
KKK	60.634.
NNN	60.663(f).
QQQ	60.694.
RRR	60.703(e).
SSS	60.711(a)(16), 60.713(b)(1)(i) and (ii), 60.713(b)(5)(i), 60.713(d), 60.715(a) and 60.716.
TTT	60.723(b)(1), 60.723(b)(2)(i)(C), 60.723(b)(2)(iv), 60.724(e) and 60.725(b).
VVV	60.743(a)(3)(v)(A) and (B), 60.743(e), 60.745(a) and 60.746.
WWW	60.754(a)(5).
CCCC	60.2030(c) identifies authorities in Subpart CCCC that cannot be delegated to the State.

V. Proposed Action

EPA is proposing to approve the following changes to the Administrative Rules of Montana (ARM) that were submitted on April 18, 2003 and effective on December 27, 2002: ARM 17.8.302(f); 17.8.601(1), (7) and (10); 17.8.604(1) (except the phrase in 604(1)(a) ''or unless approval is granted by the department on a case-by-case basis''); 17.8.605(1); 17.8.606(3) and (4); 17.8.610(4); 17.8.612(4) and (5); and 17.8.614(1).

EPA is proposing to approve the following changes to the ARM that were submitted on August 20, 2003 and effective on April 11, 2003: ARM 17.8.101(2), (8), (9), (12), (19), (20), (22), (23), (30) and (36); 17.8.102; 17.8.103(1); 17.8.106; 17.8.110(2); 17.8.302(1); 17.8.801(1), (3), (4), (6), (20), (21), (22), (24), (27) and (28); 17.8.802(1); 17.8.818(2), (3) and (6); 17.8.819(3); 17.8.821; 17.8.901(1), (11), (12) and (14); 17.8.902(1); 17.8.905(1)(c); and 17.8.1002(1). We are also proposing to approve the deletion of the definition in ARM 17.8.101(43).

EPA is proposing to disapprove the following change to the ARM that was submitted on April 18, 2003 and effective on December 27, 2002: the phrase ''or unless approval is granted by the department on a case-by-case basis'' in ARM 17.8.604(1)(a).

EPA is not acting on the following changes to the ARM that were submitted on August 20, 2003 and effective on April 11, 2003: ARM 17.8.401 and 17.8.402. These revisions will be addressed in a separate action.

Section 110(l) of the Clean Air Act states that a SIP revision cannot be approved if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress towards attainment of the NAAQS or any other applicable requirements of the Act. The Montana SIP revisions that are the subject of this document do not interfere with the maintenance of the NAAQS or any other applicable requirement of the Act. The April 18, 2003 submittal revises the open burning rules. However, as discussed earlier, we do not believe the changes will impact the NAAQS. The August 20, 2003 submittal merely makes administrative amendments to the State's Administrative Rules of Montana. Therefore, section 110(l) requirements are satisfied.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled ''Regulatory Planning and Review.''

B. Paperwork Reduction Act

Under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, OMB must approve all ''collections of information'' by EPA. The Act defines ''collection of information'' as a requirement for ''answers to * * * identical reporting or recordkeeping requirements imposed on ten or more persons * * *'' 44 U.S.C. 3502(3)(A). Because this proposed rule does not impose an information collection burden, the Paperwork Reduction Act does not apply.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This proposed rule will not have a significant impact on a substantial number of small entities because SIP approvals and disapproval under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve or disapprove requirements that the State is already imposing. Therefore, because the Federal SIP approval/disapproval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to

accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the action proposed does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action proposes to partially approve and partially disapprove pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely proposes to partially approve and partially disapprove a State rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. This action does not involve or impose any requirements that affect Indian tribes. Thus, Executive Order 13175 does not apply to this rule.

EPA specifically solicits additional comment on this proposed rule from tribal officials.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

40 CFR Part 60

Air pollution control, Aluminum, Ammonium sulfate plants, Beverages, Carbon monoxide, Cement industry, Coal, Copper, Dry cleaners, Electric power plants, Fertilizers, Fluoride, Gasoline, Glass and glass products, Grains, Graphic arts industry, Household appliances, Insulation, Intergovernmental relations, Iron, Lead, Lime, Metallic and nonmetallic mineral processing plants, Metals, Motor vehicles, Natural gas, Nitric acid plants, Nitrogen dioxide, Paper and paper products industry, Particulate matter, Paving and roofing materials, Petroleum, Phosphate, Plastics materials and synthetics, Reporting and recordkeeping requirements, Sewage disposal, Steel, Sulfur oxides, Tires, Urethane, Vinyl, Waste treatment and disposal, Wool, Zinc.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: July 13, 2004.

Robert E. Roberts,

Regional Administrator, Region 8.

[FR Doc. 04–16448 Filed 7–19–04; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 1600

[Docket No. WO–350–2520–24 1A]

RIN 1004–AD 57

Land Use Planning

AGENCY: Bureau of Land Management (BLM), Interior.

ACTION: Proposed rule.

SUMMARY: This proposed rule would modify the BLM's planning regulations for three reasons. It defines cooperating agency and cooperating agency status. It clarifies the responsibility of managers to offer this status to qualified agencies and governments and to respond to requests for this status. Finally, it makes clear the rule of cooperating agencies in the various steps of BLM's planning process.

The rule is needed to emphasize the importance of working with federal and state agencies and local and tribal governments through cooperating agency relationships in developing, amending, and revising the Bureau's resource management plans. BLM's current planning regulations do not mention the cooperating agency relationship.

DATES: You should submit your comments on or before September 20, 2004. The BLM may not necessarily consider comments postmarked or received by messenger or electronic mail after the above date in the decision-making process on the final rule.

ADDRESSES:

Mail: Director (630), Bureau of Land Management, Eastern States Office, 7450 Boston Boulevard, Springfield, Virginia, 22153, Attention: RIN 1004–AD57.

Personal or messenger delivery: Room 401, 1620 L Street, NW., Washington, DC, 20036.

Direct Internet: *www.blm.gov/nhp/news/regulatory/index.htm*

Internet e-mail: *WOComment@BLM.gov* (Include ''Attn: AD57''.

Federal eRulemaking Portal: *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Robert Winthrop at (202) 785–6597 or Mark Lambert at (202) 452–7763. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures
II. Background
III. Why Are We Proposing This Rule?
IV. Section-by-Section Analysis
V. Procedural Matters

I. Public Comment Procedures

A. How Do I File Comments?

You may submit your comments by any one of several methods:

- You may mail your comments to: Director (630), Bureau of Land Management, Eastern States Office, 7450 Boston Boulevard, Springfield, Virginia, 22153, Attention: RIN 1004–AD57.
- You may deliver comments to 1620 L Street, NW., Suite 401, Washington, DC 20036.
- You may comment directly via the Internet by accessing our automated commenting system located at *www.blm.gov/mhp/news/regulatory/index.htm* and following the instructions there.
- You may e-mail your comment to: *WOComment@blm.gov* (Include ''Attn: AD57'' in the subject line).

Please make your comments on the proposed rule as specific as possible, confine them to issues pertinent to the proposed rule, and explain the reason for any changes you recommend. Where possible, your comments should reference the specific section or paragraph of the proposal that you are addressing.

The Department of the Interior may not necessarily consider or include in the Administrative Record for the final rule comments that we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

B. May I Review Comments Others Submit?

BLM intends to post all comments on the Internet. If you are requesting that your comment remain confidential, do not send us your comment at the direct internet address or the e-mail address because we immediately post all comments we receive on the internet. Also, comments, including names and street addresses of respondents, will be available for public review at the address listed under **ADDRESSES:** Personal or messenger delivery'' during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday, except holidays.

Individual respondents may request confidentiality, which we will honor to the extent allowable by law. If you wish to withhold your name and address, except for the city or town, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

II. Background

Cooperative agency status provides a formal framework for governmental units—local, state, tribal, or federal—to engage in active collaboration with a lead federal agency to implement the requirements of the National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. 4321, *et seq.* The goals of the cooperating agency relationship include:

- Gaining early and consistent involvement;
- incorporating local knowledge of economic and social conditions;
- addressing intergovernmental issues;
- avoiding duplication of effort; and
- building relationships of trust and collaboration for long-term mutual gain.

To focus our efforts and those of our cooperating agencies, at the start of the land use planning process BLM should indicate general goals of the land use plan, including potential land allocation parameters consistent with statutory and regulatory requirements.

The Council on Environmental Quality (CEQ) defines cooperating agency in regulations implementing NEPA, particularly at 40 CFR 1501.6 and 1508.5. The regulations specify that a federal agency qualifies as a cooperating agency because of ''jurisdiction by law or special expertise'' in federal actions significantly affecting the quality of the human environment. A state agency, local government, or tribal government having similar qualifications may also serve as a cooperating agency. The Federal Land Policy and Management Act of 1976 (FLPMA, 43 U.S.C. 1712(c)(9)) mandates that to the extent practical and consistent with laws governing public lands, BLM coordinate the planning it undertakes with the plans of other federal agencies, state agencies, and local and tribal governments. As proposed here, the cooperating agency relationship complements FLPMA's coordination requirement. It would require BLM,

except in unusual circumstances, to collaborate with its counterparts from cooperating Federal, state, local or tribal agencies or governments in developing or revising BLM's resource management plans. The BLM Planning Handbook (H–1601–1) defines collaboration as ''a cooperative process in which interested parties, often with widely varied interests, work together to seek solutions with broad support for managing public and other lands.''

Because this proposed rule would modify BLM's planning, it does not address the use of the cooperating agency relationship or collaboration with interested parties in other contexts, particularly project-level actions. This proposed rule is not intended to restrict other uses of cooperating agency or collaboration.

III. Why Are We Proposing This Rule?

BLM's policy emphasizes the importance of working with federal and state agencies and local and tribal governments to develop the Bureau's resource management plans. BLM's current planning regulations do not mention the cooperating agency relationship, an important tool for working with other agencies and governments. The proposed rule:

- Defines cooperating agency and cooperating agency status;
- Clarifies the responsibility of managers to offer this status to qualified agencies and governments, and to respond to requests for this status; and,
- Formally establishes the role of cooperating agencies in the various steps of BLM's planning process.

The proposed rule would not make any substantive changes in the public participation requirements found at § 1610.2. These requirements direct BLM to provide the public with meaningful opportunities to participate in the preparation of plans, amendments, and related guidance. The collaboration between BLM and cooperating agencies envisioned by the proposal is in addition to existing requirements to engage the public in the planning process.

Because cooperating agencies are government agencies, any meetings between BLM and agencies that have attained cooperating agency status would not be subject to the requirements of the Federal Advisory Committee Act (FACA), 5 U.S.C. Appendix section 2. This is because Section 204(b) of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, provides that FACA does not apply to meetings held exclusively between Federal officials and officers of state, local, and tribal governments.

BLM is proposing other minor changes not directly related to cooperating agencies that update our planning regulations to reflect our current organizational structure. BLM was reorganized in many district and area jurisdictions. We now use the term ''field office'' in referencing these jurisdictions. Therefore, resource management plan boundaries do not typically follow the previous ''resource area'' boundaries and managers of these new jurisdictions have assumed the title of field manager. These organizational adjustments are reflected in the proposed rule changes.

IV. Section-by-Section Analysis

Section 1601.4 Responsibilities

* * * * *

The only changes proposed for this section are editorial, and would not affect the substance of the rule.

Section 1601.0–5 Definitions

We propose to amend this section by adding definitions of ''cooperating agency'' and ''cooperating agency status.'' The definition of cooperating agency is drawn directly from the cooperating agency definition in the Council of Environmental Quality (CEQ) regulations in 40 CFR 1501.6 and 1508.5. The definition of cooperating agency status makes clear that an agency becomes a cooperating agency only after it has entered into a written agreement with BLM.

We are also adding a definition of Field Manager. The purpose of the definition is to update the regulations to reflect BLM's current organizational structure. In many cases, BLM has moved away from having district offices and subordinate area offices. BLM now has field offices that we formerly called area offices or district offices. However, in some instances, we maintain a district office with subordinate field offices. Therefore, to avoid having to use the term ''District Manager and/or Field Manager'' we are defining Field Manager to include both positions.

Section 1610.1 Resource Management Planning Guidance

The only changes proposed for this section are editorial, and would not affect the substance of the rule.

Section 1610.2 Public Participation

The only changes proposed for this section are editorial, and would not affect the substance of the rule.

Section 1610.3–1 Coordination of Planning Efforts

Changes to this section would provide direction that explicitly requires State Directors and Field Managers to utilize the cooperating agency relationship in their efforts to coordinate with other federal and state agencies and local and tribal governments, where possible and appropriate. We propose to include language instructing State Directors and Field Managers to invite qualifying federal agencies, state and local governments, and tribal governments to participate as cooperating agencies in the development, amendment, and revision of resource management plans. New language also would require Field Managers to consider requests for cooperating agency status from other federal and state agencies and local and tribal governments, and to inform the State Director if the Field Manager denies the request. These changes would provide a more consistent approach to the use of cooperating agencies by the BLM. Other changes proposed for this section are editorial, and would not affect the substance of the rule.

Section 1610.4–1 Identification of Issues

We propose revising this section to instruct Field Managers to collaborate with cooperating agencies throughout the scoping process. Other changes proposed for this section are editorial, and would not affect the substance of the rule.

Section 1610.4–2 Development of Planning Criteria

We propose revising the first sentence of this section to expressly include cooperating agencies among those the BLM will coordinate with in developing planning criteria for resource management plans and revisions.

Section 1610.4–3 Inventory Data and Information Collection

We propose revising the first sentence of this section to instruct Field Managers to collaborate with cooperating agencies in arranging for the collection of data and information. Other changes proposed for this section are editorial, and would not affect the substance of the rule.

Section 1610.4–4 Analysis of the Management Situation

We propose revising the first sentence of this section to instruct Field Managers to collaborate with cooperating agencies in preparing the analysis of the management situation.

Section 1610.4–5 Formulation of Alternatives

We propose revising the first sentence of this section to instruct BLM to

collaborate with cooperating agencies in formulating alternatives. We also would emphasize that the decision to identify a preferred alternative remains the exclusive responsibility of the BLM.

Section 1610.4–6 Estimation of Effects of Alternatives

We propose revising this section to instruct Field Managers to collaborate with cooperating agencies in analyzing and displaying the effects of implementing each alternative. The second sentence would emphasize that the decision to identify a preferred alternative remains the exclusive responsibility of the BLM. Other changes proposed for this section are editorial, and would not affect the substance of the rule.

Section 1610.4–7 Identification of Preferred Alternative

We are changing the title of the section to be consistent with CEQ regulations that address the identification of a preferred alternative, not the selection of the preferred alternative. We propose rewriting the first sentence of this section into two sentences. The first sentence would instruct Field Managers to collaborate with cooperating agencies in evaluating the alternatives and identifying a preferred alternative. The second sentence would emphasize that the decision to identify a preferred alternative remains the exclusive responsibility of the BLM. Other changes proposed for this section are editorial, and would not affect the substance of the rule.

Changing Titles

We are proposing numerous changes throughout Part 1600 when referring to position titles. These changes would replace the title of District Manager and Area Manager with the term Field Manager to reflect the current BLM organization.

V. Procedural Matters

Executive Order 12866, Regulatory Planning and Review

This proposed rule is not a significant regulatory action and is not subject to review by the Office of Management and Budget under Executive Order 12866. The effect of the rule is limited to governmental entities, and merely clarifies within BLM's planning regulations the criteria for cooperating agency relationships, and their application to BLM's planning process. This rule does not create new opportunities or obligations for other agencies beyond those already existing under the Council on Environmental Quality's regulations, particularly 40 CFR 1501.6 and 1508.5.

The proposed rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity competition, jobs, the environment, public health, or safety, of State, local or tribal governments or communities. The proposed rule will not interfere or create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. This proposed rule does not alter the budgetary effects of entitlements, grants, user fees, loan payments, or the right or obligations of their recipients; nor does it raise novel legal or policy issues.

BLM does not have to assess the potential costs and benefits of the rule under section 6(a)(3) of that order because the rule does not meet the criteria for assessment described in that section. That is, the proposed rule does not result in economic impacts of $100 million or more per year, does not propose any novel policy changes, does not cause any significant sectoral impacts, and does not conflict with any other regulations.

Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act of 1980 (RFA), as amended, 5 U.S.C. 601–612, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. This rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act. The effect of the rule is limited to governmental entities, and merely clarifies within BLM's planning regulations the criteria for cooperating agency relationships, and their application to BLM's planning process. While state agencies and local and tribal governments may entail some expense in participating as cooperating agencies in BLM planning processes, their participation is entirely voluntary. Moreover, this rule does not alter their opportunities to participate as cooperating agencies, which is already provided for in the Council on Environmental Quality (40 CFR 1500 *et seq.*) regulations.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule does not have an annual effect on the economy of $100 million or more. It will not cause an increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. While state agencies and local and tribal governments may entail some expense in participating as cooperating agencies in BLM planning processes, their participation is voluntary. This rule does not alter their opportunities to participate as cooperating agencies. The rule does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

BLM has determined that this proposed rule is not significant under the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, because it will not result in State, local, and tribal government, or private sector expenditures of $100 million or more in any one year. This proposed rule will not significantly or uniquely affect small governments. Therefore, BLM is not required to prepare a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq.*).

Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights (Takings)

The proposed rule does not represent a government action capable of interfering with constitutionally protected property rights. Therefore, the Department of the Interior has determined that the rule would not cause a taking of private property or require further discussion of takings implications under this Executive Order.

Executive Order 13132, Federalism

The proposed rule 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. The rule only codifies existing policy that allows states and local government to participate in land use planning with BLM and neither adds nor removes these entities from a decision making role. Therefore, BLM has determined that this proposed rule does not have sufficient Federalism implications to

warrant BLM preparation of a Federalism Assessment.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

The proposed rule does not include policies that have tribal implications as defined in Executive Order 13175. That is, it would not ''have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes''. The proposed rule would not alter the right of a federally recognized tribal government to serve as a cooperating agency in the BLM planning process. Moreover, tribal governments are sovereign dependent nations, standing in a government-to-government relationship with the U.S. government. This provides the primary basis for consultation with federal agencies, taking precedence over any consultation procedures established through regulation, including the rule proposed here.

Executive Order 12988, Civil Justice Reform

Under Executive Order 12988, the Office of the Solicitor has determined that this proposed rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This proposed regulation does not contain any information collection requirements.

National Environmental Policy Act of 1969

BLM has determined that this proposed rule is categorically excluded from environmental review under section 102(2)(c) of the National Environmental Policy Act (NEPA). Under the Department of the Interior Manual 516 DM, Chapter 2, Appendix 1, § 1.10, this proposed rule qualifies as a categorical exclusion because it is procedural in nature and because its environmental effect is too broad, speculative or conjectural to analyze. Furthermore, the proposed rule does not meet any of the 10 criteria for exceptions to the categorical exclusions listed in 516 DM, Chapter 2, Appendix 2. Under Council on Environmental Quality regulations (40 CFR 1508.4) and the environmental policies and procedures of the Department of the Interior, the term ''categorical exclusions'' means a category of actions that do not individually or cumulatively have a significant effect on the human environment and that have been found to have no such effect in procedures adopted by a Federal agency and for which neither an environmental assessment nor an environmental impact statement is required.

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

In accordance with Executive Order 13211, BLM has determined that the proposed rule will not have substantial direct effects on the energy supply, distribution or use, including a shortfall in supply or price increase.

Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are simple and easy to understand. We invite your comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

(1) Are the requirements in the proposed regulations clearly stated?

(2) Do the proposed regulations contain technical language or jargon that interferes with their clarity?

(3) Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, *etc.*) aid or reduce their clarity?

(4) Would the regulations be easier to understand if they were divided into more (but shorter) sections? (A ''section'' appears in bold type and is preceded by the symbol ''§'' and a numbered heading, for example § 2522.42 If I am an assignee, what must I provide to BLM to obtain my assignment?

(5) Is the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the proposed regulations? How could this description be more helpful in making the proposed regulations easier to understand?

Please send any comments you have on the clarity of the regulations to the address specified in the **ADDRESSES** section.

The principal authors of this proposed rulemaking are Robert Winthrop and Mark Lambert, of BLM's Planning, Assessment, and Community Support Group, assisted by Michael Schwartz, of BLM's Regulatory Affairs Group.

List of Subjects at 43 CFR Part 1600

Administrative practice and procedures, Environmental impact statements, Indians, Intergovernmental relations, Public lands.

Dated: July 7, 2004.

Rebecca W. Watson,

Assistant Secretary, Land and Minerals Management.

For reasons set forth in the preamble and under the authority of the FLPMA (43 U.S.C. 1740), BLM proposes to amend part 1600 of title 43 of the Code of Federal Regulations as set forth below:

1. The authority citation for part 1600 continues to read as follows:

Authority: 43 U.S.C. 1711–1712.

2. Amend § 1601.0–4 by revising paragraphs (b) and (c) to read as follows:

§ 1601.0–4 Responsibilities.

* * * * *

(b) State Directors will provide quality control and supervisory review, including plan approval, for plans and related environmental impact statements and provide additional guidance, as necessary, for use by Field Managers. State Directors will file draft and final environmental impact statements associated with resource management plans and amendments.

(c) Field Managers will prepare resource management plans, amendments, revisions and related environmental impact statements. State Directors must approve these documents.

3. Amend § 1601.0–5 by redesignating paragraphs (d) through (k) as paragraphs (g) through (n) respectively, by adding in newly redesignated paragraph (m) ''or field office'' following the word ''area'' in the first sentence, and by adding new paragraphs (d), (e), and (f) to read as follows:

§ 1601.0–5 Definitions.

* * * * *

(d) *Cooperating agency* has the same meaning as provided in the Council of Environmental quality regulations at 40 CFR 1501.6 and 1508.5, and meaning a government entity that—

(1) Is one of the following agencies:

(i) Any Federal agency other than a lead agency;

(ii) A similarly qualified—

(A) State agency;

(B) Local government agency; or

(C) Indian tribe or tribal agency when the effects are on a reservation or on ceded public land with reserved treaty rights; and

(2) Is qualified to participate in the development of environmental impact statements as provided in 40 CFR 1501.6 and 1508.5 or, as necessary, other environmental documents that BLM prepares, by virtue of its:

(i) Jurisdiction by law as defined in 40 CFR 1508.15 or,

(ii) Special expertise as defined in 40 CFR 1508.26.

(e) *Cooperating agency status* means a cooperating agency that has entered into a written agreement with the BLM establishing the respective responsibilities of the parties in the planning and NEPA processes. BLM and the cooperating agency will work together under the terms of the agreement. Cooperating agencies will participate in the various steps of BLM's planning process as feasible, given the constraints of the agencies' resources and expertise.

(f) *Field Manager* means a BLM employee with the title ''Field Manager'' or ''District Manager.''

* * * * *

§ 1610.1 [Amended]

4. Amend § 1610.1 by inserting after ''resource areas'' wherever it appears, the term ''or field office.''

5. Amend § 1610.2 by revising the first sentence of paragraph (c) and revising paragraph (g) to read as follows:

§ 1610.2 Public participation.

* * * * *

(c) When BLM starts to prepare, amend or revise resource management plans we will begin the process by publishing a notice in the **Federal Register** and appropriate local media, including newspapers of general circulation in the state and field office area. The Field Manager may also decide if it is appropriate to publish a notice in media in adjoining States. * * *

* * * * *

(g) BLM will make copies of an approved resource management plan and amendments reasonably available for public review. Upon request, we will make single copies available to the public during the public participation process. After BLM approves a plan, amendment, or revision we may charge a fee for additional copies. We will also have copies available for public review at:

(1) The State Office that has jurisdiction over the lands;

(2) The Field Office that prepared the plan; and

(3) The District Office, if any, having jurisdiction over the Field Office that prepared the plan.

* * * * *

6. Amend § 1610.3–1 by:

a. Revising paragraph (a),

b. Redesignating existing paragraphs (b), (c), (d), (e), and (f) as (c), (d), (e), (f), and (g) respectively,

c. Revising newly redesignated paragraph (g) and,

d. Adding a new paragraph (b) to read as follows:

§ 1610.3–1 Coordination of planning efforts.

(a) In addition to the public involvement prescribed by § 1610.2 the following coordination is to be accomplished with other Federal agencies, state and local governments, and Indian tribes. The objectives of the coordination are for the State Directors and Field Manager to:

(1) Keep apprised of non-Bureau of Land Management plans;

(2) Assure that BLM considers those plans that are germane in the development of resource management plans for public lands;

(3) Assist in resolving, to the extent practicable, inconsistencies between Federal and non-Federal government plans;

(4) Provide for meaningful public involvement of other Federal agencies, State and local government officials, both elected and appointed, and Indian tribes in the development of resource management plans, including early public notice of proposed decisions that may have a significant impact on non-Federal lands; and

(5) Where possible and appropriate, develop resource management plans collaboratively with cooperating agencies.

(b) When developing or revising resource management plans, BLM State Directors and Field Managers will invite qualifying Federal agencies and state, local, and tribal governments to participate as cooperating agencies. The same requirement applies when BLM amends resource management plans through an environmental impact statement. State Directors and Field Managers will consider any requests of other Federal agencies and State, local, and tribal governments for cooperating agency status. Field Managers who deny such requests will inform the State Director of the denial. The State Director will determine if the denial is appropriate.

* * * * *

(g) When an advisory council has been formed under section 309 of the Federal Land Policy and Management Act of 1976 for the area addressed in a resource management plan or plan amendment, BLM will inform that council, seek its views, and consider them throughout the planning process.

7. Amend § 1610.4–1 by revising the second sentence to read as follows:

§ 1610.4–1 Identification of issues.

* * * The Field Manager, in collaboration with any participating cooperating agencies, will analyze those suggestions and other available data, such as records of resource conditions, trends, needs, and problems, and select topics and determine the issues to be addressed during the planning process. * * *

8. Revise § 1610.4–2 to read as follows:

§ 1610.4–2 Development of planning criteria.

(a) The Field Manager will prepare criteria to guide development of the resource management plan or revision, to ensure:

(1) It is tailored to the issues previously identified and

(2) That BLM avoids unnecessary data collection and analyses.

(b) Planning criteria will generally be based upon applicable law, Director and State Director guidance, the results of public participation and coordination with any participating cooperating agencies and other Federal agencies, State and local governments, and Indian tribes.

(c) BLM will make proposed planning criteria, including any significant changes, available for public comment prior to being approved by the Field Manager for use in the planning process.

(d) BLM may change planning criteria as planning proceeds if we determine that public suggestions or study and assessment findings make such changes desirable.

9. Amend § 1610.4–3 by revising the first sentence to read as follows:

§ 1610.4–3 Inventory data and information collection.

(a) The Field Manager, in collaboration with any participating cooperating agencies, will arrange for resource, environmental, social, economic and institutional data and information to be collected, or assembled if already available. * * *

10. Revise § 1610.4–4 by amending the first sentence of the introductory text to read as follows:

§ 1610.4–4 Analysis of the management situation.

The Field Manager, in collaboration with any participating cooperating agencies, will analyze the inventory data and other information available to determine the ability of the resource area to respond to identified issues and opportunities. * * *

11. Amend § 1610.4–5 by revising the first sentence to read as follows:

§ 1610.4–5 Formulation of alternatives.

At the direction of the Field Manager, in collaboration with any participating cooperating agencies, BLM will consider all reasonable resource management alternatives and develop several complete alternatives for detailed study. Nonetheless, the decision to designate alternatives for the further development and analysis remains the exclusive responsibility of the BLM. * * *

12. Amend § 1610.4–6 by revising the first sentence to read as follows:

§ 1610.4–6 Estimating effects of alternatives.

The Field Manager, in collaboration with any participating cooperating agencies, will estimate and display the physical, biological, economic, and social effects of implementing each alternative considered in detail. * * *

13. Amend § 1610.4–7 by revising the section heading and the first sentence to read as follows:

§ 1610.4–7 Identification of preferred alternatives.

The Field Manager, in collaboration with any participating cooperating agencies, will evaluate the alternatives, estimate their effects according to the planning criteria, and identify a preferred alternative that best meets Director and State Director guidance. Nonetheless, the decision to identify a preferred alternative remains the exclusive responsibility of the BLM. * * *

14. In addition to the amendments set forth above, in 43 CFR part 1600, in the table below, for each section indicated in the left column, remove the title indicated in the middle column from wherever it appears in the section, and add the title indicated in the right column.

§§ 1610.0–5, 1610.1, 1610.2, 1610.3–1, 1610.3–2, 1610.4–8, 1610.4–9, 1610.5–1, 1610.5–3, 1610.5–5, 1610.5–7, 1610.7–1, 1610.8 [Amended]

Section	Remove	Add
1601.0–5	District and Area Manager	Field Manager.
1610.1	District and Area Manager	Field Manager.
1610.2	District Manager	Field Manager.
1610.3–1	District or Area Manager	Field Manager.
1610.3–2	District and Area Managers	Field Managers.
1610.4–8	District Manager	Field Manager.
1610.4–9	District Manager	Field Manager.
1610.5–1	District Manager	Field Manager.
1610.5–3	District and Area Manager	Field Manager.
1610.5–5	District Manager	Field Manager.
1610.5–7	District and Area Manager	Field Manager.
1610.7–1	District Manager	Field Manager.
1610.8	District or Area Manager	Field Manager.

[FR Doc. 04–16224 Filed 7–19–04; 8:45 am]

BILLING CODE 4310–84–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 040706201–4201–01; I.D. 060204F]

RIN 0648–AR97

Fisheries off West Coast States and in the Western Pacific; Coastal Pelagic Species Fisheries; Annual Specifications

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes a regulation to implement the annual harvest guideline for Pacific mackerel in the exclusive economic zone (EEZ) off the Pacific coast. The Coastal Pelagic Species (CPS) Fishery Management Plan (FMP) and its implementing regulations require NMFS to set an annual harvest guideline for Pacific mackerel based on the formula in the FMP. This action proposes allowable harvest levels for Pacific mackerel off the Pacific coast.

DATES: Comments must be received by August 4, 2004.

ADDRESSES: Copies of the report *Stock Assessment of Pacific Mackerel with Recommendations for the 2004–2005 Management Season*, and the Regulatory Impact Review may be obtained from the Southwest Regional Office (see **ADDRESSES**).

You may submit comments on this proposed rule, identified by [I.D. 060204F] by any of the following methods:

- E-mail: *0648–AR97.SWR@noaa.gov*. Include the I.D. number in the subject line of the message.
- Federal e-Rulemaking portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Mail: Rodney R. McInnis, Acting Regional Administrator, Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802.
- Fax: (562) 980–4047.

FOR FURTHER INFORMATION CONTACT: Tonya L. Ramsey, Southwest Region, NMFS, (562) 980–4036.

SUPPLEMENTARY INFORMATION: The FMP, which was implemented by publication of the final rule in the **Federal Register** on December 15, 1999 (64 FR 69888), divides management unit species into the categories of actively managed and monitored. Harvest guidelines of actively managed species (Pacific sardine and Pacific mackerel) are based on formulas applied to current biomass estimates. Biomass estimates are not calculated for species that are only monitored (jack mackerel, northern anchovy, and market squid).

At a public meeting each year, the biomass for each actively managed species is reviewed by the Pacific Fishery Management Council's (Council) CPS Management Team (Team). The biomass, harvest guideline, and status of the fisheries are then reviewed at a public meeting of the Council's CPS Advisory Subpanel (Subpanel). This information is also reviewed by the Council's Scientific and Statistical Committee (SSC). The Council reviews reports from the Team, Subpanel, and SSC, then, after providing time for public comment, makes its recommendation to NMFS. The annual harvest guideline and season structure is published by NMFS in the **Federal Register** as soon as practicable before the beginning of the

appropriate fishing season. The Pacific mackerel season begins on July 1 of each year and ends on June 30 the following year.

The Team and Subpanel meetings took place at the Long Beach, CA, office of the NMFS, Southwest Region, on May 18th and 19th, 2004. The SSC meeting took place in conjunction with the June 13–18, 2004, Council meeting in Foster City, CA.

A modified virtual population analysis stock assessment model is used to estimate the biomass of Pacific mackerel. The model employs both fishery dependent and fishery independent indices to estimate abundance. The biomass was calculated through the end of 2003, then estimated for the fishing season that began July 1, 2004, based on: (1) the number of Pacific mackerel estimated to comprise each year class at the beginning of 2004, (2) modeled estimates of fishing mortality during 2003, (3) assumptions for natural and fishing mortality through the first half of 2004, and (4) estimates of age-specific growth. Based on this approach the biomass for July 1, 2004, would be 81,383 metric tons (mt). Applying the formula in the FMP would result in a harvest guideline of 13,268 mt, which is higher than last year but similar to low harvest guidelines of recent years.

The formula in the FMP uses the following factors to determine the harvest guideline:

1. *The biomass of Pacific mackerel.* For 2004, this estimate is 81,383 mt.

2. *The cutoff.* This is the biomass level below which no

commercial fishery is allowed. The FMP established the cutoff level at 18,200 mt. The cutoff is subtracted from the biomass, leaving 63,183 mt.

3. *The portion of the Pacific mackerel biomass that is in U.S. waters.* This estimate is 70 percent, based on the historical average of larval distribution obtained from scientific cruises and the distribution of the resource obtained from logbooks of fish-spotters. Therefore, the harvestable biomass in U.S. waters is 70 percent of 63,183 mt, that is, 44,228 mt.

4. *The harvest fraction.* This is the percentage of the biomass above 18,200 mt that may be harvested. The FMP established the harvest fraction at 30 percent. The harvest fraction is multiplied by the harvestable biomass in U.S. waters (44,228 mt), which results in 13,268 mt.

Information on the fishery and the stock assessment are found in the report *Stock Assessment of Pacific Mackerel with Recommendations for the 2004–2005 Management Season*, which may be obtained from the Southwest Regional Office.

Following recommendations of the fishing industry and Subpanel for the 2003–2004 fishing season, a directed fishery for Pacific mackerel of 7,500 mt was set beginning July 1, 2003, followed by an incidental allowance of 40 percent of Pacific mackerel in landings of any CPS, if the 7,500 mt was harvested. A 1 mt landing of Pacific mackerel per trip would have been allowed if no other species were landed during a trip. NMFS implemented a directed and incidental fishery last season in response to concerns about how a low harvest guideline for mackerel might interfere with the sardine fishery. Pacific mackerel is often caught with sardine; therefore, mackerel might have to be discarded, which would increase bycatch. As of May 10, 2004, approximately 5,616 mt of Pacific mackerel had been landed; therefore, an incidental fishery was not necessary.

At its meeting on May 19, 2004, the Subpanel recommended for the 2004–2005 fishing season that a directed fishery of 9,100 mt and an incidental fishery of 4,168 mt be implemented. An incidental allowance of 40 percent of Pacific mackerel in landings of any CPS would become effective when 9,100 mt of Pacific mackerel is estimated to be harvested. The Subpanel also recommended to allow 1 mt of mackerel to be landed per trip during the incidental fishery without landing any other CPS. The Subpanel recommended that an inseason review of the mackerel season be completed for the March 2005 Council meeting, with the possibility of reopening the directed fishery June 1, 2005, if sufficient fish remain. At that time the NMFS Southwest Regional Administrator will review the fishery to assess whether there is a sufficient amount of the unharvested portion of the harvest guideline (i.e., anything in excess of the amount needed to support incidental harvest) to warrant a reopening of the directed fishery.

Classification

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

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

The purpose of the proposed rule is to inform the public of the 2004–2005 harvest guideline for Pacific mackerel in the exclusive EEZ off the Pacific coast. The CPS FMP and its implementing regulations require NMFS to set an annual harvest guideline for Pacific mackerel based on the formula in the FMP. The harvest guideline is derived by a formula applied to the current biomass estimate. The formula leaves little latitude for discretion except when errors are found in the calculations or in the data. There is no alternative to the harvest guideline as specified; there is no discretion to use an adjusted formula. Further, there is only one stock assessment method available to establish the adult biomass used to derive the harvest guideline. No changes are proposed in the regulations governing the fishery.

The harvest guideline would apply to the CPS purse seine fleet, which consists of 62 small vessels fishing within U.S. waters. These vessels fish for small pelagic fish (Pacific sardine, Pacific mackerel) all year and for market squid in the winter, and may harvest tuna in the U.S. exclusive economic zone seasonally when they are available, usually late in the summer and early fall. These vessels are considered small business entities. There should not be any significant economic impact to a substantial number of these small entities.

The Pacific mackerel season began on July 1, 2004, and ends on June 30, 2005, or when the harvest guideline is achieved and the fishery is closed. The proposed harvest guideline for 2004–2005 is 13,268 mt. Of that, the directed fishery is initially allocated 9,100 mt, allowing up to 4,168 mt for incidental catches in mixed species fisheries for the rest of the year. This is intended to prevent premature closure of the fishery targeting other CPS species such as Pacific sardine. The 2004–2005 harvest guideline is higher than the 2003–2004 (10,652 mt) fishing year which could result in increased revenue to the fleet. If the fleet were to take the full harvest guideline, the total revenue to the fleet would be $1.54 million for the 2003–2004 fishing season and $1.92 million for the 2004–2005 fishing season. Thus the proposed harvest guideline could potentially increase the revenue for the 2004–2005 fishing season assuming there is no change in average ex-vessel price from the current level under existing market conditions. However, even though the harvest guideline is increasing, the actual landings for the 2004–2005 fishing season are expected to be approximately the same as in the 2003–2004 fishing season, around 6,000 mt. The harvest of Pacific mackerel is dependent on fishing conditions related to weather and the schooling of fish related to ocean conditions (which affects the ability of the fishermen to find them). Assuming a harvest approximately the same as in the 2003–2004 fishing season, the only way in which small businesses could be adversely affected is if relevant market conditions, such as the need for feed for aquaculture, were to change. No such changes are expected. Since both fishing conditions and market conditions are expected to remain stable, there will not be any change in effect on small businesses.

As a result, a regulatory flexibility analysis is not required and none has been prepared.

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

Dated: July 14, 2004.

Rebecca Lent,

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

[FR Doc. 04–16471 Filed 7–19–04; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 69, No. 138

Tuesday, July 20, 2004

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

Animal and Plant Health Inspection Service

[Docket No. 04–067–1]

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 Services intention to request an extension of approval of an information collection insupport of the Pseudorabies Eradication Program.

DATES: We will consider all comments that we receive on or before September 17, 2004.

ADDRESSES: You may submit comments by any of the following methods:

- Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. 04–067–1, 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. 04–067–1.
- 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. 04–067–1'' on the subject line.
- Agency Web site: Go to *http://www.aphis.usda.gov/ppd/rad/cominst.html* for a form you can use to submit an e-mail comment through the APHIS Web site.

Reading Room: 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.

Other Information: You may view APHIS documents published in the **Federal Register** and related information, including the names of groups and individuals who have commented on APHIS dockets, on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html.*

FOR FURTHER INFORMATION CONTACT: For information regarding the Pseudorabies Eradication Program, contact Dr. John Korslund, National Swine Programs Liaison, Eradication and Surveillance Team, National Center for Animal Health Programs, VS, APHIS, 4700 River Road Unit 43, Riverdale, MD 20737–1231; (301) 734–5914. 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: Pseudorabies.

OMB Number: 0579–0070.

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 is responsible for preventing the spread of contagious, infectious, or communicable animal diseases from one State to another, and for eradicating such diseases from the United States when feasible.

In connection with this mission, APHIS regulates the interstate movement of swine in order to carefully control the movement of swine that are infected with or exposed to pseudorabies. These regulations are found in 9 CFR part 85. The most common method of pseudorabies transmission is through the movement of infected swine from one herd to another.

Regulating the interstate movement of these animals requires the use of certain information collection activities, including the completion of documents attesting to the health status of the swine being moved, the number of swine being moved in a particular shipment, the shipment's point of origin, and the shipment's destination.

With this information, we are able to carefully monitor the location of infected or exposed animals and prevent them from coming into contact with healthy animals.

These documents also provide useful ''traceback'' information in the event an infected animal is discovered and an investigation must be launched to determine where the animal originated, as well as the number and location of other animals with which it may have had contact during its interstate movement.

The information provided by these documents is critical to our ability to prevent the interstate spread of pseudorabies, and therefore plays a vital role in our Pseudorabies Eradication Program.

We are asking the Office of Management and Budget (OMB) to approve the 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 collection of information, including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond, 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 0.0226558 hours per response.

Respondents: U.S. producers and shippers, State animal health protection authorities, and accredited veterinarians.

Estimated annual number of respondents: 30,050.

Estimated annual number of responses per respondent: 2.66888.

Estimated annual number of responses: 80,200.

Estimated total annual burden on respondents: 1,817 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 14th day of July 2004.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 04–16435 Filed 7–19–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—Annual Report of State Revenue Matching

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Food and Nutrition Service (FNS) is publishing for public comment a summary of a proposed information collection. The proposed collection is an extension of a collection currently approved that reports on state revenue used to comply with matching requirements in the National School Lunch Program.

DATES: Comments on this notice must be received by September 20, 2004, to be assured of consideration.

ADDRESSES: Send comments and requests for copies of this information collection to Alan Rich, Program Reports, Analysis, and Monitoring Branch, Budget Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, VA 22302.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of 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.

All comments will be summarized and included in the request for Office of Management and Budget approval of the information collection. All comments will become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Alan Rich, (703) 305–2109.

SUPPLEMENTARY INFORMATION:

Title: Annual Report of State Revenue Matching.

OMB Number: 0584–0075.

Expiration Date: October 31, 2004.

Type of Request: Extension of a currently approved collection.

Abstract: The National School Lunch Program is mandated by the National School Lunch Act, 42 U.S.C. 1751, *et seq.*, and the Child Nutrition Act of 1966, 42 U.S.C. 1771, *et seq.* Program implementing regulations are contained in 7 CFR part 210. In accordance with § 210.17(g), State agencies must submit an annual report of state revenue matching in order to receive Federal reimbursement for meals served to eligible participants.

Respondents: State agencies that administer the National School Lunch Program.

Number of Respondents: 54.

Estimated Number of Responses per Respondent: The number of responses is estimated to be one submission per State agency per school year.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 80 hours per respondent per submission.

Estimated Total Annual Burden on Respondents: 4,320 hours.

Dated: July 13, 2004.

Roberto Salazar,

Administrator, Food and Nutrition Service.

[FR Doc. 04–16434 Filed 7–19–04; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Opal Creek Scenic Recreation Area (SRA) Advisory Council

AGENCY: Forest Service, USDA Forest Service.

ACTION: Notice of meeting.

SUMMARY: An Opal Creek Scenic Recreation Area Advisory Council meeting will convene in Stayton, Oregon on Wednesday, August 4, 2004. The meeting is scheduled to begin at 6:30 p.m., and will conclude at approximately 8:30 p.m. The meeting will be held in the South Room of the Stayton Community Center located on 400 West Virginia Street in Stayton, Oregon.

The Opal Creek Wilderness and Opal Creek Scenic Recreation Area Act of 1996 (Opal Creek Act) (Pub. L. 104–208) directed the Secretary of Agriculture to establish the Opal Creek Scenic Recreation Area Advisory Council. The Advisory Council is comprised of thirteen members representing State, county and city governments, and representatives of various organizations, which include mining industry, environmental organizations, inholders in Opal Creek Scenic Recreation Area, economic development, Indian tribes, adjacent landowners and recreation interests. The council provides advice to the Secretary of Agriculture on preparation of a comprehensive Opal Creek Management Plan for the SRA, and consults on a periodic and regular basis on the management of the area. Tentative agenda items include: Introductions; Current Project Updates; Project Priority Development; and Federal Advisory Committee Act Overview.

A direct public comment period is tentatively scheduled to begin at 8 p.m. Time allotted for individual presentations will be limited to 3 minutes. Written comments are encouraged, particularly if the material cannot be presented within the time limits of the comment period. Written comments may be submitted prior to the August 4th meeting by sending them to Designated Federal Official Paul Matter at the address given below.

FOR FURTHER INFORMATION CONTACT: For more information regarding this meeting, contact Designated Federal Official Paul Matter; Willamette National Forest, Detroit Ranger District, HC 73 Box 320, Mill City, OR 97360; (503) 854–3366.

Dated: July 14, 2004.

Y. Robert Iwamoto,

Acting Forest Supervisor.

[FR Doc. 04–16414 Filed 7–19–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Mendocino Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Mendocino County Resource Advisory Committee will meet July 16, 2004, (RAC) in Willits, California. Agenda items to be covered include: (1) Approval of minutes, (2) Public Comment, (3) Sub-committees (4) Discussion/approval of projects (Over flights of forest M1—Indian Dick Road, Field trip to Keller) (5) Matters before the group-discussion only (membership), (6) Next agenda and meeting date.

DATES: The meeting will be held on July 16, 2004, from 9 a.m. to 12 noon.

ADDRESSES: The meeting will be held at the Mendocino County Museum, located at 400 E. Commercial St., Willits, California.

FOR FURTHER INFORMATION CONTACT: Roberta Hurt, Committee Coordinator, USDA, Mendocino National Forest, Covelo Ranger District, 78150 Covelo Road, Covelo CA 95428. (707) 983–8503; e-mail *rhurt@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Persons who wish to bring matters to the attention of the Committee may file written statements with the Committee staff by July 13, 2004. Public comment will have the opportunity to address the committee at the meeting.

Dated: June 28, 2004.

Blaine Baker,

Designated Federal Official.

[FR Doc. 04–16453 Filed 7–19–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–867]

Notice of Final Results of Antidumping Duty Changed Circumstances Review: Automotive Replacement Glass Windshields From the People's Republic of China

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

ACTION: Notice of Final Results of Antidumping Duty Changed Circumstances Review.

SUMMARY: On March 8, 2004, the Department of Commerce (''Department'') published a notice of initiation of changed circumstances review of the antidumping duty order on Automotive Replacement Glass (''ARG'') Windshields from the People's Republic of China (''PRC'') to determine whether Shenzhen CSG Automotive Glass Co., Ltd. (''Shenzhen CSG'') is the successor-in-interest to Shenzhen Benxun AutoGlass Co., Ltd. (''Shenzhun Benxun'') for purposes of determining antidumping liabilities. *See Initiation of Antidumping Duty Changed Circumstances Review: Automotive Replacement Glass Windshields from the People's Republic of China*, 69 FR 10655 (March 8, 2004) (''*Notice of Initiation*''). On June 7, 2003, the Department published its preliminary results of this changed circumstance review and preliminarily determined that Shenzhen CSG is the successor-in-interest to Shenzhun Benxun, for purposes of determining antidumping duty liability in this proceeding. *See Notice of Preliminary Results of Antidumping Duty Changed Circumstances Review: Automotive Replacement Glass Windshields from the People's Republic of China*, 69 FR 31789 (June 7, 2004) (''*Preliminary Results*''). We provided interested parties an opportunity to comment on the preliminary results. We did not receive any comments. Therefore, the final results of review do not differ from the preliminary results of review.

EFFECTIVE DATE: July 20, 2004.

FOR FURTHER INFORMATION CONTACT: Jon Freed or Robert Bolling, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–3818 or (202) 482–3434, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 4, 2002, the Department of Commerce (''the Department'') published in the **Federal Register** the antidumping duty order on ARG windshields from the PRC. *See Antidumping Duty Order: Automotive Replacement Glass Windshields from the People's Republic of China*, 67 FR 16087 (April 4, 2002). On April 7, 2003, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on ARG windshields from the PRC for the period September 19, 2001, through March 31, 2003. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 68 FR 16761 (April 7, 2003). On April 30, 2003, the Department received a letter on behalf of Shenzhen CSG requesting an administrative review of its sales and entries of subject merchandise. In its request, Shenzhen CSG indicated that it had undergone a name change, and that it had formerly been known as Shenzhen Benxun. Shenzhen Benxun was a respondent in the original investigation of this case. The request for review did not include a request for a changed circumstance review to determine whether Shenzhen CSG was in fact a successor in interest to Shenzhen Benxun.

On May 21, 2003, in response to timely requests from respondents subject to the order on ARG windshields from the PRC, the Department published in the **Federal Register** a notice of initiation of an antidumping duty administrative review of sales by ten respondents, including Shenzhen CSG (formerly known as Shenzhen Benxun) of ARG windshields from the PRC for the period September 19, 2001, through March 31, 2003. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 68 FR 27781 (May 21, 2003). On June 3, 2003, the Department issued antidumping duty questionnaires to the ten respondents, including Shenzhen CSG (formerly known as Shenzhen Benxun). On July 8, 2003, the Department received a letter from Shenzhen CSG (formerly known as Shenzhen Benxun) withdrawing its request for an administrative review of its sales and entries of subject merchandise exported to the United States and covered by the antidumping duty order on ARG windshields from the PRC. On September 8, 2003, the Department published in the **Federal Register** a notice of partial rescission of the administrative review on ARG windshields from the PRC, which included a rescission of the administrative review of sales and entries from Shenzhen CSG (formerly known as Shenzhen Benxun). On December 29, 2003, the Department instructed Customs and Border Protection (''Customs'') to liquidate entries from Shenzhen Benxun at its company-specific rate, but to liquidate entries from Shenzhen CSG at the PRC-wide rate because the Department never had an opportunity to determine whether Shenzhen CSG was a successor-in-interest to Shenzhen Benxun. On January 12, 2004, the Department received a letter on behalf of Shenzhen CSG (formerly known as Shenzhen Benxun) requesting the Department to amend its instructions that it sent to Customs that direct Customs to liquidate all of Shenzhen CSG's entries at the PRC-wide rate. Shenzhen CSG asserted that Shenzhen Benxun changed its name to Shenzhen CSG and that entries from Shenzhen CSG should be entitled to Shenzhen Benxun's cash deposit rate.

On March 8, 2004, the Department published a notice of initiation of

changed circumstances review of the antidumping duty order on ARG Windshields from the PRC to determine whether Shenzhen CSG is the successor-in-interest to Shenzhun Benxun for purposes of determining antidumping liabilities. *See Notice of Initiation*. On March 17, 2004, the Department issued a successorship questionnaire to Shenzhun Benxun. Shenzhen Benxun submitted its response to the Department's successorship questionnaire on April 6, 2004 (''Shenzhen Benxun's Response''). On June 7, 2003, the Department published its preliminary results of review and preliminarily determined that Shenzhen CSG is the successor-in-interest to Shenzhun Benxun, for purposes of determining antidumping duty liability in this proceeding. *See Preliminary Results*. The Department did not receive any comments regarding its preliminary results of review.

Scope of the Review

The products covered by this review are ARG windshields, and parts thereof, whether clear or tinted, whether coated or not, and whether or not they include antennas, ceramics, mirror buttons or VIN notches, and whether or not they are encapsulated. ARG windshields are laminated safety glass (*i.e.*, two layers of (typically float) glass with a sheet of clear or tinted plastic in between (usually polyvinyl butyral)), which are produced and sold for use by automotive glass installation shops to replace windshields in automotive vehicles (*e.g.*, passenger cars, light trucks, vans, sport utility vehicles, *etc.*) that are cracked, broken or otherwise damaged.

ARG windshields subject to this review are currently classifiable under subheading 7007.21.10.10 of the Harmonized Tariff Schedules of the United States (HTSUS). Specifically excluded from the scope of this investigation are laminated automotive windshields sold for use in original assembly of vehicles. While HTSUS subheadings are provided for convenience and Customs purposes, our written description of the scope of this review is dispositive.

Final Results of the Changed Circumstances Review

In its *Preliminary Results*, the Department preliminarily determined that Shenzhen CSG should be given the same antidumping duty treatment as Shenzhen Benxun. The Department did not receive any comments from interested parties. Therefore, the Department has determined that Shenzhen CSG is the successor-in-interest to Shenzhen Benxun. Consequently, we have determined that Shenzhen CSG will receive the same antidumping duty cash deposit rate as Shenzhen Benxun.

Instructions to the Customs Service

The cash deposit determination from this changed circumstances review will apply to all entries of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this changed circumstances review. *See Notice of Final Results of Antidumping Duty Changed Circumstances Review: Pressure Sensitive Plastic Tape From Italy* 69 FR 15297, 15298 (March 25, 2004), *see also, Certain Hot-Rolled Lead and Bismuth Carbon Steel Products From the United Kingdom: Final Results of Changed-Circumstances Antidumping and Countervailing Duty Administrative Reviews* 64 FR 66880, 66881 (November 30, 1999). This deposit rate shall remain in effect until publication of the final results of the next administrative review in which Shenzhen CSG participates.

Notification

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with section 351.306 of the Department's regulations. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation. This notice is in accordance with sections 751(b) and 777(i)(1) of the Tariff Act of 1930, as amended, and section 351.221(c)(3)(i) of the Department's regulations.

Dated: July 14, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–16466 Filed 7–19–04; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–840]

Notice of Preliminary Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod From Canada

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

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on carbon and certain alloy steel wire rod from Canada. We preliminarily determine that sales of subject merchandise by Ivaco Inc. (Ivaco) have been made below normal value (NV). If these preliminary results are adopted in our final results, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on appropriate entries based on the difference between the export price (EP) and the NV.

Interested parties are invited to comment on these preliminary results. We will issue the final results no later than 120 days from the publication of this notice.

DATES: Effective July 20, 2004.

FOR FURTHER INFORMATION CONTACT: Daniel O'Brien or Constance Handley, at (202) 482–5346 or (202) 482–0631, respectively; AD/CVD Enforcement Office 1, Group 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On October 29, 2002, the Department published an antidumping duty order on carbon and certain alloy steel wire rod from Canada. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Carbon and Certain Alloy Steel Wire Rod From Canada*, 67 FR 65944 (October 29, 2002). On October 1, 2003, the Department issued a notice of opportunity to request the first administrative review of this order. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 68 FR 56618 (October 1, 2003). On October 31, 2003, in accordance with 19 CFR 351.213(b), Ivaco requested an administrative review. On October 31, 2003, also in accordance with 19 CFR 351.213(b), the

petitioners [1] requested an administrative review of Ivaco. On November 18, 2003, the Department published the notice of initiation of this antidumping duty administrative review, covering the period April 10, 2002, through September 30, 2003 (the POR). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 68 FR 66799, November 28, 2003.

On December 9, 2003, the Department issued its antidumping questionnaire to Ivaco, specifying that the responses to Section A and Sections B–E would be due on December 30, 2003, and January 15, 2004, respectively.[2] We received timely responses to Sections A–E of the initial antidumping questionnaire and associated supplemental questionnaires. In accordance with section 773(b)(2)(A)(ii) of the Tariff Act of 1930, as amended (''the Act''), since the Department determined in the original investigation that Ivaco made home-market sales below cost, we found that there were reasonable grounds to believe or suspect that Ivaco made sales below cost in this review.

Scope of the Review

The merchandise covered by this order is certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter.

Specifically excluded are steel products possessing the above-noted physical characteristics and meeting the *Harmonized Tariff Schedule of the United States* (HTSUS) definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; and (e) concrete reinforcing bars and rods. Also excluded are (f) free machining steel products (*i.e.*, products that contain by weight one or more of the following elements: 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorus, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium).

Also excluded from the scope are 1080 grade tire cord quality wire rod and 1080 grade tire bead quality wire rod. This grade 1080 tire cord quality rod is defined as: (i) Grade 1080 tire cord quality wire rod measuring 5.0 mm or more but not more than 6.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) ''having no non-deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.15 mm; (vi) capable of being drawn to a diameter of 0.30 mm or less with 3 or fewer breaks per ton, and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.006 percent or less of nitrogen, and (5) not more than 0.15 percent, in the aggregate, of copper, nickel and chromium.

This grade 1080 tire bead quality rod is defined as: (i) Grade 1080 tire bead quality wire rod measuring 5.5 mm or more but not more than 7.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) ''having no non-deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.2 mm; (vi) capable of being drawn to a diameter of 0.78 mm or larger with 0.5 or fewer breaks per ton; and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of soluble aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.008 percent or less of nitrogen, and (5) either not more than 0.15 percent, in the aggregate, of copper, nickel and chromium (if chromium is not specified), or not more than 0.10 percent in the aggregate of copper and nickel and a chromium content of 0.24 to 0.30 percent (if chromium is specified).

For purposes of the grade 1080 tire cord quality wire rod and the grade 1080 tire bead quality wire rod, an inclusion will be considered to be deformable if its ratio of length (measured along the axis—that is, the direction of rolling—of the rod) over thickness (measured on the same inclusion in a direction perpendicular to the axis of the rod) is equal to or greater than three. The size of an inclusion for purposes of the 20 microns and 35 microns limitations is the measurement of the largest dimension observed on a longitudinal section measured in a direction perpendicular to the axis of the rod. This measurement methodology applies only to inclusions on certain grade 1080 tire cord quality wire rod and certain grade 1080 tire bead quality wire rod that are entered, or withdrawn from warehouse, for consumption on or after July 24, 2003.

The designation of the products as ''tire cord quality'' or ''tire bead quality'' indicates the acceptability of the product for use in the production of tire cord, tire bead, or wire for use in other rubber reinforcement applications such as hose wire. These quality designations are presumed to indicate that these products are being used in tire cord, tire bead, and other rubber reinforcement applications, and such merchandise intended for the tire cord, tire bead, or other rubber reinforcement applications is not included in the scope. However, should petitioners or other interested parties provide a reasonable basis to believe or suspect that there exists a pattern of importation of such products for other than those applications, end-use certification for the importation of such products may be required. Under such circumstances, only the importers of record would normally be required to certify the end use of the imported merchandise.

All products meeting the physical description of subject merchandise that are not specifically excluded are included in this scope. The products under review are currently classifiable under subheadings 7213.91.3000, 7213.91.3011, 7213.91.3091, 7213.91.4500, 7213.91.6000, 7213.99.0030, 7213.99.0090, 7227.20.0000, and 7227.90.6050 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this proceeding is dispositive.

To determine whether sales of steel wire rod from Canada were made in the United States at less than fair value, we compared the export price (EP) and the constructed export price (CEP) to the normal value (NV), as described in the *Export Price and Constructed Export Price* and *Normal Value* sections of this notice. In accordance with section

[1] The petitioners in this case are Gerdau Ameristeel U.S. Inc., Georgetown Steel Company, Keystone Consolidated Industries, Inc., and North Star Steel Texas, Inc.

[2] Section A of the questionnaire requests general information concerning a company's corporate structure and business practices, the merchandise under review that it sells, and the manner in which it sells that merchandise in all of its markets. Section B requests a complete listing of all home market sales, or, if the home market is not viable, of sales in the most appropriate third-country market (this section is not applicable to respondents in non-market economy cases). Section C requests a complete listing of U.S. sales. Section D requests information on the cost of production of the foreign like product and the constructed value of the merchandise under review. Section E requests information on further manufacturing.

777A(d)(1)(A)(i) of the Act, we calculated weighted-average EPs and CEPs. We compared these to weighted-average home market prices or CVs, as appropriate, in Canada.

Export Price and Constructed Export Price

For the price to the United States, we used, as appropriate, EP or CEP, as defined in sections 772(a) and 772(b) of the Act, respectively. Section 772(a) of the Act defines EP as the price at which the subject merchandise is first sold before the date of importation by the producer or exporter outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection 722(c) of the Act.

Section 772(b) of the Act defines CEP as the price at which the subject merchandise is first sold in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections 772(c) and (d) of the Act.

During the POR, Ivaco made both EP and CEP sales. We calculated an EP for sales where the merchandise was sold directly by Ivaco to the first unaffiliated purchaser in the United States prior to importation, and CEP was not otherwise warranted based on the facts on the record. We calculated a CEP for sales made by Ivaco Rolling Mills (IRM) and by Ivaco's two affiliated U.S. further processors after the importation of the subject merchandise into the United States. For EP sales, we made additions to the starting price (gross unit price), where appropriate, for freight revenue (reimbursement for freight charges paid by Ivaco) and for billing errors (debit-note price adjustments made by Ivaco), and deductions, where appropriate, for billing adjustments (including credit-note price adjustments made by Ivaco), early payment discounts and rebates, and movement expenses in accordance with section 772(c)(2)(A) of the Act. Movement expenses included inland freight, warehousing expenses, brokerage fees, U.S. customs duty, and U.S. merchandise processing fees.

For CEP sales, we made the same adjustments to the starting price as for the EP transactions described above. In accordance with sections 772(d) of the Act, we also made deductions, where appropriate, for direct and indirect selling expenses, further manufacturing costs, and CEP profit. Included in the indirect selling expenses we deducted those expenses Ivaco and IRM incurred in Canada which were associated with economic activities in the United States; *i.e.*, expenses incurred arranging transportation to unaffiliated U.S. customers, evaluating orders from such customers, and issuing invoices for CEP sales, and so forth. The preamble to *Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27351 (May 19, 1997) (Preamble), states that the Department will deduct all CEP expenses related to the first sale to an unaffiliated U.S. customer "* * * even if, for example, the foreign parent of the affiliated U.S. importer pays those expenses." *See also* the *Statement of Administrative Action* (SAA) accompanying the Uruguay Round Agreements Act (URAA), H. Doc. 103–316, Vol. I (1994), at 823. The U.S. Court of International Trade has upheld such deductions. *See Mitsubishi Heavy Industry Ltd.* v. *United States,* 54 F. Supp. 2d 1183 (Ct. Int'l Trade 1999).

In accordance with section 772(c)(2) of the Act, we made deductions from the starting price for movement expenses and export taxes and duties, where appropriate. Section 772(d)(1) of the Act provides for additional adjustments to calculate CEP. Accordingly, where appropriate, we deducted direct and indirect selling expenses related to economic activity in the United States. Pursuant to section 772(d)(3) of the Act, where applicable, we made an adjustment for CEP profit.

Normal Value

A. Selection of Comparison Markets

Section 773(a)(1) of the Act directs that NV be based on the price at which the foreign like product is sold in the home market, provided that the merchandise is sold in sufficient quantities (or value, if quantity is inappropriate) and that there is no particular market situation that prevents a proper comparison with the EP. The statute contemplates that quantities (or value) will normally be considered insufficient if they are less than five percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States.

We found that Ivaco had a viable home market for steel wire rod. As such, Ivaco submitted home market sales data for purposes of the calculation of NV. In deriving NV, we made adjustments as detailed in the *Calculation of Normal Value Based on Home Market Prices* section below.

B. Cost of Production Analysis

Because we disregarded below-cost sales in the investigation, we have reasonable grounds to believe or suspect that home market sales of the foreign like product by Ivaco were made at prices below the cost of production (COP) during the period of the second review. Therefore, pursuant to section 773(b)(2)(A)(ii) of the Act, we initiated a COP investigation of sales made by Ivaco.

1. Calculation of Cost of Production

In accordance with section 773(b)(3) of the Act, we calculated the weighted-average COP, by model, based on the sum of materials, fabrication, and general and administrative (G&A) expenses. We relied on Ivaco's submitted COP except for the following adjustments:

(a) We removed the further manufacturing field from the home market sales database and added the further manufacturing expenses erroneously reported in the sales database to Ivaco's cost of manufacturing;

(b) We added the depreciation expenses incurred on Ivaco Steel Processing (New York) LLC's idled assets to ISP's G&A expenses; and

(c) We allocated the portion of Ivaco's head office expenses that did not go to IRM, Sivaco Quebec, and Sivaco Ontario to Ivaco's other entities.

See Memorandum from Daniel O'Brien and Amber Musser, International Trade Compliance Analysts, to Constance Handley, Program Manager, Re: Analysis Memorandum for Ivaco, Inc., dated July 2, 2004 (the Analysis Memorandum).

2. Test of Comparison Market Sales Prices

We compared the weighted-average COPs for Ivaco to its home market sales prices of the foreign like product, as required under section 773(b) of the Act, to determine whether these sales had been made at prices below the COP within an extended period of time (*i.e.*, a period of one year) in substantial quantities and whether such prices were sufficient to permit the recovery of all costs within a reasonable period of time.

On a model-specific basis, we compared the COP to the home market prices, less any applicable movement charges, discounts, rebates, and direct and indirect selling expenses.

3. Results of the COP Test

We disregard below-cost sales where (1) 20 percent or more of a respondent's sales of a given product during the POR were made at prices below the COP and thus were made within an extended period of time in substantial quantities in accordance with sections 773(b)(2)(B)

and (C) of the Act, and (2) based on comparisons of price to weighted-average COPs for the POR, we determined that the below-cost sales of the product were at prices which would not permit recovery of all costs within a reasonable time period, in accordance with section 773(b)(2)(D) of the Act. We found that Ivaco made sales below cost and we disregarded such sales where appropriate.

C. Calculation of Normal Value Based on Comparison-Market Prices

We determined NV for Ivaco as follows. We made adjustments for any differences in packing and deducted home market movement expenses pursuant to sections 773(a)(6)(A) and 773(a)(6)(B)(ii) of the Act. In addition, we made adjustments for differences in circumstances of sale (COS) pursuant to section 773(a)(6)(C)(iii) of the Act.

We made COS adjustments for Ivaco's EP transactions by deducting direct selling expenses incurred for home market sales (credit expenses and warranty expenses) and adding U.S. direct selling expenses (credit expenses and warranty expenses). For matches of similar merchandise, we made adjustments, where appropriate, for physical differences in the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act.

Because Ivaco paid commissions on its EP sales, in calculating NV, we deducted the lesser of either (1) the weighted-average amount of commission paid on a U.S. sale for a particular product, or (2) the weighted-average amount of indirect selling expenses paid on the home market sales for a particular product. See Preamble, 62 FR 27296, 27414 (May 19, 1997) at 19 CFR 351.410(e) (clarifying the deduction described in 19 CFR 351.410 (e)).

D. Arm's-Length Sales

Ivaco reported sales of the foreign like product to an affiliated customer. To test whether these sales to affiliated customers were made at arm's length, where possible, we compared the prices of sales to affiliated and unaffiliated customers, net of all movement charges, direct selling expenses, and packing. To test whether the sales to affiliates were made at arm's-length prices, we compared the unit prices of sales to affiliated and unaffiliated customers net of all movement charges, direct selling expenses, and packing expenses. Where the price to that affiliated party was, on average, within a range of 98 to 102 percent of the price of the same or comparable merchandise sold to the unaffiliated parties at the same level of trade, we determined that the sales made to the affiliated party were at arm's length. *See Modification Concerning Affiliated Party Sales in the Comparison Market,* 67 FR 69186 (November 15, 2002).

E. Calculation of Normal Value Based on Constructed Value

Section 773(a)(4) of the Act provides that, where NV cannot be based on comparison-market sales, NV may be based on constructed value (CV). Accordingly, for those models of steel wire rod for which we could not determine the NV based on comparison-market sales, either because there were no sales of a comparable product or all sales of the comparison products failed the COP test, we based NV on CV.

Section 773(e)(1) of the Act provides that CV shall be based on the sum of the cost of materials and fabrication for the imported merchandise plus amounts for selling, general, and administrative expenses (SG&A), profit, and U.S. packing expenses. We calculated the cost of materials and fabrication based on the methodology described in the COP section of this notice. We based SG&A and profit on the actual amounts incurred and realized by the respondent in connection with the production and sale of the foreign like product in the ordinary course of trade, for consumption in the comparison market, in accordance with section 773(e)(2)(A) of the Act. In addition, we used U.S. packing costs as described in the Export Price section of this notice, above.

We made adjustments to CV for differences in COS in accordance with section 773(a)(8) of the Act and 19 CFR 351.410. For CEP and EP comparisons, we deducted direct selling expenses incurred for home market sales (credit expenses and warranty expenses). For EP sales we added U.S. direct selling expenses (credit expenses and warranty expenses) to the NV.

Because Ivaco paid commissions on its EP sales, in calculating NV, we deducted the lesser of either (1) the weighted-average amount of commission paid on a U.S. sale for a particular product, or (2) the weighted-average amount of indirect selling expenses paid on the home market sales for a particular product. *See* Preamble, 62 FR 27296, 27414 (May 19, 1997) at 19 CFR 351.410(e) (clarifying the deduction described in 19 CFR 351.410 (e)).

F. Level of Trade/Constructed Export Price Offset

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade as the EP transaction. The NV level of trade is that of the starting-price sales in the comparison market. For EP sales, the U.S. level of trade is also the level of the starting-price sale, which is usually from exporter to importer.

To determine whether NV sales are at a different level of trade than EP transactions, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different level of trade and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the level of trade of the export transaction, we make a level-of-trade adjustment under section 773(a)(7)(A) of the Act.

In implementing these principles in this administrative review, we obtained information from Ivaco about the marketing stages involved in the reported U.S. and home market sales, including a description of the selling activities performed by the respondent for each channel of distribution. In identifying levels of trade for EP and home market sales, we considered the selling functions reflected in the starting price before any adjustments.

In conducting our level-of-trade analysis for Ivaco, we examined the specific types of customers, the channels of distribution, and the selling practices of the respondent. Generally, if the reported levels of trade are the same, the functions and activities of the seller should be similar. Conversely, if a party reports levels of trade that are different for different categories of sales, the functions and activities may be dissimilar. We found the following.

Ivaco reported two channels of distribution in the home market. The channels of distribution are: (1) Direct sales by IRM and (2) direct sales by Sivaco. To determine whether separate levels of trade exist in the home market, we examined the stages in the marketing process and selling functions along the chain of distribution between Ivaco and its customers. Based on this examination, we preliminarily determine that Ivaco sold merchandise at two levels of trade in the home market during the POR. One level of trade is for sales made by Ivaco's steel wire rod manufacturing facility, IRM; the second level of trade is for sales made by Sivaco, Ivaco's customer service center, which is also a steel wire rod processing and drawing facility. From our analysis of the marketing

process for these sales, we determined that sales by Sivaco are at a more remote marketing stage than that for sales by IRM. Sales by Sivaco have different, more complex, distribution patterns, involving substantially greater selling activities. Based on these differences, we concluded that two levels of trade exist in the home market, an IRM level of trade (''level one'') and a Sivaco level of trade (''level two'').

The Department analyzed Ivaco's selling functions in the home market, including inventory maintenance services, delivery services, handling services, freight services, sales administration services, bid assistance, technical services, and extension of credit. With regard to inventory maintenance, Sivaco offers more extensive inventory services than IRM. Sivaco maintains a significant general inventory, which results in a significantly longer inventory turnover rate for Sivaco, and additional services. This allows Sivaco to offer its customers just-in-time (JIT) delivery services. Thereby, Sivaco assumes the inventory services that would normally be performed by the customer. IRM does not provide these additional services. As stated by the Department in *Pipe and Tube from Turkey,* ''inventory maintenance is a principal selling function'' and ''the additional responsibilities of maintaining merchandise in inventory also gives rise to related selling functions that are performed.'' [3]

Specifically, Sivaco ships more often than IRM due to the fact that Sivaco offers its customers JIT inventory, while IRM produces and ships rod based on a quarterly rolling schedule. In addition, Sivaco provides more handling and freight services than IRM in that it offers smaller, more frequent shipments with more varied freight services. For example, IRM sells rod in either full truck load or rail car quantities, while Sivaco will arrange shipment for less than truck-load quantities. With regard to sales administration services, Sivaco has a smaller average shipment size than IRM, resulting in a higher proportional sales administrative service cost than IRM. Furthermore, Sivaco offers the following services to its customers, which IRM does not; (1) Bid assistance to customers, (2) assistance with product specification and material/ processing review, and (3) a wider range of technical assistance, including helping customers solve usage problems and choose the best type of rod for their applications and machinery.

In the U.S. market, Ivaco reported two EP channels of distribution. The channels of distribution are: (1) Direct sales by IRM to U.S. customers and (2) direct sales by Sivaco to U.S. customers. To determine whether separate levels of trade exist for EP sales to the U.S. market, we examined the selling functions, the chain of distribution, and the customer categories reported in the United States.

Specifically, we have found that direct sales by IRM to U.S. customers involve all the same selling functions as IRM's sales in the home market. Further, direct sales by Sivaco in the U.S. include all the same selling functions and are made at the same level of trade as those found in the home market. Sales by Ivaco's steel wire rod manufacturing facility, IRM, are made at level of trade one, the same as IRM's home market sales. EP sales by Sivaco are made at the second level of trade. Because the levels of trade in the United States for EP sales are identical to those in the home market, the preceding analysis with respect to the home market levels of trade applies equally to the U.S. market.

To the extent possible, we have compared U.S. EP transactions and home market sales at the same level of trade without making a level-of-trade adjustment. When we were unable to find sales of the foreign like product in the home market at the same level of trade as the U.S. sale, we examined whether a level-of-trade adjustment was appropriate. When we compare U.S. sales to home market sales at a different level of trade, we make a level-of-trade adjustment if the difference in levels of trade affects price comparability. We determine any effect on price comparability by examining sales at different levels of trade in a single market, the home market. Any price effect must be manifested in a pattern of consistent price differences between home market sales used for comparison and sales at the equivalent level of trade of the export transaction. To quantify the price differences, we calculate the difference in the average of the net prices of the same models sold at different levels of trade. Net prices are used because any difference will be due to differences in level of trade rather than other factors. We use the average difference in net prices to adjust NV when NV is based on a level of trade different from that of the export sale. If there is no pattern of consistent price differences, the difference in levels of trade does not have a price effect and, therefore, no adjustment is necessary.

For EP sales, we found that there were consistent price differences between models sold at different levels of trade. Therefore, we made a level-of-trade adjustment for EP sales for which we were unable to find sales of the foreign like product in the home market at the same level of trade as the U.S. sale.

In addition, Ivaco has two CEP channels of distribution which constitute a single level of trade: (1) Sales of goods manufactured by IRM that are not further manufactured before being sold to unaffiliated customers from inventory locations in the United States and (2) sales by IRM of products further manufactured in the United States by affiliated companies. For CEP sales, we examined the relevant functions after deducting the costs of further manufacturing and U.S. selling expenses and associated profit. As a result, there are no selling activities associated with Ivaco's CEP sales in either channel of distribution when effecting the level-of-trade comparison with home market sales. Therefore, we preliminarily find that the CEP level of trade is not comparable to either level of trade in the home market. We were unable to quantify the level-of-trade adjustment, in accordance with section 773(a)(7)(B) of the Act; therefore, we matched, where possible, to the closest home market level of trade, level one, and granted a CEP offset pursuant to section 773(a)(7)(B) of the Act.

Currency Conversion

We made currency conversions into U.S. dollars in accordance with section 773A of the Act, based on exchange rates in effect on the date of the U.S. sale, as certified by the Federal Reserve Bank.

Preliminary Results of Review

As a result of this review, we preliminarily determine that the following weighted-average margin exists for the period April 10, 2002, through September 30, 2003:

Producer	Weighted-average margin (Percentage)
Ivaco	10.38

The Department will disclose calculations performed in accordance with 19 CFR 351.224(b). An interested party may request a hearing within 30 days of publication of these preliminary results. *See* 19 CFR 351.310(c). Any hearing, if requested, will be held 44 days after the date of publication, or the first working day thereafter. Interested parties may submit case briefs and/or written comments no later than 30 days

[3] *See Certain Welded Carbon Steel Pipe and Tube From Turkey,* 63 FR 35190 (1998) (*Pipe and Tube from Turkey*).

after the date of publication of these preliminary results. Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be filed no later than 37 days after the date of publication. Parties who submit arguments are requested to submit with the argument (1) a statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities. Further, the parties submitting written comments should provide the Department with an additional copy of the public version of any such comments on diskette. The Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, within 120 days of publication of these preliminary results.

Assessment

Upon completion of this administrative review, pursuant to 19 CFR 351.212(b), the Department will calculate an assessment rate on all appropriate entries. We will calculate importer-specific duty assessment rates on the basis of the ratio of the total amount of antidumping duties calculated for the examined sales to the total volume of the examined sales for that importer. Where the assessment rate is above *de minimis*, we will instruct CBP to assess duties on all entries of subject merchandise by that importer.

Cash Deposit Requirements

The following deposit rates will be effective upon publication of the final results of this administrative review for all shipments of steel wire rod from Canada entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(1) of the Act: (1) The cash deposit rate listed above for Ivaco will be the rate established in the final results of this review, except if a rate is less than 0.5 percent, and therefore *de minimis*, the cash deposit will be zero; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be 8.11 percent, the ''All Others'' rate established in the LTFV investigation. These cash deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entities during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This determination is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: July 2, 2004.

Jeffrey May,

Acting Assistant Secretary for Import Administration.

[FR Doc. 04–16582 Filed 7–19–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 071404B]

Marine Fisheries Advisory Committee; Public Meeting

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

ACTION: Notice of public meetings.

SUMMARY: Notice is hereby given of meetings of the Marine Fisheries Advisory Committee (MAFAC) from August 10 through August 12, 2004.

DATES: The meetings are scheduled as follows:

August 10, 2004, 8:30 a.m. 5 p.m.
August 11, 2004, 8:30 a.m. 5 p.m.
August 12, 2004, 8:30 a.m. 5 p.m.

ADDRESSES: The meetings will be held at the Westmark Baranof Hotel, 127 N Franklin, Juneau, AK. Requests for special accommodations may be directed to MAFAC, Office of Constituent Services, NMFS, 1315 East-West Highway, #9508, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Laurel Bryant, Designated Federal Official; telephone: (301) 713–2379 ext. 171.

SUPPLEMENTARY INFORMATION: As required by section 10(a) (2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1982), notice is hereby given of meetings of MAFAC. MAFAC was established by the Secretary of Commerce (the ''Secretary'') on February 17, 1972, to advise the Secretary on all matters concerning living marine resources that are the responsibility of the Department of Commerce. The Committee makes recommendations to the Secretary to assist in the development and implementation of Departmental regulations, policies and programs critical to the mission and goals of the National Marine Fisheries Service (the ''Agency''). The Committee is composed of leaders in commercial, recreational, environmental, academic, state, tribal, and consumer interests from the nation's coastal regions.

Matters To Be Considered

August 10, 2004

General overview and updates on agency activities including Individual Fishing Quota initiatives, Recreational Fisheries Draft Strategic plan, and implementation status of the National Bycatch Reduction Plan, National Sea Grant Program, and collaborative Projects. Discussions will include participation from Sea Grant.

August 11, 2004

MAFAC will review and discuss the agency's initiative to modify National Standard One Guidelines under the Sustainable Fisheries Act. The remainder of the day will be dedicated to discussing the development of Marine Aquaculture policy.

August 12, 2004

The committee will make final reports to NOAA Fisheries prepare for the next meeting in 2005, and adjourn.

Time will be set aside for public comment on agenda items.

Special Accommodations

The meetings are physically accessible to people with disabilities. Request for sign language interpretation or other auxiliary aids should be directed to Laurel Bryant at (301) 713–2379 at least 7 days prior to the meeting date.

Dated: July 14, 2004.

Rebecca Lent,

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

[FR Doc. 04–16470 Filed 7–19–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Submission for OMB Review; Comment Request

The United States Patent and Trademark Office (USPTO) has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: United States Patent and Trademark Office (USPTO).

Title: Admittance to Practice and Roster of Registered Patent Attorneys and Agents Admitted to Practice Before the United States Patent and Trademark Office (USPTO).

Form Number(s): PTO–158, PTO–158A, PTO–275, PTO–107A, PTO–1209.

Agency Approval Number: 0651–0012.

Type of Request: Revision of a currently approved collection.

Burden: 48,227 hours annually.

Number of Respondents: 30,035 responses per year.

Avg. Hours Per Response: The USPTO estimates that it will take the registered practitioner or agent approximately 40 hours (40.0) to complete the petition for reinstatement after disciplinary removal. It is estimated to take 7 hours (7.0) to complete the registration examination to become a registered practitioner. These times include time to gather the necessary information, and prepare and submit the forms and requirements in this collection.

Needs and Uses: This information is required by 35 U.S.C. 2(b)(2)(D) and administered by the USPTO through 37 CFR 11.7(h). The information is used by the Director of the Office of Enrollment and Discipline (OED) to determine if the applicant for registration is of good moral character and repute; has the necessary legal, scientific, and technical qualifications; and is otherwise competent to advise and assist applicants in the presentation and prosecution of applications for patents. The USPTO is submitting this collection in support of a final rulemaking, ''Changes to Representation of Others Before the United States Patent and Trademark Office'' (RIN 0651–AB55). In this final rulemaking, the USPTO is proposing to update the rules and procedures regarding the enrollment and recognition of individuals to practice as attorneys and agents before the USPTO in patent, trademark, and other non-patent matters. These proposed changes are also expected to improve how the USPTO handles applications for registration and petitions.

Affected Public: Individuals or households; business or other for-profit; the Federal government; and State, local or tribal governments.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Susan K. Brown, Records Officer, Office of the Chief Information Officer, Office of Data Architecture and Services, (703) 308–7400, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313, Attn: CPK 3 Suite 310, or by e-mail at *susan.brown@uspto.gov.*

Written comments and recommendations for the proposed information collection should be sent on or before August 19, 2004, to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: July 14, 2004.

Susan K. Brown,

Records Officer, USPTO, Office of Data Architecture and Services, Data Administration Division.

[FR Doc. 04–16411 Filed 7–19–04; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Trademark Processing

ACTION: Proposed collection; comment request.

SUMMARY: The United States Patent and Trademark Office (USPTO), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on the submission of a revision of a currently approved collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before September 20, 2004.

ADDRESSES: You may submit comments by any of the following methods:

- E-mail: *Susan.Brown@uspto.gov.* Include ''0651–0009 comment'' in the subject line of the message.
- Fax: 703–308–7407, marked to the attention of Susan Brown.
- Mail: Susan K. Brown, Records Officer, Office of the Chief Information Officer, Office of Data Architecture and Services, Data Administration Division, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to the attention of Ari Leifman, Staff Attorney, Office of the Commissioner for Trademarks, United States Patent and Trademark Office (USPTO), Washington, DC 20231, by telephone at 703–308–8900 (ext. 155), or by e-mail at *ari.leifman@uspto.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The United States Patent and Trademark Office (USPTO) administers the Trademark Act, 15 U.S.C. 1051 *et seq.*, which provides for the Federal registration of trademarks, service marks, collective trademarks and service marks, collective membership marks, and certification marks. Individuals and businesses who use their marks, or intend to use their marks, in commerce regulable by Congress, may file an application with the USPTO to register their marks. These individuals and businesses may also submit various communications to the USPTO, including requests to amend their applications to delete an originally-identified statutory filing basis, such as the ''intent to use'' basis. Registered marks remain on the register for ten years. However, the registrations are canceled unless the owner files an affidavit with the USPTO attesting to the continued use (or excusable non-use) of the mark in commerce. The applicant may withdraw his or her application. If an application becomes abandoned, the owner may petition the USPTO to revive the abandoned application. The registration may be renewed for periods of ten years.

The rules implementing the Act are set forth in 37 CFR Part 2. These rules mandate that each register entry include the mark, the goods and/or services in connection with which the mark is used, ownership information, dates of use, and certain other information. The USPTO also provides similar information concerning pending applications. The register and pending application information may be accessed by an individual or by businesses, to determine availability of a mark. By accessing the USPTO's information, parties may reduce the possibility of initiating use of a mark previously adopted by another. The Federal trademark registration process may lessen the filing of papers in court and between parties.

The trademark rules set forth in 37 CFR Part 2 provide for the appointment of attorneys of record to represent applicants in the application process. Likewise, these rules also provide for the revocation of an attorney's appointment, and the rules allow an attorney to request permission to withdraw from representation. Additionally, the rules allow applicants to change their addresses.

The trademark rules allow applicants who do not wish to pursue their applications to request that their applications be abandoned. Additionally, the rules allow applicants whose applications became abandoned by operation of law to petition to revive these applications. Finally, the rules also allow applicants to request that their applications be amended to delete a particular statutory filing basis, namely the ''intent to use'' basis.

Applicants can submit the majority of the trademark applications, petitions, requests, and other associated papers electronically through the Trademark Electronic Application System (TEAS). The USPTO is taking this opportunity to obtain approval from OMB to add seven new electronic forms into the currently approved collection of 677,151 responses, 144,587 burden hours, and $147,134,656 in annualized (non-hour) costs. The approval for the current information collection expires in June of 2005.

The seven new TEAS forms under development are as follows:

- Petition to Revive Abandoned Application—Failure to Respond Timely to Office Action (Form 2194): currently approved collection of information; new electronic form.
- Petition to Revive Abandoned Application—Failure to File Timely Statement of Use or Extension Request (Form 2195): currently approved collection of information; new electronic form.
- Revocation of Power of Attorney and/or Appointment of Attorney (Form 2196): appointment of attorney is currently approved and the USPTO is expanding this approval to include the revocation of power of attorney; new electronic form.
- Request to Delete Section 1(b) Basis, Intent to Use (Form 2200): addition of existing collection of information; new electronic form.
- Change of Owner's Address Form (Form 2197): addition of existing collection of information; new electronic form.
- Request for Permission to Withdraw as Attorney of Record (Form 2201): addition of existing collection of information; new electronic form.
- Request for Express Abandonment (Withdrawal) of Application (Form 2202): addition of existing collection of information; new electronic form.

II. Method of Collection

Electronically if applicants submit the information using the forms available through TEAS. By mail or hand delivery if applicants chose to submit the information in paper form.

III. Data

OMB Number: 0651–0009.

Form Number(s): PTO Forms 2194, 2195, 2196, 2197, 2200, 2201, and 2202.

Type of Review: Revision of a currently approved collection.

Affected Public: Primarily business or other for-profit organizations, but also individuals or households; not-for-profit institutions; farms, Federal Government; and state, local or tribal Government.

Estimated Number of Respondents: 762,701 responses. Of this total, 216,680 responses are related to new electronic forms added to this collection. The USPTO estimates that 4,400 each of the petitions to revive; 550 of requests to delete section 1(b) from an intent to use application; 89,901 of the revocations/appointment of attorney; 70,000 of the change of owner's address forms; 1,500 of requests to withdraw as the attorney of record; and 3,600 express abandonments of an application will be submitted electronically through TEAS per year. The USPTO estimates that the remaining 1,900 of the petitions to revive and 38,529 of the revocations and appointments of attorney will be mailed to the USPTO per year. The 216,680 responses being added to this collection adjusts the number of responses for the mailed petitions to revive and powers of attorney that are already covered in the currently approved collection. Currently, the USPTO estimates that 3,200 petitions to revive abandoned applications and 127,930 appointments of attorney are mailed to the USPTO. The USPTO estimates an increase in the total number of submissions for the petitions to revive abandoned applications from 3,200 to 12,600 responses per year and an increase in the total number of submissions for powers of attorney (now expanded to include a previously overlooked collection) from 127,930 to 128,430 responses per year. The addition of new electronic forms to this collection backs out the 131,130 responses for the petitions to revive and powers of attorney from the currently approved total of 677,151 responses for this collection, and adds 216,680 responses, for a new total of 762,701 responses for this collection.

Estimated Time Per Response: The USPTO estimates that it will take approximately 3 minutes (0.05 hours) to 12 minutes (0.20 hours) to complete these petitions, requests, and forms. The USPTO believes that it takes approximately 3 minutes (0.05 hours) to complete the requests for deletion of the section 1(b) basis, change of owner's address form, and the express abandonment of the application electronically through TEAS. The USPTO estimates that it takes approximately 5 minutes (0.08 hours) to complete the petitions to revive and the revocation and appointment of attorneys and 12 minutes (0.20 hours) to complete the withdrawals as the attorney of record and submit them electronically through TEAS. The USPTO estimates that it takes 6 minutes (0.10 hours) to complete the revocation and appointment of attorney and 12 minutes (0.20 hours) to complete the petitions to revive and mail them to the USPTO. This includes the time to gather the information, prepare the petitions, requests, and other associated forms, and submit them to the USPTO.

Estimated Total Annual Respondent Burden Hours: 154,483 burden hours. Of this total, 16,517 burden hours are related to the addition of the new electronic forms into this collection. The 16,517 burden hours being added to this collection adjusts the hours for the mailed petitions to revive and power of attorney that are already covered in the currently approved collection. Currently, the USPTO estimates burdens of 224 and 6,397 hours for the petitions to revive and powers of attorney, respectively. Burden hours for the petitions to revive will increase from 224 to 1,464 hours per year. Burden hours for the revocation/appointment of attorney will increase from 6,397 to 11,045 hours per year. The addition of the new electronic forms and inclusion of previously overlooked collections of information adds an additional 16,517 hours. Backing out the 6,621 hours for the mailed petitions to revive and the powers of attorney from the currently approved total of 144,587 hours amounts to a new total of 154,483 hours for this collection.

Estimated Total Annual Respondent Cost Burden: $39,491,294 total respondent cost burden. Of this total, $4,723,862 is associated with the new electronic forms that the USPTO is adding into the collection. The USPTO is using the American Intellectual Property Law Association hourly rate of $286 for associate attorneys to calculate the respondent cost. The hourly rates for completing petitions to revive an abandoned application and the powers

of attorney forms (which are covered in the currently approved collection), have been adjusted to the current professional hourly rate of $286 for associate attorneys. The respondent costs of $4,723,862 being added to this collection adjusts the respondent cost burden for the petitions to revive an abandoned application and the power of attorney from $56,448.00 to $418,704 and from $1,612,044 to $3,158,870, respectively. The addition of the new electronic forms adds $4,723,862 in respondent costs to this collection. The USPTO will revise the currently approved respondent costs by subtracting $1,668,492 in respondent costs from the currently approved total of $36,435,924 in order to reflect the new estimate. This results in a new total of $39,491,294 in respondent cost burden estimates for this collection.

Item	Estimated time for response (minutes)	Estimated annual responses	Estimated annual burden hours
Petition to Revive Abandoned Application—Failure to Respond Timely to Office Action—No Form Associated	12	1,900	380
Petition to Revive Abandoned Application—Failure to File Timely Statement of Use or Extension Request—No Form Associated	12	1,900	380
Electronic Form Petition To Revive Abandoned Application—Failure to Respond Timely to Office Action	5	4,400	352
Electronic Form Petition to Revive Abandoned Application—Failure to File Timely Statement of Use or Extension Request	5	4,400	352
Electronic Form Request to Delete Section 1(b) Basis, Intent to Use	3	550	28
Revocation of Power of Attorney and/or Appointment of Attorney (Power of Attorney)—No Form Associated	6	38,529	3,853
Electronic Form Revocation of Power of Attorney and/or Appointment of Attorney (Power of Attorney)	5	89,901	7,192
Electronic Form Change of Owner's Address Form	3	70,000	3,500
Electronic Form Request for Permission to Withdraw as Attorney of Record	12	1,500	300
Electronic Form Request for Express Abandonment (Withdrawal) of Application	3	3,600	180
Totals		216,680	16,517

Estimated Total Annual Non-Hour Respondent Cost Burden: $148,101,566. Of this total, $1,286,910 is related to postage costs for the mailed petitions and appointments of attorney ($26,910) and filing fees related to the addition of electronic forms for the petitions to revive ($1,260,000). This collection has no operation or maintenance costs.

Customers incur postage costs when submitting non-electronic information to the USPTO by mail through the United States Postal Service. The USPTO does not maintain statistics on the percentage of submissions per manner of submission. However, the USPTO estimates that a large majority of submissions for these forms are made via first class mail. For purposes of this request, the USPTO is estimating that approximately 98% are mailed to the USPTO by first class mail and the other 2% are mailed by Express Mail. First class postage is 37 cents and the Express Mail service typically costs $13.65. For the petitions to revive abandoned applications, the USPTO estimates that approximately 3,724 are mailed to the USPTO by first class mail and 2% or approximately 76 are mailed by Express Mail. For the revocation of power of attorney and/or appointment of attorney, the USPTO estimates that approximately 37,758 are mailed to the USPTO by first class mail and 2% or approximately 771 are mailed by Express Mail. Therefore, a total estimated mailing cost of $26,910 is incurred.

Item	Responses (yr) (a)	Postage costs (b)	Total cost (yr) (a x b)
Petition to Revive Abandoned Application—Failure to Respond Timely to Office Action—First Class Mail	1,862	$.37	$689.00
Petition to Revive Abandoned Application—Failure to Respond Timely to Office Action—Express Mail or Courier Service	38	13.65	519.00
Petition to Revive Abandoned Application—Failure to File Timely Statement of Use or Extension Request—First Class Mail	1,862	.37	689.00
Petition to Revive Abandoned Application—Failure to File Timely Statement of Use or Extension Request—Express Mail or Courier Service	38	13.65	519.00
Revocation of Power of Attorney and/or Appointment of Attorney (Power of Attorney)—First Class Mail	37,758	.37	13,970.00
Revocation of Power of Attorney and/or Appointment of Attorney (Power of Attorney)—Express Mail or Courier Service	771	13.65	10,524.00
Totals	42,329		26,910.00

Filing fees of $1,260,000 are associated with petitions to revive abandoned applications; there are no fees associated with the other forms under development. The approval of this inclusion of the new TEAS forms will adjust the filing fee costs associated with the petitions from the currently approved $320,000 to $1,260,000. The USPTO would delete $320,000 in filing fees for the petitions to revive from the currently approved fees of $145,980,100 for this information collection and add adjusted fees of $1,260,000 for the petitions to revive, for a new adjusted total of $146,920,100 in filing fees for this collection.

Item	Responses (yr) (a)	Filing fees (b)	Total cost (yr) (a x b)
Petition to Revive Abandoned Application—Failure to Respond Timely to Office Action	1,900	$100.00	$190,000.00
Petition to Revive Abandoned Application—Failure to File Timely Statement of Use or Extension Request	1,900	100.00	190,000.00
Electronic Petition to Revive Abandoned Application—Failure to Respond Timely to Office Action	4,400	100.00	440,000.00
Electronic Petition to Revive Abandoned Application—Failure to File Timely Statement of Use or Extension Request	4,400	100.00	440,000.00
Request to Delete Section 1(b) Basis, Intent to Use	550	0.00	0.00
Revocation of Power of Attorney and/or Appointment of Attorney (Power of Attorney)	150	0.00	0.00
Electronic Revocation of Power of Attorney and/or Appointment of Attorney (Power of Attorney)	350	0.00	0.00
Change of Owner's Address Form	70,000	0.00	0.00
Request for Permission to Withdraw as Attorney of Record	1,500	0.00	0.00
Request for Express Abandonment (Withdrawal) of Application	3,600	0.00	0.00
Totals	88,750		1,260,000.00

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, *e.g.*, the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for OMB approval of this information collection; they will also become a matter of public record.

Dated: July 14, 2004.

Susan K. Brown,

Records Officer, U.S. Patent and Trademark Office, Office of the Chief Information Officer, Office of Data Architecture and Services, Data Administration Division.

[FR Doc. 04–16415 Filed 7–19–04; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Proposed Collection; Comment Request

AGENCY: Defense Finance and Accounting Service, DOD.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Defense Finance and Accounting Service announces the proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by September 20, 2004.

ADDRESSES: Written comments and recommendations on the proposed information collection should be sent to, Attn: DFAS–DGG/CL, Rodney Winn, Assistant General Counsel for Garnishment Operations, Defense Finance and Accounting Service—Cleveland, P.O. Box 998002, Cleveland, OH 44199–8002.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the above address, or call, Mr. Rodney Winn, (216) 522–5118.

Title, Associated Form, and OMB Number: Application for Former Spouse Payments From Retired Pay, DD Form 2293; OMB Number 0730–0008.

Needs and Uses: Under 10 U.S.C. 1408, State courts may divide military retired pay as property or order alimony and child support payments from that retired pay. The former spouse may apply to the Defense Finance and Accounting Service (DFAS) for direct payment of these monies by using DD Form 2293. This information collection is needed to provide DFAS the basic data needed to process the request.

Affected Public: Individuals and households.

Annual Burden Hours: 5,130 hours.

Number of Respondents: 20,520.

Responses Per Respondent: 1.

Average Burden Per Response: 15 minutes.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The respondents of this information collection are spouses or former spouses of military members. The applicant submits a DD Form 2293 to the Defense Finance and Accounting Service (DFAS). The information from the DD Form 2293 is used by DFAS in processing the applicant's request as authorized under 10 U.S.C. 1408. The DD Form 2293 was devised to standardize applications for payment under the Act. Information on the form is also used to determine the applicant's current status and contains statutory required certifications the applicant/former spouse must make when applying for payments.

Dated: July 13, 2004.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–16397 Filed 7–19–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF ENERGY

Bonneville Power Administration

Opportunity for Public Comment; Bonneville Power Administration's Policy Proposal for Power Supply Role for Fiscal Years 2007–2011

AGENCY: Bonneville Power Administration (BPA), Department of Energy.

ACTION: Notice of Regional Dialogue policy proposal and opportunity for public comment.

SUMMARY: BPA is publishing a policy proposal stating how the agency proposes to market power and distribute the costs and benefits of the Federal Columbia River Power System (FCRPS) in the Pacific Northwest for Fiscal Years (FY) 2007–2011. This proposal is intended to clarify BPA's obligation to supply power to its regional power customers and guide BPA in developing and establishing its firm power rates in the future. Clarifying these issues will create valuable certainty for customers over their BPA power supply. Final policy decisions will be made by BPA in December 2004 after all public comments have been reviewed.

DATES: Public comments will be accepted through September 22, 2004. Public meeting dates are included in the **SUPPLEMENTARY INFORMATION** section below.

ADDRESSES: Written comments should be submitted to Bonneville Power Administration, P.O. Box 14428, Portland OR 97293–4428. Comments can also be sent via e-mail to *comment@bpa.gov* or submitted on-line at *http://www.bpa.gov/comment.* The proposal is also available at *http://www.bpa.gov/power/regionaldialogue.* Helen Goodwin, Regional Dialogue project manager, is the official responsible for the development of the Regional Dialogue proposal.

FOR FURTHER INFORMATION CONTACT: Helen Goodwin, Regional Dialogue project manager, at (503) 230–3129.

SUPPLEMENTARY INFORMATION:

Schedule of public meetings:

1. August 17, 2004, 6 to 8 p.m., Seattle, Wash.—Mountaineers Headquarters, Olympus Room, 300 Third Avenue West.
2. August 19, 2004, 6:30 to 8:30 p.m., Eugene, Ore.—Eugene Water & Electric Board, 500 East 4th Avenue.
3. August 26, 2004, 6 to 8 p.m., Spokane, Wash.—Airport Ramada Inn, 8909 Airport Road.
4. August 31, 2004, 6 to 8 p.m., Boise, Idaho—Boise Centre on the Grove, 850 W. Front Street.
5. September 9, 2004, 6 to 8 p.m., Portland, Ore.—East Portland Community Center, 740 SE 106th Avenue.
6. September 15, 2004, 5 to 7 p.m., Kalispell, Mont.—WestCoast Kalispell Center Hotel, 20 North Main Street.

Any changes or additions to this meeting schedule will be posted on BPA's Regional Dialogue Web site at *http://www.bpa.gov/power/regionaldialogue.*

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I. The Origins of Regional Dialogue

BPA is engaged in the Regional Dialogue process as part of its effort to provide clarity around key issues the agency and region will face when the current rate period ends with FY 2006. BPA's immediate goal is to decide issues for the FY 2007–2011 period that prepare the way for setting rates for the next rate period while assuring that the agency's long-term strategic goals and its long-term responsibilities to the region are aligned.

BPA must make and carry out policy decisions that promote the development of a cost-effective electric industry infrastructure and protect the value of the existing Federal system for the region in the long run without shifting risk to U.S. taxpayers.

These decisions will provide customers greater clarity about their Federal power supply so that they can plan effectively for the future and make capital investments in long-term electricity infrastructure, if they so choose. This process and ongoing efforts within the Western Interconnection and the Pacific Northwest to develop resource adequacy metrics will provide necessary transparency to the region's load serving entities regarding the amount of resources needed to serve load. BPA's strategic interest is to improve this clarity soon to avoid creating significant risk for the region's ratepayers that would come from delaying the development of the necessary infrastructure. Delays could create imbalance between supply and demand, which could in turn cause excessive price levels and volatility.

The Regional Dialogue began in April 2002 when a group of BPA's Pacific Northwest electric utility customers submitted a ''joint customer proposal'' to BPA. This proposal focused on settling the outstanding litigation on the Residential Exchange Program Settlement Agreement signed in 2000, as well as on determining how to market Federal power and distribute the costs and benefits of the FCRPS for 20 years. Although BPA agreed with substantial portions of the proposal, there were also areas of disagreement, such as the methodology and magnitude of benefits potentially offered to investor-owned utilities (IOUs) for the benefit of their residential and small-farm consumers.

In June 2002, BPA and the Northwest Power and Conservation Council (Council) jointly initiated a public process regarding BPA's marketing of Federal power post-2006. In September 2002, several jointly sponsored public meetings were held throughout the region for interested parties to discuss their proposals and provide new ideas and suggestions. BPA and the Council accepted comments and proposals from all interested parties. This phase of the Regional Dialogue ended when the Council submitted final recommendations on ''The Future Role of Bonneville'' to BPA in December 2002.

In February 2003, faced with a continuing financial crisis, BPA announced that it would proceed with a rate-setting process for the Safety Net Cost Recovery Adjustment Clause (SN CRAC). Consequently, BPA decided that the Regional Dialogue discussions

should take on a slower, more deliberate pace, focusing only on a couple of key items, such as the level of benefits for the residential and small-farm consumers of the region's IOUs, until the rate case concluded.

In a June 5, 2003, letter, the governors of the four Pacific Northwest states encouraged BPA and the Council to jointly restart the Regional Dialogue. In response, BPA and the Council hosted a series of informal meetings with customers and interested parties throughout the region in the fall of 2003. Shortly thereafter, the Council released a set of principles and an issue paper entitled ''Proposed Council Principles for the Future Role of the Bonneville Power Administration in Power Supply'' for public comment. Following the close of comment in December 2003, the Council held several workgroup meetings aimed at gathering input from customers and others to help guide its next round of recommendations on the future role of BPA in power supply.

Following conclusion of the workgroup meetings, the Council released in April 2004 its draft recommendations on ''The Future Role of the Bonneville Power Administration in Power Supply'' and took public comment. Those recommendations were finalized and sent to BPA in May 2004.

In February 2004, BPA sent a letter to the region updating BPA's plans for resolving Regional Dialogue issues. This letter included a plan to present this policy proposal to the region for comment by the end of June 2004.

II. Scope of the Proposal

BPA's current firm power rates expire at the end of FY 2006 while nearly all of BPA's regional power sales contracts continue through FY 2011. BPA believes its first priority in the Regional Dialogue must be to resolve policy issues that likely will influence the next rate case and which must otherwise be made before 2007. This is the focus of this proposal.

In the February 2004 letter, BPA identified issues that are a priority to resolve for the FY 2007–2011 period. While this Regional Dialogue proposal focuses primarily on the FY 2007–2011 issues, key long-term questions remain unanswered. BPA is committed to resolving the long-term issues soon after the conclusion of this current process. A proposed process and schedule for resolving these issues is included in Section VII.B. BPA is strongly motivated to meet that schedule with the greatest degree of regional alignment possible. However, even if regional consensus does not emerge, BPA is committed to resolving the longer-term issues of who has the obligation to serve. BPA intends to make decisions based on the schedule outlined in Section VII.B.

III. Council Recommendations on BPA's Future Role

BPA thoroughly examined the Council's recommendations as it developed this proposal. This review showed that BPA's proposal and the Council's recommendations differ relatively little where the two address the same issues. BPA has intentionally limited the scope of this proposal primarily to issues that have to be resolved for FY 2007–2011. Consequently, issues such as the long-term ''allocation'' of the system are not addressed. As already mentioned, BPA agrees with the Council over the importance of these long-term issues and proposes a schedule for their resolution in Section VII.B.

Overall, BPA and the Council agree on the overall goals of the Regional Dialogue process—resolution of BPA's long-term role in providing power to regional customers at the lowest embedded cost-based rate, and capturing that role in long-term contracts and rates as soon as possible to create a durable solution. This proposal is the first step toward meeting these goals.

IV. Link to FY 2007–2011 Strategic Direction

The financial impacts of the West Coast energy crisis of 2000–2001 led many utilities to examine their policies and approaches to their power supply. BPA is no exception. Over the past year, BPA has invested much time and effort in strategic planning. The agency is in the process of finalizing its strategic direction with emphasis on FY 2007–2011.

This re-examination of BPA's mission and values is, along with comments and advice from the Council, customers, and other regional stakeholders, informing the agency's approach to the Regional Dialogue process.

A. The Report to the Region

In early 2003, BPA initiated a detailed examination of the events that began in 2000 that led to the significant rate increases and deterioration of BPA's financial condition. On April 18, 2003, BPA released a Report to the Region that included lessons the agency had learned, with the intention of translating those lessons into future actions.

Among a number of other lessons, the report noted that the level of BPA's costs and risks are driven heavily by the load obligations BPA assumes. Meeting those obligations was a large driver of BPA's cost and rate levels. The report pointed out that the amount of risk (market volatility and uncertainty) to be managed in the region's power system has grown substantially in recent years, and the fraction of that risk that BPA can absorb has gotten smaller. The report also noted that BPA must avoid the need to acquire large amounts of power on short notice to meet demand. There were also a number of recommendations for process improvement in cost management, decision making, risk analysis, and communications that BPA has put into place agency wide and used in developing this proposal.

The Regional Dialogue proposal has been developed specifically with those lessons in mind, particularly to resolve the agency's load uncertainty as soon as possible and provide customers with the certainty they need.

B. Strategic Direction

The Report to the Region highlighted the need for BPA to have a clear and steady strategy and manage to clear objectives. In response, the agency devoted a significant amount of time in the last year to clarifying its strategic direction.

BPA's strategic direction establishes the agency's most important objectives and the actions that will help it manage to these objectives. The strategic direction calls on BPA to advance the Pacific Northwest's future leadership in four core values—high reliability, low rates consistent with sound business principles, responsible environmental stewardship, and clear accountability to the region.

It should come as no surprise that the subjects to be covered in the Regional Dialogue process are well represented in the agency's strategic direction, particularly with regard to BPA's role as a low-cost provider and for clear regional accountability. The strategic direction guiding this proposal includes:

1. *Regional Infrastructure Development:* BPA policies encourage regional actions that ensure adequate, efficient, and reliable transmission and power service.

2. *Conservation and Renewables:* Development of all cost-effective energy efficiency to meet BPA loads, facilitation of regional renewable resources, and adoption of cost-effective non-construction alternatives to transmission expansion.

3. *Benefits to Residential and Small-Farm Consumers of IOUs:* The post-2011 benefit that BPA provides to IOUs for their residential and small-farm

consumers is equitable based on the Northwest Power Act.

4. *Rates:* BPA's lowest firm power rates to public preference customers are consistent with sound business principles, reflect the cost of the undiluted Federal Base System (FBS) and are below market for comparable products, are predictable, and have low volatility.

5. *Service to Direct Service Industrial Customers (DSIs):* Explore a post-2006 DSI service option with a known or capped value.

6. *Regional Stakeholder Satisfaction:* Customer, constituent, and tribal satisfaction, trust, and confidence meet targeted levels.

7. *Management:* Collaborative customer/constituent/tribal relationships are supported by managing to clear long-term objectives with reliable results.

8. *Cost Recovery:* Consistent cost recovery over time.

9. *Treasury Payment:* BPA will plan to achieve and maintain a Treasury payment probability (TPP) that is the equivalent of a 95 percent probability for a two-year period and 88 percent for a five-year period. Options for achieving this goal include, but are not limited to, Cost Recovery Adjustment Clauses (CRACs) and Planned Net Revenue for Risk (PNRR).

10. *Ratepayer and Taxpayer Interests:* FCRPS assets are managed to protect ratepayer and taxpayer interests for the long-term.

11. *Best Practices:* Best practices (with emphasis on cost performance and simplicity) are obtained in key systems and processes.

12. *Risk:* Risks are managed within acceptable bounds. An additional principle guiding the Regional Dialogue is:

13. *Legal Criteria:* Approaches or policy options should not require legislative change and should minimize legal risk.

C. Customer and Stakeholder Comments on the Agency Vision

In the spring of 2004, BPA publicly released information about its long-term strategic direction as a springboard for discussions with customers and other stakeholders. The issues addressed in the strategic direction, as mentioned above, serve as the foundation for the Regional Dialogue. Account Executives held informal meetings and conversations with customers and discussed and recorded their comments. Some customers, as well as other constituents, also submitted written comments.

In the process of developing this proposal, BPA analyzed and considered 388 comments related to Regional Dialogue issues. Many who commented said that allocation of the system is a high priority issue and that the appropriate timing is now. They cautioned that discussions regarding BPA's long-term obligation to serve at embedded cost rates for Pacific Northwest firm requirements loads and related decisions would be difficult, and their objections to tiered rates were much more frequent than support. Commenters said that any allocation should be done before entering into the process to tier power rates.

V. BPA Loads and Resources FY 2007–2011

In order to match BPA's firm power obligation for FY 2007–2011 to its resources, this discussion needs to begin with a clear understanding of BPA's current loads and resources.

For the FY 2007–2011 period, BPA projects that firm power sales obligations will exceed firm Federal resources, with the difference growing from a deficit of about 15 average megawatts (aMW) in FY 2007 to about 190 aMW by FY 2011. Although it will have to be carefully managed, a deficit of this size does not create the same degree of cost and rate risk exposure as that BPA faced in 2000–2001 when the agency was preparing to solve the 3,300 aMW deficit it faced for FY 2002–2006. Historically, the system has remained in balance either by BPA making power purchases or through customer load reductions consistent with then-effective contractual terms and conditions. The price of solving BPA's 3,300 aMW deficit has been a 50 percent increase in BPA's wholesale power rates.

BPA assesses its loads and resources in its annual Loads and Resources Study, or ''Whitebook,'' as well as in the forecasts used to set firm power rates. These studies, which are a compilation of load and resource projections, provide a synopsis of BPA's loads and resources analyses. They share three major interrelated components: (1) BPA's Federal system load forecast; (2) BPA's Federal system resource forecast; and (3) load and resource balances.

The Federal system load forecast is the forecast of firm energy sales that BPA expects to make during the FY 2007–2011 period. It comprises aggregated net requirements sales forecasts for public utilities and Federal agencies, DSI customers, IOUs, and other BPA contractual obligations.

The majority of BPA's public utility and Federal agency customers have contracts that continue through September 30, 2011. A small number of contracts terminate or contain off-ramps as of September 30, 2006. For this estimate, BPA assumes public utility sales to Block and Slice/Block customers will equal their current contractual amounts, including step-ups in 2007, and that BPA will continue to serve those loads during the FY 2007–2011 period. There are no sales to the DSIs and no deliveries of power to the IOUs assumed during the FY 2007–2011 period because contracts currently do not call for deliveries to any of these customers. In fact, recently signed agreements with the IOUs explicitly state that there will not be any power sales for FY 2007–2011.

The forecast of available generating and contract resources includes the output of Federally-owned hydro generation, non-Federally-owned resources (hydro, thermal, and wind projects), exchange energy associated with BPA's existing capacity-for-energy exchanges, power purchases, and other BPA hydro-related contracts. Firm hydro resources are based on 1937 critical water conditions under the 2000 Biological Opinion that was implemented December 20, 2000, and incorporates changes associated in hydro regulation 03SN67a and up to 172 aMW of hydro improvements by FY 2012. The thermal firm resource is Columbia Generating Station. Examples of non-Federally owned resources include the Foote Creek 1, 2, and 4, Stateline, Condon, and Klondike Phase 1 wind projects; Ashland solar; Wauna cogeneration and Cowlitz Falls and Dworshak hydro.

To calculate the BPA load resource balance, BPA compares Federal system firm energy loads with Federal system energy outputs for each month of the study period years. The results of this comparison yield the monthly and annual firm energy surplus or deficit of the Federal system.

VI. An Integrated Strategy for FY 2007–2011

A. FY 2007–2011 Rights to Lowest-Cost Priority Firm (PF) Rate

Most current 10-year Subscription contracts with public utility customers contain a guarantee that BPA will apply the lowest cost-based PF rates throughout the remaining term of the Subscription power sales contracts. Three five-year contracts also contain this 10-year guarantee.

Upon review, BPA believes this contractual guarantee is clear. Accordingly, even if BPA were to adopt a tiered-rate design during the term of

the existing contracts, BPA would not apply a higher priced PF Tier 2 rate to the purchases of customers whose contracts contain the rate guarantee during the term of the contract.

B. Tiered Rates

BPA proposes in Section VII.A. a long-term policy to limit its sales of firm power to its Pacific Northwest customers' firm requirements loads at its embedded cost rates to approximately the firm capability of the existing Federal system. Administrator Steve Wright suggested in his December 9, 2003, letter to the Council that BPA believes tiered rates should be fully explored as a means to achieve that goal. In comments to the Council, many customers have voiced concerns regarding implementing tiered rates in the rate period starting in FY 2007. Most agreed with limiting BPA sales at embedded cost, but urged that new long-term contracts defining rights to the lowest embedded cost rate be developed before BPA puts tiered rates into effect. In its May 2004 recommendations ''The Future Role of the Bonneville Power Administration in Power Supply,'' the Council acknowledged that tiered rates would be the clearest practical indication of how BPA will be carrying out its role in the future. However, it went on to say, if BPA defines its role as the Council recommends, and if critical issues are resolved in a timeframe consistent with the Council's request that new contracts be offered no later than October 2007, then the Council would not press for tiered rates under the current contracts for the next rate period.

BPA is obligated to serve customer net requirements, even if that request is in excess of what the existing Federal system can supply. BPA believes tiered rates in combination with new contracts are a necessary part of the long-term solution to limit BPA's sales at embedded costs for Pacific Northwest firm requirements loads to the existing system. However, BPA also believes it is not critical to implement tiered rates in FY 2007, because BPA loads and resources are roughly in balance for the FY 2007–2011 period. Accordingly, BPA proposes to exclude tiered rates in its FY 2007 initial rate proposal. Instead, BPA proposes to explore tiered rates as part of an integrated long-term contract and rate solution that would implement the proposed long-term policy of limiting BPA sales at embedded cost for Pacific Northwest firm requirements loads.

C. Term of the Next Rate Period

Most of BPA's current power contracts are effective through FY 2011. BPA's current power rates are effective through September 30, 2006. In early 2005, BPA will begin rate case workshops in preparation for the FY 2007 rate case that will set rates for the next rate period. Based in part on suggestions from customers and others, BPA has already made a tentative decision to limit the duration of the next rate period to less than five years. The primary reason for doing so is to reduce the risk inherent in setting rates for longer periods of time, thus allowing BPA to set rates lower than otherwise would be the case and to reduce the need for rate adjustment mechanisms like the current CRACs. BPA is proposing to limit the next rate period to either two or three years. Before making a final decision on this, BPA would like to consider public comments. The following are some considerations on the length of the rate periods:

Two-year rate period (October 2006–September 2008): A two-year rate period would likely result in lower rates, and lessen the need for rate adjustment mechanisms due to reduced uncertainty. In Section VII.B., BPA proposes a schedule for developing new long-term power contracts, with the earliest effective date of those contracts projected at October 1, 2008. A two-year rate period would synchronize the start of these new contracts with the start of the subsequent rate period, both in FY 2009. However, proposing a two-year rate period is not without risk. Putting new contracts and new rates in place by FY 2009 will require a major effort in a compressed time frame by BPA and its customers. The formal rate case to support these new contracts would likely need to occur between January and August 2008. A separate rates process to define a long-term rate methodology may also be necessary. If new contracts are not in place by October 2008, but rates expire on that date, BPA would either have to extend then-effective rates or conduct a new rate case.

Three-year rate period (October 2006–September 2009): A three-year rate period would enable the Power Business Line's (PBL) rate period to coincide with the BPA Transmission Business Line's (TBL) rate period starting in October 2009, as requested by some customers and other interested parties. It would reduce the risk of not completing long-term contract negotiations on schedule and having to conduct a new rate case or extend rates. If BPA's long-term policy decision and subsequent contract negotiations are concluded earlier, BPA would have to replace those rates with new rates that reflect the new Regional Dialogue contracts.

D. Service to Publics With Expiring Five-Year Purchase Commitments That Do Not Contain Lowest PF Rate Guarantee Through FY 2011

The majority of BPA's public body, cooperative, and Federal agency customers signed 10-year Subscription contracts during the 1999–2000 Subscription period. However, seven public customers entered into five-year Subscription contracts, representing 307 aMW of load, expiring on September 30, 2006.

BPA assumes that these customers will request either an extension of their current contracts through September 30, 2011, or follow-on contracts. Three of the seven customers have contracts containing language that guarantees service through September 30, 2011, at the lowest applicable cost-based power rates provided under the applicable PF rate schedule. The remaining five-year customers have informed BPA that they would like BPA to offer them the lowest-cost PF rates through September 30, 2011. This would provide them with the rate certainty for FY 2007–2011 they are seeking.

Besides the five-year customers described above, four public customers signed 10-year contracts that contain five-year options, giving them the right to either remove or add load (*i.e.*, PF off-ramp, PF on-ramp). These customers seek rate certainty for FY 2007–2011 for any purchases they elect to make under their options. The load associated with the five-year options is 524 aMW.

In addition, in 2002, BPA officially extended the United States Navy's five-year Subscription contracts for Naval Submarine Base Bangor, Naval Station Bremerton, and Naval Radio Station Jim Creek through September 30, 2011. Because the window for Subscription closed prior to the contract amendments, the Navy's contracts do not contain language that guarantees the lowest PF rates for the FY 2007–2011 period. The Navy has informed BPA that it would like BPA to apply the same rate treatment to the Navy that will be applied to the customers with five-year purchase commitments that do not contain the lowest PF rates guarantee.

Customers with five-year purchase commitments, as well as the United States Navy, are seeking clarity about post-FY 2006 rates, and BPA is seeking early load certainty from customers in order to facilitate better resource and

rates planning. In addition, the agency is looking to create parity among all public customers by proposing to place the public customers with five-year purchase commitments that do not contain the lowest PF rates guarantee on equal footing with the 10-year customers from a rates perspective. Such alignment will facilitate BPA's move toward developing and offering new long-term contracts.

As a means of achieving the aforementioned goals, BPA proposes to offer all of the public customers with expiring five-year contracts that do not contain the lowest PF rate guarantee an amendment to extend the term of their existing contracts through September 30, 2011, which would make them consistent with the other 10-year Subscription contracts. The amendment would include language providing the same guarantee of the lowest PF rates (except for New Large Single Loads (NLSL)) as other customers have. The guarantee of lowest cost-based PF rates would also be extended to the United States Navy. In addition, BPA proposes to recalculate the firm power load net requirements of each of the affected public customers for the FY 2007–2011 period for purposes of load and resource planning, rate setting, and contract offers. BPA proposes to make such an offer well in advance of BPA's next section 7(i) power rate case. Public customers would have a 60- to 90-day period, specified by BPA, in which to accept BPA's offer. This window would close no later than June 30, 2005. This timeframe would allow BPA to incorporate the results of the net requirements calculation into the FY 2007 initial rates proposal. BPA is also proposing the offer be for the same power products and services as the customer currently purchases, as addressed in Section VI.F., Product Availability. Customers who choose not to accept the offer during this time frame may still request a new contract, but they will not be eligible to receive the lowest PF rate guarantee. The product choices available would be those described in Section VI.F.

BPA proposes similar action for public customers with expiring options for FY 2007–2011. BPA would offer each customer a contract amendment to provide an early opportunity to elect to cancel its PF off-ramps or on-ramps and add language that guarantees service at the lowest PF rates (except for NLSL), consistent with language in other current 10-year contracts. BPA would calculate the net requirements of those customers, reflect the amount where appropriate in the contract amendment, and provide service for the returning off-ramp or on-ramp load based on the results of the net requirements calculation. Again, customers would have to accept the offer within a 60- to 90-day period to be specified by BPA. As with the window for customers with the five-year contracts, this window would close no later than June 30, 2005.

If customers do not accept BPA's offer during the prescribed timeframe, they would be subject to the applicable rates determined in FY 2007, which will include a proposed Targeted Adjustment Charge (TAC) or its successor, reflecting the cost and risk entailed in delayed certainty about the size of BPA's purchase obligations for the rate period starting in FY 2007.

By calculating the net requirements of customers, particularly those with options affecting the second five years, it may be reasonable to expect a reduction in the amount of load BPA will be obligated to serve during FY 2007–2011. This should reduce the need for BPA to acquire firm resources on an annual basis to serve its firm load obligations, help prevent adding high costs to the FBS, and help lower firm power rates.

E. Service to New Publics and Annexed Investor Owned Utility (IOU) Loads

Selling power to new public utilities is consistent with BPA's mandate to encourage the widest possible use of Federal power. Since enactment of the Northwest Power Act in 1980, the agency has been obligated to sell power to serve the regional firm power requirements loads of public bodies (including new public utilities), cooperatives, and IOUs net of such entities' non-Federal resources used to serve their load. BPA is also authorized to sell power to Federal agencies in the region.

Over the last 20 years, BPA has supplied new public utilities with approximately 300 aMW of power. This section addresses the proposed conditions under which BPA would propose in its rate case to serve new public utilities (public body, cooperative, and Federal agencies) between October 1, 2006, and September 30, 2011, at the lowest PF rate. In addition, it addresses service to IOU loads annexed by public utility customers.

New Public Utilities: Under law and BPA policy, in order to receive service from BPA, entities that form new public utilities must meet BPA's Standards for Service criteria and request firm power service under section 5(b) of the Northwest Power Act. For purposes of the FY 2007–2011 period, BPA proposes that in order to receive power at the lowest PF rate, new public customers would need to meet these criteria prior to June 30, 2005. If these criteria are met, the customer would be eligible for future rate treatment comparable to other BPA public utility customers.

Conversely, BPA proposes that new public utilities which meet BPA's Standards for Service, and request firm power service from BPA after June 30, 2005, will be served at the PF rate plus a charge or rate that covers any incremental cost incurred by BPA to serve the new publics. The charge would be similar to the current TAC and would be applicable for the rate period that begins in FY 2007. Long-term applicability of a PF plus incremental cost-based rate to such new public utilities will be part of subsequent long-term Regional Dialogue discussions and future rate cases.

Annexed IOU Loads: To the extent an existing public utility requests firm power service for load that is annexed from an IOU, BPA proposes that the residential and small-farm load proportion receiving residential exchange benefits through the IOU will offset any applicable incremental cost charge, such as a TAC, in an amount equal to its proportionate share of benefits received from the IOU. BPA will continue to treat such annexed load as it does today under existing contract terms and conditions with its customers.

BPA has reviewed its contingent Subscription power sales contracts and has determined this proposal creates no impact on entities holding such contracts because these customers have contractual rights to qualify prior to a date certain. This proposal limits BPA's risk associated with new public customer loads by assuring that loads to be served at the lowest PF rate are known before rate case decisions are made. Commitment by a date certain provides earlier certainty about BPA's firm power obligation.

F. Product Availability

BPA is addressing which products it will offer its net requirements purchasers in the FY 2007–2011 period, specifically, what products customers can purchase in addition to or instead of the products currently being purchased in existing power sales contracts. Most BPA regional power sales contracts are effective through FY 2011, and the rest expire in FY 2006. BPA has also considered whether customers may decrease the amount of power they are obligated to purchase from BPA during FY 2007–2011.

To date, issues that are of concern to customers and other parties, as well as

recommendations from the Council, focus on the following three questions:

1. Which products can customers with contracts that expire in FY 2006 purchase during this period?

2. Can customers with contracts that expire in FY 2011 switch products in FY 2007 or change the allocation of products they currently purchase?

3. Can customers with contracts that expire in either FY 2006 or FY 2011 acquire and use non-Federal resources to serve their firm loads and thereby reduce their net requirements service from BPA in the FY 2007–2011 period?

The Council recommends that BPA provide customers the opportunity to choose the products that best meet their needs.

Under existing contracts for service, BPA sells Full Service, Partial Service for customers with non-Federal resources, Fixed Blocks, and Slice. Partial Service is provided for customers with fixed resources and for customers with hydro resources dedicated entirely to serve load. BPA's proposal is as follows:

Products for Customers Whose Contracts Expire in FY 2006 or Are New Public Customers

BPA proposes that any customer whose contract expires in FY 2006 may simply request a contract extension with no product changes under the terms described in Section VI.D., above. Any new public customer or customer whose contract expires in FY 2006 and who elects to execute a new contract may select its choice of any of the following core requirement products—Full Requirements Service, Simple Partial Requirements Service, Partial Requirements Service with Dedicated Resources, and Block Service (with the optional feature of Shaping Capacity). The terms of the contract will be consistent with the terms described in sections VI.D. and VI.E., above.

No customers currently have the Complex Partial (Factoring) and Block with Factoring products. BPA does not intend to offer either of these products in future contracts because of the lack of interest shown and the expected complexity of administering and billing the products.

Product Switching or Changing the Allocation of Products Currently Purchased by Customers With Contracts That Expire in FY 2011

BPA has received indications that most customers whose contracts expire in FY 2011 want to keep their current product selections. Therefore, BPA does not see a need to offer contract amendments that would allow changes in the power products and services purchased by 10-year Subscription contract holders. However, a few customers have expressed interest in purchasing Slice in FY 2007 or in increasing or decreasing the amount of the current Slice contract amount.

BPA is very reluctant to deny requests to change Slice purchases when those requests come from customers who may feel strongly that it is in their strategic interest to make such a change. However, after extensive review and discussion of the issue, BPA believes it would not be prudent to propose a change in FY 2007 in the number of Slice customers or the Slice percentage sold. A primary reason for the proposal is the major importance placed by BPA and most customers on moving promptly to develop new long-term contracts and rates to implement the BPA power supply role proposed in this document. BPA is concerned that changing Slice elections by customers within existing contracts, and dealing with the associated inter-customer equity issues and technical issues, would be a complicated undertaking that would become a major diversion from the goal of new long-term contracts. The schedule proposed in this document creates a customer option to move to new contracts in FY 2009. BPA believes that focusing BPA and customer effort on meeting the schedule for those new contracts should be a higher priority than making adjustments to Slice purchases under existing contracts. Additionally, there is ongoing litigation pertaining to the annual true-up of the Slice product whose outcome will be uncertain for some time. BPA's view is that one outcome of this litigation could result in a significant cost shift from Slice customers to non-Slice customers. Increasing the amount of Slice purchases while such a cost shift risk exists is a significant concern. BPA therefore proposes no changes to the number of Slice customers or Slice percentage sold in FY 2007.

Customer Acquisition of Additional Non-Federal Resources to Reduce Net Requirements by Customers With Contracts That Expire in Either FY 2006 or FY 2011

BPA proposes to consider, on a case-by-case basis, requests from load-following customers to add non-Federal resources to their existing contract declarations. Such action could assist in relieving BPA's load-serving obligation post-2006 without increasing costs or risks for other customers. BPA will make such a determination at the time a customer makes its request.

For additional information on the products offered, please see BPA's Web site *http://www.bpa.gov/power/psp/products/catalog.shtml.* For wind integration, see *http://www.bpa.gov/Power/PGC/wind/BPA_Wind_Integration_services.pdf.*

G. Service to Direct Service Industries (DSIs)

DSI Subscription contracts expire September 30, 2006. The original 1,500 aMW of DSI contracts have been significantly reduced by load buy-downs, contract terminations, smelter bankruptcies, and other DSI financial difficulties. Only half of the original contracts are still in effect, and the highest monthly total for power provided under these agreements has never exceeded 400 aMW.

The Council recommended that BPA continue to provide some service to the DSIs. The Council suggested ''there may be an opportunity to provide a limited amount of power for a limited duration under specified terms and conditions. If power is to be made available to DSIs, the amount and term should be limited, the cost impact on other customers should be minimized, and Bonneville should retain rights to interrupt service for purposes of maintaining system stability and addressing temporary power supply inadequacy.'' BPA also continues to be interested in finding ways to provide limited service to DSI customers but recognizes that the agency's ability to affect the viability of the aluminum industry in the Pacific Northwest continues to be greatly limited by other factors beyond BPA's control. Global aluminum markets continue to make Pacific Northwest DSI economics appear highly challenging. These global markets and the construction of new, efficient, lower-cost smelters elsewhere in the world have pushed Pacific Northwest smelters from their former role as base-load plants to either swing plants or worse, excess capacity.

Although BPA has no statutory obligation to serve the DSIs, it recognizes that the DSIs have been an important part of the Pacific Northwest economy for decades. BPA is committed to exploring DSI service options that would result in a known, or capped, cost to other Federal power customers. BPA proposes providing up to 500 aMW worth of service benefits to DSIs. Under this proposal, any benefits would be targeted to DSIs that are creditworthy and have fully met their obligations under their Subscription contracts. BPA proposes providing these benefits only if such actions actually enable

aluminum production and maintain Pacific Northwest jobs.

Within these proposed boundaries, BPA continues to look at a number of alternatives for continuing service to the DSIs as explained in the following paragraphs.

Financial Incentive to Operate: BPA is examining offering eligible DSI loads a defined and limited financial incentive to operate. This is the agency's current preferred approach. This benefit would be paid based on each eligible DSI demonstrating that it has used power purchased from the market to produce its product. To implement this, BPA would need to be assured that the cost impact on its other customers would be roughly no greater than if BPA had exercised its discretion to serve the DSI customers directly. This approach would allow eligible DSIs to make their own operating decisions recognizing the availability of the financial credit from BPA. It eliminates the direct sale of Federal power to the DSIs and, thereby, the associated credit and ''take-or-pay'' issues for all parties.

Continue Industrial Power (IP) Service: Providing IP power would appear not to meet BPA's principle of finding an alternative with a known or capped cost because the approach would require augmentation of the BPA system at an unknown cost. If, however, the cost could be fixed and limited in an acceptable fashion, then this alternative may hold promise.

Surplus Firm Power: BPA has explored ways to serve the DSIs with surplus firm power. Efforts to date have not found a product that appears to make economic sense for the smelters. The shape of BPA's surplus relative to the flat load of the DSIs and the fact that the smelters need a steady power supply do not align well. Finding a viable surplus product at a sufficiently low price is particularly difficult when coupled with the reality that smelter operations incur significant costs when they shut down and start up. In addition, getting power to DSIs could be challenging since BPA's Pacific Northwest public customers have priority access to BPA's low-cost surplus.

Credit Support for New DSI Generating Resources: The argument that is made for credit support from BPA is that it would enable smelters to operate without further reliance on power from BPA. With this option as well, BPA would need to be assured that the cost impact on its other customers would be roughly no greater than if BPA had exercised its discretion to serve the DSI customers directly. Credit support could be structured to cap and limit BPA cost and risk, though it would carry significant market and transactional risk to BPA, up to these limits. However, the cost of new resources continues to be much higher than what is needed for profitable smelting. Efficient gas-fired combustion turbines produce power at prices that appear too high under expected future natural gas, alumina, and aluminum market prices.

BPA is interested in public comment on whether BPA should continue to offer service to DSIs and whether the agency's current preferred approach is the way to deliver such benefits. BPA is also interested and willing to explore other ideas to provide qualifying DSIs benefits at a known or capped value that would be roughly no greater than if BPA had exercised its discretion to serve the DSI customers directly.

H. Service to New Large Single Loads (NLSL)

In June 2001, BPA opened a public process on three specific issues regarding BPA's NLSL policy. Two of the issues, transferability of Contracted For Committed To (CFCT) status and closing of the window for applying for CFCT status were subsequently resolved in a BPA record of decision (ROD) signed March 27, 2002. A decision on the third issue of transferring former DSI load to a preference customer in 9.9 aMW increments was postponed. BPA stated that this issue needed more debate on a broader scale and that it would be decided within the Regional Dialogue process.

The specific DSI NLSL policy issue raised was ''whether BPA should change its NLSL policy to allow current and former DSI customers' production load served at BPA's IP rate, or any other rate, to transfer and receive power service in 9.9 aMW increments from a public body, cooperative, or Federal agency customer with power purchased at BPA's PF rate.''

This issue arose in part because two BPA preference customers with DSI plants in their service territories expressed the view that they should be able to acquire an additional 9.9 aMW of BPA power per year at the PF rate to serve local DSI plant production load. One utility in late 1999 began serving 9.9 aMW of DSI plant load by entering into a contract with the DSI that limited the amount of utility-provided service to 9.9 aMW. (The remainder of the DSI load was served with other contract resources.)

BPA and the utility disagreed on whether the applicable BPA wholesale rate was the PF rate or the New Resources (NR) rate. The question of which rate applied had no financial consequence prior to October 1, 2001, because during the 1996 rate period the PF rate was equal to the NR rate. The utility, the DSI involved, and BPA subsequently entered into a ''standstill'' agreement pending completion of a BPA DSI NLSL policy review that would establish which rate was applicable to DSI load transferred to local utility service in 9.9 aMW increments.

BPA proposes to continue its current NLSL policy with regard to a DSI transferring service to a local utility in 9.9 aMW increments. Any DSI load transferred to local utility service would be a NLSL and subject to the NR rate if served with Federal power unless the DSI qualifies for the cogeneration and renewables exception described below.

Besides affirming its current NLSL policy with regard to DSIs transferring service to a local utility in 9.9 aMW increments, BPA proposes to adopt an on-site cogeneration and renewables exception to its NLSL policy based on a similar exception contained in the 1981 BPA Utility Power Sales Contracts.

Section 8(e) of the 1981 Utility Power Sales Contracts stated, ''If a Consumer of a Purchaser provides a renewable or cogeneration resource to serve all or a portion of a load associated with a facility which would otherwise be a New Large Single Load, and thereby reduces the demand on the Purchaser, that portion of such load on the Purchaser, if any, shall not be a New Large Single Load, unless the load or portion thereof on the Purchaser is 10 aMW or more; provided, however, that if a Consumer sells, displaces or removes a resource or portion thereof from service to the Consumer's load at such facility, all such load shall be a New Large Single Load. * * *''

BPA proposes the exception be restricted to renewables and on-site cogeneration. Providing this exception would allow former DSI load to take a total of 9.9 aMW of service from a local utility at the PF rate if the rest of its plant load was served by renewables or on-site cogeneration. This may make it economically feasible for some DSI load to operate while limiting the amount of former DSI load that could be served at a PF rate. It also supports the development of cogeneration and renewable resources.

I. Service to Residential and Small-Farm Consumers of Investor-Owned Utilities (IOUs)

BPA is obligated to implement its Subscription contracts throughFY 2011. These contracts implemented BPA's 1998 Power Subscription Strategy, which BPA designed to provide an

equitable distribution of the benefits of the FCRPS throughout the region.

The Subscription contracts require BPA to provide 2,200 aMW of power or financial benefits to the residential and small-farm consumers of the region's six IOUs during FY 2007–2011. BPA recently signed agreements with all six regional IOUs that provide certainty in the amount and manner that benefits will be provided to their residential and small-farm consumers under their Subscription contracts. These agreements provide certainty by defining benefits as financial payments and not power deliveries, defining a mark-to-market methodology that uses an independent market price forecast in calculating the financial benefits; and, establishing a floor of $100 million and a cap of $300 million per year for these financial benefits.

BPA expects this approach will successfully implement the Subscription contracts. However, these agreements are under legal challenge. Since a fundamental goal of this Regional Dialogue proposal is clarification of BPA and customer load obligation for the FY 2007–2011 period, BPA seeks to clarify how it will proceed if the new agreements were set aside. Accordingly, in the event a court sets aside the new agreements and amendments but leaves the underlying Subscription contracts in place, BPA will notify the IOUs that BPA will exercise its Subscription contractual right to provide financial benefits and not power benefits during FY 2007–2011 under those contracts. In such an event, the financial benefits will continue to be based on a forecast of the market price of power developed in the BPA rate case. If the Subscription contracts are successfully challenged in court, the agency will follow the court's instructions in negotiating new contracts under the Northwest Power Act.

As indicated, BPA proposes to provide financial benefits rather than physical power to the residential and small-farm consumers of the region's IOUs for a number of reasons. BPA hopes that clarifying now which entity is responsible for acquiring resources to serve the IOUs' load will help spur development of regional infrastructure. This need for certainty supports BPA's current decision to exercise its contractual right to provide financial benefits rather than physical power instead of waiting until October 1, 2005, to make that decision as allowed by the Subscription contracts. In addition, BPA is seeking to minimize the acquisition of additional amounts of power that could result in an increase in the average cost of the existing FBS resources. Providing financial benefits eliminates the need and associated risk of BPA purchasing power in the market to support power deliveries to the region's IOUs. BPA believes this approach will continue to provide equitable benefits to the residential and small-farm consumers of the region's IOUs while balancing the costs to BPA's other customers.

J. Conservation Resources

Conservation has been a core resource for over two decades in the Pacific Northwest. BPA's programs have captured savings equivalent to a large nuclear power plant; and, consistent with guidance from the Council, conservation will remain a major portion of the agency's resource portfolio in the future.

Continued commitment to conservation is consistent with the priority outlined in the Northwest Power Act to increase the efficiency of all electric energy consumption. Further, BPA's support of conservation has been essential to helping maintain the necessary regional infrastructure to ensure energy efficiency programs are successful.

While there has been much discussion of how conservation development might be regionally structured for the post-2006 time frame, BPA has not determined what the specifics will be. Similar to the recommendations made by the Council, BPA proposes five principles to guide development of the specific elements for conservation. These general principles are:

- Use of the Council's plan to identify the agency's share of cost-effective conservation. BPA has been working closely with Council staff to ensure those targets are a reflection of the true cost-effective conservation potential in the region.
- The bulk of the conservation to be achieved is best pursued and achieved at the local level. There are some initiatives that are best served by regional approaches (*e.g.*, market transformation through the Northwest Energy Efficiency Alliance (NEEA)). However, the knowledge local utilities have of their consumers and their needs reinforces many of the successful energy efficiency programs being delivered today.
- To contribute to meeting the financial challenges facing the region, BPA will seek to meet its conservation goals at the lowest possible cost and lowest possible rate impacts. While only cost-effective measures and programs are a given, the region can benefit by working together to jointly drive down the cost of acquiring those resources. For example, Conservation and Renewables Discount (C&RD) reporting to date indicates a cost for installed conservation measures in the range of $2.2 million per aMW while Conservation Augmentation (Con Aug) is averaging about $1.3 million per aMW versus NEEA programs, which are costing just under $1 million per aMW. Regarding the C&RD conservation costs, the $2.2 million figure excludes the customers' low-income expenditures claimed under the program and is an average cost reflecting that some utilities are booking conservation measure savings at a rate of $4 million per aMW. The wide variance in cost per aMW offers a significant opportunity for the region to pursue an important cost-saving option.
- BPA funding for local administrative support to plan and implement conservation programs has been essential. In the future, this support should be retained, with the appropriate level of funding open for discussion.
- Financial support for education, outreach, and low-income weatherization are important initiatives that complement a complete and effective conservation portfolio. However, these types of programs often yield no measurable savings or considerably more expensive energy savings (*e.g.*, low-income weatherization). These program efforts have been successful and should continue to be funded.

These principles are consistent with Council recommendations. However, there is a need for significant detail to be developed before these principles can be transformed into a specific program structure that best serves the region. BPA envisions some form of collaborative planning process in which experienced individuals can develop a fully defined proposal for conservation that can then be brought to the entire region for consideration. This joint planning process can accomplish the blending of appropriate policy guidance with the flexibility to ensure conservation can meet the huge variance of conditions and needs that exist in the region.

The C&RD and Con Aug, complemented by regional initiatives such as NEEA, may provide a solid foundation for establishing viable program elements so the region can be effectively served going forward.

Finally, as BPA pursues opportunities to reduce long-term costs to ratepayers, conservation, as well as other demand side management options, will be carefully considered as part of the

solution to transmission constraints. Conservation can be part of a Non-Wires Solution, which will not only provide low-cost power resources, but also will reduce or defer the need for transmission construction.

K. Renewable Resources

A key purpose of the Northwest Power Act is to ''encourage, through the unique opportunity provided by the FCRPS, the development of renewable resources within the Pacific Northwest.'' [1] In meeting this purpose, BPA is to consider cost-effective renewable resources before acquiring other conventional resources while fulfilling its obligation to serve its customers' regional firm power loads.

In recent years, BPA has supported a range of renewable research and development (R&D) activities. BPA currently purchases 198 megawatts (MW) of output from new renewable resources to serve regional firm power load. Going forward, BPA proposes to engage in an active and creative facilitation role with respect to renewable resource development. This signals a move away from large-scale renewables acquisition toward a greater focus on finding ways to reduce the barriers and costs interested customers face in developing and acquiring renewables. As an added benefit, BPA believes its facilitation role would also help non-BPA customers develop renewable resources in the region. This direction is consistent with several of BPA's major strategic objectives.

Facilitation Options: There are many tools available to BPA to help facilitate the development of renewable resources in the region. BPA proposes to use a combination of these tools and asks for input as to which set of tools would best accomplish BPA's facilitation goal, within the financial limits described below. The tools BPA sees as being available include the following:

Integration services: BPA recently developed two new wind integration services in the spirit of regional facilitation. These services, and other intelligent and prudent uses of the flexibility of the Federal hydro system, will serve as the centerpiece of a renewable resources facilitation effort. BPA also intends to work with regional stakeholders to reduce transmission barriers facing renewable resources.

Transmission system improvements: Another option is participation in regional efforts to construct strategic transmission lines to foster the development of the region's excellent wind resources as well as finding ways to make more efficient use of existing transmission infrastructure.

Rate Discount: Approximately 30 customers devoted a portion of their C&RD funds to renewables in this rate period. Continuing such a rate discount mechanism is another facilitation option.

Limited Acquisition Role: Temporary acquisition of output from a renewable energy project as an ''anchor tenant'' for such projects is another facilitation option. However, it should be noted that among various options available to help facilitate renewables in the region, direct acquisition places the greatest financial demands on BPA and would be subject to rigorous financial and risk tests before approval.

BPA will apply a careful cost-effectiveness screen in considering which of the above-mentioned facilitation actions receive the most emphasis. The goal is to maximize the ratio of new megawatts installed per dollar spent. BPA will also consult with regional stakeholders as it considers facilitation options.

Program Funding: Consistent with its current approach, BPA proposes to continue to support its renewables program up to a net cost of $15 million per year. Calculation of net cost is the actual cost of all acquisition of current and any future renewable energy, plus internal support costs, less the value of energy produced by the renewable resources based on the long-term cost of power from a combined-cycle natural gas-fired power plant, and minus Green Tag and green energy premium revenues. The costs associated with the $15 million renewables fund would be recovered through BPA's firm power rates. In addition to the $15 million annual net cost, during the current FY 2002–2006 rate period, $6 million per year has been available for renewables development through the C&RD program. BPA proposes to continue this level of support in addition to the $15 million net cost, though as described above, BPA has not concluded whether a C&RD-like mechanism is the best vehicle for use of this level of financial support. BPA's renewables facilitation activities will be subject to a risk review to ensure that they are consistent with the agency's financial objectives.

L. Controlling Costs and Consulting With BPA's Stakeholders

BPA seeks to renew and strengthen its role as a reliable business partner with its customers and to maintain the trust and confidence of the region's stakeholders. A key feature of this effort is designing structures and mechanisms that allow stakeholders to provide input on long-term cost control and on revenue requirements and especially before starting the FY 2007 rate case. BPA believes these actions directly support several of the agency's strategic objectives, including:

- Best practices (with emphasis on cost performance and simplicity) are obtained in key systems and processes,
- Increased transparency in processes, decisions, and performance, and
- Customer, constituent, and tribal satisfaction.

During the last two years, BPA has responded to customer and constituent requests for greater transparency in its finances and decisions that affect BPA's ability to control its costs. BPA has participated in the customer-organized Customer Collaborative process, which was set up to provide greater insights into BPA's financial performance, cost drivers, challenges, and controls. BPA also created, at the request of customers and constituents, the Power Net Revenue Improvement Sounding Board. The Sounding Board is a broad cross section of customers and constituents that provided BPA with input on how best to achieve $100 million in cost reductions and revenue enhancements during FY 2004–2005. BPA has been conducting regular monthly technical updates on financial conditions for customer staff.

Moreover, during the last year, BPA improved its financial reporting. These efforts include creation of new standardized financial reports and implementation of a new financial disclosure policy.

BPA proposes to continue the mechanisms described above. Forums such as the current Customer Collaborative structure, as an executive-level customer-led forum, is an effective way for customers to be at the table to discuss BPA's financial performance and related issues (for example, the effects of debt optimization on the power function or of new security cost increases). Likewise, the Power Net Revenue Improvement Sounding Board has served well as a means for providing leaders of both customers and non-customers better insight and input into BPA cost control efforts. The monthly technical financial update meetings with customers and constituents have been useful, and BPA is willing to continue such forums.

For the term of existing contracts (through FY 2011), or until new contracts go into effect if that is earlier, BPA proposes to continue to focus on non-contractual means that promote transparency under BPA's financial

[1] Northwest Power Act, Section 2(1)(B), 94 Stat., #2679.

disclosure policy, allow for public input on agency costs and demonstrate management of those costs. The additional actions being proposed are described below.

Collaborative Forums: BPA is willing to participate in collaborative forums with both customers and non-customers in a structured approach similar to the Sounding Board and current Customer Collaborative. BPA believes that such forums should include the following:

1. Stated expectations, purpose, membership appointment, attendance, procedures, schedules, norms, roles and responsibilities, and disclosure requirements.
2. A focus on both standard routine financial updates and specific discussions aimed at understanding cost structure and drivers.
3. A summary of standardized information each quarter on how the effects of risk were factored into decision making.
4. As desired by the Collaborative participants, discussions aimed at understanding and providing individual participant input to specific issues BPA faces.

Financial Reporting with Customer and Constituent Input: BPA intends to make further advancements in its external financial reporting in order to increase awareness and understanding of BPA's financial performance by both experts and laypersons. Such information will also be posted on BPA Web sites.

Business Process Improvement: BPA also expects to develop and implement a plan to respond to the recommendations in the Business Process Improvement/Benchmarking initiative currently underway. Reports communicating BPA's progress against the resulting plan will be made available.

Power Function Review: Beginning in the fall of 2004, BPA plans to conduct a regional discussion regarding PBL program budgets and expenditures similar to the TBL's Programs in Review process. Toward that end, PBL will meet directly with customers and constituents and hold workshops as part of a Power Function Review public process. The goal of the Power Function Review is to allow for substantial review and public comment on PBL program levels prior to the next power rate case. Areas to be discussed include program challenges expected over the next seven years proposed program capital and expense levels, and program drivers.

Criteria for Public Comment on Cost Issues: In its effort to make cost decisions more transparent, BPA believes it is prudent to establish criteria by which to assess the need to subject pending discretionary BPA decisions that affect power costs to public review and comment.

First as a threshold, the decision or action must be a discretionary cost decision within BPA's control, not including short-term power purchases and associated revenues. It can include environmental, policy, or regulatory actions as well as new contracts, contract modifications, actions changing BPA's load-serving obligation, and BPA power marketing policies.

BPA will engage customers and other interests to determine specific criteria to be used to decide whether a discretionary action BPA is contemplating is appropriate for a public review and comment process and when BPA will inform the region of non-discretionary decisions. BPA believes that the factors below should be considered and addressed:

- Whether the cost action establishes a precedent.
- The effect on BPA, its customers, constituents, and other stakeholders.
- Whether and when public support is required for effective implementation of the cost action.
- The particular segments of stakeholders that can be expected to be interested in the cost action.
- The time available for public review and comment.
- The existence of concurrent public review and comment activities on similar or non-discretionary cost actions.

VII. Long-Term Issues

A. Proposed Long-Term Policy: Limiting BPA's Long-Term Load Service Obligation at Embedded Cost Rates for Pacific Northwest Firm Requirements Loads

Most of this proposal deals with FY 2007–2011 issues. However, BPA is also proposing a long-term policy regarding its load obligations. BPA's proposal is to limit its sales of firm power to its Pacific Northwest customers' firm requirements loads at its embedded cost rates to approximately the firm capability of the existing Federal system. BPA is further proposing a policy that firm power service beyond what the existing system can supply would be provided at a higher tiered rate that would reflect the incremental cost of purchasing power to meet those additional loads. BPA proposes to implement this long-term policy through new long-term contracts and rates on the proposed schedule presented in the next section. As stated in Section VI.B., Tiered Rates, BPA does not propose to implement tiered rates in FY 2007.

The agency is making this proposal for several key reasons:

- It would help reduce BPA's firm power rates by sharply limiting the past practice of acquiring power and melding its costs with the lower cost of the existing system, thereby ''diluting'' the low-cost existing system with higher-cost purchases.
- Greater assurance is needed that necessary electric infrastructure will be developed. Many BPA utility customers and other market participants are willing and able to invest in needed electric infrastructure, suggesting that the capability exists to supply the infrastructure without a continued buy-and-meld role for BPA. But these utilities need clarity about their load responsibilities versus BPA's if they are to move forward on infrastructure investment. This policy will help provide that clarity.
- A closely related benefit is that this policy will help utilities ''see'' market price signals as they make decisions about new resources, conservation investments, and load additions. This should lead to more efficient decision making throughout the regional electric industry.
- This policy does not prevent utility customers from continuing to rely on BPA to serve all their loads in the future if that is what they choose; consistent with BPA's legal requirement to do so.
- This policy will increase the certainty that BPA can repay the Federal taxpayer's investment in the Federal system by creating a higher likelihood that BPA rates stay well below market and fluctuate less with the costs of power purchases.
- There is strong support from BPA's utility customers for this policy direction. This is important because these utilities would be assuming more of the responsibility for new resource development over time.
- This policy direction is likewise consistent with the recommendations to BPA from the Council in its May 17, 2004, recommendations on ''The Future Role of the Bonneville Power Administration in Power Supply.''

By itself, this policy is not enough to accomplish all the benefits listed above. It is only one step. For example, fully realizing those benefits requires that individual utilities know specifically how much power they will receive from BPA at the lowest embedded cost rate, and how much they will pay for increments beyond that amount. Creating that certainty will require subsequent development of new power contracts and rates. The proposed schedule for these additional steps, assuming the proposed long-term policy

decision described here is sustained, is described next.

B. Proposed Schedule for Long-Term Issue Resolution

Although this proposal focuses primarily on resolving issues for the FY 2007–2011, BPA and the region have a strategic interest in resolving a number of key long-term issues. BPA is strongly inclined towards 20-year contracts assuming we can reach agreement on reasonable terms. This interest centers on providing BPA customers certainty over load service obligations and enabling customers and the market to respond with the necessary electric industry infrastructure investments. Other key strategic interests include general market stability, BPA risk management, and long-term assurance of funding to repay the United States Treasury. BPA's interest in resolving those long-term issues is shared by most BPA customers and with the Council.

To become effective, almost all the decisions must be captured in new long-term contracts and rates. There is a range of opinion within the region on what commitments and decisions can be made in contracts versus those that can be made in rates. BPA's view is that customers and BPA must work together to develop a logically-linked set of new contracts and rates, and that neither by itself will be sufficient to accomplish the long-term goals. This split between contracts and rates must be discussed and decided.

With respect to rates, BPA wishes to discuss with customers the merits of establishing a long-term rate methodology to accompany the contract. Another key question is when to execute new contracts and when to begin performance of the contracts. A key constraint is most customers have existing contracts that run through FY 2011. Many customers may be willing to sign new contracts well before FY 2011, but only so long as performance does not begin until their existing contract expires. BPA is also willing to explore other ideas to reach a goal of providing certainty to customers such as the option of offering contract amendments that would include a more limited list of issues, while providing customers with the load service certainty they are seeking.

Why BPA Believes These Issues Need To Be Addressed Now: It is in the strategic interest of BPA, BPA's customers, and the region as a whole to encourage regional actions that ensure adequate, efficient, and reliable transmission and power service. Waiting until near FY 2012 to create the clarity of obligations to develop resources would create a significant risk of waiting too long to create the necessary infrastructure. It would also create a longer period of risk to the region of losing the Federal system benefits and increase the risk that the taxpayers' investment in the Federal system would not be repaid in a timely fashion. Although executing contracts within the next few years to replace the current Subscription contracts carries significant risk, BPA is convinced that it is more risky to delay the necessary decisions. Nothing short of new contracts and rates will create sufficient clarity for individual utilities about their resource development obligations so that they can act with confidence on those obligations to develop the necessary electric infrastructure.

Next Steps: Given the complexity of developing new 20-year contracts, BPA needs to create a policy ''blueprint'' as soon as possible to guide development of new contracts and rates. The scope of this policy ''blueprint'' would be all the major policy issues needing resolution. Ideally, BPA's decisions on the issues will be informed by the broadest possible regional agreement. To that end, BPA intends to engage very actively with its customers, other stakeholders, and the Council to help achieve that agreement.

However, BPA has been encouraged by customers and the Council to establish and meet decision making deadlines and not defer decisions in hopes more time will yield consensus. Accordingly, after considering comment on the draft schedule below, BPA intends to establish a schedule and then make decisions on that schedule. The policy ''blueprint'' will also include a step for ensuring compliance with the National Environmental Policy Act (NEPA).

Proposed Schedule: BPA intends to begin now to operate on the schedule outlined below, subject to change based on public comment. The Council recommended a schedule that had new contracts offered in October 2007. This schedule has contracts offered almost a year earlier than that. This schedule is ambitious, but BPA agrees with the perspective of the Council and many customers that the region has a core interest in the earliest practical completion of this process.

PROPOSED SCHEDULE FOR ACHIEVING LONG-TERM CONTRACTS AND RATES

Milestone	Date
BPA Administrator Issues Long-Term Regional Dialogue Proposal for Public Review and Comment.	July 2005.
BPA Administrator Signs Long-Term Regional Dialogue Policy.	January 2006.
New Contracts Offered	December 2006.
Contract Signature Deadline	April 2007.
Earliest Contract Effective Date.	October 2008.

This proposed schedule does not include rates decisions, which are a key component, because BPA wishes to have further discussion of the concept of a long-term methodology rate case. The final schedule will include rates milestones.

Challenges in Achieving Our Goal: BPA understands that achieving this schedule will be challenging. Challenges that both customers and the agency will have to manage include:

1. Ability of BPA, customers and other interests to find a solution to provide long-term benefits to residential and small-farm consumers to IOUs.
2. Ability to structure long-term contracts to protect taxpayer and ratepayer interests.
3. Managing changes to existing products and other contract terms and conditions that will allow meeting an aggressive schedule.
4. Managing the interaction of all power-related issues with the evolution of transmission issues including the TBL rate case and Grid West.
5. Developing regional resource adequacy metrics/standards to provide clarity and mechanisms to assure the development of needed electrical infrastructure.
6. Ability of customers and other interests to invest the necessary time, especially in view of the concurrent activity on BPA's FY 2007 power rate case and a variety of other issues.
7. Ensuring BPA and customers can administer new 20-year contracts for several years concurrent with contracts of customers who choose to retain their existing Subscription contracts through 2011.
8. Willingness of customers to sign new 20-year contracts before the supporting rate case concludes.

VIII. Risk Analysis

BPA undertook an analysis of risks associated with this proposal. The analysis identified the most potentially significant risks to be centered on load

uncertainty and load placement and the absence of any effective ways to manage them given the statutory obligation to serve in the Northwest Power Act.

The amount and type of risks BPA takes in the area of load placement are central to development of the Regional Dialogue proposal. Augmentation, with its potential to leave BPA short in a volatile market, can and has led to significant rate increases. BPA's strategic direction, on the other hand, is heavily weighted toward stabilizing rates through a combination of better cost controls, risk management, and maintenance of key financial indicators such as Treasury Payment Probability (TPP). BPA found the primary areas of load uncertainty and potential risk concern to be service to new publics and service to the DSIs.

IX. Environmental Analysis

BPA staff is in the process of conducting a review under NEPA and its implementing regulations of the potential environmental effects of this proposal. As part of this review, BPA is evaluating how the proposal fits within BPA's Business Plan Final Environmental Impact Statement, DOE/EIS–0183, June 1995 (Business Plan EIS).

The Business Plan EIS evaluates the environmental impacts of a range of BPA business policy alternatives. This range includes BPA Influence, Market-Driven BPA, Maximize BPA Financial Returns, Minimal BPA Marketing, and Short-Term Marketing alternatives. The EIS also contains various policy ''modules'' for key issues such as rate design, DSI service, and conservation and renewables. These modules can be used to vary the alternatives. The alternatives are compared in terms of market responses, and the market responses are then used to determine potential environmental impacts. In addition, the Business Plan EIS identifies representative response strategies that could be implemented to address revenue shortfalls.

In August 1995, the BPA Administrator issued a ROD (Business Plan ROD) that adopted the Market-Driven Alternative from the Business Plan EIS. This alternative was selected because, among other reasons, it is the alternative that best allows BPA on balance to: (1) Recover costs through rates; (2) achieve strategic business objectives; (3) competitively market BPA's products and services; (4) continue to meet BPA's legal mandates; (5) meet legal mandates and contractual obligations; and (6) establish rates that are easy to understand and administer, stable, and fair.

An initial review of the Regional Dialogue proposal indicates that its potential environmental effects have been largely evaluated in the Business Plan EIS and that it would be consistent with relevant aspects of the Market-Driven alternative identified above. The proposal generally continues many of the business decisions and approaches taken by BPA in recent years that already have NEPA coverage, either through the Business Plan EIS itself or through subsequent RODs tiered to the Business Plan and ROD. For those areas in which the proposal may vary from current business decisions and approaches, the range of alternatives in the Business Plan EIS appears to provide coverage. Furthermore, implementation of this policy would be consistent with the response strategies identified in the Business Plan EIS and adopted in the Business Plan ROD. If further review confirms these consistencies, BPA likely would tier its policy decision under NEPA to the Business Plan EIS and ROD. All necessary NEPA review and documentation for this proposal would be completed prior to or concurrently with the Administrator's final ROD for this proposal.

X. Next Steps

The BPA Administrator intends to make final policy decisions for this part of the Regional Dialogue and sign a ROD in December 2004. Updated information will continue to be posted on BPA's Regional Dialogue Web site at: *http://www.bpa.gov/power/regionaldialogue.*

Issued in Portland, Oregon on July 7, 2004.

Stephen J. Wright,

Administrator and Chief Executive Officer, Bonneville Power Administration.

[FR Doc. 04–16446 Filed 7–19–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Federal Energy Management Advisory Committee

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an open meeting of the Federal Energy Management Advisory Committee (FEMAC). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that these meetings be announced in the **Federal Register** to allow for public participation. This notice announces the ninth meeting of FEMAC, an advisory committee established under Executive Order 13123—''Greening the Government through Efficient Energy Management.''

DATES: Monday, August 9, 2004; 6 to 7:30 p.m.

ADDRESSES: Rochester Riverside Convention Center, 123 East Main Street, Room Highland A, Rochester, NY 14604–1619.

FOR FURTHER INFORMATION CONTACT: Rick Klimkos, Designated Federal Officer, Office of Federal Energy Management Programs, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; (202) 586–8287.

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: To seek input and feedback from interested parties on working group recommendations to meet mandated Federal energy management goals.

Tentative Agenda: Agenda will include discussions on the following topics:

- Update on FEMAC Working Groups
- Discussion on FEMAC priorities
- Open discussion with public

Public Participation: In keeping with procedures, members of the public are welcome to observe the business of the Federal Energy Management Advisory Committee. 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 Rick Klimkos at (202) 586–8287 or *rick.klimkos@ee.doe.gov* (e-mail). You must make your request for an oral statement at least 5 business days before the meeting. Members of the public will be heard in the order in which they sign up at the beginning of the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The chair of the committee will make every effort to hear the views of all interested parties. The chair will conduct the meeting to facilitate the orderly conduct of business.

Minutes: The minutes of the meeting will be available for public review and copying within 60 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 July 14, 2004.

Rachel M. Samuel,

Deputy Committee Management Officer.

[FR Doc. 04–16445 Filed 7–19–04; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[OAR–2004–0089; FRL–7789–7]

Agency Information Collection Activities: Proposed Collection; Comment Request; Retrofit/Rebuild Requirements for 1993 and Earlier Model Year Urban Buses, EPA ICR Number 1702.04, OMB Control Number 2060–0302

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB). This is a request to renew an existing approved collection. This ICR is scheduled to expire on November 30, 2004. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before September 20, 2004.

ADDRESSES: Submit your comments, referencing docket ID number OAR–2004–0089, to EPA online using EDOCKET (our preferred method), by e-mail to *a-and-r-docket@epamail.epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Air and Radiation Docket and Information Center, Mail Code 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Ms. Nydia Y. Reyes-Morales, Mail Code 6403J, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 343–9264; fax number: (202) 343–2804; e-mail address: *reyes-morales.nydia@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has established a public docket for this ICR under Docket ID number OAR–2004–0089, which is available for public viewing at the Air and Radiation Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket is (202) 566–1742. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket*. Use EDOCKET to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA within 60 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, *see* EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov./edocket*.

Affected entities: Entities potentially affected by this action are manufacturers of retrofit equipment and urban bus fleet operators.

Title: Retrofit/Rebuild Requirements for 1993 and Earlier Model Year Urban Buses.

Abstract: Section 219(d) of the Clean Air Act, as amended in 1990, required that the EPA promulgate regulations for urban buses that: (a) Operate in Metropolitan Statistical Areas (MSA) or consolidated MSA's with a 1980 population of 750,000 or more (the program could be expanded in the future to MSA's of less than 750,000, under section 219(c) of the CAA); (b) are not subject to the 1994 or later urban bus standards; and (c) have their engines replaced or rebuilt after January 1, 1995. The CAA Amendments require the subject urban buses be retrofitted to comply with an emission standard that reflects the best retrofit technology and maintenance practices reasonably achievable. Under these provisions, EPA has set requirements for pre-1994 model year urban buses that are effective after January 1, 1995, when urban bus engines are rebuilt or replaced. The program requires that the particulate emissions level of the urban bus engines be reduced to a level below the engines' original particulate level through the use of retrofit/rebuild equipment that is certified by EPA. The program will phase itself out as pre-1994 urban buses are retired from fleets. Responses to the collection of information are mandatory. All the information required by this collection is needed for the implementation and the activities of various EPA programs. The information is collected by the Engine Programs Group, Certification and Compliance Division, Office of Transportation and Air Quality, Office of Air and Radiation. Specific certification information submitted by manufacturers is held as confidential. Confidentiality of proprietary information is granted in accordance with the Freedom of Information Act, EPA regulations at 40 CFR 2, and class determinations issued by EPA's Office of General Counsel.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

The EPA would like to solicit comments to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Burden Statement: The annual public reporting and record keeping burden for this collection of information is estimated to average 20 hours per response for 159 respondents. Respondents will incur in estimated total operation and maintenance costs of $105,700. No capital start-up costs or purchase of service costs are associated with this information collection. Burden

means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Dated: July 13, 2004.

Robert Brenner,

Acting Assistant Administrator, Office of Air and Radiation.

[FR Doc. 04–16450 Filed 7–19–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[UT–001–0058; FRL–7789–8]

Adequacy Status of the Provo, Utah Carbon Monoxide Redesignation and Maintenance Plan Emission Budgets for Transportation Conformity Purposes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of adequacy.

SUMMARY: In this document, EPA is notifying the public that we have found that the motor vehicle emissions budgets in the Provo, Utah Carbon Monoxide Redesignation and Maintenance Plan, that was submitted by the Utah Governor on April 1, 2004, are adequate for conformity purposes. On March 2, 1999, the D.C. Circuit Court ruled that budgets in submitted State Implementation Plans (SIPs) cannot be used for conformity determinations until EPA has affirmatively found them adequate. As a result of our finding, the Mountainland Association of Governments, the Utah Department of Transportation and the U.S. Department of Transportation are required to use the motor vehicle emissions budgets from this submitted maintenance plan for future transportation conformity determinations.

DATES: This finding is effective August 4, 2004.

FOR FURTHER INFORMATION CONTACT: Jeffrey Kimes, Air & Radiation Program (8P–AR), United States Environmental Protection Agency, Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202–2466, (303) 312–6445. The letter documenting our finding is available at EPA's conformity Web site: *http://www.epa.gov/otaq/transp/conform/adequacy.htm.*

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we'', ''us'', or ''our'' are used we mean EPA.

This action is simply an announcement of a finding that we have already made. We sent a letter to the Utah Division of Air Quality on June 30, 2004, stating that the motor vehicle emissions budgets in the submitted Provo, Utah Carbon Monoxide Redesignation and Maintenance Plan are adequate. This finding has also been announced on our conformity Web site at *http://www.epa.gov/otaq/transp/conform/adequacy.htm.*

Transportation conformity is required by section 176(c) of the Clean Air Act. Our conformity rule requires that transportation plans, programs, and projects conform to SIPs and establishes the criteria and procedures for determining whether or not they demonstrate conformity. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards.

The criteria by which we determine whether a SIP's motor vehicle emission budgets are adequate for conformity purposes are outlined in 40 CFR 93.118(e)(4). Please note that an adequacy review is separate from our completeness review, and it also should not be used to prejudge our ultimate approval of the SIP. Even if we find a budget adequate, the SIP could later be disapproved, and vice versa.

We have described our process for determining the adequacy of submitted SIP budgets in a memo entitled, ''Conformity Guidance on Implementation of March 2, 1999 Conformity Court Decision,'' dated May 14, 1999. We followed this guidance in making our adequacy determination.

For the reader's ease, we have excerpted the motor vehicle emission budgets from the Provo, Utah Carbon Monoxide Redesignation and Maintenance Plan and they are as follows: Motor vehicle emissions budget for the year 2014 is 70.44 tons per day of CO. The final year budget, for the year 2015 and beyond, is 72.10 tons per day of CO.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: July 9, 2004.

Robert E. Roberts,

Regional Administrator, Region VIII.

[FR Doc. 04–16451 Filed 7–19–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7790–2]

Notice of Availability of the ''Draft Model Application/Information Request for CERCLA Service Station Dealer Exemption'' Under Section 114(c) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

AGENCY: Environmental Protection Agency.

ACTION: Notice of availability.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is announcing the availability for review and comment of the draft document entitled ''Draft Model Application/Information Request for CERCLA Service Station Dealer Exemption.''

DATES: Comments on the ''Draft Model Application/Information Request for CERCLA Service Station Dealer Exemption'' must be received by August 13, 2004.

ADDRESSES: Comments may be sent by e-mail to *boushell.susan@epa.gov*, mailed to Susan Boushell, Office of Site Remediation Enforcement (Mail Code 2273A), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20006, or delivered to Susan Boushell, Ariel Rios South Building, 1200 Pennsylvania Avenue, NW., Room 6233Q, Washington, DC 20006, (202) 564–2173.

FOR FURTHER INFORMATION CONTACT: Susan Boushell, EPA's Office of Site Remediation Enforcement, (202) 564–2173 or *boushell.susan@epa.gov*.

SUPPLEMENTARY INFORMATION: On February 3, 2004 (29 FR 5147), EPA published a notice of availability for public comment on the ''Draft Model CERCLA Application/Information Request for Service Station Dealers.'' In response to comments received, EPA revised the draft model and is making the revised draft model available for public comment. The revised draft model, entitled ''Draft Model Application/Information Request for CERCLA Service Station Dealer Exemption,'' will be available on the

Internet at *http://www.epa.gov/compliance/resources/policies/cleanup/superfund/ssde-draftmod-appinfo.pdf*. For more information about the draft model, please *see* the February 3rd **Federal Register** notice.

Dated: July 13, 2004.

Elliott Gilberg,

Deputy Director, Office of Site Remediation Enforcement.

[FR Doc. 04–16452 Filed 7–19–04; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

July 7, 2004.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Pub. L. No. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before September 20, 2004. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Les Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Leslie.Smith@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Les Smith at (202) 418–0217 or via the Internet at *Leslie.Smith@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0788.

Title: DTV Showings/Interference Agreements.

Form Number: FCC Form 301 and FCC Form 340.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; and not-for-profit institutions.

Number of Respondents: 300.

Estimated Time per Response: 5 hours.

Frequency of Response: On occasion reporting requirement; and third party disclosure.

Total Annual Burden: 1,500 hours.

Total Annual Cost: $2,400,000.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: Section III–D of the FCC Form 301 and Section VII of the FCC Form 340 begin with a ''Certification Checklist.'' This checklist contains a series of questions by which applicants may certify compliance with key processing requirements. The first certification requires conformance with the DTV Table of Allotments. The Commission allows flexibility for DTV facilities to be constructed at locations within five kilometers of the reference allotment sites without consideration of additional interference to analog or DTV service, provided the DTV service does not exceed the allotment reference height above average terrain or effective radiated power. In order for the Commission to process applications that cannot certify affirmatively, 47 CFR Section 73.623(c) requires applicants to submit a technical showing to establish that their proposed facilities will not result in additional interference to TV broadcast and DTV operations.

Additionally, the Commission permits broadcasters to agree to proposed DTV facilities that do not conform to the initial allotment parameters, even though they might be affected by potential new interference. The Commission will consider granting applications on the basis of interference agreements if it finds that such grants will serve the public interest. These agreements must be signed by all parties to the agreement. In addition, the Commission needs the following information to enable such public interest determinations: a list of parties predicted to receive additional interference from the proposed facility, a showing as to why a grant based on the agreements would serve the public interest, and technical studies depicting the additional interference.

In 2001, the Commission removed from this collection all references to industry frequency coordination committees. These committees did not evolve. Respondents have been using consulting engineers and attorneys to prepare the technical showings and interference agreements.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–16457 Filed 7–19–04; 8:45 am]

BILLING CODE 6712–10–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission

July 8, 2004.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before August 19, 2004. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should

advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments regarding this Paperwork Reduction Act submission to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., DC 20554 or via the Internet to *Judith-B.Herman@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0678.

Title: Part 25 of the Commission's Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network Earth Stations and Space Stations.

Form No: FCC Form 312 and Schedule S.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 2,396.

Estimated Time Per Response: 1–11 hours.

Frequency of Response: On occasion and annual reporting requirements and third party disclosure requirement.

Total Annual Burden: 26,334 hours.

Total Annual Cost: $8,425,000.

Privacy Act Impact Assessment: Not applicable.

Needs and Uses: On April 16, 2004, the Commission adopted and released a Fourth Report and Order in IB Docket Nos. 02–34 and 00–248, FCC 04–92. In this Order, the Commission extended mandatory electronic filing to all space station and earth station applications, related pleadings, and other filings governed by Part 25.

OMB Control No.: 3060–0774.

Title: Federal-State Joint Board on Universal Service, CC Docket No. 96–45, (47 CFR Part 54).

Form No: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, and state, local or tribal government.

Number of Respondents: 5,554,651 respondents; 6,311,546 responses.

Estimated Time Per Response: .084–125 hours.

Frequency of Response: On occasion, quarterly, annual and every five years reporting requirements, recordkeeping requirement and third party disclosure requirement.

Total Annual Burden: 1,876,790 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The Commission has revised this information collection because two reporting requirements have now past their due dates and are no longer in effect. We also corrected miscalculations of public burden. With this submission we are reporting more accurate estimates.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–16458 Filed 7–19–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted to OMB for Review and Approval

July 12, 2004.

SUMMARY: The Federal Communications Commissions, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted on or before August 19, 2004. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments to Les Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Leslie.Smith@fcc.gov* or Kristy L. LaLonde, Office of Management and Budget (OMB), Room 10236 NEOB, Washington, DC 20503, (202) 395–3087 or via the Internet at *Kristy_L._LaLonde@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copy of the information collection(s) contact Les Smith at (202) 418–0217 or via the Internet at *Leslie.Smith@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–XXXX.

Title: Section 25.701 of the Commission's Rules, Direct Broadcast Satellite Public Interest Obligations, MB Dkt. 93–25.

Form Number: N/A.

Type of Review: New collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 15.

Estimated Time per Response: 25 hours.

Frequency of Response: Recordkeeping; On occasion, one-time, and annual reporting requirements.

Total Annual Burden: 375 hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On March 25, 2004, the FCC released a Second Order on Reconsideration of First Report and Order, *In the Matter of Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations, Sua Sponte Reconsideration (''Order''),* MM Docket No. 93–25, FCC 04–44. The political broadcasting reporting and recordkeeping requirements adopted in this Order will be used by the public to assess money expended and time allotted to a political candidate and by the Commission to ensure that equal access is afforded to other qualified candidates. The Commission and the public will use the children's programming recordkeeping burden to verify DBS operator compliance with the Commission's commercial limits on children's television programming.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–16459 Filed 7–19–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority

July 7, 2004.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Pub. L. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction (PRA) comments should be submitted on or before September 20, 2004. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Les Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Leslie.Smith@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Les Smith at 202–418–0217 or via the Internet at *Leslie.Smith@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0024.

Title: Section 76.29, Special Temporary Authority.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 1.

Estimated Time per Response: 3 hours.

Frequency of Response: On occasion reporting requirement; and Third party disclosure.

Total Annual Burden: 3 hours.

Total Annual Cost: None.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: 47 CFR 76.29 states that in circumstances requiring the temporary use of community units for operations not authorized by FCC rules, a cable television system may request special temporary authority to operate. The Commission may grant special temporary authority, upon finding that the public interest would be served. Requests for special temporary authority may be submitted informally by letter.

OMB Control Number: 3060–0560.

Title: Section 76.911, Petition for Reconsideration of Certification.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; and State, local, or tribal government.

Number of Respondents: 25.

Estimated Time per Response: 10–12 hours.

Frequency of Response: On occasion reporting requirement; and Third party disclosure.

Total Annual Burden: 210 hours.

Total Annual Cost: None.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: Cable television operators file petitions for reconsideration to challenge a franchising authority's certification. The Commission uses information derived from these petitions for reconsideration of certification to resolve disputes concerning the presence or absence of effective competition in franchise areas and to determine whether there are grounds for denying franchising authority certifications to regulate rates.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–16460 Filed 7–19–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

July 9, 2004.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Pub. L. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before September 20, 2004. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Les Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Leslie.Smith@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Les Smith at (202) 418–0217 or via the Internet at *Leslie.Smith@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0313.

Title: Section 76.1701, Political File.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 5,375.

Estimated Time per Response: 0.25 hours (1 hour/cable system).

Frequency of Response: Recordkeeping.

Total Annual Burden: 5,375 burden hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impact(s).

Needs and Uses: 47 CFR 76.1701 requires every cable television system to keep and permit public inspection of a complete record (political file). The file contains all requests for cablecast time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the system of such requests, and the charges made, if any, if the request is granted. The disposition includes the schedule of time purchased, when the spots actually aired, the rates charged, and the classes of time purchased. Also, when free time is provided for use by or on behalf of candidates, a record of the free time provided is to be placed in the political file.

OMB Control Number: 3060–0004.

Title: Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Second Memorandum Opinion and Order, ET Docket No. 93–62.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Not-for-profit institutions; Business or other for-profit; and State, local or tribal government.

Number of Respondents: 126,550.

Estimated Time per Response: 2 hours (avg.).

Frequency of Response: On occasion reporting requirement; Third party disclosure.

Total Annual Burden: 239,620 hours.

Total Annual Cost: $849,000.

Privacy Act Impact Assessment: N.A.

Needs and Uses: The National Environmental Policy Act of 1969 (NEPA) required Federal agencies to evaluate the effects of their actions on ''human environmental quality.'' To comply with NEPA, the Commission adopted rules, 47 CFR Section 1.1307, which revised the Radio Frequency (RF) exposure guidelines for FCC-regulated facilities. The new guidelines reflect more recent scientific studies of RF electromagnetic fields and their biological effects and are designed to ensure that the public and workers receive adequate protection from exposure to potentially harmful RF electromagnetic fields. The FCC staff uses the information required under 47 CFR 1.1307 to determine whether the environmental evaluation is sufficiently complete and in compliance with the FCC Rules to be acceptable for filing.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–16461 Filed 7–19–04; 8:45 am]

BILLING CODE 6712–10–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

July 1, 2004.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Pub. L. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before September 20, 2004. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Judith-B.Herman@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0626.

Title: Regulatory Treatment of Mobile Services.

Form No.: FCC Form 395.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 2,985.

Estimated Time Per Response: 1–10 hours.

Frequency of Response: On occasion reporting requirement and recordkeeping requirement.

Total Annual Burden: 13,605 hours.

Total Annual Cost: $1,328,000.

Privacy Act Impact Assessment: N/A.

Needs and Uses: This information is necessary to ensure that licensees comply with the Commission's technical and operational rules for common carriers and private mobile radio services that are necessary to implement Sections 3(n) and 332 of the Act. The Commission is seeking extension (no change) of this information collection in order to obtain the full three-year approval from OMB.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–16462 Filed 7–19–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

July 8, 2004.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not

display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before September 20, 2004. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Judith-B.Herman@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0806.

Title: Universal Service—Schools and Libraries Universal Service Program.

Form Nos.: FCC Forms 470 and 471.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, and State, local or tribal government.

Number of Respondents: 60,000.

Estimated Time Per Response: 4 hours.

Frequency of Response: On occasion reporting requirement, recordkeeping requirement and third party disclosure requirement.

Total Annual Burden: 480,000 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The Commission adopted rules providing support for all telecommunications services, Internet access, and internal connections for all eligible schools and libraries. To participate in the program, schools and libraries must submit a description of the services desired to the Administrator of the program via FCC Form 470. FCC Form 471 is submitted by schools and libraries that have ordered telecommunications services, Internet access and internal connections. The data is used to determine eligibility. The Commission is working on a Fifth Report and Order for this program which will revise the FCC Forms 470 and 471 and their instructions. After this 60 day comment period, the Commission will submit this information collection to the Office of Management and Budget for approval prior to implementation of the revised forms.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–16463 Filed 7–19–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission

July 1, 2004.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before August 19, 2004. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments regarding this Paperwork Reduction Act submission to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Judith-B.Herman@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at (202) 418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0454.

Title: Regulation of International Accounting Rates.

Form No: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 5 respondents; 80 responses.

Estimated Time per Response: 1 hour.

Frequency of Response: On occasion, and one-time reporting requirements.

Total Annual Burden: 80 hours.

Total Annual Cost: $7,000.

Privacy Act Impact Assessment: Not applicable.

Needs and Uses: On March 30, 2004, the Commission released a First Report and Order in IB Docket Nos. 02–324 and 96–261, FCC 04–53. The Commission removed the International Settlements Policy benchmark-compliant routes, eliminated the Commission's International Simple Resale (ISR) policy and associated filing requirements. The information is used by Commission staff in carrying out its duties under the Communications Act. The information collections are necessary for the Commission to maintain effective oversight of U.S. carriers that are affiliated with, or involved in certain co-marketing or similar arrangements with, foreign carriers that have market power. Additionally, the information collections are necessary to analyze market trends to determine whether amendment of the Commission's existing rules or proposals of new rules are necessary to promote effective competition and prevent anti-competitive behavior between American and foreign carriers.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–16464 Filed 7–19–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[CCB/CPD File No. 98–30; DA 04–1903]

Notice of Dismissal of Petition for Declaratory Ruling on Interexchange Carrier ''Rounding-Up'' Practices

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document is a notification of dismissal of a petition for declaratory ruling in CCB/CPD File No. 98–30. The Commission on April 2, 2004, issued a Public Notice, DA 04–943, 69 FR 23756, April 30, 2004, asking parties to update the record regarding a petition for declaratory ruling on interexchange carrier ''rounding-up'' practices filed by Connie L. Smith on March 30, 1998. The parties that previously filed the petition and comments to the related Public Notice did not respond to the Commission's request to refresh the record in this proceeding and expressed no intent to pursue the petition. As a result, any interested parties are hereby notified that the petition was dismissed on June 28, 2004.

FOR FURTHER INFORMATION CONTACT: Steve Morris, Wireline Competition Bureau, Pricing Policy Division, (202) 418–2858.

SUPPLEMENTARY INFORMATION: On April 2, 2004, the Wireline Competition Bureau issued a Public Notice requesting interested parties to the petition for declaratory ruling filed by Connie L. Smith (Petitioner) on March 30, 1998, CCB/CPD File No. 98–30, to file a supplemental notice indicating those issues that the parties still wish to be considered, 69 FR 23756, April 30, 2004. The notice was issued because the district court's dismissal of the underlying litigation, and the Petitioner's apparent decision not to pursue the matter before the Commission after the court's decision, may have left no outstanding issues for the Commission to address.

The Public Notice further stated that the Commission would deem such petition withdrawn and would dismiss it unless parties indicated an intent to pursue the issues delineated in the petition for declaratory ruling no later than August 19, 2004. The notice was published in the **Federal Register** on April 30, 2004, and comments were due on or before June 1, 2004, with reply comments due on or before June 14, 2004, 69 FR 23756, April 30, 2004. The Bureau did not receive any filings that responded to the notice within this time frame from parties that had previously filed the petition for declaratory ruling or submitted comments in response to the related Public Notice. As a result, the Commission on June 28, 2004, issued a Public Notice of Dismissal of Petition for Declaratory Ruling, DA 04–1903, in CCB/CPD File No. 98–30.

Federal Communications Commission.

William F. Maher, Jr.,

Chief, Wireline Competition Bureau.

[FR Doc. 04–16465 Filed 7–19–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[RM–10803]

Broadcasters' Services to Their Local Communities

AGENCY: Federal Communications Commission.

ACTION: Notice of meeting.

SUMMARY: The Federal Communications Commission will hold a Localism Task Force hearing in Monterey, California, on July 21, 2004. The purpose of the hearing is to gather information from consumers, industry, civic organizations, and others on broadcasters' service to their local communities. An important focus of the hearings is to gather information and to conduct outreach for the ongoing nationwide round of broadcast station license renewals.

DATES: The hearing will be held on Wednesday, July 21, 2004, from 6 p.m. to 10 p.m.

ADDRESSES: The hearing will be held at the Monterey Conference Center, Steinbeck Forum, Third Floor, located at One Portola Plaza, Monterey, California.

FOR FURTHER INFORMATION CONTACT: Rebecca Lockhart, Media Bureau, (202) 418–7777.

SUPPLEMENTARY INFORMATION: The Federal Communications Commission (FCC) will hold a Localism Task Force hearing on the subject of broadcast localism, on July 21, 2004. Several FCC Commissioners will preside. The purpose of the hearing is to gather information from consumers, industry, civic organizations, and others on broadcasters' service to their local communities. An important focus of the hearings is to gather information and to conduct outreach for the ongoing nationwide round of broadcast station license renewals.

Parking

Parking is available in the Custom House East and West public parking garages on Del Monte and Tyler Streets. More information about nearby parking (including hours of operation, directions, and rates) is available at *http://www.monterey.org/parking/garages.html*.

Admission Tickets

To avoid the need for the public to line up for the hearing, the Task Force will distribute free, general admission tickets on a first-come, first-served basis in advance of the hearing. A ticket guarantees admission to the hearing. One ticket will be issued to each person. To make it easy for members of the public to pick up an admission ticket, tickets will be available before, during and after regular business hours as follows:

Ticket Distribution Opportunity #1

Date and Time: Monday, July 19, 2004, 6 p.m.–8 p.m.(two evenings before the hearing).

Location: Steinbeck Forum Terrace (corner of Pacific Street & Del Monte Avenue, across from the Hotel Pacific), Monterey Conference Center, One Portola Plaza.

Number of Tickets: 150 tickets will be available (approximately 40% of the public seating in the hearing room).

Ticket Distribution Opportunity #2

Date and Time: Wednesday, July 21, 2004, 7 a.m.–1 p.m.(the day of the hearing).

Location: Steinbeck Forum Terrace (corner of Pacific Street & Del Monte Avenue, across from the Hotel Pacific), Monterey Conference Center, One Portola Plaza.

Number of Tickets: All remaining tickets will be available.

Any tickets that remain after the close of the second distribution opportunity will be available when the hearing room is opened for seating, at approximately 5:30 p.m. Therefore, those who do not get a ticket beforehand may still request one at the hearing and will be admitted until the capacity of the hearing room is reached.

Format of Hearing

The hearing will include panels of speakers, comprised of representatives of community and advocacy groups and broadcasters. The panels have been designed to be balanced and informative. As in past hearings, a substantial portion of the hearing will be dedicated to hearing from members of the public during an open microphone segment.

Open Microphone

In order to ensure that all members of the public who wish to speak have an equal opportunity to do so, the Task Force will use a random method to select speakers during the open microphone session. Anyone who wishes to speak must draw a card with a ''Group Number'' pre-printed on it (for example: ''Group 25''). There are a total of 10 cards for each group. During the open microphone segment, the Task Force will randomly select group numbers and then display them on screens in the hearing room. If a person's group number is displayed, that person may proceed to the open microphone check-in area. An FCC staff member will then direct them to the microphone at the appropriate time. A public participation fact sheet containing these procedures, as well as additional details on participating in the open microphone segment and procedures for filing written comments, will be included in the information packet given to each person upon entering the hearing.

Translation, Captioning and Other Accommodations

Simultaneous translation of the hearing will be provided in Spanish via wireless headsets. Open captioning and sign language interpreters will also be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests should include a description of the accommodation needed, providing as much detail as possible, as well as contact information, should additional information be needed. Please make requests as early as possible. All requests will be accepted and every effort will be made to fulfill them, although timing considerations may make that impossible in some cases. Send requests via e-mail to *fcc504@fcc.gov*, or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

A live audiocast of the hearing will be available at the FCC's Web site at *http://www.fcc.gov* on a first-come, first-served basis. In addition, the hearing will be recorded, and the recording will be made available to the public. The public may also file comments or other documents with the Commission and should reference RM–10803. Filing instructions are provided at *http://www.fcc.gov/localism/filing_instructions.doc.*

Federal Communications Commission.

Royce D. Sherlock,

Chief, Industry Analysis Division, Media Bureau.

[FR Doc. 04–16456 Filed 7–19–04; 8:45 am]

BILLING CODE 6712–01–U

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 August 3, 2004.

A. Federal Reserve Bank of Kansas City (Donna J. Ward, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198–0001:

1. Barbro A. Lucas, Fairway, Kansas; Ann Sink, Roeland Park, Kansas; Eva Wilkin, Olathe, Kansas; and Lucas Family Partnership, L.P., LLLP; to acquire voting shares of SSC Bancshares, Inc., Osceola, Missouri, and thereby indirectly acquire voting shares of St. Clair County State Bank, Osceola, Missouri.

Board of Governors of the Federal Reserve System, July 14, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–16403 Filed 7–19–04; 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 August 16, 2004.

A. Federal Reserve Bank of Richmond (A. Linwood Gill, III, Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1. Wachovia Corporation, Charlotte, North Carolina; to acquire 100 percent of the voting securities of, and thereby merge with SouthTrust Corporation, Birmingham, Alabama, and thereby indirectly acquire SouthTrust Bank, Birmingham, Alabama, and SouthTrust of Alabama, Inc., Birmingham, Alabama. In connection with this application, Wachovia Corporation also has applied to acquire up to 19.5 percent of SouthTrust Corporation.

B. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. Chisholm Holdings, Inc., Wilmington, Delaware, and Chisholm Bancshares, Inc., Decatur, Texas; to become bank holding companies by acquiring 100 percent of the voting shares of North Texas Bank, National Association, Decatur, Texas (a *de novo* bank).

Board of Governors of the Federal Reserve System, July 14, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–16404 Filed 7–19–04; 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 August 13, 2004.

A. Federal Reserve Bank of San Francisco (Tracy Basinger, Director, Regional and Community Bank Group) 101 Market Street, San Francisco, California 94105–1579:

1. Columbia Banking System, Inc., Tacoma, Washington; to acquire 100 percent of the voting shares of Bank of Astoria, Astoria, Oregon.

Board of Governors of the Federal Reserve System, July 15, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–16472 Filed 7–19–04; 8:45 am]

BILLING CODE 6210–01–S

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 August 4, 2004.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. Nicholas, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. The Marvin T. Loosbrock Residuary Trust U/A dated April 9, 1984; the Marvin T. Loosbrock QTIP Trust U/A datedApril 9, 1984 (collectively, the ''Trusts''); Lois M. Loosbrock, individually and as trustee of the Trusts; Mark L. Loosbrock, individually and as trustee of the Trusts; and Gary M. Loosbrock, individually and as trustee of the Trusts; a group acting in concert, all of Lismore, Minnesota; to acquire voting shares of Lismore Financial Services, Inc., Lismore, Minnesota, and thereby indirectly acquire voting shares of State Bank of Lismore, Lismore, Minnesota.

Board of Governors of the Federal Reserve System, July 15, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–16473 Filed 7–19–04; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Scientific Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Office of Research Integrity (ORI) and the Acting Assistant Secretary for Health have taken final action in the following case:

Tirunelveli S. Ramalingam, Ph.D., California Institute of Technology: Based on the report of an investigation conducted by the California Institute of Technology (CIT Report) and additional analysis conducted by ORI in its oversight review, the U.S. Public Health Service (PHS) found that Tirunelveli S. Ramalingam, Ph.D., former Postdoctoral Fellow, Division of Biology at CIT, engaged in scientific misconduct in research supported by National Institute for Allergy and Infectious Disease (NIAID), National Institutes of Health (NIH), grant 1 R01 AI41239–01, ''Neonatal Fc receptor/IgG interaction.''

Specifically, PHS found that:

A. Respondent plagiarized Figures 6a and 7a from: Dustin, M.L. ''Adhesive Bond Dynamics in Contacts between T Lymphocytes and Glass-supported Planar Bilayers Reconstituted with the Immunoglobulin-related Adhesion Molecule CD58.'' J. Biol. Chem. 272:15782–15788, 1997 (hereafter referred to as the ''JBC 1997 paper'').

B. Respondent also falsified Figures 6a and 7a from the JBC 1997 paper by electronically manipulating the images and representing them as a different experiment in Figure 6 of NIH grant application 2 R01 AI41239–06A1, entitled ''Analysis of the Neonatal Fc Receptor/IgG Interaction.''

C. Respondent fabricated timed experimental data obtained from using the fluorescense recovery after photobleaching (FRAP) technique in Figure 7 (upper and lower panels) in a draft manuscript: ''IgG can bridge between adjacent membranes containing the neonatal Fc receptor (FcRn): Implications for FcRn-mediated transport of IgG.''

The draft manuscript was not submitted for publication; however, due to the laboratory's inability to verify scientific experiments conducted by Dr. Ramalingam, two other papers published in Nature Cell Biology in 2000 and EMBO Journal in 2002 were retracted.

Dr. Ramalingam has entered into a Voluntary Exclusion Agreement (Agreement) in which he has voluntarily agreed for a period of three (3) years, beginning on July 2, 2004:

(1) To exclude himself from any contracting or subcontracting with any agency of the United States Government and from eligibility or involvement in, nonprocurement programs of the United States Government referred to as ''covered transactions'' as defined in the debarment regulations at 45 CFR part 76; and

(2) To exclude himself from serving in any advisory capacity to the PHS including but not limited to service on

any PHS advisory committee, board, and/or peer review committee, or as a consultant.

FOR FURTHER INFORMATION CONTACT: Director, Division of Investigative Oversight, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (301) 443–5330.

Chris B. Pascal,

Director, Office of Research Integrity.

[FR Doc. 04–16442 Filed 7–19–04; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention (CDC)

Citizens Advisory Committee on Public Health Services Activities and Research at Department of Energy Sites: Notice of Charter Renewal

This gives notice under the Federal Advisory Committee Act (Pub. L. 92–463) of October 6, 1972, that the Citizens Advisory Committee on Public Health Services Activities and Research at Department of Energy Sites of the Department of Health and Human Services, has been renewed for a 2-year period extending through July 7, 2006.

FOR FURTHER INFORMATION CONTACT: Joseph E. Salter, Committee Management Officer, CDC, 1600 Clifton Road, NE., m/s E–72, Atlanta, Georgia 30333. Telephone (404) 498–0090, or fax (404) 498–0011.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: July 14, 2004.

William J. Atkinson,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–16413 Filed 7–19–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Expansion of Psychosocial Support and Peer Counseling Services to HIV-Infected Women and Their Families in Botswana

Announcement Type: New.

Funding Opportunity Number: PA 04256.

Catalog of Federal Domestic Assistance Number: 93.041

Dates:

Application Deadline: August 20, 2004.

I. Funding Opportunity Description

Authority: This program is authorized under Sections 307 and 317(k)(2) of the Public Health Service Act, [42 U.S.C. Sections 2421 and 247b(k)(S)], as amended.

Purpose: The purpose of the program is to provide funding to technical and organizational capacity building support for the expansion of psychosocial support services and development of peer counseling programs for HIV-infected women and their families. The awardee will provide funding for technical and organizational capacity building support to no more than five civil society organizations (non-governmental, community-based and faith-based organizations) working in HIV prevention, care and support in Botswana. This can be done either directly by the awardee or by an umbrella agency designated to manage and monitor the funding to the civil society organizations.

The Botswana National Prevention of Mother to Child Transmission (PMTCT) program, which is supported technically and financially under the President's Emergency Plan for AIDS Relief (PEPFAR) and the PMTCT initiative, provides limited counseling services to women and their families during antenatal and postnatal care, and relies on non-governmental and faith-based organizations for on-going counseling for HIV-infected clients. This program addresses the urgent need to increase the role of civil society in HIV prevention, care and support in Botswana.

Botswana's HIV prevalence is the world's highest. National HIV surveillance prevalence for 2003, among women in antenatal clinics, is estimated to be 37.4 percent. There are approximately 40,000 infants born each year in Botswana, 14,960 of them to HIV-positive women. Without intervention, roughly 6,000 of these infants will be HIV-infected (approximately 40 percent transmission). Through the use of antiretroviral (ARV) drug prophylaxis and infant formula, instead of breastfeeding, this number could be reduced to approximately 750–1500 (5–10 percent transmission rate).

In 1999, Botswana started a PMTCT program to provide AZT prophylaxis to mother and infant, and free infant formula. The program has been available in all public health facilities since November 2001. An evaluation conducted in 1999, to review the progress of the first phase of the program, identified counseling as a major area of weakness in the program. Since then, several steps have been taken to improve access to and quality of counseling, including placement of dedicated PMTCT counselors in all health facilities. These counselors, however, have limited training (four weeks) and are unable to provide the on-going, supportive counseling that is required to meet the needs of HIV-infected women. Additionally, counselors only have contact with women during their pregnancy. Where services exist, counselors are encouraged to refer women to non-governmental and faith-based organizations for on-going support. Unfortunately, Botswana has a weak, underdeveloped civil society, and psychosocial services for HIV-infected people are limited to very few cities, towns and large villages. In January 2004, Botswana began implementation of routine HIV testing in all health facilities. With this new approach, women will be tested for HIV during antenatal care along with other routine blood tests, unless they refuse. It is hoped that this will normalize HIV testing, reduce stigma and increase utilization of the PMTCT, ARV and other programs. With routine HIV testing, it is expected that the number of people knowing their positive HIV status will increase tremendously and the need for psychosocial support services will intensify accordingly.

The PMTCT program currently does not have a personal face in Botswana. Only one woman, to date, has gone public with her status after going through the PMTCT program. Support groups for pregnant, infected women, though encouraged, do not yet exist. In a recent survey, 85 percent of women expressed interest in talking to other HIV-infected women and there is general agreement that there is a great need for support groups and peer counseling programs.

The U.S. Government seeks to reduce the impact of HIV/AIDS in specific countries within sub-Saharan Africa, Asia, and the Americas through the President's Emergency Plan for AIDS Relief (PEPFAR). Through this new initiative, CDC's Global AIDS Program (GAP) will continue to work with host countries to strengthen capacity and expand activities in the areas of: (1) Primary HIV prevention; (2) HIV care, support, and treatment; and (3) capacity and infrastructure development,

especially for surveillance and training. Targeted countries represent those with the most severe epidemics where the potential for impact is greatest and where U.S. Government agencies are already active. Botswana is one of these targeted countries.

To carry out its activities in these countries, CDC is working in a collaborative manner with national governments and other agencies to develop programs of assistance to address the HIV/AIDS epidemic. CDC's program of assistance to Botswana focuses on several areas of national priority including scaling up of promising prevention and care strategies for HIV prevention, care, and treatment.

The measurable outcomes of the program will be in alignment with the following performance goals for the National Center for HIV, STD and TB Prevention (NCHSTP), GAP: To reduce HIV transmission and improve care of persons living with HIV. They will also contribute to the goals of the PEPFAR which are: Within five years, treat more than two million HIV-infected persons with effective combination anti-retroviral therapy; care for 10 million HIV-infected persons and those orphaned by HIV/AIDS; and prevent seven million infections in 14 countries throughout the world.

Activities:

Awardee activities for this program are as follows: The awardee will serve as or designate an umbrella organization which will be responsible for awarding and managing grants and providing technical assistance and organizational capacity development to no more than five civil society organizations in Botswana.

Activities to be carried out by selected civil society organizations under this task order are as follows:

1. Expand psychosocial support services for HIV-positive women and their families.

• Establish counseling and psychosocial care services in three underserved (currently without non-governmental, community-based or faith-based support services for people living with HIV/AIDS (PLWHAs)) areas to include counseling and support groups for HIV + women from the PMTCT program and their families. This funding does not provide for construction, erection or renovation of buildings.

2. Establish a peer counseling program for antenatal women.

• Develop and implement a peer counseling program in which HIV-positive women who have received PMTCT services provide education, counseling and support for pregnant women in government clinics in conjunction with existing counseling structures. This program may involve multiple local providers (up to three) and may only begin in limited sections of the country in the first year.

3. Establish a peer counseling program at ARV sites.

• Train and support PLWHAs, including HIV+ women from the PMTCT program, as ARV counselors at 15 implementing ARV sites.

The awardee will provide funding, technical assistance, and organizational capacity building support to the selected civil society organizations directly or through an umbrella organization as follows:

Funding

The awardee or umbrella organization will award grants of up to five local civil society organizations to carry out the above activities. The awardee will oversee the financial management of funds awarded and submit reports to Botswana/USA Project (BOTUSA/CDC) as required.

Technical Assistance

The awardee will provide technical expertise and guidance to the selected umbrella organization and/or civil society organizations in support of the tasks outlined above. The awardee will provide relevant staff with training to meet the needs of the project.

Organizational Capacity Building

The awardee or umbrella organization will provide on-going support to the selected civil society organizations in general management and administration, financial management, supervision, monitoring and evaluation and other areas identified. All organizational capacity building support should be coordinated with other organizations working in this area, *e.g.* Botswana Council of Non-Governmental Organizations (BOCONGO), Bristol-Myers Squibb Foundation (BMS), and African Comprehensive HIV/AIDS Partnerships (ACHAP).

The awardee and/or umbrella organization will provide relevant staff with training to meet the needs of the project.

The awardee will coordinate activities and receive necessary approvals from BOTUSA, with input from the Ministry of Health and a sub-committee of the PMTCT Technical Advisory Committee, specifically tasked with providing input to the awardee (hereafter known as the Reference Group). The Reference Group will be selected by the PMTCT Technical Advisory Committee. The Reference Group is responsible for providing overall guidance and technical support to the awardee. The Reference Group will also participate in the selection of the civil society organizations.

In a cooperative agreement, CDC staff is substantially involved in the program activities, above and beyond routine grant monitoring.

CDC Activities for this program are as follows:

1. Collaborate in designing and implementing the activities listed above including but not limited to the provision of technical assistance to develop and implement program activities, quality assurance, data management and presentation of program methods and findings.

2. Collaborate with all relevant partners (awardee, umbrella organization and civil society organizations) in the development of program activities.

3. Monitor project and budget performance.

II. Award Information

Type of Award: Cooperative Agreement. CDC involvement in this program is listed in the Activities Section above.

Fiscal Year Funds: 2004.

Approximate Total Funding: $3,000,000.

Approximate Number of Awards: one.

Approximate Average Award: $600,000. (This amount is for the first 12-month budget period, and includes both direct and indirect costs.)Floor of Award Range: None.

Ceiling of Award Range: $600,000.

Anticipated Award Date: September 1, 2004.

Budget Period Length: Twelve months.

Project Period Length: Five years.

Throughout the project period, CDC's commitment to continuation of awards will be conditioned on the availability of funds, evidence of satisfactory progress by the recipient (as documented in required reports), and the determination that continued funding is in the best interest of the Federal Government.

III. Eligibility Information

III.1. Eligible Applicants

Applications may be submitted by non-profit voluntary organizations, including faith-based and community-based organizations, with experience working with HIV/AIDS in Botswana.

Eligible applications will have the following qualifications:

• At least two years experience or longer in the development and

implementation of psychosocial services for PLWHAs, including supportive counseling, peer counseling and support groups.

• Program staff should have expertise in psychology, social work, management, monitoring and evaluation, supervision and training, organizational capacity development.

• PLWHAs should be included on the team.

• Experience working in Africa.

III.2. Cost Sharing or Matching

Matching funds are not required for this program.

III.3. Other

If you request a funding amount greater than the ceiling of the award range, your application will be considered non-responsive, and will not be entered into the review process. You will be notified that your application did not meet the submission requirements.

If your application is incomplete or non-responsive to the requirements listed in this section, it will not be entered into the review process. You will be notified that your application did not meet submission requirements.

Note: Title 2 of the United States Code Section 1611 states that an organization described in Section 501(c)(4) of the Internal Revenue Code that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, or loan.

Prostitution and Related Activities

The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons.

Any entity that receives, directly or indirectly, U.S. Government funds in connection with this document (''recipient'') cannot use such U.S. Government funds to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides. A recipient that is otherwise eligible to receive funds in connection with this document to prevent, treat, or monitor HIV/AIDS shall not be required to endorse or utilize a multisectoral approach to combating HIV/AIDS, or to endorse, utilize, or participate in a prevention method or treatment program to which the recipient has a religious or moral objection. Any information provided by recipients about the use of condoms as part of projects or activities that are funded in connection with this document shall be medically accurate and shall include the public health benefits and failure rates of such use.

In addition, any foreign recipient must have a policy explicitly opposing, in its activities outside the United States, prostitution and sex trafficking, except that this requirement shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency, if such entity is a recipient of U.S. government funds in connection with this document.

The following definitions apply for purposes of this clause:

• Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

• A foreign recipient includes an entity that is not organized under the laws of any State of the United States, the District of Columbia or the Commonwealth of Puerto Rico. Restoration of the Mexico City Policy, 66 FR 17303, 17303 (March 28, 2001).

All recipients must insert provisions implementing the applicable parts of this section, ''Prostitution and Related Activities,'' in all sub-agreements under this award. These provisions must be express terms and conditions of the sub-agreement, acknowledge that each certification to compliance with this section, ''Prostitution and Related Activities,'' are a prerequisite to receipt of U.S. Government funds in connection with this document, and must acknowledge that any violation of the provisions shall be grounds for unilateral termination of the agreement prior to the end of its term. In addition, all recipients must ensure, through contract, certification, audit, and/or any other necessary means, all the applicable requirements in this section, ''Prostitution and Related Activities,'' are met by any other entities receiving U.S. government funds from the recipient in connection with this document, including without limitation, the recipients' sub-grantees, sub-contractors, parents, subsidiaries, and affiliates. Recipients must agree that HHS may, at any reasonable time, inspect the documents and materials maintained or prepared by the recipient in the usual course of its operations that relate to the organization's compliance with this section, ''Prostitution and Related Activities.''

All primary grantees receiving U.S. Government funds in connection with this document must certify compliance prior to actual receipt of such funds in a written statement referencing this document (*e.g.*, ''[Recipient's name] certifies compliance with the section, 'Prostitution and Related Activities.' '') addressed to the agency's grants officer. Such certifications are prerequisites to the payment of any U.S. Government funds in connection with this document.

Recipients' compliance with this section, ''Prostitution and Related Activities,'' is an express term and condition of receiving U.S. Government funds in connection with this document, and any violation of it shall be grounds for unilateral termination by HHS of the agreement with HHS in connection with this document prior to the end of its term. The recipient shall refund, to HHS, the entire amount furnished in connection with this document in the event it is determined by HHS that the recipient has not complied with this section, ''Prostitution and Related Activities.''

IV. Application and Submission Information

IV.1. Address To Request Application Package

To apply for this funding opportunity use application form PHS 5161. Application forms and instructions are available on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/forminfo.htm.* If you do not have access to the Internet, or if you have difficulty accessing the forms on-line, you may contact the CDC Procurement and Grants Office Technical Information Management Section (PGO–TIM) staff at: 770–488–2700. Application forms can be mailed to you.

IV.2. Content and Form of Submission

Application: You must submit a project narrative with your application forms. The narrative must be submitted in the following format:

• *Maximum number of pages:* 15. If your narrative exceeds the page limit, only the first pages, which are within the page limit, will be reviewed.

• *Font size:* 12 point unreduced.

• Double spaced.

• *Paper size:* 8.5 by 11 inches.

• *Page margin size:* One inch.

• Printed only on one side of page.

• Held together only by rubber bands or metal clips; not bound in any other way.

• All pages should be numbered, and a complete index to the application and any appendices must be included.

Your narrative should address activities to be conducted over the entire project period, and must include the following items in the order listed:

- Goals and Objectives.
- Activities and timeline.
- Staffing Plan with Level of Effort.
- Methods of Evaluation.
- Summary Budget by line item along with a budget justification (this will not be counted against the stated page limit).

Additional information may be included in the application appendices. The appendices will not be counted toward the narrative page limit. This additional information includes:

- Curriculum Vitae or Resumes for Proposed Staff.
- Organizational Charts.
- Letters of Support.

You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the Federal government. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711.

For more information, see the CDC Web site at: *http://www.cdc.gov/od/pgo/funding/pubcommt.htm.* If your application form does not have a DUNS number field, please write your DUNS number at the top of the first page of your application, and/or include your DUNS number in your application cover letter.

Additional requirements that may require you to submit additional documentation with your application are listed in section ''VI.2. Administrative and National Policy Requirements.''

IV.3. Submission Dates and Times

Application Deadline Date: August 19, 2004.

Explanation of Deadlines: Applications must be received in the CDC Procurement and Grants Office by 4 p.m. eastern time on the deadline date. If you send your application by the United States Postal Service or commercial delivery service, you must ensure that the carrier will be able to guarantee delivery of the application by the closing date and time. If CDC receives your application after closing due to: (1) Carrier error, when the carrier accepted the package with a guarantee for delivery by the closing date and time, or (2) significant weather delays or natural disasters, you will be given the opportunity to submit documentation of the carrier's guarantee. If the documentation verifies a carrier problem, CDC will consider the application as having been received by the deadline.

This announcement is the definitive guide on application submission address and deadline. It supersedes information provided in the application instructions. If your application does not meet the deadline above, it will not be eligible for review, and will be discarded. You will be notified that your application did not meet the submission requirements.

CDC will not notify you upon receipt of your application. If you have a question about the receipt of your application, first contact your courier. If you still have a question, contact the PGO–TIM staff at: 770–488–2700. Before calling, please wait two to three days after the application deadline. This will allow time for applications to be processed and logged.

IV.4. Intergovernmental Review of Applications

Executive Order 12372 does not apply to this program.

IV.5. Funding Restrictions

Restrictions, which must be taken into account while writing your budget, are as follows:

- Antiretroviral Drugs—The purchase of antiretrovirals, reagents, and laboratory equipment for antiretroviral treatment projects requires pre-approval from the GAP headquarters.
- Needle Exchange—No funds appropriated under this Act shall be used to carry out any program of distributing sterile needles or syringes for the hypodermic injection of any illegal drug.
- Funds may be spent for reasonable program purposes, including personnel, training, travel, supplies and services. Equipment may be purchased and renovations completed, however, prior written approval by CDC officials must be requested in writing.
- All requests for funds contained in the budget shall be stated in U.S. dollars. Once an award is made, CDC will not compensate foreign grantees for currency exchange fluctuations through the issuance of supplemental awards.
- The costs that are generally allowable in grants to domestic organizations are allowable to foreign institutions and international organizations, with the following exception: With the exception of the American University, Beirut, and the World Health Organization, Indirect Costs will not be paid (either directly or through sub-award) to organizations located outside the territorial limits of the United States or to international organization regardless of their location.
- The applicant may contract with other organizations under this program, however, the applicant must perform a substantial portion of the activities, including program management and operations, and delivery of prevention and care services for which funds are requested.
- You must obtain an annual audit of these CDC funds (program-specific audit) by a U.S.-based audit firm with international branches and current licensure/authority in-country, and in accordance with International Accounting Standards or equivalent standard(s) approved in writing by CDC.
- A fiscal Recipient Capability Assessment may be required, prior to or post award, in order to review the applicant's business management and fiscal capabilities regarding the handling of U.S. Federal funds.

Awards will not allow reimbursement of pre-award costs.

Guidance for completing your budget can be found on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/funding/budgetguide.htm.*

IV.6. Other Submission Requirements

Application Submission Address:

Submit the original and two hard copies of your application by mail or express delivery service to: Technical Information Management—PA #04256, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341.

Applications may not be submitted electronically at this time.

V. Application Review Information

V.1. Criteria

You are required to provide measures of effectiveness that will demonstrate the accomplishment of the various identified objectives of the cooperative agreement. Measures of effectiveness must relate to the performance goals stated in the ''Purpose'' section of this announcement. Measures must be objective and quantitative, and must measure the intended outcome. These measures of effectiveness must be submitted with the application and will be an element of evaluation. Your application will be evaluated against the following criteria:

Technical Approach and Methodology (40 points)

Provide a detailed description of the proposed methodology for development and implementation of the activities as

outlined above. Include a 12-month timeline and budget.

Personnel and Management Plan (35 points)

Provide a description and history of the organization, including personnel. Include their experience, education, skills and qualifications. If sub-contractors are proposed, provide information to support their qualifications and experience as well.

Document recent successful experience in managing similar or related work that is comparable, especially work performed in Botswana that demonstrates capacity for achieving the above objective.

Understanding of the Problem and Statement of Work (25 points)

Provide a detailed and comprehensive statement of the problem, scope and purpose of the project to demonstrate complete understanding of the intent and requirements of the agreement and potential problems, which may be encountered.

V.2. Review and Selection Process

Applications will be reviewed for completeness by the Procurement and Grants Office (PGO) staff, and for responsiveness by NCHSTP. Incomplete applications and applications that are non-responsive to the eligibility criteria will not advance through the review process. Applicants will be notified that their application did not meet submission requirements.

An objective review panel will evaluate complete and responsive applications according to the criteria listed in the ''V.1. Criteria'' section above.

V.3. Anticipated Announcement and Award Date

September 1, 2004.

VI. Award Administration Information

VI.1. Award Notices

Successful applicants will receive a Notice of Grant Award (NGA) from the CDC Procurement and Grants Office. The NGA shall be the only binding, authorizing document between the recipient and CDC. The NGA will be signed by an authorized Grants Management Officer, and mailed to the recipient fiscal officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review by mail.

VI.2. Administrative and National Policy Requirements

45 CFR Part 74 and Part 92

For more information on the Code of Federal Regulations, see the National Archives and Records Administration at the following Internet address: *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html.*

The following additional requirements apply to this project:

- AR–1—Human Subjects Requirements
- AR–6—Patient Care
- AR–10—Smoke-Free Workplace Requirements
- AR–12—Lobbying Restrictions
- AR–15—Proof of Non-Profit Status
- AR–21—Small, Minority, and Women-Owned Business
- AR–22—Research Integrity
- AR–23—States and Faith-Based Organizations
- AR–25—Release and Sharing of Data

Additional information on these requirements can be found on the CDC Web site at the following Internet address: *http://www.cdc.gov/od/pgo/funding/ARs.htm.*

VI.3. Reporting Requirements

You must provide CDC with an original, plus two hard copies of the following reports:

1. Interim progress report, no less than 90 days before the end of the budget period. The progress report will serve as your non-competing continuation application, and must contain the following elements:

a. Current Budget Period Activities Objectives.

b. Current Budget Period Financial Progress.

c. New Budget Period Program Proposed Activity Objectives.

d. Budget.

e. Additional Requested Information.

f. Measures of Effectiveness.

2. Financial status report, no more than 90 days after the end of the budget period.

3. Final financial and performance reports, no more than 90 days after the end of the project period.

These reports must be mailed to the Grants Management or Contract Specialist listed in the ''Agency Contacts'' section of this announcement.

Additionally, the awardee shall submit quarterly progress reports to BOTUSA/MOH covering both technical and financial aspects of the task order. Following receipt of the report, a meeting shall be held between the contractor and BOTUSA (MOH will be in attendance) to discuss progress.

VII. Agency Contacts

For general questions about this announcement, contact:

Technical Information Management Section, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341, telephone: 770–488–2700.

For program technical assistance, contact: Thierry Roels, Project Officer, c/o American Embassy, Plot 5348 Dithakore Way, Extension 12, Gaborone, Botswana, telephone: 011 267 390 1696, e-mail: *tbr6@cdc.gov.*

For financial, grants management, or budget assistance, contact: Shirley Wynn, Grants Management Specialist, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341, telephone: 770/488–1515, e-mail: *Zbx6@cdc.gov.*

Dated: July 14, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–16412 Filed 7–19–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0286]

Withdrawal of Six Guidances on the Clinical Evaluation or Requirements for Approval of Certain Classes of Drugs

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; withdrawal.

SUMMARY: The Food and Drug Administration (FDA) is announcing the withdrawal of six guidances on the clinical evaluation or the requirements for approval of radiopharmaceuticals, antacids, antidiarrheals, laxatives, gastric secretory depressants, and drugs to treat superficial bladder cancer. The guidances are being withdrawn because they are out of date and of little use to the drug industry. The agency has developed other guidances and/or resources to assist the industry in obtaining information on the clinical evaluation and the requirements for approval of these classes of drugs.

DATES: General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written comments 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 agency guidance documents.

FOR FURTHER INFORMATION CONTACT: Maria R. Walsh, Center for Drug Evaluation and Research (HFD–103), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3139.

SUPPLEMENTARY INFORMATION:

I. Withdrawal of Guidances

FDA is announcing the withdrawal of the following six guidances because they are out of date.

1. Clinical Evaluation of Antidiarrheal Drugs—September 1977
2. Clinical Evaluation of Gastric Secretory Depressant (GSD) Drugs—September 1977
3. Clinical Evaluation of Antacid Drugs—April 1978
4. Clinical Evaluation of Laxative Drugs—April 1978

For information on the topics addressed by the preceding four guidances, contact the Division of Gastrointestinal and Coagulation Drug Products (HFD–180) in the Center for Drug Evaluation and Research (CDER).

5. Clinical Evaluation of Radiopharmaceutical Drugs—October 1981

In the **Federal Register** of June 22, 2004 (69 FR 34683), the agency announced the availability of three guidances for industry on ''Developing Medical Imaging Drug and Biological Products.'' For additional information on developing therapeutic radiopharmaceuticals, contact the Division of Medical Imaging and Radiopharmaceutical Drug Products (HFD–160), CDER.

6. FDA Requirements for Approval for Drugs to Treat Superficial Bladder Cancer—June 1989

For information on the topic addressed by the preceding guidance, contact the Division of Reproductive and Urologic Drug Products (HFD–580), CDER.

II. Comments

Interested persons may submit written or electronic comments 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. 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 may obtain CDER guidance documents at *http://www.fda.gov/cder/guidance/index.htm*.

Dated: July 13, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–16477 Filed 7–19–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1528–DR]

Arkansas; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Arkansas (FEMA–1528–DR), dated June 30, 2004, and related determinations.

EFFECTIVE DATE: July 9, 2004.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective July 9, 2004.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individual and Household Housing; 97.049, Individual and Household Disaster Housing Operations; 97.050 Individual and Household Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

Michael D. Brown,

Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 04–16407 Filed 7–19–04; 8:45 am]

BILLING CODE 9110–10–M

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1525–DR]

Virginia; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Virginia (FEMA–1525–DR), dated June 15, 2004, and related determinations.

EFFECTIVE DATE: July 13, 2004.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the Commonwealth of Virginia is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of June 15, 2004:

All counties and independent cities in the Commonwealth of Virginia are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individual and Household Housing; 97.049, Individual and Household Disaster Housing Operations; 97.050 Individual and Household Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

Michael D. Brown,

Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 04–16406 Filed 7–19–04; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No.FR–4903–N–49]

Notice of Submission of Proposed Information Collection to OMB; Application for Multifamily Housing Project

AGENCY: Office of the Chief Information Officer.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

This collection is completed by sponsors and general contractors of proposed multifamily projects and submitted by a HUD-approved mortgagee or application of FHA mortgage insurance. The information is used to determine project feasibility, principal's acceptability, and credit worthiness. HUD requires professional liability insurance for health care facilities and as a result, this revision requires documentation from operators/managers of health care facilities as part of the mortgage insurance application process. The proposed revision requires changes and additional exhibits to Section K of Form HUD–92013–NHICF.

DATES: *Comments Due Date:* August 19, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0029) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, AYO, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail *Wayne_Eddins@HUD.gov*; telephone (202) 708–2374. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Mr. Eddins and at HUD's Web site at *http://www5.hud.gov:63001/po/i/icbts/collectionsearch.cfm*.

SUPPLEMENTARY INFORMATION: This notice informs the public that the U.S. Department of Housing and Urban Development (HUD) has submitted to OMB, for emergency processing, a survey instrument to obtain information from faith based and community organizations on their likelihood and success at applying for various funding programs. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Application for Multifamily Housing Project.

OMB Approval Number: 2502–0029.

Form Numbers: HUD–92013, HUD–92013–SUPP, HUD–92013–NHICF, and HUD–92013–E.

Description of the Need for the Information and its Proposed Use: This collection is completed by sponsors and general contractors of proposed multifamily projects and submitted by a HUD-approved mortgagee for application of FHA mortgage insurance. The information is used to determine project feasibility, principal's acceptability, and credit worthiness. HUD requires professional liability insurance for health care facilities and as a result, this revision requires documentation from operators/managers of health care facilities as part of the mortgage insurance application process. The proposed revision requires changes and additional exhibits to Section K of Form HUD–92013–NHICF.

Frequency of Submission: On occasion.

	Number of Respondents	Annual Responses	×	Hours per Response	=	Burden Hours
Reporting Burden:	6,350	1		29.71		188,680

Total Estimated Burden Hours: 188,680.

Status: Revision of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: July 12, 2004.

Wayne Eddins,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 04–16389 Filed 7–19–04; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4900–C–02B]

Notice of HUD's Fiscal Year (FY) 2004, Notice of Funding Availability (NOFA), Policy Requirements and General Section to FY2004 SuperNOFA for HUD's Discretionary Grant Programs; Correction

AGENCY: Office of the Secretary, HUD.

ACTION: Super Notice of Funding Availability (SuperNOFA) for HUD Discretionary Grant Programs; correction.

SUMMARY: This document makes corrections to the documents published in the **Federal Register** on June 22, 2004, and on May 14, 2004, concerning HUD's Fiscal Year (FY) 2004 SuperNOFA. The corrections pertain to the General Section to the SuperNOFA; the Section 202 Supportive Housing for the Elderly Program (Section 202 Program); the Section 811 Program of Supportive Housing for Persons with Disabilities (Section 811 Program); and the Public Housing Resident Opportunities and Self-Sufficiency (ROSS) Program, Resident Service Delivery Models-Family.

FOR FURTHER INFORMATION CONTACT: For the programs listed in this notice, please contact the offices or the individuals listed under the ''Agency Contact(s)'' heading in the respective program sections of the SuperNOFA, published on May 14, 2004.

SUPPLEMENTARY INFORMATION: On May 14, 2004 (69 FR 26941), HUD published its Fiscal Year (FY) 2004, Notice of Funding Availability (NOFA), Policy Requirements and General Section to the SuperNOFA for HUD's Discretionary Grant Programs. On May 28, 2004 (69 FR 30697), and on June 22, 2004 (69 FR 34878), respectively, HUD published a technical correction for several of the programs included in the SuperNOFA. This notice published in today's **Federal Register** corrects the omission of Portland, Oregon as an Enterprise Community (EC) from the list in Appendix E of the May 14, 2004, document. Further, this document corrects the statement in the May 14, 2004, document with respect to the determination of the project rental assistance contract (PRAC) contract authority for both the Section 202 and the Section 811 programs. Additionally, this document makes a correction to an erroneous reference to the application due date published in the June 22, 2004, document with respect to the Public Housing Resident Opportunities and Self-Sufficiency (ROSS) Program Resident Service Delivery Models-Family. Accordingly, this document makes the following corrections:

Notice of HUD's Fiscal Year (FY) 2004, Notice of Funding Availability (NOFA), Policy Requirements and General Section to the SuperNOFA for HUD's Discretionary Programs

Appendix E, beginning on page 27010 of the May 14, 2004, NOFA, contains the List of EZs, ECs, Urban Enhanced Enterprise Communities, and Renewal Communities (List). Portland, Oregon was inadvertently omitted from the List. In the June 22, 2004, document, HUD advised that it was modifying the List and would publish a modification to the List on its Web site. Today's document makes a further modification to the List by adding Portland as a designated EC to the List. HUD will publish the modified List on its Web site at *http://www.hud.gov/offices/adm/grants/fundsavail.cfm.*

Section 202 Supportive Housing for the Elderly Program (Section 202 Program)

On page 27711 of the May 14, 2004, NOFA under section I.C.2. captioned ''PRAC Funds,'' HUD mistakenly described the determination of the PRAC contract authority as ''by multiplying the number of revenue units for elderly persons by the appropriate operating cost standard *and then multiplying the result by 12 (months).*'' The underscored phrase, ''*and then multiplying the result by 12 (months),*'' adds an additional step in the calculation that is incorrect. This document corrects the description of the determination of the PRAC contract by removing the underscored language from section I.C.2. As corrected, section I.C.2. now reads as follows:

2. *PRAC Funds.* The PRAC contract authority is determined by multiplying the number of revenue units for elderly persons by the appropriate operating cost standard. The PRAC budget authority is determined by multiplying the PRAC contract authority by 5 (years). The operating cost standards will be published by Notice.

Section 811 Program of Supportive Housing for Persons with Disabilities (Section 811 Program)

On page 27755 of the May 14, 2004, NOFA under section I.D.2. captioned ''PRAC Funds,'' HUD mistakenly described the determination of the PRAC contract authority as ''by multiplying the number of units for residents with disabilities in an independent living project or the number of residents with disabilities in a group home by the appropriate operating cost standard *and then multiplying the result by 12 (months).*'' The underscored phrase, ''*and then multiplying the result by 12 (months),*'' adds an additional step in the calculation that is incorrect. This document corrects the description of the determination of the PRAC contract by removing the underscored language from section I.D.2. As corrected, section I.D.2. now reads as follows:

PRAC Funds. The PRAC contract authority is determined by multiplying the number of units for residents with disabilities in an independent living project or the number of residents with disabilities in a group home by the appropriate operating cost standard. The PRAC budget authority is determined by multiplying the PRAC contract authority by 5 (years). The operating cost standards will be published by Notice.

Public Housing Resident Opportunities and Self-Sufficiency Program

On page 34879, column 3 of the June 22, 2004, document under the caption Public Housing Resident Opportunities and Self-Sufficiency Program, it is erroneously stated that the ''application due date for Resident Service Delivery Models-Family is extended to August 3, 2004.'' In fact, the application due date is August 24, 2004, as extended and correctly stated under **DATES** in columns 1 and 2 of page 34878.

Dated: July 14, 2004.

Aaron Santa Anna,

Assistant General Counsel for Regulations.

[FR Doc. 04–16444 Filed 7–19–04; 8:45 am]

BILLING CODE 4210–32–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of the Draft Comprehensive Conservation Plan and Environmental Assessment for Fish Springs National Wildlife Refuge, Dugway, UT

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces that the Draft Comprehensive Conservation Plan and Environmental Assessment (CCP/EA) for the Fish Springs National Wildlife Refuge (Refuge) is available for public review and comment. This Draft CCP/EA was prepared pursuant to the National Wildlife Refuge System Administration Act, as amended, and the National Environmental Policy Act (NEPA). The Draft CCP/EA describes the Service's proposal for management of the Refuge for 15 years.

DATES: Written comments must be received at the postal or electronic addresses listed below by August 18, 2004. Comments may also be submitted VIA electronic mail to: *toni_griffin@fws.gov*.

ADDRESSES: To provide written comments or to obtain a copy of the Draft CCP/EA, please write to Toni Griffin, Planning Team Leader, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225–0486; (303) 236–4378; fax (303) 236–4792 or Jay Banta, Refuge Manager, Fish Springs National Wildlife Refuge, P.O. Box 568, Dugway, Utah 84022; (435) 831–5353; fax (435) 831–5354. The Draft CCP/EA will also be available for viewing and downloading online at *http://mountain-prairie.fws.gov/planning*.

FOR FURTHER INFORMATION CONTACT: Toni Griffin, Planning Team Leader at the above address or at (303) 236–4378.

SUPPLEMENTARY INFORMATION: The National Wildlife System Administration Act of 1966, as amended by the National Wildlife Refuge Improvement Act of 1997 (16 U.S.C. 668dd–668ee *et seq.*), requires the Service to develop a CCP for the Refuge. The purpose in developing a CCP is to provide refuge managers with a 15-year

strategy for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife science, conservation, legal mandates, and Service policies. In addition to outlining broad management direction on conserving wildlife and their habitats, the CCP identifies wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, wildlife observation and photography, and environmental education and interpretation. We will review and update these CCPs at least every 15 years in accordance with the National Wildlife Refuge System Administration Act of 1966, as amended by the National Refuge System Improvement Act of 1997, and the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370d).

Background: Fish Springs National Wildlife Refuge was established under the Migratory Bird Conservation Act (MBCA) by the Migratory Bird Conservation Commission. The stated purpose is ''* * * for use as an inviolate sanctuary, or for any other management purpose, for migratory birds.'' 16 U.S.C. 715d (Migratory Bird Act)

Significant issues addressed in the Draft CCP/EA include: habitat and wildlife management, ecological integrity, visitor services, cultural resources, and partnerships. The Service developed three alternatives for management of the Refuge: Alternative A—No Action; Alternative B—Restoration; Alternative C—Enhanced Habitat Management and Public Use. All three alternatives outline specific management objectives and strategies related to wildlife and habitat management, ecological integrity, visitor services, cultural resources, and partnerships.

Alternative A—No Action (Current Management) focuses on managing water in nine marsh units to meet the life cycle needs of waterfowl, shorebirds, and water birds. The marsh units are currently rotated through a 5-year drawdown schedule according to the Marsh Management Plan approved in 1991. In addition, the units drawn down each year are burned according to a prescribed fire plan approved in August 2002. Visitation to Fish Springs currently ranges between 2000 and 3100 visitors each year. Up to 40 percent of the Refuge is open for duck and coot hunting each year. Waterfowl hunting remains the greatest recreational interest. Continuing to provide educational and interpretive opportunities for visitors will enhance understanding and appreciation of the wildlife and cultural resources represented on the Refuge. Efforts to inventory and analyze unmapped cultural resource sites and fully understand known sites will continue. Continuing to foster and increase opportunities for participation in conservation initiatives, such as the Eastern Bonneville partnership, will help the Refuge maximize its contribution to natural resource conservation.

Alternative B—Restoration, will restore, maintain and enhance the Refuge's original hydrological system and high-desert shrubland habitat to a condition resembling their historic nature prior to Refuge development. Marsh restoration will ensure that habitat that is critical to maintain the flora and fauna that historically inhabited the Refuge is provided. Marsh restoration will call for the removal of all dikes and water control structures. High-desert shrubland will be restored to its historic native composition benefiting those species dependent on this habitat type, such as kit fox, Bonneville pocket gopher, loggerhead shrike, black-throated sparrow, and neotropical migrants. Visitor services will change slightly under the restoration alternative, with more emphasis placed on non-consumptive uses, such as environmental education, interpretation, wildlife observation and photography. The shift in visitor services is due mainly to the removal of water control structures (*i.e.* dikes and roads) which will limit vehicle access. The current hunting program will continue with the addition of a goose hunt. Access to hunting areas will be provided via boat and/or foot passage, promoting a remote hunting experience. Restoration and subsequent monitoring of the marsh ecosystem will provide expanded opportunities for interpretation and environmental education.

Alternative C—Enhanced Habitat Management and Visitor Services, the Service's Proposed Action, emphasizes the utilization of Fish Springs NWR by a diversity of migratory birds. Marshes will continue to be managed for waterfowl, shorebirds, and water birds. Current marsh water management will continue, with few minor modifications to improve foraging and nesting habitat for shorebirds and water birds. High-desert shrublands will be restored to historic native composition, thereby benefiting those species dependent on this habitat type, such as kit fox, Bonneville pocket gopher, loggerhead shrike, black-throated sparrow, and neotropical migrants. One of the five major thermal springs that arise from a fault line at the base of the east slope of the Fish Springs Range will be restored to its historic natural condition providing habitat that is critical to maintain the flora and fauna that historically inhabited the Refuge. Restoration and subsequent monitoring of the marsh ecosystem will provide expanded opportunities for interpretation and environmental education. Increased efforts in visitor services and the addition of a goose hunt to the current hunting program will attract more visitors to the Refuge. The Refuge will maintain an auto-tour route which traverses a cross section of the habitats and provides opportunity for wildlife viewing and photography. The construction of an interpretive boardwalk and an observation platform will further enhance wildlife viewing and photography.

The review and comment period is 30 calendar days commencing with publication of this Notice of Availability in the **Federal Register**. After the review and comment period for this Draft CCP/EA, all comments will be analyzed and considered by the Service. All comments received from individuals on the Environmental Assessment become part of the official public record. Requests for such comments will be handled in accordance with the Freedom of Information Act, the Council on Environmental Quality's NEPA regulations (40 CFR 1506.6(f)) and other Service and Departmental policies and procedures.

Dated: July 14, 2004.

John A. Blankenship,

Deputy Regional Director, Region 6.

[FR Doc. 04–16409 Filed 7–19–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Receipt of an Application for an Incidental Take Permit for Construction of a Single-Family Home in Brevard County, FL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: David Sime (Applicant) requests an incidental take permit (ITP) pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973 (U.S.C. 1531 *et seq.*), as amended (Act). The Applicant anticipates taking about 0.33 acre of Florida scrub-jay (*Aphelocoma coerulescens*) (scrub-jay) foraging, sheltering, and possibly nesting habitat,

incidental to lot preparation for the construction of a single-family home and supporting infrastructure in Brevard County, Florida (Project). The destruction of 0.33 acre of foraging, sheltering, and possibly nesting habitat is expected to result in the take of one family of scrub-jays.

The Applicant's Habitat Conservation Plan (HCP) describes the mitigation and minimization measures proposed to address the effects of the Project to the Florida scrub-jay. These measures are outlined in the **SUPPLEMENTARY INFORMATION** section below. We have determined that the Applicant's proposal, including the proposed mitigation and minimization measures, will individually and cumulatively have a minor or negligible effect on the species covered in the HCP. Therefore, the ITP is a ''low-effect'' project and qualifies as a categorical exclusion under the National Environmental Policy Act (NEPA), as provided by the Department of Interior Manual (516 DM2, Appendix 1 and 516 DM 6, Appendix 1). We announce the availability of the HCP for the incidental take application. Copies of the HCP may be obtained by making a request to the Regional Office (*see* **ADDRESSES**). Requests must be in writing to be processed. This notice is provided pursuant to Section 10 of the Endangered Species Act and NEPA regulations (40 CFR 1506.6).

DATES: Written comments on the ITP application and HCP should be sent to the Service's Regional Office (*see* **ADDRESSES**) and should be received on or before August 19, 2004.

ADDRESSES: Persons wishing to review the application and HCP may obtain a copy by writing the Service's Southeast Regional Office, Atlanta, Georgia. Please reference permit number TE086774–0 in such requests. Documents will also be available for public inspection by appointment during normal business hours at the Regional Office, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 (Attn: Endangered Species Permits), or Field Supervisor, U.S. Fish and Wildlife Service, 6620 Southpoint Drive South, Suite 310, Jacksonville, Florida 32216–0912.

FOR FURTHER INFORMATION CONTACT: Mr. David Dell, Regional HCP Coordinator, (*see* **ADDRESSES** above), telephone: (404) 679–7313, facsimile: (404) 679–7081; or Mr. Rob Bittner, Fish and Wildlife Biologist, Jacksonville Field Office, Jacksonville, Florida (*see* **ADDRESSES** above), telephone: (904) 232–2580, ext. 120.

SUPPLEMENTARY INFORMATION: If you wish to comment, you may submit comments by any one of several methods. Please reference permit number TE086774–0 in such comments. You may mail comments to the Service's Regional Office (*see* **ADDRESSES**). You may also comment via the internet to ''*david_dell@fws.gov*''. Please submit comments over the internet as an ASCII file avoiding the use of special characters and any form of encryption. Please also include your name and return address in your internet message. If you do not receive a confirmation from us that we have received your internet message, contact us directly at either telephone number listed below (*see* **FOR FURTHER INFORMATION CONTACT**). Finally, you may hand deliver comments to either Service office listed below (*see* **ADDRESSES**). Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the administrative record. We will honor such requests to the extent allowable by law. There may also be other circumstances in which we would withhold from the administrative record a respondent's identity, as allowable by law. If you wish us to withhold your name and address, you must state this prominently at the beginning of your comments. We will not, however, consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

The Florida scrub-jay (scrub-jay) is geographically isolated from other species of scrub-jays found in Mexico and the western United States. The scrub-jay is found exclusively in peninsular Florida and is restricted to xeric uplands (predominately in oak-dominated scrub). Increasing urban and agricultural development have resulted in habitat loss and fragmentation which has adversely affected the distribution and numbers of scrub-jays. The total estimated population is between 7,000 and 11,000 individuals.

The decline in the number and distribution of scrub-jays in east-central Florida has been exacerbated by tremendous urban growth in the past 50 years. Much of the historic commercial and residential development has occurred on the dry soils which previously supported scrub-jay habitat. Based on existing soils data, much of the historic and current scrub-jay habitat of coastal east-central Florida occurs proximal to the current shoreline and larger river basins. Much of this area of Florida was settled early because few wetlands restricted urban and agricultural development. Due to the effects of urban and agricultural development over the past 100 years, much of the remaining scrub-jay habitat is now relatively small and isolated. What remains is largely degraded due to the exclusion of fire which is needed to maintain xeric uplands in conditions suitable for scrub-jays.

A family of scrub-jays is known to have used the residential lot during 2001 as a nesting site, then were observed again in 2002 using the site for foraging. The scrub-jays using the subject residential lot and adjacent properties are part of a larger complex of scrub-jays located in a matrix of urban and natural settings in areas of northern Brevard County. The project site is positioned on the extreme western edge of an area supporting 16 families of scrub-jays. Scrub-jays in urban areas are particularly vulnerable and typically do not successfully produce young that survive to adulthood. Persistent urban growth in this area will likely result in further reductions in the amount of suitable habitat for scrub-jays. Increasing urban pressures are also likely to result in the continued degradation of scrub-jay habitat as fire exclusion slowly results in vegetative overgrowth. Thus, over the long-term, scrub-jays are unlikely to persist in urban settings, and conservation efforts for this species should target acquisition and management of large parcels of land outside the direct influence of urbanization.

Construction of the Project's infrastructure and facilities will result in harm to scrub-jays, incidental to the carrying out of these otherwise lawful activities. Habitat alteration associated with the proposed residential construction will reduce the availability of foraging, sheltering, and possible nesting habitat for one family of scrub-jays. The Applicant proposes to conduct construction activities outside of the nesting season. Other on-site minimization measures are not practicable as the footprint of the home, infrastructure and landscaping on the 0.33 acre lot will utilize all the available land area. Retention of scrub-jay habitat on-site may not be a biologically viable alternative due to increasing negative demographic effects caused by urbanization.

The Applicant proposes to mitigate the take of scrub-jays through contribution of $4,422 to the Florida Scrub-jay Conservation Fund administered by the National Fish and

Wildlife Foundation. Funds in this account are ear-marked for use in the conservation and recovery of scrub-jays and may include habitat acquisition, restoration, and/or management. The $4,422 is sufficient to acquire and perpetually manage 0.66 acre of suitable occupied scrub-jay habitat based on a replacement ratio of two mitigation acres per one impact acre. The cost is based on previous acquisitions of mitigation lands in southern Brevard County at an average $5,700 per acre, plus a $1,000 per acre management endowment necessary to ensure future management of acquired scrub-jay habitat.

We have determined that the HCP is a low-effect plan that is categorically excluded from further NEPA analysis, and does not require the preparation of an EA or EIS. This preliminary information may be revised due to public comment received in response to this notice. Low-effect HCPs are those involving: (1) Minor or negligible effects on federally listed or candidate species and their habitats, and (2) minor or negligible effects on other environmental values or resources. The Applicant's HCP qualifies for the following reasons:

1. Approval of the HCP would result in minor or negligible effects on the Florida scrub-jay population as a whole. We do not anticipate significant direct or cumulative effects to the Florida scrub-jay population as a result of the construction project.

2. Approval of the HCP would not have adverse effects on known unique geographic, historic or cultural sites, or involve unique or unknown environmental risks.

3. Approval of the HCP would not result in any significant adverse effects on public health or safety.

4. The project does not require compliance with Executive Order 11988 (Floodplain Management), Executive Order 11990 (Protection of Wetlands), or the Fish and Wildlife Coordination Act, nor does it threaten to violate a Federal, State, local or tribal law or requirement imposed for the protection of the environment.

5. Approval of the Plan would not establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.

We have determined that approval of the Plan qualifies as a categorical exclusion under the NEPA, as provided by the Department of the Interior Manual (516 DM 2, Appendix 1 and 516 DM 6, Appendix 1). Therefore, no further NEPA documentation will be prepared.

We will evaluate the HCP and comments submitted thereon to determine whether the application meets the requirements of section 10(a) of the Act. If it is determined that those requirements are met, the ITP will be issued for the incidental take of the Florida scrub-jay. We will also evaluate whether issuance of the section 10(a)(1)(B) ITP complies with section 7 of the Act by conducting an intra-Service section 7 consultation. The results of this consultation, in combination with the above findings, will be used in the final analysis to determine whether or not to issue the ITP.

Pursuant to the June 10, 2004, order in *Spirit of the Sage Council* v. *Norton*, Civil Action No. 98–1873 (D. D.C.), the Service is enjoined from approving new section 10(a)(1)(B) permits or related documents containing ''No Surprises'' assurances until such time as the Service adopts new permit revocation rules specifically applicable to section 10(a)(1)(B) permits in compliance with the public notice and comment requirements of the Administrative Procedure Act. This notice concerns a step in the review and processing of a section 10(a)(1)(B) permit and any subsequent permit issuance will be in accordance with the Court's order. Until such time as the Service's authority to issue permits with ''No Surprises'' assurances has been reinstated, the Service will not approve any incidental take permits or related documents that contain ''No Surprises'' assurances.

Dated: July 3, 2004.

Mitch King,

Acting Regional Director, Southeast Region.

[FR Doc. 04–16410 Filed 7–19–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Notice of Intent To Prepare an Environmental Impact Statement for the Proposed Scotts Valley Band of Pomo Indians' Trust Acquisition and Casino Project, Contra Costa County, CA

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice advises the public that the Bureau of Indian Affairs (BIA) as lead agency, with the Scotts Valley Band of Pomo Indians (Band) as cooperating agency, intends to gather information necessary for preparing an Environmental Impact Statement (EIS) for a proposed 29.87± acre trust acquisition and casino project to be located within unincorporated Contra Costa County, California. The purpose of the proposed action is to help provide for the economic development of the Band. This notice also announces a public scoping meeting to identify potential issues and content for inclusion in the EIS.

DATES: Written comments on the scope and implementation of this proposal must arrive by August 19, 2004. The public scoping meeting will be held August 4, 2004, from 6 p.m. to 9 p.m., or until the last public comment is received.

ADDRESSES: You may mail or hand carry written comments to Clay Gregory, Regional Director, Pacific Regional Office, Bureau of Indian Affairs, 2800 Cottage Way, Sacramento, California 95825. The public scoping meeting will be held at Richmond Memorial Auditorium, 403 Civic Center Plaza, Richmond, California.

FOR FURTHER INFORMATION CONTACT: William Allan, (916) 978–6043.

SUPPLEMENTARY INFORMATION: The Band proposes that 29.87± acres of land be taken into trust and that a casino, parking and other facilities supporting the casino be constructed on the trust acquisition property. The 29.87± acres encompasses 6 parcels of land located entirely within unincorporated Contra Costa County, California, contiguous with the city of Richmond. The project site is adjacent to Richmond Parkway and Parr Boulevard, and within 3 miles of Interstate 80. Regional access to the casino complex would be from Richmond Parkway via Interstate 80.

The Proposed Action includes the development of a 225,000± square foot, 30-foot tall casino complex, which would consist of a combination of uses including, but not limited to the following: a main gaming hall; food and beverage facilities, including a restaurant, buffet, food court and sports bar; an entertainment lounge; banking and administration facilities; and an event center. The proposed facility would also include approximately 1,200 surface parking stalls and 1,400 parking stalls located in a 3± level parking structure. Spaces for self-parking, valet parking, overflow parking, bus and RV parking, employee parking and executive parking would also be provided. Driveways along Parr Boulevard would provide access to the parking areas and the casino.

Areas of environmental concern to be addressed in the EIS include land use, geology and soils, water resources, agricultural resources, biological

resources, cultural resources, mineral resources, paleontological resources, traffic and transportation, noise, air quality, public health/environmental hazards, public services and utilities, hazardous waste and materials, socio-economics, environmental justice, and visual resources/ aesthetics. The range of issues addressed may be expanded based on comments received during the scoping process.

Public Comment Availability

Comments, including names and addresses of respondents, will be available for public review at the BIA address shown in the **ADDRESSES** section, during business hours, 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. Individual respondents may request confidentiality. If you wish us to withhold your name and/or address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comment. Such requests will be honored to the extent allowed by the law. We will not, however, consider anonymous comments. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

Authority

This notice is published in accordance with section 1503.1 of the Council on Environmental Quality Regulations (40 CFR Parts 1500 through 1508) implementing the procedural requirements of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4371 *et seq.*), and the Department of the Interior Manual (516 DM 1–6), and is in the exercise of authority delegated to the Principal Deputy Assistant Secretary—Indian Affairs by 209 DM 8.1.

Dated: July 15, 2004.

Aurene M. Martin,

Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 04–16583 Filed 7–19–04; 8:45 am]

BILLING CODE 4310–W7–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Outer Continental Shelf, Pacific Region, Environmental Document Prepared for Nuevo Energy Company's Submarine Power Cable Repair Project

AGENCY: Minerals Management Service (MMS).

ACTIONS: Notice of Availability of Environmental Assessment (EA) and Finding of No Significant Impact (FONSI).

SUMMARY: The MMS prepared an EA for Nuevo Energy Company's Submarine Power Cable Repair Project and issued a FONSI pursuant to the requirements of the National Environmental Policy Act (NEPA).

DATES: MMS completed the EA and issued the FONSI on June 15, 2004.

FOR FURTHER INFORMATION CONTACT: Minerals Management Service, Pacific Region, 770 Paseo Camarillo, Camarillo, CA 93010, Mr. John Lane, telephone (805) 389–7820.

SUPPLEMENTARY INFORMATION: The MMS prepares EA's and FONSI's for Outer Continental Shelf (OCS) oil and gas exploration and development activities and other operations on the Pacific OCS. Nuevo Energy Company's power cable repair project involves replacing a segment (1,800 feet) of failed power cable that links OCS Platforms Henry and Hillhouse which are located offshore the County of Santa Barbara. The EA examines the potential environmental effects of the project and presents MMS's conclusions regarding the significance of those effects. The MMS prepares EA's to determine whether proposed projects constitute a major Federal action that significantly affects the quality of the human environment in the sense of NEPA 102(2)(C). A FONSI is prepared in those instances where the MMS finds that approval will not result in significant effects on the quality of the human environment. The FONSI briefly presents the basis for that finding and includes a summary or copy of the EA. This notice constitutes the public Notice of Availability of environmental documents required under the NEPA regulations.

Dated: June 24, 2004.

Thomas A. Readinger,

Associate Director for Offshore Minerals Management.

[FR Doc. 04–16443 Filed 7–19–04; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

National Park Service

60-Day Notice of Intention To Request Clearance of Collection of Information; Opportunity for Public Comment

AGENCY: National Park Service, the Department of Interior.

ACTION: Notice and request for comments.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507 *et seq.*) and 5 CFR part 1320, the National Park Service (NPS) invites public comments on a submitted request to the Office of Management and Budget (OMB) to approve a revision of a currently approved collection (OMB# 1024–0038) associated with the Historic Preservation Fund (HPF) Grants to States program. NPS intends to request a new control number for these information collections in order to separate grant-related information collections from other information collections related to 36 CFR part 61, ''Procedures for State, Tribal, and Local Government Historic Preservation Programs.'' In addition, some information collections had not been recognized previously as needing OMB approval because they were government-wide requirements using government-wide and OMB-approved forms/systems. Section 101(b) of the National Historic Preservation Act, as amended, (16 U.S.C. 470a(b) specifies the role of States in the national historic preservation program. Section 108 of the Act (16 U.S.C. 470(h) created the Historic Preservation Fund (HPF) to carry out the purposes of the Act. Section 101(e)(1) of the Act (16 U.S.C. 470a(e)) directs the Secretary of the Interior through the National Park Service to ''administer a program of matching grants to the States for the purposes of carrying out'' the Act. Each year Congress directs NPS to use part of the annual appropriation from the HPF for the State grant program. The purpose of the HPF State grants program is to assist States in carrying out their statutory role in the national historic preservation program. All 59 States, Territories, and the District of Columbia participate in the national historic preservation program. HPF grants to States are program grants; *i.e.,* each State selects its own HPF-eligible activities and projects. Each HPF grant to a State has two years of fund availability. At the end of the first year, NPS employs a ''Use or Lose'' policy to ensure efficient and effect use of the grant funds. NPS developed the program

requirements/information collections in consultation with the States. The requirements/information collections are unchanged since the last approval by OMB.

DATES: To assure that the NPS considers your comments on this notice, NPS must receive the comments on or before September 20, 2004.

Send Comments To: John W. Renaud, Project Coordinator, State, Tribal and Local Programs, Heritage Preservation Services, National Center for Cultural Resources, National Park Service, 1849 C St., NW., Org. Code 2255, Washington, DC 20240–0001, via fax at 202–371–1961, or via e-mail at *John_Renaud@nps.gov.*

FOR FURTHER INFORMATION CONTACT: John W. Renaud, Project Coordinator, State, Tribal and Local Programs, Heritage Preservation Services, National Center for Cultural Resources, National Park Service, 1849 C St., NW., Org. Code 2255, Washington, DC 20240–0001; via fax at 202–373–1961, via e-mail at *John_Renaud@nps.gov*, or via telephone at (202) 354–2066.

SUPPLEMENTARY INFORMATION:

Title: Historic Preservation Fund (HPF) grants to States.

OMB Number: 1024–xxxx.

Expiration Date of Approval: July 31, 2004.

Type of Request: Revision of a currently approved collection.

Abstract: This information collection has an impact on State governments that wish to apply for Historic Preservation Fund grants. The National Park Service uses the information collections to ensure compliance with the National Historic Preservation Act, as amended (16 U.S.C. 470 *et seq.*) as well as the government-wide grant requirements that OMB has issued and the Department of the Interior implements through 43 CFR part 12. This information collection also will produce performance data that NPS uses to asses its progress in meeting goals set in Departmental and NPS strategic plans created pursuant to the 1993 Government Performance and Results Act, as amended.

Respondents: State governments.

Estimate of Burden: NPS estimates that the public burden for the HPF-supported State grant program collections of information will average 12 hours per application and 53 hours per grant per year for all of the grant-related collections. The combined total public burden for the HPF State grant program-related information collections would average 65 hours per successful applicant/grantee. These estimates of burden include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and reviewing the collection of information. These burden estimates are a one-year average for the two-year grants.

Estimated Number of Respondents/ Record Keepers: NPS estimates that there are 696 responses per year. This is the gross number of responses for all of the elements included in this information collection. The net numbers of applicants and grantees participating in this information collection annually are 59 State applicants and grantees. The frequency of response varies depending upon the activity. Applicants complete the grant application once. This includes the government-wide require application and budget forms (*i.e.*, SF 424), a ''Cumulative Products Table'' of projected performance in summary format, an ''Organization Chart'' showing the availability of appropriately qualified staff, and a (major) ''Anticipated Activities List''. Successful applicants execute the grant agreement once. During the grant cycle, project report. Throughout the duration of the grant, grantees comply with government-wide recordkeeping requirements. Grantees make requests for payment on an as-needed basis using the U.S. Government's SMARTLINK payment management system. Each year, every State submits an ''End of Year Report'' that includes the Cumulative Products Table (which compares actual to proposed performance), a ''Sources of Nonfederal Matching Share Report,'' a ''Project/ Activity Database Report,'' an ''Unexpended Carryover Funds Table and Carryover Statement,'' and a ''Significant Preservation Accomplishments Summary.''

Estimated average number of Applicant responses: 148 annually.

Estimated average gross number of Grantee responses: 548 annually.

Estimated average gross number of responses: 696 annually.

Estimated average burden hours per Applicant response: 3 hours.

Estimated average burden hours per response: 5 hours.

Estimated average annual burden hours per Grantee for all responses: 53 hours.

Estimated total annual average burden hours per respondent: 65 hours.

Estimated Annual Burden on all Respondents: 3,597 hours.

NPS is soliciting comments regarding:

(1) Whether the collection of information is necessary for the proper performance of the functions of NPS, including whether the information will have practical utility;

(2) The accuracy of the burden estimate including the validity of the method and assumptions used;

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

(4) Ways to minimize the burden of collecting the information, including through the use of appropriate automated, electronic, mechanical, or other forms of information technology; or,

(5) Any other aspect of this collection of information.

NPS will summarize and include in the request for OMB approval all responses to this notice. All comments will also become a matter of public record. You can obtain copies of the information collection from John W. Renaud, Project Coordinator, State, Tribal and Local Programs, Heritage Preservation Services, National Center for Cultural Resources, National Park Service, 1849 C St., NW., Org. Code 2255, Washington, DC 20240–0001.

Dated: July 13, 2004.

Leonard E. Stowe,

Acting, Information Collection Clearance Officer, National Park Service, WAPC.

[FR Doc. 04–16393 Filed 7–19–04; 8:45 am]

BILLING CODE 4312–52–M

DEPARTMENT OF THE INTERIOR

National Park Service

Denali National Park Subsistence Resource Commission Meeting

AGENCY: National Park Service, Interior.

ACTION: Notice of meeting; correction.

SUMMARY: The National Park Service published a document in the **Federal Register** of July 6, 2004, volume 69, number 128, page 40650, concerning a public meeting of the Denali National Park Subsistence Resource Commission. The date given for the meeting was in error; in addition, the agenda for the meeting has been changed.

Correction: The correct information concerning the meeting is as follows.

Meeting Date and Time: Friday, August 20, 2004, from 9 a.m. to 5 p.m.

Location: Kantishna Roadhouse, in Kantishna, Alaska.

Agenda: The following agenda items will be discussed—

1. Call to order.
2. Roll call and confirmation of quorum.
3. Superintendent's welcome and introductions.
4. Approval of minutes from last commission meeting.
5. Additions and corrections to draft agenda.

6. Public and other agency comments.
7. Old Business.
a. Cantwell Resident Zone issues.
b. North Access and Stampede Summit meetings.
c. Predator-Prey Research Studies.
8. New Business.
a. Federal Subsistence Board actions on wildlife proposals for 2004–2005.
b. Federal Subsistence Fisheries proposals for 2005–06.
c. Subsistence ATV use in Denali.
d. Alaska Board of Game actions on wildlife proposals for 2004–2005.
9. NPS reports and updates.
a. Fish and wildlife updates.
b. Cultural and Subsistence updates. Nikolai Community Harvest Assessments. Native Tribal Council meetings. Nikolai Historical Fishery study.
c. Annual SRC Chairs meeting update.
10. Public and other agency comments.
11. Set time and place of next Denali SRC meeting.
12. Adjournment.

FOR FURTHER INFORMATION CONTACT: Hollis Twitchell, Subsistence and Cultural Resources Manager, or Roy Tansy, Jr., Subsistence Technician, at (907) 683–9544 or (907) 455–0673.

SUPPLEMENTARY INFORMATION: Notice of this meeting is required pursuant to the Federal Advisory Committee Act, 5 U.S.C. Appendix 1–16; Pub. L. 92–463.

The Subsistence Resource Commission is authorized by the Alaska National Interest Lands Conservation Act (see, 16 U.S.C. 3118; Pub. L. 96–487, title VIII, section 808), and operates in accordance with the provisions of the Federal Advisory Committee Act.

Draft minutes of the meeting will be available for public inspection approximately six weeks after the meeting from: Superintendent, Denali National Park and Preserve, P.O. Box 9, Denali Park, AK 99755.

Pete Lucero,

Acting, Alaska Desk Officer.

[FR Doc. 04–16394 Filed 7–19–04; 8:45 am]

BILLING CODE 4312–14–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Meeting

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Commission Act that a meeting of the Landmarks Committee of the National Park System Advisory Board will be held beginning at 1 p.m. on September 21, 2004, and at the following location. The meeting will continue beginning at 9 a.m. on the subsequent dates.

DATES: September 21–23, 2004.

Location: The Charles Sumner School, 1201 Seventeenth Street, NW., Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Patricia Henry, National Historic Landmarks Survey, National Register, History, and Education, National Park Service, 1849 C Street, NW., (2280), Washington, DC 20240; telephone (202) 354–2216.

SUPPLEMENTARY INFORMATION: The purpose of the meeting of the Landmarks Committee of the National Park System Advisory Board is to evaluate nominations of historic properties in order to advise the National Park System Advisory Board of the qualifications of the property being proposed for National Historic Landmark (NHL) designation, and to recommend to the National Park System Advisory Board if the Landmarks Committee finds that each property meets the criteria for designation as a National Historic Landmark. The Committee also makes recommendations to the National Park System Advisory Board regarding amendments to existing designations, and proposals for withdrawal of designation. The members of the National Landmarks Committee are:

Mr. Larry E. Rivers, Ph.D., CHAIR
Mr. Ian W. Brown, Ph.D.
Ms. Mary Werner DeNadai, FAIA
Ms. Alferdteen Brown Harrison, Ph.D.
Mr. Bernard L. Herman, Ph.D.
Mr. E.L. Roy Hunt, J.D., Professor Emeritus
Mr. Ronald James
Ms. Paula J. Johnson
Mr. William J. Murtagh, Ph.D.
Mr. William D. Seale, Ph.D.

The meeting will be open to the public. Any member of the public may file for consideration by the committee written comments concerning the National Historic Landmarks nominations, amendments to existing designations, or proposals for withdrawal of designation, as well as matters pursuant to 36 CFR part 65.

Comments should be submitted to Carol D. Shull, Chief, National Historic Landmarks Survey and Keeper of the National Register of Historic Places, National Register, History, and Education, National Park Service, 1849 C Street, NW., (2280), Washington, DC 20240.

The committee will consider the following nominations, amendments to existing designations, and proposals for withdrawal of designation:

Nominations

Alabama

- BETHEL BAPTIST CHURCH, PARSONAGE, AND GUARD HOUSE, Collegeville, AL
- FOSTER AUDITORIUM, Tuscaloosa, AL

Alaska

- AMALIK BAY ARCHEOLOGICAL DISTRICT, Lake and Peninsula Borough, AK

California

- SANTA BARBARA COUNTY COURTHOUSE, Santa Barbara, CA

Delaware

- HOWARD HIGH SCHOOL, Wilmington, DE

District of Columbia

- LAFAYETTE BUILDING, DC
- UNITED MINE WORKERS OF AMERICA BUILDING, DC

Florida

- FREEDOM TOWER, Miami, FL

Indiana

- AUBURN CORD DUESENBERG AUTOMOBILE FACILITY, Auburn, IN

Louisiana

- ROSEDOWN, West Feliciana Parish, LA
- LONGUE VUE HOUSE AND GARDENS, New Orleans, LA

Massachusetts

- WILLIAM ROTCH, JR. HOUSE, New Bedford, MA
- FREDERICK AYER MANSION, Boston, MA
- WESLEYAN GROVE, Oak Bluffs, MA
- QUINCY HOMESTEAD, Quincy, MA

Mississippi

- BATTLE OF PORT GIBSON, Claiborne County, MS

New Jersey

- RADBURN, Borough of Fair Lawn, NJ

New York

- WILLARD MEMORIAL CHAPEL—WELSH MEMORIAL HALL, Auburn, NY
- ELEPHANT HOTEL, Somers, NY

North Dakota

- FREDERICK A. AND SOPHIA BAGG BONANZA FARM, Richland County, ND

Ohio

• MOUNT PLEASANT HISTORIC DISTRICT, Mount Pleasant, OH

Pennsylvania

• CHATHAM VILLAGE, Pittsburgh, PA

• LIGHTFOOT MILL, Chester Springs, PA

• MEADOWCROFT ROCKSHELTER, Washington County, PA

• OLD ST. JOSEPH'S CATHOLIC CHURCH, Philadelphia, PA

Tennessee

• GRACELAND (ELVIS PRESLEY HOME), Memphis, TN

Wisconsin

• MILWAUKEE CITY HALL, Milwaukee, WI

• WISCONSIN DAIRY BARN, Madison, WI

Amendments to Existing Designations

Alabama

• BOTTLE CREEK SITE, Baldwin County, AL (boundary revision)

North Carolina

• BILTMORE ESTATE, Buncombe County, NC (boundary revision and revised documentation)

North Dakota

• MENOKEN INDIAN VILLAGE SITE, Burleigh County, ND (revised documentation)

Proposals for Withdrawal of Designation

Illinois

• GRANT PARK STADIUM(SOLDIER FIELD), Chicago, IL

Michigan

• LINCOLN MOTOR COMPANY PLANT, Detroit, MI

Ohio

• ROCKET ENGINE TEST FACILITY, Cuyahoga County, OH

Tennessee

• ISAAC FRANKLIN PLANTATION (FAIRVUE), Gallatin, TN

Carol D. Shull,

Chief, National Historic Landmarks Survey and Keeper of the National Register of Historic Places, National Park Service, Washington, DC.

[FR Doc. 04–16395 Filed 7–19–04; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent To Repatriate a Cultural Item: Field Museum of Natural History, Chicago, IL

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 43 CFR 10.8(f), of the intent to repatriate a cultural item in the possession of the Field Museum of Natural History, Chicago, IL, that meets the definition of ''sacred object'' under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 43 CFR 10.8(f). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural item. The National Park Service is not responsible for the determinations in the notice.

The cultural item is a totemic carving in the shape of a salmon (catalog number 14422). The carving is wood, and details such as the eye, mouth, gill, fins, and scales of the salmon are carved in low relief. The salmon is painted red and blue on a black background on one side. No details are carved or painted on the other side of the salmon. The carving is 2 feet 5 inches long, 8 inches at its widest point, and ½ inch thick. Three holes through the body of the salmon appear to be from nails.

At an unknown date Edward E. Ayer acquired the carving. In 1894, Mr. Ayer donated the carving to the Field Museum of Natural History and it was accessioned into the museum's collection in the same year (accession number 112). Museum records do not indicate how Mr. Ayer acquired the cultural object.

The cultural affiliation of the carving is Sitka Tlingit, as indicated by museum records and by consultation evidence presented by the Central Council of the Tlingit & Haida Indian Tribes. The Central Council of the Tlingit & Haida Indian Tribes requested the return of the carving on behalf of the L'ooknax.ádi clan. Museum records indicate that the carving is a ''Totem of Kuthouse family-raven clan—Originally of gunah ho village [unknown word] Alsek River Northern Sitka.'' The ''gunah ho village'' mentioned in museum records appears to be the equivalent of Gunaaxoo, the ancestral home of the L'ooknax.ádi clan near the Alsek River in Alaska.

Officials of the Field Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001 (3)(C), the cultural item is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. Officials of the Field Museum of Natural History also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the sacred object and the Central Council of the Tlingit & Haida Indian Tribes, on behalf of the L'ooknax.ádi clan.

Officials of the Field Museum of Natural History assert that, pursuant to 25 U.S.C. 3001 (13), the Field Museum of Natural History has right of possession of the sacred object. Officials of the Field Museum of Natural History recognize the significance of the sacred object to the L'ooknax.ádi clan as represented by the Central Council of the Tlingit & Haida Indian Tribes and reached an agreement with the Central Council of the Tlingit & Haida Indian Tribes that allows the Field Museum of Natural History to return the sacred object to the Central Council of the Tlingit & Haida Indian Tribes voluntarily, pursuant to the compromise of claim provisions of the Field Museum of Natural History's repatriation policy.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the sacred object should contact Jonathan Haas, MacArthur Curator of the Americas, Field Museum of Natural History, 1400 South Lake Shore Drive, Chicago, IL 60605, telephone (312) 665–7829, before August 19, 2004. Repatriation of the sacred object to the Central Council of the Tlingit & Haida Indian Tribes on behalf of the L'ooknax.ádi clan may proceed after that date if no additional claimants come forward.

The Field Museum of Natural History is responsible for notifying the Central Council of the Tlingit & Haida Indian Tribes, L'ooknax.ádi clan, Sealaska Corporation, Shee Atika, Inc., and Sitka Tribe of Alaska that this notice has been published.

John Robbins,

Assistant Director, Cultural Resources.

[FR Doc. 04–16145 Filed 7–19–04; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF JUSTICE

Justice Management Division; Agency Information Collection Activities: Proposed Collection: Extension, With Change, of a Previously Approved Collection

ACTION: 30-day notice of information collection under review: Attorney General's Honor Program, Summer Law Intern Program Electronic Applications.

The Department of Justice (DOJ), Office of Justice Programs (OJP) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 69, Number 60, page 16287 on March 29, 2004, allowing for a 60 day comment period.

The purpose of this notice is to allow an additional 30 days for public comment until August 19, 2004. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20530. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806. Comments may also be submitted to the Department of Justice (DOJ), Justice Management Division, Policy and Planning Staff, Attention: Department Clearance Officer, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Written comments and suggestions from the public and affected agencies should address one or more of the following points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies/components estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of information collection:* Extension of a previously approved collection.

(2) *The title of the form/collection:* Attorney General's Honor Program, Summer Law Intern Program Electronic Applications.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection: Form number:* None. Office of Attorney Recruitment and Management, Justice Management Division, United States 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. This data collection is used by the way the Department of Justice (DOJ) to hire graduating law students. The application form is submitted voluntarily, once a year by students/judicial law clerks who will be in this applicant pool only once; the information sought relates to the hiring criteria established as an internal matter by DOJ personnel.

(5) *An estimate of the total number of respondents and the amount of time estimate for an average respondent to respond:* 5,000 respondents at 1 hour per response.

(6) *An estimated of the total public burden (in hours) associated with the collection:* 5,000 annual burden hours.

If additional information is required, contact: Mrs. Brenda E. Dyer, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: July 14, 2004.

Brenda E. Dyer,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 04–16392 Filed 7–19–04; 8:45 am]

BILLING CODE 4410–26–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substance; Notice of Application

Pursuant to 21 CFR 1301.33(a), this is notice that on June 7, 2004, Johnson Matthey Inc., Custom Pharmaceuticals Department, 2003 Nolte Drive, West Deptford, New Jersey 08066, made application by letter to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of Dihydromorphine (9145), a basic class of controlled substance listed in Schedule I.

The company plans to manufacturer Dihydromorphine for internal use in production of other controlled substances for distribution to its customers.

Any other such applicant and any person who is presently registered with DEA to manufacture such a substance may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistance Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCD) and must be filed not later than September 20, 2004.

Dated: July 8, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 04–16386 Filed 7–19–04; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

By Notice dated April 9, 2004 and published in the **Federal Register** on April 26, 2004, (69 FR 22566), Penick Corporation, 158 Mount Olivet Avenue, Newark, New Jersey 07114, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic classes of controlled substances:

Drug	Schedule
Coca Leaves (9040)	II
Raw Opium (9600)	II
Poppy Straw (9650)	II

Drug	Schedule
Concentrate of Poppy Straw (9670).	II

The company plans to import the basic classes of controlled substances to manufacture bulk controlled substances and a non-controlled substance flavor extract.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Penick Corporation to import the basic classes of controlled substances is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Penick Corporation to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic classes of controlled substances listed.

Dated: July 8, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By notice dated March 5, 2004, and published in the **Federal Register** on March 15, 2004, (69 FR 12180), Roche Diagnostics Corporation, Attn: Regulatory Compliance, 9115 Hague Road, Indianapolis, Indiana 46250, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances:

Drug	Schedule
Lysergic Acid Diethylamide (7315)	I
Tetrahydrocannabinols (7370)	I
Alphamethadol (9605)	I
Phencyclidine (7471)	II
Benzoylecgonine (9180)	II
Methadone (9250)	II
Morphine (9300)	II

The company plans to produce small quantities of controlled substances for use in diagnostic products.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Roche Diagnostics Corporation, to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Roche Diagnostics Corporation to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: July 8, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 04–16384 Filed 7–17–04; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11160 & D–11161, et al.]

Proposed Exemptions; Camino Medical Group, Inc.

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. ____, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or fax. Any such comments or requests should be sent either by e-mail to: *''moffitt.betty@dol.gov''*, or by fax to (202) 219–0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type

requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Camino Medical Group, Inc. Matching 401(k) Plan (the 401(k) Plan) and the Camino Medical Group, Inc. Employee Retirement Plan (the Retirement Plan; Together, the Plans) Located in Santa Clara, California

[Application Nos. D–11160 & D–11161, respectively]

Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act (or 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, 32847, August 10, 1990).[1] If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to (1) the leasing (the New Lease) of a medical treatment center (the Treatment Center) by the Retirement Plan to Camino Medical Group, Inc. (CMG), the sponsor of the Retirement Plan and a party in interest with respect to such Retirement Plan; and (2) the exercise, by CMG, of options to renew the New Lease, for two additional terms, provided that the following conditions are met:

(a) The terms and conditions of the New Lease are no less favorable to the Retirement Plan than those obtainable by the Retirement Plan under similar circumstances when negotiated at arm's length with unrelated third parties.

(b) The Retirement Plan is represented for all purposes under the New Lease, and during each renewal term, by a qualified, independent fiduciary.

(c) The Retirement Plan's independent fiduciary has negotiated, reviewed, and approved the terms and conditions of the New Lease and the options to renew the New Lease on behalf of the Retirement Plan and has determined that the transactions are appropriate investments for the Retirement Plan and are in the best interests of the Retirement Plan and its participants and beneficiaries.

(d) The rent paid to the Retirement Plan under the New Lease, and during each renewal term, is no less than the fair market rental value of the Treatment Center, as established by a qualified, independent appraiser.

(e) The rent is subject to adjustment at the commencement of the second year of the term of the New Lease and each year thereafter by way of an independent appraisal. A qualified, independent appraiser is selected by the independent fiduciary to conduct the appraisal. If the appraised fair market rent of the Treatment Center is greater than that of the current base rent, then the base rent is revised to reflect the appraised increase in fair market rent. If the appraised fair market rent of the Treatment Center is less than or equal to the current base rent, then the base rent remains the same.

(f) The New Lease commences within 30 days after the granting of the final exemption and is triple net, requiring all expenses for maintenance, taxes, utilities and insurance to be paid by CMG, as lessee.

(g) The Retirement Plan's independent fiduciary monitors compliance with the terms of the New Lease and the conditions of the exemption throughout the duration of the New Lease and each renewal term, and is responsible for legally enforcing the payment of the rent and the proper performance of all other obligations of CMG under the terms of the New Lease.

(h) The Retirement Plan's independent fiduciary expressly approves any renewal of the New Lease beyond the initial term.

(i) CMG provides the Retirement Plan's independent fiduciary with documentation that the rent has been paid on a monthly basis.

(j) At all times throughout the duration of the New Lease and each renewal term, the fair market value of the Treatment Center does not exceed 25 percent of the value of the total assets of the Retirement Plan.

(k) CMG files a Form 5330 with the Internal Revenue Service (the Service) and pays all applicable excise taxes, if any, within 90 days of the publication, in the **Federal Register**, of the grant notice with respect to the past and continued leasing of the Treatment Center by the 401(k) Plan and the Retirement Plan (together, the Plans) to CMG.

(l) To the extent CMG owes the 401(k) Plan or the Retirement Plan additional rent by reason of the past and continued leasing of the Treatment Center, (i) the independent fiduciary makes all such determinations, including the payment of reasonable interest; and (ii) CMG makes such payments to the Plans.

Summary of Facts and Representations

1. CMG, formerly known as the ''Sunnyvale Medical Clinic, Inc.'' (Sunnyvale), is one of northern California's largest physician-governed multi-specialty medical groups, with more than 190 primary care and specialist physicians, nurse practitioners and physician assistants. An affiliate of the Palo Alto Medical Foundation, CMG is a not-for-profit, community-based organization that contracts with most leading Health Maintenance Organization and Preferred Provider Organization insurance plans. While maintaining 12 California patient care sites in Cupertino/San Jose, Los Altos, Mountain View, Santa Clara and Sunnyvale, CMG is focused on delivery of health care services, patient education and health care research, and offers 28 medical specialties, which include, but are not limited to, pediatrics, urgent care, and infusion therapy.

2. CMG sponsors the Plans. Originally, CMG established the Sunnyvale Medical Clinic, Inc. Employee Retirement and Profit Sharing Plan (the ERPS Plan), which was a single plan with two trusts. The retirement portion of the ERPS Plan was a money purchase pension plan and the profit sharing portion of the ERPS Plan was a profit sharing plan. Each portion of the ERPS Plan had its own separate trust.

3. Effective January 1, 1989, the 401(k) Plan was established. Employees of CMG who were eligible to participate in the ERPS Plan were also eligible to participate in the 401(k) Plan. Also, some physicians who worked for CMG but who did not participate in the ERPS Plan were eligible to participate in the 401(k) Plan.

On or about December 31, 1989, the ERPS Plan was restated as two separate plans, the ''Sunnyvale Medical Clinic, Inc. Employee Profit Sharing Plan'' (the Sunnyvale Profit Sharing Plan) for the profit sharing portion of the ERPS Plan and the ''Sunnyvale Medical Clinic, Inc. Retirement Plan'' (the Sunnyvale Retirement Plan, now known as the Retirement Plan) for the money purchase pension portion of the ERPS Plan.

On January 1, 1992, the Sunnyvale Profit Sharing Plan was merged into the

[1] For purposes of this proposed exemption, references to provisions of Title I of the Act, unless otherwise specified, refer also to corresponding provisions of the Code.

401(k) Plan. As a result of the merger, the 401(k) Plan received the Sunnyvale Profit Sharing Plan's assets and the flow of income deriving from those assets.

4. As of June 30, 2003, the 401(k) Plan covered 758 participants. As of the same date, the 401(k) Plan had total assets of $40,927,597. T. Rowe Price serves as the 401(k) Plan trustee.

The Administrative Committee, which is comprised of physicians who are shareholders of CMG, is the agent of CMG, and in such capacity is generally responsible for the interpretation, application and administration of the 401(k) Plan. The accounts in the 401(k) Plan are participant-directed, although the Administrative Committee also has the authority to direct the trustee's investment of the assets of the 401(k) Plan's trust. Currently, participants select from a menu of 13 investment choices. Participants can also choose to invest up to 50 percent of their vested account balance outside the menu of choices. With the assistance of an investment adviser, the Administrative Committee selects and monitors the menu of investment choices from which participants direct the investment of their accounts.

5. The Retirement Plan is not a party in interest with respect to the 401(k) Plan or vice versa. As of June 30, 2003, the Retirement Plan had 965 participants. As of August 31, 2003, the Retirement Plan had total assets of $36,055,367. The trustee of the Retirement Plan is Wells Fargo Bank.

The Administrative Committee is generally responsible for the administration of the Retirement Plan. To the extent that Retirement Plan participants do not direct the investment of their own accounts, the Administrative Committee directs the trustee's investment of the assets of the Retirement Plan's trust. Investment decisions are made by the Administrative Committee, with the exception of those participants who choose to segregate their accounts. An investment adviser assists the Administrative Committee in overseeing the investment of Retirement Plan assets. There are currently 15 participants who direct the investment of their own accounts in the Retirement Plan.

6. In 1980, the ERPS Plan acquired the real property presently constituting the Treatment Center from Sunnyvale Medical Building Company, Inc. (SMBC), a California corporation.[2]

The property is located at 570, 574, 580 and 582 South Sunnyvale Avenue, Sunnyvale, California. The property was occupied by retail businesses and comprised over 5,000 square feet of space at the time of acquisition. The property and the rental income were allocated to the profit sharing portion of the ERPS Plan.

7. Following the acquisition, a portion of the Treatment Center identified as 582 South Sunnyvale Avenue was leased to Richard P. Carr Physical Therapy (Carr PT), an unrelated party. The lease term was for a period of 125 months, commencing August 1, 1980, through December 31, 1990. The rental provided for under the lease was determined by a qualified, independent real estate appraiser. Moreover, the lease provided for an annual rental increase based upon the CPI.

8. Before entering into the lease of the 582 South Sunnyvale Avenue property, Carr PT had subleased premises from CMG at a nearby location, 411 Old San Francisco Road, Sunnyvale, California. In addition, CMG furnished Carr PT various billing and administrative services. The fee charged for the administrative services was based upon a percentage of Carr PT's billings. Further, Carr PT's patients consisted primarily of referrals from CMG. The same arrangement continued after Carr PT changed its location from the subleased premises to 582 South Sunnyvale Avenue.

Also prior to entering into the lease with Carr PT, the Administrative Committee of the ERPS Plan sought and obtained an opinion of legal counsel that the lease by the ERPS Plan to Carr PT would not be a prohibited transaction because Carr PT was not a party in interest with respect to such plan.

As Carr PT grew, it leased more of the premises belonging to the ERPS Plan. In February, 1983, 580 South Sunnyvale Avenue was added; in July 1985, 574 South Sunnyvale Avenue was added; and in January, 1987, 570 South Sunnyvale Avenue was added, completing its occupancy of the entire building comprising the Treatment Center. The lease was amended to reflect these additions.

9. As of August 1, 1991, a lease extension agreement was entered into between the Sunnyvale Profit Sharing Plan and Carr PT, as lessee, to extend the lease from August 1, 1991, through December 31, 1995. About 2 years later, as of March 1, 1993, by mutual agreement between Carr PT and the 401(k) Plan, the successor in interest to the Sunnyvale Profit Sharing Plan, the lease was terminated and simultaneously replaced by a lease between the 401(k) Plan and Advanced Infusion Systems (AIS), an unrelated party, as the new lessee. AIS provides infusion therapy services, more commonly known as chemotherapy. The new lease was for a 5-year term, from March 1, 1993, through February 28, 1998. AIS made substantial tenant improvements to the Treatment Center in order to carry out its business. In addition, AIS and CMG entered into an agreement under which CMG provided administration and management services to AIS.

10. Before the end of the lease term, the Administrative Committee for the 401(k) Plan and the Retirement Plan and AIS engaged in discussions relating to the renewal of the lease of the Treatment Center. The Administrative Committee anticipated that AIS would renew the lease. However, at the end of February 1998, AIS chose not to renew the lease and vacated the premises. Accordingly, on March 1, 1998, CMG

[2] A title search by the applicant revealed that on June 4, 1980, the Treatment Center was sold by Stephen Louis Millich to Price Walker Associates, Ltd. who were unrelated parties, the latter of which transferred the Treatment Center to SMBC on the same day. The applicant states that it has not been able to obtain any records which directly document the sales price for either of these transfers. However, the applicant represents that the recorded deed for each June 4, 1980, transfer includes a notation that the transfer tax paid was $291.50. The applicant opines that because the applicable transfer tax rate at that time was $1.10 per $1,000, it is reasonable to conclude that the sale price for each June 4, 1980, transfer was approximately $265,000.

Although the applicant explains that it searched all of its Retirement Plan files for information regarding how the Treatment Center was transferred to the ERPS Plan in 1980, the applicant states that it did not find any information to indicate whether the transfer could be characterized as an in kind contribution, a gift, a sale, or something else, or any other information regarding the circumstances or background of the transfer. The applicant believes that the transfer did not result in the violation of any tax qualification requirement under the Code.

Further, the applicant states that, to the best of its knowledge, there was no financing involved in connection with the acquisition of the Treatment Center by the ERPS Plan or deeds of trust filed at or near the time of any of the 1980 property acquisitions.

In addition, the applicant states that, while SMBC was an entity owned and operated by physicians at Sunnyvale, it is not known whether in 1980 its relationship to Sunnyvale or the ERPS Plan was such as to make it a party in interest with respect to the ERPS Plan. The applicant states that although SMBC was identified as a party in interest with respect to the ERPS Plan in connection with Prohibited Transaction Exemption (PTE 87–13) 87–13, 52 FR 2630 (January 23, 1987), it is unable to determine why SMBC was so identified. Moreover, the applicant states that SMBC formally dissolved in 1994, and to the best of its recollection, the ERPS Plan was always intended to be the ultimate transferee of the Treatment Center, with SMBC intended to serve merely as a conduit.

In this regard, the Department notes that it is not proposing, nor has the applicant requested, exemptive relief regarding the acquisition of the Treatment Center by the ERPS Plan from SMBC to the extent SMBC was a party in interest with respect to the ERPS Plan.

stepped into the shoes of AIS to continue the flow of rental income and the provision of infusion therapy to the CMG patients.

11. Currently, the Treatment Center consists of .5 acres of fully-landscaped land improved by a single-story building containing approximately 5,184 square feet of space and a parking lot that has 17 uncovered spaces. The Treatment Center is contiguous to other parcels of real property, a residence (the Residence) and an urgent care center (the Urgent Care Center), owned by the Plan and leased to CMG. The Treatment Center is also located in close proximity to certain real property that is owned by CMG. In addition, five parking spaces at the Residence are allocated for Treatment Center patients and Treatment Center employees are required to park in a nearby employee parking lot.

12. The Plans' Administrative Committee decided that it was in the best interests of the 401(k) Plan and its participants and beneficiaries to switch the 401(k) Plan's investment program and plan administration to a family of mutual funds, and to allow the participants and beneficiaries to make their own portfolio selections from a ''menu'' offered by the mutual fund provider. The Committee determined that savings would be realized if the same provider provided the investment options, the administrative services and the trustee services. After examination and consideration was given, the Committee chose T. Rowe Price as the provider for all such services.

13. Because T. Rowe Price would only serve as the trustee of mutual fund assets, the firm decided it would not serve as the trustee for the 401(k) Plan's other real estate interests.[3] In order to maintain the efficiency and cost effectiveness of the ''one-stop shop,'' and thus avoid a second trustee for the 401(k) Plan to hold only the real estate assets, the Committee determined that the 401(k) Plan should dispose of its interests in the real estate. On the other hand, since the real estate interests had proven to be a good source of income and a good vehicle for investment diversification for the Plans, the Committee chose to transfer the 401(k) Plan's interests to the Retirement Plan rather than dispose of them entirely. Accordingly, the Committee determined to cause the 401(k) Plan to sell its 76.5 percent interest in the Urgent Care Center and the Residence, and its 100 percent interest in the Treatment Center, to the Retirement Plan. Such properties represented approximately 8.97 percent of the 401(k) Plan's assets and approximately 14.16 percent of the Retirement Plan's assets. Hence, on June 17, 1999, in an all cash transaction, the 401(k) Plan sold its real estate interests, including the Treatment Center, to the Retirement Plan for $4,081,471. No fees or commissions were paid by either Plan. The expenses associated with the transaction were borne by CMG. At present, CMG leases the Treatment Center from the Retirement Plan and it pays such Plan a monthly rental of $1,456.

14. Due to the lack of oversight by a qualified, independent fiduciary with full investment discretion to review, approve and monitor the past and continuing leasing arrangements between the Plans and CMG, and the absence of contemporaneous independent appraisals establishing the fair market value or the fair market rental value of the Treatment Center at the inception of each lease or at the time of the sale of the Treatment Center by the 401(k) Plan to the Retirement Plan, the Department is not prepared to provide exemptive relief with respect to such transactions. Therefore, within 90 days of the publication in the **Federal Register** of the notice granting this exemption, CMG will file a Form 5330 with the Service and pay all applicable excise taxes that are due. In addition, to the extent the leases resulted in rental deficiencies to either the 401(k) Plan or the Retirement Plan, or the 401(k) Plan received less than fair market value when it sold the Treatment Center to the Retirement Plan, the present independent fiduciary is required to make such determinations, including the payment of reasonable interest by CMG to the affected Plans. In addition, CMG will be required to make such payments to the Plans.

Accordingly, the Administrative Committee and CMG request a prospective administrative exemption from the Department in order to allow the Retirement Plan to lease the Treatment Center to CMG under the provisions of a new written lease and to allow the exercise, by CMG, of options to renew the New Lease for two additional terms. The initial term of the New Lease will commence within 30 days after the granting of the final exemption and it will have an expiration date of February 28, 2008. The New Lease will also have options to renew for two additional five year terms, only with the express approval of the Retirement Plan's independent fiduciary. The New Lease will be triple net and will require CMG to pay all real estate taxes on the Treatment Center for the Retirement Plan, as well as all expenses that are associated with insurance, maintenance and utilities. In addition, the base rent under the New Lease will be the greater of $14,256 per month or the fair market value of the Treatment Center, as determined by a qualified, independent appraiser.[4] Moreover, CMG will provide the Retirement Plan's independent fiduciary with documentation that the rent has been paid on a monthly basis.

The applicant represents that, at the commencement of the second year of the initial term of the New Lease and each year thereafter, the Retirement Plan's independent fiduciary will select a qualified, independent appraiser to reappraise the Treatment Center to determine the appropriate fair market rental value, and based upon such determinations, it will make appropriate adjustments to the rent. However, in no event will the independent fiduciary adjust the rent below the rental amount for the preceding New Lease term.

15. In an independent appraisal report dated October 14, 2003 (the 2003 Appraisal), Walter D. Carney, MAI and Larry W. Hulberg, MAI, both independent, certified-general appraisers affiliated with Hulberg & Associates, Inc. (H&A), of San Jose, California, updated an October 18, 2002, appraisal that was prepared by their firm, in which the fair market value of

[3] In this regard, in 1987, the ERPS Plan, which was a predecessor plan to the 401(k) Plan, applied for and received a prohibited transaction exemption (*i.e.*, PTE 87–13) from the Department for the purchase and leaseback of two parcels of real estate, consisting of the Urgent Care Center and the Residence. The ERPS Plan purchased (the Original Purchase) the properties from the ERPS Plan sponsor, Sunnyvale (now known as CMG), for $3.4 million on July 17, 1985 and leased (the Original Lease) such properties back to Sunnyvale, under the provisions of a triple net lease, for an initial term of ten years, followed by two additional five-year renewal periods, for a combined total duration of 20 years which expires in 2007. Of the purchase price paid for the Urgent Care Center and the Residence, 76.5 percent came from the trust established for the profit sharing portion of the ERPS Plan and the other 23.5 percent came from the trust setup for the money purchase pension plan portion of the ERPS Plan. Rental income from the properties was allocated between the two trusts in accordance with the foregoing proportions. The initial rental, as determined by qualified, independent appraisers, was $28,216 per month. To represent the interests of the ERPS Plan, Barclays Bank of California (Barclays), the ERPS Plan trustee, reviewed, approved, and agreed to monitor such transactions as the independent fiduciary.

By letter dated May 29, 1996, the Department concluded that PTE 87–13 was still effective. This letter was requested as a result of: (a) The merger of the Sunnyvale Profit Sharing Plan into the 401(k) Plan and the 401(k) Plan's receipt of rent; (b) the renaming of Sunnyvale to CMG; and (c) the substitution of Barclays with Wells Fargo, as the new trustee, into which Barclays had merged.

[4] This is the rental amount that is currently paid by CMG to the Retirement Plan.

a leased fee interest in the Treatment Center as well as its monthly fair market rental value were placed at $1,150,000 and $10,368 (or $2.00 per square foot), respectively, as of October 15, 2002. Mr. Carney, a Principal and Executive Vice President, who has been associated with H&A since November 1984, states that he has been involved with commercial, industrial and residential appraisal assignments, as well as other assignments involving agricultural land, easements, railroad and public utility corridors, ''plottage parcels,'' wetlands and waters of the U.S., reservoirs, abandoned public streets, eminent domain/condemnation, and litigation. Mr. Hulberg, an appraiser with H&A since 1997, states that he has dealt with commercial, industrial and residential appraisal assignments, as well as special purpose assignments involving mixed-use properties, single room occupancy hotels, and residential care facilities.

Both Mr. Carney and Mr. Hulberg certify that they have no present or contemplated future interest in the Treatment Center and that they have no personal interest or bias with respect to the Treatment Center or the parties involved. In addition, Messrs. Carney and Hulberg certify that their compensation is not contingent upon the reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value estimate, the attainment of a stipulated result, or the occurrence of a subsequent event.

16. In the 2003 Appraisal, Messrs. Carney and Hulberg determined that a leased fee interest in the Treatment Center had a fair market value of $1,460,000 as of October 1, 2003. Messrs. Carney and Hulberg gave the most weight in their analysis to the Income Approach to valuation because of this methodology's reasonable support of rent, overall capitalization data, widespread use and its understandability to investors who would be the most likely purchasers of the Treatment Center. On the same date, Messrs. Carney and Hulberg also determined that the estimated monthly fair market rental value of the Treatment Center was $11,664 or $2.25 per square foot.[5] In a letter dated March 17, 2004, Mr. Hulberg represented that the Treatment Center has no special or unique value to CMG, either in terms of parking availability or property value, despite its proximity to other real estate owned or leased by CMG.

Thus, on the basis of the 2003 Appraisal, the fair market value of the Treatment Center currently represents approximately 4.1 percent of the Retirement Plan's total assets. Messrs. Carney and Hulberg will reevaluate the fair market rental value of the Treatment Center at the time the New Lease is executed by the Retirement Plan and CMG.

17. An independent party, Mr. Thomas J. Nault, has served as the Retirement Plan's independent fiduciary since March 3, 2003. Mr. Nault represents that he is qualified to act as an independent fiduciary for the Retirement Plan because he has more than 22 years of experience managing assets of all types, including settlement work for the Department, intellectual property, limited partnerships, raw land development, joint venture agreements, asset recovery and liquidation, assigning and evaluating asset managers, and ESOP, profit sharing and 401(k) plans. Mr. Nault further represents that he has been acting as a court-appointed trustee of tax-qualified plans since 1994, that he has replaced trustees who were removed in connection with ERISA violations, and that in two recent cases he has been responsible for evaluating and deciding the disposition of real estate assets. Mr. Nault confirms that he has had no prior contact nor any past or current relationship with any interested party in this matter. Mr. Nault also confirms that he is not now nor has he ever been related to CMG or its principals in any way, and that he currently derives approximately 5 percent of his gross annual income from CMG.[6] Further, Mr. Nault acknowledges and accepts his fiduciary responsibilities and liabilities in acting as an independent fiduciary on behalf of the Retirement Plan.

18. As the Retirement Plan's independent fiduciary, Mr. Nault agreed to (a) determine whether the lease provisions between the 401(k) Plan and CMG were reasonable and whether the 401(k) Plan received fair market value rent; (b) determine if the 401(k) Plan received fair market value from the Retirement Plan upon upon the sale of the 401(k) Plan's interests in the Treatment Center, the Residence and the Urgent Care Center; (c) analyze the lease of the Treatment Center after its transfer to the Retirement Plan from the 401(k) Plan to determine if the lease provisions were reasonable and if the rental was at, or better than, market value; (d) examine the Retirement Plan's investment portfolio and investment policy to determine if the ownership of the Treatment Center is prudent and in compliance with such investment policy; and (e) negotiate and/or monitor the New Lease on behalf of the Retirement Plan on an ongoing basis.

Following his analysis of the transactions, Mr. Nault believes that the 401(k) Plan received fair market value on the sale of its interests in the Treatment Center, the Residence and the Urgent Care Center to the Retirement Plan. In addition, Mr. Nault has determined that the lease provisions were strongly in favor of the participants of the Plans and, averaged from 1998 to 2003, the rent paid on the Treatment Center has been well over market. Mr. Nault explains that there was only one year (1998) that CMG was paying below market rent on the Treatment Center to the Plans by $.10 per square foot and, after 2001, CMG has paid the Retirement Plan more than $.50 per square foot over market on the Treatment Center.

Mr. Nault also indicates that the terms and conditions of the New Lease are more favorable to the Retirement Plan than those obtainable by the Retirement Plan in an arm's length transaction with unrelated third parties. Mr. Nault attributes this observation to the timing of the New Lease and the decline in the real estate market at the contemplated inception of the New Lease. In reaching this conclusion, Mr. Nault states that he has considered the terms of similar leases between unrelated parties, the Retirement Plan's overall investment portfolio, the Retirement Plan's liquidity and diversification requirements.

Further, Mr. Nault certifies that the proposed transactions are appropriate investments for the Retirement Plan and are in the best interests of the Retirement Plan and its participants and beneficiaries. Mr. Nault bases his statement on all data at his disposal, discussions with the independent appraisers, as well as reviews of the Treatment Center's performance.

Finally, Mr. Nault represents that he will monitor, on behalf of the Retirement Plan, compliance with the New Lease terms throughout the duration of such lease, and each renewal term, and, if necessary, he will take the appropriate actions to enforce the payment of the rent and the proper performance of all other obligations of CMG under the terms of the New Lease.

19. In summary, it is represented that the transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

[5] The applicant represents that, to the best of its knowledge, to the extent that the rent to be paid by CMG to the Retirement Plan exceeds fair market rental value, such excess rent (if treated as an employer contribution) will not cause the annual additions to such Plan to exceed the limitations prescribed by section 415 of the Code.

[6] In the ensuing years that the New Lease is in effect, Mr. Nault expects to derive less than 3 percent of his gross revenues from CMG.

(a) The terms and conditions of the New Lease are no less favorable to the Retirement Plan than those obtainable by the Retirement Plan under similar circumstances when negotiated at arm's length with unrelated third parties.

(b) The Retirement Plan is represented for all purposes under the New Lease, and during each renewal term, by a qualified, independent fiduciary.

(c) The Retirement Plan's independent fiduciary has negotiated, reviewed, and approved the terms and conditions of the New Lease and the options to renew the New Lease on behalf of the Retirement Plan and has determined that the transactions are appropriate investments for the Retirement Plan and are in the best interests of the Retirement Plan and its participants and beneficiaries.

(d) The rent paid to the Retirement Plan under the New Lease and during each renewal term will be no less than the fair market rental value of the Property, as established by a qualified, independent appraiser.

(e) The rent is subject to adjustment at the commencement of the second year of the term of the New Lease and each year thereafter by way of an independent appraisal. A qualified, independent appraiser will be selected by the independent fiduciary to conduct the appraisal. If the appraised fair market rent of the Treatment Center is greater than that of the current base rent, then the base rent will be revised to reflect the appraised increase in fair market rent. If the appraised fair market rent of the Treatment Center is less than or equal to the current base rent, then the base rent will remain the same.

(f) The New Lease will commence within 30 days after the granting of the final exemption and will be triple net, requiring all expenses for maintenance, taxes, utilities and insurance to be paid by CMG, as lessee.

(g) The Retirement Plan's independent fiduciary will monitor compliance with the terms of the New Lease and the conditions of the exemption throughout the duration of the New Lease and each renewal term, and is responsible for legally enforcing the payment of the rent and the proper performance of all other obligations of CMG under the terms of the New Lease.

(h) The Retirement Plan's independent fiduciary will expressly approve any renewal of the New Lease beyond the initial term.

(i) CMG will provide the Plan's independent fiduciary with documentation that the rent has been paid on a monthly basis.

(j) At all times throughout the duration of the New Lease and each renewal term, the fair market value of the Treatment Center will not exceed 25 percent of the value of the total assets of the Retirement Plan.

(k) CMG will file a Form 5330 with the Service and will pay all applicable excise taxes, if any, within 90 days of the publication of the grant notice in the **Federal Register** with respect to the past and continued leasing of the Treatment Center by the 401(k) Plan and the Retirement Plan.

(1) To the extent CMG owes the 401(k) Plan or the Retirement Plan additional rent by reason of the past and continued leasing of the Treatment Center, (i) the independent fiduciary will make all such determinations, including the payment of reasonable interest; and (ii) CMG will make such payments to the Plans.

Tax Consequences of the Transactions

The Department of the Treasury has determined that if a transaction between a qualified employee benefit plan and its sponsoring employer (or affiliate thereof) results in the plan either paying less than or receiving more than fair market value, such excess may be considered to be a contribution by the sponsoring employer to the plan and, therefore, must be examined under applicable provisions of the Internal Revenue Code, including sections 401(a)(4), 404 and 415.

FOR FURTHER INFORMATION CONTACT: Ms. Anna M.N. Mpras of the Department, telephone (202) 693–8565. (This is not a toll-free number.)

The Prudential Insurance Company of America (Prudential) Located in Newark, New Jersey

[Application No. D–11213]

Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act (or 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, 32847, August 10, 1990).[7] If the exemption is granted, as of November 21, 2003, Prudential shall not be precluded from functioning as a ''qualified professional asset manager'' (QPAM), pursuant to Prohibited Transaction Class Exemption 84–14 (PTCE 84–14), 49 FR 9494 (March 13, 1984), solely because of a failure to satisfy Section I(g) of PTCE 84–14, as a result of Prudential's affiliation with an entity convicted of violating a dual-penalty law of Korea, Japan or Taiwan, provided that the following conditions have been met:

(a) The affiliate convicted under a dual-penalty law does not provide fiduciary or QPAM services to ERISA-covered plans or otherwise exercise discretionary control over ERISA assets.

(b) ERISA-covered assets are not involved in the misconduct that is the subject of the affiliate's conviction(s).

(c) Prudential imposes its internal procedures, controls, and protocols on the affiliate to reduce the likelihood of any recurrence of misconduct to the extent permitted by local law.

(d) This exemption is not applicable if Prudential, or any affiliate (other than affiliates convicted of violating a dual-penalty law of Korea, Japan or Taiwan) is convicted of any of the crimes described in Section I(g) of PTCE 84–14.

(e) Prudential maintains records that demonstrate that the conditions of the exemption have been and continue to be met for at least six years following the conviction of an affiliate under the dual-penalty laws of Korea, Japan or Taiwan.

(f) The criminal acts in question are neither authorized nor condoned by Prudential.

(g) Prudential complies with the other conditions of PTCE 84–14, combined with the procedures it adopts to afford ample protection of the interests of participants and beneficiaries of employee benefit plans.

Effective Date: If granted, this proposed exemption will be effective as of November 21, 2003.

Summary of Facts and Representations

1. Prudential is a life insurance company organized under the laws of New Jersey. Prudential is a subsidiary of Prudential Financial Inc., a financial services holding company. Prudential provides a wide range of financial services and products including investment management, brokerage, mutual funds and real estate services. In addition, Prudential provides fiduciary and other services to employee benefit plans described in section 3(3) of the Act. Prudential currently manages billions of dollars representing ERISA-covered plan assets.

2. Section I(g) of PTCE 84–14 precludes a person who otherwise qualifies as a QPAM from serving as a QPAM if such person or an affiliate thereof has, within 10 years immediately preceding the transaction, been either convicted or released from imprisonment, whichever is later, as a result of certain specified criminal

[7] For purposes of this proposed exemption, references to provisions of Title I of the Act, unless otherwise specified, refer also to corresponding provisions of the Code.

activity described under Section I(g) of PTCE 84–14, section 411 of the Act and various laws incorporated by reference in section 411 of the Act. On July 9, 2003, Prudential received Final Authorization Number (FAN) 2003–10E, made pursuant to PTCE 96–62 (61 FR 39988, July 31, 1996) (EXPRO). Such authorization allows Prudential to maintain its QPAM status, notwithstanding its possible failure to satisfy Section I(g) of PTCE 84–14 following its acquisition of a Korean corporation which has been convicted of certain Korean dual-penalty securities law violations. The corporate acquisition giving rise to Prudential's affiliation with the Korean company described in FAN 2003–10E was eventually finalized on February 26, 2004.[8]

As described in Prudential's submission for FAN 2003–10E, the violations which would jeopardize Prudential's QPAM status involved convictions of a potential Korean affiliate of Article 215 of the Korean Securities and Exchange Law (KSEL). Article 215 is codified in the ''penalty'' section of the KSEL. An English translation of Article 215 of the KSEL provides the following:

> If a representative of a juristic person, or an agent, servant, or other employee of a juristic person or individual commits any offense as prescribed in Articles 207–2 through 212 of the KSEL in connection with the affairs of the juristic person or individual, the fine as prescribed in the respective article shall also be imposed on such juristic person or individual, in addition to a punishment of the offender.

Under Article 215 of the KSEL, liability for certain criminal violations committed by an employee is imposed automatically on an employer without regard to fault. Under this provision, like other Korean dual-penalty laws, when an employee is convicted of certain enumerated criminal securities violations (in this case, violations of Articles 207–2 through 212 of the KSEL), a criminal penalty is imposed against the employee's employer even though there is no required showing of wrongdoing on the part of the company. There is no requirement to show intent to commit the wrongful act or negligence on the part of the company in order to be fined under Article 215 of the KSEL. These penalties are imposed without regard to whether the company was negligent in any way in hiring or supervising the employee or otherwise acted unreasonably. Therefore, when a company is fined under a dual-penalty provision, it is automatically criminally fined for the wrongdoing of its employee. Fines under Article 215 of the KSEL are imposed by a court, rather than a governmental agency. The applicant states that it is not aware of any similar automatic imposition of criminal liability on an employer in connection with violations of an employee in American criminal jurisprudence.

3. Dual-penalty provisions similar to Article 215 of the KSEL are found in many areas of Korean law including Korean securities, financial, construction, labor and employment laws. For example, at least six major Korean securities laws contain dual-penalty provisions that are nearly identical to and impose automatic liability similar to Article 215 of the KSEL. In addition, the applicant represents that it has identified several laws in Japan and Taiwan that contain similar dual-penalty provisions.[9] The dual-penalty laws which the applicant has identified are listed in the Appendix.

4. Because the liability of a company under a dual-penalty provision derives from a criminal violation committed by an employee, there may be no liability of a company without a finding of an underlying violation by an employee. The underlying violations that may give rise to employer liability under a dual-penalty law are likewise codified in the ''penalty'' provisions of the relevant statutes, as are the dual-penalty provisions themselves.

In court proceedings involving allegations of a dual-penalty violation, the applicant explains that the company/employer is named as a defendant along with the employee. However, the company's opportunity to defend itself is limited to supporting the employee's arguments that the employee is innocent of the alleged underlying violation or challenging the amount of the penalty. Accordingly, Prudential points out that the company would have no opportunity to argue that it should not be liable under a dual-penalty law because it was not negligent in hiring or supervising the employee or otherwise acted reasonably under the circumstances.[10]

5. According to Prudential, certain Korean legal commentators have expressed the view that liability under a dual-penalty provision such as Article 215 of the KSEL is based on a theory that a principal shall be liable for the acts of its agent. Prudential represents that these laws reflect a cultural belief that the principal has a duty to supervise its employees and thus should be held accountable for the acts of its employees, regardless of whether the principal has any wrongful intent or has engaged in any misconduct.

The applicant states that it understands that the legal systems of certain European countries such as Germany may have enacted dual-penalty laws such as those found in Korea. Specifically, in Germany there were efforts made to change certain penalties imposed for violations of administrative regulations (such as finance-related regulations) from criminal sanctions to administrative sanctions. In response, in 1952, amendments were made to certain German laws which reclassified many of the penalties under certain financial laws from criminal violations to administrative fines. No similar amendments have been made to Korean statutes, and as such, these dual-penalty provisions remain classified as criminal violations.

6. The applicant has reviewed the range of fines that may be imposed under several of the major Korean dual-penalty statutes. In general, the maximum fine that may be imposed against a company for a dual-penalty violation is less than $100,000 U.S. dollars. Courts in their discretion may impose fines less than the maximum permitted fine depending on the severity of the violation and other relevant circumstances. The applicant states that, in its limited experience, fines actually imposed under Article

[8] On February 26, 2004, Prudential Financial, Inc. announced that it had closed the purchase of an 80 percent interest of Hyundai Investment and Securities Co., Ltd. (HITC) and its subsidiary, Hyundai Investment Trust Management Co., Ltd. (HIMC), with an option to purchase the remaining 20 percent three to six years after the closing date. At that time Prudential assumed operational control of HITC and HIMC. The names of the Hyundai units acquired have been subsequently changed from HITC to Prudential Investment & Securities Co., Ltd.

[9] The applicant states that although the dual-penalty provisions that it has identified under Japanese law closely resemble Korean and Taiwanese dual-penalty laws, Japanese dual-penalty provisions differ slightly from those of Korea and Taiwan. For example, under the Securities and Exchange Laws of Japan, the burden of proof is transferred to the defendant company wherein penalties are automatically imposed unless the company mounts a successful defense. Thus, companies may be able to assert certain defenses to liability that are unavailable under similar Korean and Taiwanese laws. However, the applicant represents that it has been advised by Japanese counsel that while there may be a right to a defense under Japanese law, no company has succeeded in avoiding dual-penalty liability once it has been indicted, so that the imposition of a dual penalty on the Japanese company remains virtually certain.

[10] As noted above, the applicant understands that Japanese dual-penalty laws may provide an opportunity for an employer to present evidence in its own defense in response to an allegation of liability under certain dual-penalty provisions under relevant case law, subject to the limitations described above.

215 of the KSEL have amounted to less than $10,000 U.S. dollars. Given that expenses associated with challenging the imposition of these fines or settling these matters can easily exceed $100,000 U.S. dollars or more, Prudential explains that companies faced with these penalties frequently choose to pay fines rather than incur the much higher cost of settling the case or challenging the fine.[11] Even though these fine amounts are relatively minor, the applicant indicates that it is concerned that, because of the criminal nature of the penalties, they would cause a company like it to fail to satisfy the requirements of Section I(g) of PTCE 84–14.

7. Prudential has several foreign affiliates in Japan, Korea and Taiwan.[12] As stated above, in these countries, criminal liability is automatically imposed on employers in connection with the criminal actions of their employees through so-called dual-penalty laws, and liability is imposed even though there is no finding of actual criminal conduct by the company. For QPAMs that have foreign affiliates in these countries, such as Prudential, convictions of affiliates under these laws may jeopardize QPAM status even though the misconduct at issue places no ERISA-covered assets at risk.

However, the applicant states that convictions of individual employees of Prudential affiliates in the United States would not, by themselves, disqualify Prudential from serving as a QPAM because, in this regard, individual employees of Prudential affiliates would not constitute ''affiliates'' of Prudential for purposes of Section I(g) of PTCE 84–14.[13]

Inasmuch as the dual-penalty laws in Korea, Japan and Taiwan automatically impose criminal liability on an employer in connection with certain convictions of employees, the applicant believes that QPAMs that have these foreign affiliates in countries that have enacted dual-penalty laws, such as Korea, Japan and Taiwan, are unfairly disadvantaged. The applicant believes this because any time an employee of such a foreign affiliate is convicted of certain underlying criminal violations that give rise to automatic employer liability under a dual-penalty law, the U.S. parent's QPAM status is jeopardized under Section I(g) of PTCE 84–14. This is the case even if the foreign affiliate has no ERISA-covered business, exercises no control or discretion over ERISA plan assets and has no intention of doing so in the future. The applicant believes that this is an unfair result given that the purpose of Section I(g) of PTCE 84–14 is to protect ERISA-covered assets against risk of loss arising from criminal misconduct. The applicant states that when a foreign affiliate has no contact with ERISA-covered assets whatsoever, no risk of loss arises from any misconduct that may result in the criminal liability of a foreign affiliate under a dual-penalty statute. The applicant opines that these dual-penalty laws will present increasing problems for QPAMs given the growing trend of globalization among major companies providing QPAM services, such as Prudential.

8. Accordingly, the applicant requests an exemption to enable Prudential and any of its current or future affiliates to act as a QPAM despite their failure to satisfy Section I(g) of PTCE 84–14 solely as a result of a violation of a dual-penalty law of Korea, Japan or Taiwan. The transactions covered by the proposed exemption would include the full range of transactions that can be executed by investment managers who qualify as QPAMs pursuant to PTCE 84–14. If granted, the exemption will enable Prudential and its current and future affiliates to qualify as QPAMs by satisfying all conditions of PTCE 84–14, except that when an employee of a Korean, Japanese or Taiwanese affiliate is convicted of certain underlying criminal violations that give rise to automatic employer liability under dual-penalty law, such conviction will not prevent satisfaction of the condition stated in Section I(g) of PTCE 84–14 solely because of Prudential's affiliation with such affiliate.

9. The applicant maintains that the requested exemption is protective of the rights of participants and beneficiaries of affected plans because: (a) None of the alleged misconduct involved ERISA-covered plan assets; (b) the applicant is not involved in any of the alleged misconduct; (c) any Korean, Japanese or Taiwanese affiliate charged with criminal misconduct is not and will not in the future be involved in the provision of QPAM or investment management services to ERISA plans and will not otherwise exercise discretionary control over plan assets; (d) the fines are imposed against the Korean, Japanese or Taiwanese affiliate without any finding that such affiliate itself engaged in any wrongful conduct in its corporate capacity or that it may have ratified the acts of its employees and generally without any opportunity to present mitigating evidence;[14] and (e) the applicant will take steps to implement its internal control procedures on the Korean, Japanese or Taiwanese affiliate during a transition period after acquisition of the affiliate, to the extent permitted by foreign law, to reduce the likelihood of recurrence of misconduct consistent with its worldwide operations.[15]

[11] The following list describes the range of fines that may be imposed for violations of some of Korea's dual-penalty laws: (a) Korean Securities and Exchange Law, Article 215: up to the greater of (i) 30 million won ($26,000 U.S. dollars) or (ii) 3 times the profit gained (or loss evaded) by the offense (depending on the type of crime, up to 2 million won, 5 million won, 10 million won or 30 million won); (b) Futures and Exchange Law, Article 100: up to the greater of (i) 20 million won ($17,000 U.S. dollars) or (ii) 3 times the profit gained (or loss evaded) by the offense (depending on the type of crime, up to 5 million won, 10 million won, or 20 million won); (c) Foreign Exchange Transactions Act, Article 31: up to the greater of (i) 200 million won ($174,000 U.S. dollars) or (ii) 3 times the value of the object with respect to which a violation is committed (depending on the type of crime, up to 50 million won, 100 million won or 200 million won); (d) Foreign Investment Promotion Act, Article 36: up to not less than twice and not more than ten times the amount of the illegal transfer (depending on the type of crime, up to 10 million won or 30 million won ($36,000 U.S. dollars)); (e) Securities Investmet Trust Business Act, Article 63: up to 30 million won ($26,000 U.S. dollars) (depending on the type of crime, up to 5 million won, 20 million won, or 30 million won); (f) Securities Investment Company Act, Article 89: up to 30 million won ($26,000 U.S. dollars) (depending on the type of crime, up to 5 million won, 20 million won, or 30 million won); (g) Labor Standards Act, Article 116: up to 30 million won ($26,000 U.S. dollars) (depending on the type of crime, 5 million won, 10 million won, 20 million won or 30 million won).

[12] The following list contains a sampling of the current foreign affiliates of Prudential located in Korea, Japan and Taiwan: (a) POK Securitization Specialty Co., Inc. located in Seoul, Korea; (b) Prudential Asset Management Co., Ltd. (previously Hyundai Investment Trust Management, HIMC) located in Seoul, Korea; (c) Prudential Asset Management Japan, Inc. located in Tokyo, Japan; (d) Prudential Holdings of Japan, Inc. located in Tokyo, Japan; (e) Prudential Financial Securities Investment Trust Enterprise located in Taipei, Taiwan; and (f) Prudential Life Insurance Company of Taiwan Inc. located in Taipei, Taiwan.

[13] For purposes of Section I(g) of PTCE 84–14, the term ''affiliate'' includes only certain employees of the QPAM (certain officers and highly compensated employees, and employees possessing authority, responsibility or control over plan assets). Pursuant to Section V(d)(4) of PTCE 84–14, it does not include employees of an affiliate of the QPAM unless the employee is a director of, a relative of, or a partner in the QPAM.

[14] As noted, certain defenses to liability may exist under Japanese dual-penalty laws that are unavailable under similar Korean or Taiwanese provisions. However, the applicant believes that, notwithstanding the defenses, the imposition of the dual penalty is virtually automatic once a company is indicted.

[15] Prudential states that it has adopted substantial compliance policies and procedures intended to ensure that applicable legal requirements are satisfied and the highest standard of business integrity is maintained wherever Prudential conducts business. Prudential further states that the compliance program for Prudential's International Investments organizations has been developed over the last five years. Prudential explains that the compliance program was initially modeled after

The proposed exemption also contains conditions, in addition to those imposed by PTCE 84–14, which are designed to ensure the presence of adequate safeguards to protect the interests of the ERISA plan participants and beneficiaries against wrongdoers now and in the future. In this regard, the proposed exemption will be applicable if: (a) The affiliate convicted under a dual-penalty law has not provided, nor in the future will it provide, fiduciary or QPAM services to ERISA-covered plans, or otherwise exercise discretionary control over ERISA assets; (b) ERISA-covered assets have not been involved nor will they be in the future involved in the misconduct that is the subject of the affiliate's conviction(s); (c) Prudential has imposed and will continue to impose its internal procedures, controls, and protocols on the affiliate to reduce the likelihood of any recurrence of misconduct to the extent permitted by local law; (d) Prudential has kept and will continue to keep records that demonstrate that the conditions of the exemption have been and continue to be met for at least 6 years following the conviction of an affiliate of the dual-penalty laws of a foreign country; (e) the criminal acts in question have been neither authorized nor condoned by Prudential; and (f) the other conditions of PTCE 84–14, combined with the procedures adopted by Prudential, have afforded and will continue to afford ample protection of the interests of participants and beneficiaries of employee benefit plans.

10. The applicant represents that the proposed exemption is administratively feasible because it does not require the Department to oversee or administer any aspect of the relief provided. For example, the applicant states that the exemption, as drafted, does not require the Department to review or make findings regarding Prudential's acquisition of entities that may have been convicted under a dual-penalty law of Korea, Japan or Taiwan.

Further, the applicant represents that the requested exemption does not require the Department to review the laws to determine if exemptive relief is appropriate. The applicant opines that the Department oversight of the convictions described in the requested exemption should not be required because the exemption requires that the convicted entity provide no fiduciary or QPAM services to ERISA plans and that no ERISA assets were involved in the subject conviction.

In addition, the applicant believes that the exemption is administratively feasible because the burden will be on Prudential to demonstrate that the conditions of the exemption have been met should the Department audit Prudential's compliance with the described requested exemption.

Moreover, the applicant notes that if the Department denies the requested exemption, Prudential will be forced to obtain individual exemptive relief or final authorization under EXPRO each time Prudential either seeks to acquire an entity in one of the covered foreign jurisdictions with a dual-penalty conviction or an existing Prudential affiliate is convicted under a described dual-penalty law. The applicant believes that this process will be costly and time-consuming for both the Department and Prudential.

Finally, because the conditions of the proposed exemption require the entity convicted provide no fiduciary or QPAM services to ERISA-covered plans, and that ERISA plan assets not be involved in the misconduct that is the subject of the conviction, the applicant represents that the proposed exemption poses no risk to ERISA-covered assets. In this regard, the applicant believes that the requested exemption is more administratively feasible than approaching the Department for individual relief on a case-by-case basis.

11. In the absence of an exemption, Prudential states that it could be precluded from engaging in numerous routine, non-abusive transactions for its employee benefit plan customers, resulting in the loss of investment opportunities for those customers. Prudential further states that these opportunities would be lost even though the ERISA-covered assets were not placed at any risk by the criminal conduct giving rise to the conviction of the Prudential affiliate.

12. In summary, it is represented that the transactions have satisfied and will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The affiliate convicted under a dual-penalty law has not provided and will not provide fiduciary or QPAM services to ERISA-covered plans or otherwise exercise discretionary control over ERISA assets.

(b) ERISA-covered assets have not been involved and will not be involved in the misconduct that is the subject of the affiliate's conviction(s).

(c) Prudential has continued and will continue to impose its internal procedures, controls, and protocols on the affiliate to reduce the likelihood of any recurrence of misconduct to the extent permitted by local law.

(d) This exemption is not applicable and will not be applicable if Prudential, or any affiliate (other than affiliates convicted of violating a dual-penalty law of Korea, Japan or Taiwan) is convicted of any of the crimes described in Section I(g) of PTCE 84–14.

(e) Prudential has maintained and will maintain records that demonstrate that the conditions of the exemption have been met for at least six years following the conviction of an affiliate of the dual-penalty laws of a foreign country.

(f) The criminal acts in question have not been authorized or condoned and will not be authorized or condoned by Prudential.

(g) The other conditions of PTCE 84–14, combined with the procedures adopted by Prudential, have afforded and will afford ample protection of the interests of participants and beneficiaries of employee benefit plans.

Notice to Interested Persons

The Applicant represents that because those potentially interested ERISA-covered plans cannot all be identified, the only practical means of notifying such plans of this proposed exemption is by publication in the **Federal Register**. Therefore, comments and

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Prudential's domestic programs and has now evolved into a global program. Prudential maintains that, whether it has acquired an international business or grown one from within, the compliance approach has been uniformly applied.

Prudential's compliance program requires that the following steps be taken: (a) An assessment of the regulatory environment is conducted, which includes an identification (through local counsel) of applicable local laws and regulations, including any special laws or requirements that apply because of the nature of particular investment activities, and an analysis of applicable regulatory and enforcement schemes; (b) due diligence is conducted on possible acquisition candidates; (c) regulatory examination issues are evaluated and action plans are developed to avoid repeat issues; (d) reviews are conducted to assess the adequacy of a company's written compliance policies and procedures, including recommendations that may be made to improve compliance activities to address local legal and Prudential requirements, and progress is tracked on recommendations made during compliance reviews; (e) a core set of policies and procedures is established, and these policies and procedures, as well as ethical standards, are documented in compliance manuals; (f) a local compliance staff is hired and reports to the Chief Compliance Officer of International Investments to ensure independence; (g) training is conducted in the local language; (h) monitoring programs are put in place, and periodic regulatory risk assessments are conducted during compliance reviews to assure compliance as legal, regulatory, and Prudential requirements change. Prudential states that, since no control system can guarantee compliance, in the event of a breach of the policies and/or procedures, an evaluation is performed to determine if any modifications are needed in the overall compliance structure.

The applicant also notes that the process of implementing Prudential's internal procedures and controls on recently acquired foreign entities could take as many as 12 to 18 months from the date of Prudential's acquisition of a foreign entity, subject to the constraints of local law.

requests for a public hearing must be received by the Department not later than 30 days from the publication of this notice of proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Anna M.N. Mpras of the Department, telephone (202) 693–8565. (This is not a toll-free number.)

Appendix—Sample Dual-Penalty Provisions of Foreign Countries

The following list contains English translations of Korean, Japanese, and Taiwanese dual-penalty laws. The dual-penalty provisions cited below are codified within the ''penalty'' section of the statute, and fines imposed under these laws are imposed by a court rather than a governmental agency.

Korean Laws

Securities and Exchange Act, Article 215

Joint Penal Provisions ''If a representative of a juristic person, or an agent, servant, or other employee of a juristic person or individual commits any offense as prescribed in Articles 207–2 through 212 in connection with the affairs of the juristic person or individual, the fine as prescribed in the respective article shall also be imposed on such juristic person or individual, in addition to a punishment of the offender.''

Foreign Investment Promotion Act, Article 36

Joint Penal Provisions ''Where the representative of a corporation or agent, full-time or part-time employee of a corporation or individual person has committed with respect to business matters of the corporation or individual person, a violation as prescribed by the provisions of Articles 35, the corporation or individual person shall be sentenced to the fine prescribed by the provisions of the respective Articles, in addition to the punishment of the person who has committed the violation.''

Securities Investment Company Act, Article 89

Provisions of Dual Punishment ''When a representative of a corporation, or an agent or employee of a corporation or an individual violates Article 86 through Article 88 with respect to the business affairs of such corporation or individual, a fine falling under each pertinent Article shall also be imposed to such corporation or individual, in addition to a punishment against the offenders.''

Securities Investment Trust Business Act, Article 63

Joint Penal Provisions ''If a representative of a juristic person, or an agent, employee or other personnel of a juristic person or an individual, commits an offense prescribed by Articles 59 though 62 in connection with the affairs of the juristic person of the individual, the fine prescribed in the respective Article shall also be imposed on such a juristic person or individual in addition to the punishment upon the offender.''

Foreign Exchange Transactions Act, Article 31

Joint Penal Provisions ''If the representative of a juristic person, or an agent, an employee or other employed persons of a juristic person or a private person commits such violations as provided in Articles 27 through 29 in connection with the property of affairs of the juristic person or the private person, not only such violators shall be punished, but the juristic person or the private person shall be punished by a fine as provided in the respective pertinent Articles.''

Futures Trading Act, Article 100

Joint Penal Provisions ''Where a representative of a juristic person, or an agent, employer or other employee of a juristic person or individual, violates Article 96 through 98, during the course of carrying out business of such juristic person or individual, such juristic person or individual, in addition to the very person who committed such offence, shall be subject to a fine to the extent of the amount prescribed in respective Articles.''

Mortgage-Backed Securitization Company Act, Article 25

Provisions of Dual Punishment ''When a representative of corporation an agent or servant for corporation or individual, and other employees violated § 23 or § 24 against the corporation or the individual, in addition to punishment, the fine pursuant to the corresponding Article shall be imposed on the corporation or the individual.''

Banking Act, Article 68–2

Joint Penal Provisions ''When a representative of a juristic person, or an agent, employee or other employed person of a juristic person or an individual has violated Article 67 or 68 concerning the business of the relevant juristic person or individual, the juristic person or individual shall be punished by a fine as prescribed by each Article concerned in addition to punishment of the offender.''

Depositor Protection Act, Article 43

Joint Penal Provisions ''When a representative or an agent, an employee or other employed person of an insured financial institution performs any act of violating the provisions of subparagraph 2 of Article 40 or Article 41 with respect to the business of the insured financial institution, the insured financial institution shall be sentenced to a fine as stated in the same Article, in addition to punishing the offender.''

Financial Holding Company Act, Article 71

[No English translation currently available.]

Insurance Business Act, Article 208

Joint Penal Provisions (1) ''In case of a representative of a juristic person (hereinafter in this paragraph, including an unincorporated association or foundation which has a representative or a system of administrator), or an agent, employee or other workers or a juristic person or of an individual has committed any offense prescribed in Article 200–, 202, or 204 in connection with the business of such juristic person or of the individual, the person who has committed such offense as well as the juristic person or the individual concerned shall be subject to a fine as prescribed in each respective Article.

(2) In case where an unincorporated association or foundation is subject to punishment in accordance with paragraph (1), the representative or administrator thereof shall represent the association or foundation concerned with regard to the procedures and the provisions of those Acts dealing with criminal sanctions which apply to a juristic person as a defendant, which shall be applicable mutatis mutandis thereto.''

Trade Union and Labor Relations Adjustment Act, Article 94

Joint Penal Provisions ''When the representative of a juristic person or association, or an agent, servant or any employee of a juristic person, association or individual commits an action in violation of Article 88 through 93 with respect to the business of the juristic person, association, or individual, a fine as prescribed in each of the pertinent Articles shall be imposed on the juristic person, association or individual in addition to the punishment of the actual offenders.''

Japanese Laws

Foreign Exchange and Foreign Trade Control Law, Article 73

''When representatives of a juridical person* * *, or an agent, employee, or other operator engaged by a juridical or natural person committed any offense mentioned in the provisions of article 69–6, up to the preceding Article in regard to the business or property of such a juridical or natural principal, the juridical or natural principal shall be liable to the fine specified in each Article, in addition to the offender himself.''

Banking Law, Article 64

''When representatives of a corporation (including representatives, or administrators or organizations, not corporations. Hereinafter in the Paragraph, the same), or an agent, employee, or other operator engaged by a juridical or natural person committed an act violating any of the three previous articles, in regard to the business or property of such a juridical or natural principal, in addition to punishing the perpetrator, the juridical or natural principal shall be liable to the punishments specified in each Article.''

Trademark Law, Article 82

Dual Liability ''Where an officer representing a legal entity or a representative, employee or any other servant of a legal entity or of a natural person has committed an act in violation of the following paragraphs with regard to the business of the legal entity or natural person, the legal entity shall, in addition to the offender, be liable to the fine prescribed in the following paragraphs and the natural person shall be liable for the fine prescribed in those sections:

section 78, subject to a fine up to 150 million yen; section 79 or 80, subject to a fine up to 100 million yen.

Taiwanese Law

Fair Trade Law, Article 38

''In the event that the violator referred to in any of the three preceding Articles is a legal person, in addition to the punishment to be imposed upon the person committing the act, the said legal person shall also be subject to the fine specified in the respective Article.''

The Employees' Retirement Plan of Storytown U.S.A., Inc. and Participating Affiliated Companies (the Plan) Located in Glen Falls, New York

[Application No. D–11251]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).[16] If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to: (1) The making of a loan (the Loan) to the Plan in an original principal amount sufficient to cover the Plan's unfunded liability upon termination, by Storytown U.S.A., Inc. (Storytown), the Plan sponsor and a party in interest with respect to the Plan; (2) the assignment (the Assignment) by the Plan to Storytown of all rights, title and interest the Plan has in claims (the Claims) against certain investment advisers (the Responsible Parties), in connection with losses the Plan incurred during 2003 and 2004; and (3) the potential repayment, by the Plan to Storytown, of the Loan obligation from proceeds recovered on the Claims against the Responsible Parties.

This proposed exemption is subject to the following conditions:

(a) The Plan pays no interest in connection with the Loan.

(b) The Loan proceeds only are utilized to satisfy the Plan's unfunded liability.

(c) None of the assets of the Plan are pledged to secure the Loan amount.

(d) The Loan is a non-recourse obligation of the Plan.

(e) The Plan is properly terminated and Mr. Charles Wood, the principal shareholder of Storytown, agrees to waive any benefits he will receive on the termination of the Plan.

(f) The Plan's rights to any Claims that are not resolved before final distributions are completed are assigned by the Plan to Storytown under the terms of the Assignment.

(g) The Assignment is deemed a repayment in full of the Loan by the Plan. As a result, the Plan has no liability for the Loan and no interest in the Claims. However,

(1) If the net amount recovered on the Claims against the Responsible Parties after the Assignment, from any judgment or settlement of any arbitration proceeding, is equal to or less than the amount of the Loan, the balance due on the Loan is automatically forgiven and such unpaid balance is treated by Storytown as an employer contribution to the Plan; or

(2) If the net amount recovered on the Claims against the Responsible Parties from any judgment or settlement of arbitration proceeding exceeds the amount of the Loan (the Excess Amount), such Excess Amount is treated as a reversion paid by the Plan to Storytown pursuant to the Plan document.

(h) Notwithstanding the Assignment, the Plan does not release any claims, demands and/or causes of action which it may have against Storytown and/or its affiliates.

(i) The Plan incurs no expenses, commissions or transaction costs in connection with the contemplated transactions, all of which are one-time occurrences.

(j) All terms of the transactions are at least as favorable to the Plan as those which the Plan could obtain in similar transactions negotiated at arm's length with unrelated third parties.

(k) The subject transactions do not involve any risk of loss to either the Plan or to any of the participants and beneficiaries of the Plan.

(l) Prior to the Plan's entering the transactions, a qualified, independent fiduciary (the I/F), which is acting on behalf of the Plan and which is unrelated to Storytown and/or its affiliates,

(1) Reviews, negotiates and approves the terms and conditions of the Loan and the Assignment exclusively (but does not monitor legal proceedings against the Responsible Parties following the Assignment);

(2) Determines that such transactions are prudent and in the interest of the Plan and its participants and beneficiaries; and

(3) Confirms that the Loan amount will be sufficient to satisfy all Plan liabilities, including the Plan's unfunded liability, and permit the Plan to terminate on a standard termination basis.

(m) If the I/F resigns, is removed, or for any reason is unable to serve as I/F, prior to the Plan's entering into the transactions, such I/F is replaced by a successor I/F:

(1) Who is appointed immediately upon the occurrence of such event;

(2) Who is independent of Storytown and its affiliates;

(3) Who is qualified to serve as the I/F; and

(4) Who assumes the duties and responsibilities of the predecessor I/F.

The Department is also provided written notification of such change in I/F.

Summary of Facts and Representations

1. Storytown is a New York State corporation with its principal headquarters in Glen Falls, New York. Storytown is a privately-held corporation engaged in the amusement park industry. Its principal shareholder is Mr. Charles Wood. Since 1996 (when a majority of its assets were sold to an unrelated party), Storytown has been winding up its operations in order to complete a corporate dissolution under New York State Business Corporation Law. As part of this process, Storytown wishes to terminate the Plan it sponsors, which is described below.

2. The Plan was established on June 30, 1970, but amended and restated on January 1, 2001. The Plan is a defined benefit plan, which is designed to qualify under section 401(a) of the Code. All contributions to provide Plan benefits and to cover administrative expenses are made by Storytown. As of December 31, 2002, the Plan had approximately 24 participants and total assets of approximately $1,889,006.

Storytown, as Plan sponsor, appointed Glen Falls National Bank and Trust Company (GFNB), as the Plan trustee (the Trustee) and Georgia Beckos-Wood and Shirley Myott, both employees of Storytown, as members of the Plan's Trustee Committee.

As discussed more fully below, GFNB will also serve as the I/F with respect to the transactions that are the subject of this proposed exemption.

3. As of the end of the 2000 Plan Year, the Plan was substantially overfunded. In this regard, no contributions had been required to be made to the Plan for several years and Plan assets exceeded liabilities by $3 million. As part of its proposed dissolution, Storytown retained the services of certain unrelated investment advisers to address the Plan's overfunded status. Storytown followed the advice of these Responsible Parties by amending the

[16] For purposes of this proposed exemption, references to specific sections of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

Plan to increase benefits and provide for flexible premium variable life insurance policies for the Plan participants. The action was taken in December 2000 and it absorbed all of the excess Plan assets. Although the Plan was amended as of July 2003 to freeze future benefit accruals,[17] the stock market dropped and interest rates dropped. Thus, the once overfunded Plan became underfunded by approximately $2 million as of March 30, 2004.[18] As of May 13, 2004, the Plan had filed claims (*i.e.*, the Claims) with the National Association of Securities Dealers, Inc. (NASD) to commence arbitration proceedings against the Responsible Parties.

4. As stated above, a majority of Storytown's assets have been sold to an unrelated third party. Since that time, Storytown has been in the process of a corporate dissolution under the New York State Business Corporation Law, but it has not made a formal filing of articles of dissolution. As a Plan sponsor, Storytown represents that it cannot dissolve until the Plan is fully terminated in order to avoid impairing the Plan's qualified status under section 401(a) of the Code.

Upon termination of the Plan, Storytown represents that it will formally commence the corporate dissolution process.

5. On September 27, 2003, Storytown initially applied to the Pension Benefit Guaranty Corporation (PBGC) to have the Plan terminated on a ''negotiated'' termination basis under section 4042 of the Act.[19] During the course of PBGC's review, the health of Storytown's sole shareholder, Mr. Wood, began to fail. Thus, a decision was subsequently made to withdraw the application for the Plan's termination under section 4042 of the Act and instead have the Plan terminated on a ''standard'' termination basis.

For the Plan to terminate on a standard termination basis, the Plan would need to cover the unfunded liability, which is currently projected at slightly under $2 Million. Therefore, Mr. Wood agreed to waive any benefits he might receive from the Plan under a standard termination and lend Storytown, an amount sufficient to cover the unfunded liability. Then, Storytown proposed to take Mr. Wood's loan and make a prospective interest-free loan to the Plan to cover the unfunded liability. The Loan would also be unsecured and a non-recourse obligation of the Plan.

6. In exchange for the Loan, the Plan would assign Storytown, under the terms of the Loan and Assignment agreement, its rights, title and interest in the Claims[20] against the Responsible Parties who advised the Plan to purchase flexible premium variable life insurance policies that insure the lives of each Plan participant for a premium of over $3 million. These Claims against the Responsible Parties include, among other things, misrepresentation, fraud, breach of contract, breach of fiduciary duties, unsuitability, violations of the Securities and Exchange Act, violations of the NASD Rules of Fair Practice, aiding and abetting, failure to supervise and common law fraud.

Accordingly, Storytown requests an administrative exemption from the Department to permit the proposed Loan, the Assignment and the Plan's potential repayment of its Loan obligation to Storytown from proceeds recovered from the Claims.

7. Due to the uncertainty in the outcome of the arbitration proceedings between the Plan and the Responsible Parties, it is represented that it is difficult to calculate a precise value of the rights against the Responsible Parties which the Plan proposes to assign to Storytown. In this regard, as stated in Representation 9, the I/F has reviewed and determined that the Assignment is appropriate to essentially repay the Loan. It is represented that to the extent the net amount recovered from the Claims against the Responsible Parties, if any, from such arbitration proceedings is equal to or less than the aggregate amount of the Loan, the Plan will not be responsible for any amount. Such unpaid balance will be treated by Storytown as an employer contribution to the Plan. Furthermore, in the event that the net recovery on the Claims exceeds the amount of the Loan, such Excess Amount will be treated as a reversion paid by the Plan to Storytown pursuant to the Plan document.

8. Storytown represents that the proposed transactions will adequately protect the rights of the participants and beneficiaries of the Plan. In this regard, the Loan will bear no interest. Assets of the Plan, other than the Claims, will not be pledged as collateral to secure the Loan, nor will assets of the Plan, other than the Claims, be used to repay the Loan.

As discussed fully above, in exchange for the Loan, the Plan intends to assign to Storytown any and all the Plan's rights, title and interests in the Claims, it may have against the Responsible Parties pursuant to the arbitration proceedings.

In addition, Storytown states that the proposed transactions are designed to resolve the Plan's unfunded liability problem. On a standard termination basis, the proposed transactions are deemed to be in the best interests of the Plan and its participants and beneficiaries because they will allow the Plan to terminate quickly without any benefit cutbacks.

Further, Storytown notes that with respect to a defined benefit plan such as the Plan, it is permitted to recapture the residual assets of the Plan upon termination, provided all Plan liabilities to participants and beneficiaries have been satisfied, the distribution is not contrary to any law, and the Plan provides for such distribution upon termination. Thus, Storytown explains that the net recovery on the Claims exceeding the amount of the Loan will not be needed to pay benefits pursuant to the Plan's standard termination and that such Excess Amount from the recovery will be properly payable to it as a reversion pursuant to the Plan document.

9. As an additional safeguard, GFNB has agreed to serve as the I/F with respect to the proposed transactions. The Department notes the proposed exemption is conditioned upon the I/F reviewing and monitoring the terms and conditions of the proposed transactions to ensure that such terms and conditions are at all times satisfied. The proposed exemption contains a further condition which specifies in the event the I/F resigns, is removed, or for any reason is unable to serve, including but not limited to the death or disability of

[17] The purpose of the freeze was to ensure that the Plan was in compliance with section 204(h) of the Act. Section 204(h) of the Act provides that a pension plan may not be amended to significantly reduce the rate of future benefit accruals unless the plan administrator provides timely written notification of the amendment to participants and certain other parties likely to be affected.

[18] The initial strategy adopted by Storytown to deal with the Plan's underfunding problem was to ''wait and see'' if adverse market conditions would become more favorable. However, the situation never changed.

[19] A termination under section 4042 of the Act or, for that matter, section 4041(c) of the Act, occurs when a plan is underfunded on a termination basis. When a plan is underfunded and certain circumstances exist, the PBGC may, in its discretion, take over a plan to effect a termination on either a distress termination basis under section 4041(c) of the Act or on a negotiated termination basis under section 4042 of the Act. Under these terminations, the PBGC takes over the plan and its assets, terminates the plan, and pays benefits, that have been adjusted for required cutbacks and the amount of PBGC guarantees.

In Storytown's case, the Plan's assets were substantially less than the Plan's liabilities. This resulted in the Plan being underfunded on a termination basis. Thus, Storytown originally applied to the PBGC for termination on a negotiated termination basis under section 4042 of the Act.

[20] The Plan's rights also include, but are not limited to, any and all rights in and to any recovery thereon and the recovery of any expenses of pursuing the Claims against the Responsible Parties.

such I/F, or if at any time such I/F does not remain independent of Storytown and its affiliates, such I/F will be replaced by a successor: (a) Who is appointed immediately upon the occurrence of such event; (b) who is independent of Storytown and its affiliates; (c) who is qualified to serve as the I/F; and (d) who assumes all the duties and responsibilities of the predecessor I/F. The Department will also be notified of such successor I/F.

GFNB represents that it has extensive experience as a custodian and/or trustee for over 250 qualified retirement plans. GFNB states that it has been in the qualified plan business for over 25 years. In addition to maintaining its own daily valuation platform, wholesaling qualified retirement plan investment and record-keeping services to other banks, GFNB explains that it has significant experience with employee stock ownership plans and other sophisticated fiduciary transactions. Further, GFNB represents that it, its affiliates and its holding company, Arrow Financial Corporation (Arrow Financial), are independent of all parties involved in the proposed exemption. In this regard, although GFNB explains that it has a depository relationship with both Storytown and Mr. Wood, its gross revenues from these deposits amount to less than 1 percent (1%) of GFNB's total gross revenues. Further, GFNB states that the sum of the assets of Storytown and Mr. Wood on deposit with, or held by it, over its total assets on deposit is less than 1 percent. Finally, GFNB explains that it has no loan relationships with either Storytown or Mr. Wood, and that Mr. Wood is not an officer or director of GFNB, Arrow Financial or any of GFNB's affiliates.

GFNB has acknowledged its status as an I/F under the Act, including the responsibilities and duties of a fiduciary involving the assets of the Plan. Specifically, prior to the Plan's entering the proposed transactions, GFNB is responsible for reviewing, negotiating, and approving the terms and conditions of the Loan and the Assignment, and determining whether such transactions are prudent, administratively feasible, in the interest of the Plan and its participants and beneficiaries, and protective of the participants and beneficiaries of the Plan. In this regard, GFNB as the Plan Trustee, has examined the Plan's overall investment portfolio, considered the Plan's liquidity needs, examined the diversification of the Plan's assets in light of the proposed transactions and fully considered whether the proposed transactions comply with the Plan's investment objectives and policies.

GFNB has determined that the proposed transactions are necessary in the event that the Claims are not fully resolved before final distributions are required pursuant to the Plan termination. According to GFNB, the Loan is designed to solve the Plan's unfunded liability on a standard termination basis and the Assignment of Claims is appropriate to repay the Loan.

Additionally, GFNB notes that if the net recovery on the Claims exceeds the amount of the Loan, any Excess Amounts will be properly payable to Storytown as a reversion pursuant to the Plan document. As a result of these transactions, GFNB concludes that there will not be any benefit cutbacks to participants and beneficiaries and the Plan will not be harmed or impaired, legally or financially.

Finally, GFNB represents that it will continue to monitor the proposed transactions on behalf of the Plan through the termination of the Plan, and it will take all actions that are necessary and proper to safeguard the interests of the Plan and its participants and beneficiaries. In addition, GFNB will confirm that the Loan amount will be sufficient to satisfy all Plan liabilities, including the Plan's unfunded liability, and permit the Plan to terminate on a standard termination basis.

10. In summary, it is represented that the proposed transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The Plan will pay no interest in connection with the Loan.

(b) The Loan proceeds will be utilized to satisfy the Plan's unfunded liability.

(c) None of the assets of the Plan will be pledged to secure the amount of the Loan.

(d) The Loan will be a non-recourse obligation of the Plan.

(e) When the Plan properly terminates, Mr. Charles Wood, the principal shareholder of Storytown, agrees to waive any benefits he will receive on the termination of the Plan.

(f) The Plan's rights to any Claims that are not resolved before final distributions are completed will be assigned by the Plan to Storytown under the terms of the Assignment.

(g) The Assignment will be deemed a repayment in full of the Loan by the Plan. As a result, the Plan will have no liability for the Loan and no interest in the Claims. However, if the net amount recovered on the Claims against the Responsible Parties after the Assignment, from any judgment or settlement of any arbitration proceeding, is equal to or less than the amount of the Loan, the balance due on the Loan will be automatically forgiven and such unpaid balance will be treated by Storytown as an employer contribution to the Plan.

(h) Notwithstanding the Assignment, the Plan will not release any claims, demands and/or causes of action which it may have against Storytown and/or its affiliates.

(i) The Plan will incur no expenses, commissions or transaction costs in connection with the contemplated transactions, all of which will be one-time occurrences.

(j) All terms of the transactions are at least as favorable to the Plan as those which the Plan could obtain in similar transactions negotiated at arm's length with unrelated third parties.

(k) The subject transactions will not involve any risk of loss to either the Plan or to any of the participants and beneficiaries of the Plan.

(l) Prior to the Plan's entering the transactions, a qualified I/F, which is acting on behalf of the Plan and which is unrelated to Storytown and/or its affiliates,

(1) Will review, negotiate and approve the terms and conditions of the Loan and the Assignment exclusively (but will not monitor legal proceedings against the Responsible Parties following the Assignment);

(2) Will determine that such transactions are prudent and in the interest of the Plan and its participants and beneficiaries; and

(3) Will confirm that the Loan amount will be sufficient to satisfy all Plan liabilities, including the Plan's unfunded liability, and permit the Plan to terminate on a standard termination basis.

(m) If the I/F resigns, is removed, or for any reason is unable to serve as I/F, prior to the Plan's entering into the transactions, such I/F will be replaced by a successor I/F:

(1) Who is appointed immediately upon the occurrence of such event;

(2) Who is independent of Storytown and its affiliates;

(3) Who is qualified to serve as the I/F; and

(4) Who assumes the duties and responsibilities of the predecessor I/F.

In addition, the Department will be provided written notification of such change in I/F.

Notice to Interested Persons

Notice of proposed exemption will be provided to all interested persons by first class mail within 7 days of publication of the notice of pendency in the **Federal Register**. Such notice shall include a copy of the notice of pendency of the exemption as published in the **Federal Register** and a

supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which will inform interested persons of their right to comment on the proposed exemption and/or to request a hearing. Comments and hearing requests are due within 37 days of the date of publication of the proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Shelly Mui of the Department, telephone (202) 693–8530. (This is not a toll-free number.)

Carpenters' Joint Training Fund of St. Louis (the Plan), Located in St. Louis, Missouri

[Application No. L–11181]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act shall not apply to: (1) The purchase of a parcel of improved real property located at 8300 Valcour Avenue, St. Louis County, Missouri, (the Property) by the Plan from the Carpenters District Council of Greater St. Louis (the CDC), a party in interest to the Plan; (2) The guarantee (the Guarantee) by the CDC of a $6 million loan from an unrelated bank (the Bank Loan) for the benefit of the Plan; and (3) An unsecured loan for up to $1 million from the CDC to the Plan (the CDC Loan), provided that the following conditions are met:

(a) The Plan pays the lesser of (1) $7,985,000 or (2) the fair market value of the Property at the time of the purchase of the Property;

(b) The fair market value of the Property is established by an independent, qualified real estate appraiser that is unrelated to the CDC or any other party in interest with respect to the Plan;

(c) The Plan will not pay any commissions or other expenses with respect to the transactions;

(d) An independent, qualified fiduciary (the I/F), after analyzing the relevant terms of the transactions, determines that the transactions are in the best interest of the Plan and its participants and beneficiaries;

(e) In determining the fair market value of the Property, the I/F obtains an appraisal from an independent, qualified appraiser and ensures that the appraisal is consistent with sound principles of valuation;

(f) The terms and conditions of the CDC Loan are at least as favorable to the Plan as those which the Plan could have obtained in an arm's-length transaction with an unrelated party;

(g) The Bank Loan is repaid by the Plan solely with funds the Plan retains after paying all of its operational expenses;

(h) The I/F will ensure that the terms and conditions relating to the Guarantee are in the best interest of the Plan and its participants and beneficiaries;

(i) The CDC will waive any right to recover from the Plan in the event that the Bank enforces the Guarantee against the CDC;

(j) If at any time the Plan does not have sufficient funds to make a payment on the CDC Loan, after meeting operational expenses and payments on the Bank Loan, then payments on the CDC Loan will be suspended, without additional interest or penalty, until such funds are available; and

(k) The I/F will take whatever actions it deems necessary to protect the rights of the Plan with respect to the Property and the transactions.

Summary of Facts and Representations

1. The Plan is an apprenticeship training plan, the assets of which are subject to the fiduciary responsibility provisions of part 4 of Title I of the Act. The Plan is a Taft-Hartley trust established pursuant to collective bargaining, jointly trusteed by representatives of employer and labor organizations. The Plan is an employee welfare benefit plan within the meaning of section 3(1) of ERISA, and a multiemployer plan within the meaning of section 3(37). The Plan is established in accordance with the requirements for representation on the Board of Trustees imposed by section 302(c)(5) of the Labor Management Relations Act. Currently, there are approximately 2745 participants covered by the Plan. As of August 1, 2003, the Plan had total assets of $4,528,000.

The CDC is an employee organization, some of whose members are covered in the Plan, and is, therefore, a party in interest within the meaning of section 3(14) of ERISA with respect to the Plan. The CDC purchased the Property from an unrelated third party in 2001 for $3,702,164, slightly less than its appraised value. The CDC expended over $5.4 million to renovate the Property for the particular needs of the training programs carried out by the Plan. The CDC is willing to sell the Property to the Carpenters' Plan for $7,985,000, approximately $1.1 million less than the CDC expended for the acquisition and renovation of the Property.

2. The Property is a parcel of improved real property located at 8300 Valcour Avenue, St. Louis County, Missouri, containing a building of approximately 171,000 square feet that has been renovated to provide shop, classroom and office space designed for the particular needs of the training programs conducted by the Plan.

3. In order for the Plan to carry out the purpose of providing apprentice and journeyman training for the benefit of its participants, the trustees of the Plan (the Trustees) have determined that the Plan requires the use of facilities including shop space, classrooms, and offices for faculty and administrative staff of the training programs. The Property has been renovated especially for the needs of the Plan, and it is unlikely that another facility as well suited to these needs could be found for lease without additional expenditures for tenant improvements. By owning the Property, the Plan will be free to make any changes or additions to meet future requirements without consent of a landlord; the Plan will be assured of the continued availability of the facility indefinitely; and the Plan will acquire an equity interest in the property having future value.

4. The Plan began to occupy the Property on September 1, 2002. The Plan has paid no rent or other expenses during its occupancy. The CDC has determined to forego any claims for rent or other compensation from the Plan for the use of the Property.[21]

5. The Property was appraised by J. Lawrence Von Trapp, a State of Missouri Certified General Real Estate Appraiser of McReynolds, Von Trapp and Daniel-Gentry (the Appraiser), a real estate appraisal firm located in St. Louis, Missouri. The Appraiser determined that the fair market value of the Property was $7,985,000, as of September 1, 2002. On May 3, 2004, McReynolds, Von Trapp and Daniel-Gentry updated the appraisal of the Property and stated that the fair market value of the Property is $8,800,000. However, the CDC agrees to allow the Plan to purchase the Property for $7,985,000.

The Appraiser analyzed among other factors the following in determining the fair market value of the Property: (1) The level of activity in the local economy, particularly as it pertains to and affects the value of the Property; (2) recent trends in real estate development,

[21] The Department expresses no opinion herein concerning the decision by the CDC to forego rent and other expenses as described above.

occupancy, rental rates, and property values; and (3) the comparable sales and rental information.

6. The purchase of the Property will be financed, in part, by the Bank Loan, which will be a first mortgage loan to the Plan from a commercial bank for $6 million, secured by a mortgage on the Property, with an initial term of five years at a fixed rate of interest and twenty year amortization. Principal may be prepaid at any time. CDC will provide the Guarantee with respect to the first mortgage loan. The CDC will waive any right to recover from the Plan in the event that the Bank enforces the Guarantee against the CDC. Therefore, the Guarantee by the CDC will be non-recourse to the Plan.

The CDC Loan is to be an unsecured loan from the CDC to the Plan for $1 million. The interest rate will be one-half per cent less than the Bank Loan. The loan terms will provide that, if at any time the Plan does not have sufficient funds to make a payment on the CDC Loan, after meeting operational expenses and payments on the Bank Loan, then payments on the CDC Loan will be suspended, without additional interest or penalty, until such funds are available. Except as stated, the terms of the CDC Loan will be the same as the Bank Loan. The Plan will not pay any commissions or other expenses with respect to the transactions.

7. The Plan has engaged Brian Goding (Mr. Goding), of the firm Fiduciary Consultants, Inc., (FCI) to act as the Plan's I/F. FCI is an investment consulting firm, of which Mr. Goding is the principal. Mr. Goding and his firm are experienced in the investment of assets of ERISA funds, including real estate. Mr. Goding acknowledges his duties, responsibilities and liabilities in acting as a fiduciary for the Plan for purposes of the proposed transaction. Mr. Goding represents that he is an independent fiduciary and not an affiliate of, or related to, the entities involved in the subject transaction. In this regard, Mr. Goding certifies that: (i) Less than one (1) percent of FCI's annual income (measured on the basis of the prior year's income) comes from business derived from the CDC.

8. Mr. Goding has reviewed all of the terms and conditions of the proposed transactions. Mr. Goding states he has reviewed the essential documents (including the collective bargaining agreement) associated with the transactions. With respect to the proposed purchase and loan transactions, Mr. Goding concluded that, based on the historical financial statements and projected operating results, it is economically feasible, and within the range of reasonable and prudent judgment, for the Trustees to proceed with the proposed transactions. Mr. Goding represents that the Plan is in a position to make the requisite down payment for the purchase of the Property while retaining adequate reserves for its activities. In analyzing the proposed purchase, Mr. Goding represents that the purchase price of the Property does not exceed a reasonable price, and is in fact advantageous to the Plan. Furthermore, the cost of purchasing the Property at the price offered by the CDC is comparable to, and likely to be lower than, the cost of leasing similar property.

It is Mr. Goding's opinion that the decision of the Trustees to purchase the Property from the CDC is reasonable and prudent under the circumstances and the Trustees are justified in concluding that the terms of the Bank Loan are the best of the available alternatives. Mr. Goding has also examined the Appraiser's reports and has found the methodology and analysis to be consistent with sound principles of real estate valuation. Additionally, Mr. Goding represents that, based on his analysis, it is in the best interest of the Plan to engage in the $1 million CDC Loan, rather than increase the Bank Loan amount by $1 million. As I/F, Mr. Goding will take whatever actions he deems necessary to protect the rights of the Plan with respect to the Property and the transactions. In conclusion, Mr. Goding represents that under the current collective bargaining agreement, which extends to 2009, there will be sufficient funds to enable the Plan to make both Bank and CDC Loan payments. Mr. Goding also represents that it is in the best interest of the Plan to engage in the transactions.

9. In summary, the applicant states that the transactions have satisfied the statutory criteria of section 408(a) of the Act because: (a) The Plan pays the lesser of (1) $7,985,000 or (2) the fair market value of the Property at the time of the purchase of the Property; (b) The fair market value of the Property is established by an independent, qualified real estate appraiser that is unrelated to the CDC; (c) The Plan does not pay any commissions or other expenses with respect to the transactions; (d) The I/F determines, after analyzing the relevant terms of the transactions, that the transactions are in the best interest and protective of the Plan and its participants and beneficiaries; In determining the fair market value of the Property, the I/F obtains an appraisal from an independent, qualified appraiser and ensures that the appraisal is consistent with sound principles of valuation; (f) The terms and conditions of the CDC Loan are at least as favorable to the Plan as those which the Plan could have obtained in an arm's-length transaction with an unrelated party; (g) The Bank Loan is repaid by the Plan solely with funds the Plan retains after paying all of its operational expenses; (h) The I/F ensures that the terms and conditions relating to the Guarantee are in the best interest of the Plan and its participants and beneficiaries; (i) The CDC will waive any right to recover from the Plan in the event that the Bank enforces the Guarantee against the CDC; (j) If at any time the Plan does not have sufficient funds to make a payment on the CDC Loan, after meeting operational expenses and payments on the Bank Loan, then payments on the CDC Loan will be suspended, without additional interest or penalty, until such funds are available; and (k) The I/F will take whatever actions it deems necessary to protect the rights of the Plan with respect to the Property and the transactions.

Notice to Interested Persons: Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the applicant and Department within 15 days of the date of publication in the **Federal Register**. Comments and requests for a hearing are due forty-five (45) days after publication of the notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mr. Khalif I. Ford of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 15th day of July, 2004.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 04–16418 Filed 7–19–04; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–55,140]

A.O. Smith Electrical Products Co., Mebane, NC; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act 1974, as amended, an investigation was initiated on June 24, 2004, in response to a worker petition filed by a company official on behalf of workers at A.O. Smith Electrical Products Co., Mebane, North Carolina.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 8th day of July, 2004.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–16426 Filed 7–19–04; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–55,011]

Caspain International Group, New York, NY; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on June 2, 2004, in response to a petition filed on behalf of workers at Caspain International Group, New York, New York.

The petitioners have requested that the petition be withdrawn. Consequently, further investigation would serve no purpose and the investigation has been terminated.

Signed in Washington, DC, this 6th day of July, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–16421 Filed 7–19–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–55,151]

Charleston Hosiery, Inc., Fort Payne, AL; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on June 28, 2004, in response to a petition filed on behalf of workers at Charleston Hosiery, Inc., Ft. Payne, Alabama.

The petition is invalid because two of the three workers have not been separated nor is there a threat of separation. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 6th day of July, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–16427 Filed 7–19–04; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,169]

Dresser, Inc., Dresser Piping Specialties Division, Bradford, PA; Notice of Termination of Reconsideration

On June 16, 2004, the Department issued an Affirmative Determination Regarding Application for Reconsideration for workers and former workers of the subject firm. The Department's Notice of Determination was published in the **Federal Register** on June 30, 2004 (69 FR 39501).

In a communication dated July 8, 2004, the petitioner withdrew the request for administrative reconsideration. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 9th day of July, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–16419 Filed 7–19–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–55,038]

Duracell GBMG, Lexington, NC; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on June 7, 2004, in response to a petition filed by the company on behalf of workers at Duracell GBMG, Lexington, North Carolina.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 8th day of July, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–16422 Filed 7–19–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–55,133]

H E Microwave Corp., Tucson, AZ; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on June 23, 2004, in response to a worker petition filed by the International Association of Machinists and Aerospace Workers, Local Lodge 933, on behalf of workers at H E Microwave Corporation, Tucson, Arizona.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation would serve no purpose and the investigation has been terminated.

Signed at Washington, DC, this 6th day of July, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–16425 Filed 7–19–04; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,267]

Lucent Technologies, Inc., Engineering Department, Alpharetta, GA; Notice of Negative Determination Regarding Application for Reconsideration

By application of June 21, 2004, a petitioner requested administrative reconsideration of the Department's negative determination regarding eligibility for workers and former workers of the subject firm to apply for Trade Adjustment Assistance (TAA). The denial notice was signed on May 28, 2004 and published in the **Federal Register** on June 17, 2004 (69 FR 33941).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The TAA petition, filed on behalf of workers at Lucent Technologies, Inc., Engineering Department, Alpharetta, Georgia, was denied because the worker group did not produce an article within the meaning of Section 222 of the Act, and their work was not directly related to the production of an article by Lucent Technologies.

In the request for reconsideration, the petitioner stated that the subject facility provided engineering support and were directly involved in the production of integrated systems, including circuit boards and cable harnesses at the previously certified facility known as Lucent Technologies, Bell Labs Innovations, OKS Works, Oklahoma City, Oklahoma.

Upon the review of the above allegation the Department determined that Lucent Technologies, Bell Labs Innovations, OKS Works, Oklahoma City, Oklahoma, was indeed certified eligible for TAA in April of 2002 (TA–W–40,197). However, this facility ceased its production at the end of 2001, well beyond the relevant time period. The relevant period for this investigation stretches back one year from the date of the petition, or February 10, 2003. In order for workers to be considered eligible for TAA, the worker group seeking certification must work for a ''firm'' or subdivision that produces an article domestically, and production must have occurred within the relevant period of the investigation.

A review of the original investigation revealed that the workers of the subject facility did not support domestic production of any affiliated facilities of Lucent Technologies during the relevant time period.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 12th day of July, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–16420 Filed 7–19–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–55,110]

Model Die Casting Inc., Carson City, NV; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on June 18, 2004, in response to a worker petition filed by a company official on behalf of workers at Model Die Casting Inc., Carson City, Nevada.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 2nd day of July, 2004.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–16424 Filed 7–19–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–55,078]

N.E.W. Plastics Corp., Coleman, WI; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on June 15, 2004, in response to a petition filed by a company official on behalf of workers at N.E.W. Plastics Corporation, Coleman, Wisconsin.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 6th day of July, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–16423 Filed 7–19–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–38,569]

O/Z–Gedney Co., Div. of EGS Electrical Group, Terryville, CT; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on March 27, 2001, applicable to workers of O/Z–Gedney Company, Div. of EGS Electrical Group, Terryville, Connecticut. The notice was published in the **Federal Register** on April 16, 2001 (66 FR 19521).

At the request of a company official, the Department reviewed the certification for workers of the subject firm. The workers were engaged in the production of electrical fittings for the non-residential construction industry.

New information shows that a worker, Ms. Jacqueline Lancioni, was retained at the subject firm beyond the March 27, 2003, expiration date of the certification. This employee was engaged in activities related to the close-down process until her termination on March 26, 2004.

Based on these findings, the Department is amending the certification to extend the March 27, 2003, expiration date for TA–W–38,569 to read March 26, 2004.

The intent of the Department's certification is to include all workers of O/Z–Gedney Company, Div. of EGS Electrical Group, who were adversely affected by increased imports.

The amended notice applicable to TA–W–38,569 is hereby issued as follows:

A worker of O/Z–Gedney Company, Div. of EGS Electrical Group, Terryville, Connecticut, who became totally or partially separated from employment on or after January 5, 2000, through March 26, 2004, is eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974.

Signed at Washington, DC, this 12th day of July, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–16428 Filed 7–19–04; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

Proposed Information Collection Request (ICR); Submitted for Public Comment and Recommendations; Workforce Investment Act: Migrant and Seasonal Farmworker Programs Under Section 167

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

DATES: Submit comments on or before September 20, 2004.

ADDRESSES: Send comments to Alina M. Walker, Chief, Division of Migrant and Seasonal Farmworker Programs, United States Department of Labor, Employment and Training Administration, 200 Constitution Ave. NW., Room S–4206, Washington, DC 20210, telephone: (202) 693–2706 (this is not a toll-free number), Internet address: *walker.alina@DOL.GOV*, and/or FAX: (202) 693–3945 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to Public Law 105–220, dated August 7, 1998, and 20 CFR Parts 652, *et al.*, Workforce Investment Act (WIA) Final Rules, dated August 11, 2000, the Department's Employment and Training Administration (ETA) revised the financial and program reporting instructions for the National Farmworker Jobs Program (NFJP). WIA regulations at Part 669, Subpart A, establish that the general administrative requirements found in 20 CFR Part 667 apply to the NFJP program. The proposed reporting format and corresponding instructions have been developed in accordance with the Reporting Requirements contained in 20 CFR 667.300, including the provision for cumulative accrual reporting by fiscal year of appropriation. The data elements contained on the prototype format will be submitted electronically by NFJP grantees.

II. Review Focus

The Department is soliciting comments concerning the proposed extension collection of WIA, ETA, Program and Financial Reporting Requirements for NFJP. The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

A copy of the proposed ICR can be obtained by contacting the office listed above in the addressee section of this notice.

III. Current Actions

Type of Review: Reinstatement without change.

Agency: Employment and Training Administration.

Title: Workforce Investment Act (WIA), Employment and Training Administration, Program and Financial Reporting Requirements for the National Farmworker Jobs Program.

OMB Number: 1205–0425.

Agency Numbers: ETA 9093, 9094 and 9095.

Affected Public: State agencies; private, non-profit corporations; and consortia of any and/or all of the above.

Total Respondents: See the following Reporting Burden Table for NFJP grantees to report requested WIA program and financial data electronically on forms ETA 9093, 9094 and 9095.

DOL–ETA REPORTING BURDEN FOR WIA TITLE I—NFJP GRANTEES

Required section 167 activity	NFJP Form #	Number of respondents	Responses per year	Total responses	Hours per response	Total burden hours
Plan narrative		53	1	53	20	1,060
Data record		53	(1)	42,250	2	84,500
Report from data record		53	4	212	1	212
Budget information summary	ETA 9093	53	1	53	15	795
Program planning summary	ETA 9094	53	1	53	16	848
Program status summary	ETA 9095	53	4	212	7	1,484
Totals		53	11	42,833	61	88,899

[1] On occasion.

Total Burden Cost: 88,899 hours at $25 per hour.

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the ICR; they will also become a matter of public record.

Dated: July 14, 2004.

Alina M. Walker,

Chief, Division of Migrant and Seasonal Farmworker Programs.

[FR Doc. 04–16429 Filed 7–19–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

Proposed Information Collection Request Submitted for Public Comment and Recommendations; ETA 207, Nonmonetary Determination Activities Report

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collection of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

DATES: Written comments must be submitted to the office listed in the addressee section below on or before September 20, 2004.

ADDRESSES: Send comments to Ericka Parker, U.S. Department of Labor, Employment and Training Administration, Office of Workforce Security, 200 Constitution Avenue NW., Frances Perkins Bldg. Room S–4516, Washington, DC 20210. The telephone number is 202–693–3208 (this is not a toll-free number). The internet address is *parker.ericka@dol.gov.* The FAX number is 202–693–3975.

SUPPLEMENTARY INFORMATION:

I. *Background:* The ETA 207 Report, Nonmonetary Determination Activities, contains state data on the number and types of issues that arise when unemployment insurance (UI) claims are filed. It also has data on the number of disqualifications that are issued due to reasons associated with a claimant's separation from employment or issues related to an individual's continuing eligibility for benefits. These data are used by the Office of Workforce Security (OWS) to determine workload counts, to evaluate the adequacy and effectiveness of nonmonetary determination procedures, and to evaluate the impact of state and Federal legislation with respect to such disqualifications.

II. *Desired Focus of Comments:* Currently, the Employment and Training Administration is soliciting comments concerning the proposed extension collection of the ETA 207, Nonmonetary Determinations Activities Report. Comments are requested to:

- Evaluate whether the proposed collection of information is necessary to assess performance of the nonmonetary determination function, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed above in the addressee section of this notice.

III. *Current Actions:* The continued collection of the information contained on the ETA 207 report is necessary to enable the OWS to continue evaluating state performance in the nonmonetary determination area and to continue using the data as a key input to the administrative funding process.

Type of Review: Extension without change.

Agency: Employment and Training Administration (ETA).

Title: Nonmonetary Determinations Activities Report.

OMB Number: 1205–0150.

Agency Number: ETA 207.

Affected Public: State and Local Governments.

Total Respondents: 53.

Frequency: Quarterly.

Total Responses: 212.

Average Time per Response: 4.20 hours.

Estimated Total Burden Hours: 896 hours.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintaining): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: July 2, 2004.

Cheryl Atkinson,

Administrator, Office of Workforce Security.

[FR Doc. 04–16430 Filed 7–19–04; 8:45 am]

BILLING CODE 4510–30–P

LEGAL SERVICES CORPORATION

Notice of Availability of Calendar Year 2005 Competitive Grant Funds

AGENCY: Legal Services Corporation.

ACTION: Solicitation for proposals for the provision of Civil Legal Services.

SUMMARY: The Legal Services Corporation (LSC) is the national organization charged with administering Federal funds provided for civil legal services to low-income people.

LSC hereby announces the availability of competitive grant funds and is soliciting grant proposals from interested parties who are qualified to provide effective, efficient and high quality civil legal services to eligible clients in service areas OR–2, OR–4, OR–5, MOR, and NOR–1 in Oregon. The exact amount of congressionally appropriated funds and the date, terms and conditions of their availability for calendar year 2005 have not been determined.

DATES: *See* **SUPPLEMENTARY INFORMATION** section for grants competition dates.

ADDRESSES: Legal Services Corporation—Competitive Grants, 3333 K Street, NW., Third Floor, Washington, DC 20007–3522.

FOR FURTHER INFORMATION CONTACT: Office of Program Performance by e-mail at *competition@lsc.gov*, or visit the grants competition Web site at *http://www.ain.lsc.gov*.

SUPPLEMENTARY INFORMATION: The Request for Proposals (RFP) is available at *http://www.ain.lsc.gov.* Applicants must file a Notice of Intent to Compete (NIC) to participate in the competitive grants process.

Applicants competing for service areas OR–2, OR–4, OR–5, MOR, and/or NOR–1 in Oregon must file the NIC by July 30, 2004, 5 p.m. e.t. The due date for filing grant proposals for service areas in Oregon is August 27, 2004, 5 p.m. e.t.

LSC is seeking proposals from: (1) Non-profit organizations that have as a purpose the provision of legal assistance to eligible clients; (2) private attorneys; (3) groups of private attorneys or law firms; (4) State or local governments; and (5) sub-state regional planning and coordination agencies that are composed of sub-state areas and whose governing boards are controlled by locally elected officials.

The RFP, containing the NIC and grant application, guidelines, proposal content requirements, service area descriptions, and specific selection criteria, are available from *http://www.ain.lsc.gov*. LSC will not fax the RFP to interested parties.

Interested parties are asked to visit *http://www.ain.lsc.gov* regularly for updates on the LSC competitive grants process.

Dated: July 15, 2004.

Victor M. Fortuno,

Vice President for Legal Affairs, General Counsel, and Corporate Secretary, Legal Services Corporation.

[FR Doc. 04–16469 Filed 7–19–04; 8:45 am]

BILLING CODE 7050–01–P

MISSISSIPPI RIVER COMMISSION

Sunshine Act Meetings

AGENCY: Mississippi River Commission.

TIME AND DATE: 9 a.m., August 16, 2004.

PLACE: On board MISSISSIPPI V at Riverside Park Landing, La Crosse, WI.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current projects issues within the St. Paul District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and corps of Engineers.

TIME AND DATE: 9 a.m., August 17, 2004.

PLACE: On board MISSISSIPPI V at City Front, Dubuque, IA.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission on programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Rock Island District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

TIME AND DATE: 9 a.m., August 20, 2004.

PLACE: On board MISSISSIPPI V at Melvin Price Lock & Dam, Alton, IL.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the St. Louis District and; (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

TIME AND DATE: 9 a.m., August 23, 2004.

PLACE: On board MISSISSIPPI V at City Front, New Madrid, MO.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Memphis District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or of the Commission and the Corps of Engineers.

TIME AND DATE: 9 a.m., August 24,2004.

PLACE: On board MISSISSIPPI V at City Front, Memphis, TN.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineering and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Memphis District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or of the Commission and the Corps of Engineers.

TIME AND DATE: 9 a.m., August 25, 2004.

PLACE: On board MISSISSIPPI V at City Front, Greenville, MS.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Vicksburg District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or of the Commission and the Corps of Engineers.

TIME AND DATE: 9 a.m., August 27, 2004.

PLACE: On board MISSISSIPPI V at Cenac Towing Co. Dock, Houma, LA.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the New Orleans District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or of the Commission and the Corps of Engineers.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Gambrell, telephone 601–634–5766.

Richard B. Jenkins,

Colonel, Corps of Engineers, Secretary, Mississippi River Commission.

[FR Doc. 04–16551 Filed 7–16–04; 11:41 am]

BILLING CODE 3710–GX–M

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Correction

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice; correction.

SUMMARY: NARA published a document in the **Federal Register** of July 14, 2004, concerning request for comments on agency information collection activities; submission for OMB review. The document contained an incomplete address.

FOR FURTHER INFORMATION CONTACT: Tamee Fechhelm, (301) 837–1694.

Correction

In the **Federal Register** of July 14, 2004, in FR Doc. 04–15996, on page 42216, in the first column, correct the **ADDRESSES** caption to read:

ADDRESSES: Comments should be sent to: OMB Desk Officer for NARA, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: (202) 395–5167.

Dated: July 14, 2004.

Nancy Allard,

Federal Register Liaison Officer.

[FR Doc. 04–16387 Filed 7–19–04; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission.

DATES: Weeks of July 19, 26, August 2, 9, 16, 23, 2004.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of July 19, 2004

Wednesday, July 21, 2004

9:30 a.m. Meeting with Advisory Committee on Nuclear Waste (ACNW) (Public Meeting) (Contact: John Larkins, 301–415–7360)

This meeting will be webcast live at the Web address—*www.nrc.gov.*

Week of July 26, 2004—Tentative

There are no meetings scheduled for the Week of July 26, 2004.

Week of August 2, 2004—Tentative

There are no meetings scheduled for the Week of August 2, 2004.

Week of August 9, 2004—Tentative

There are no meetings scheduled for the Week of August 9, 2004.

Week of August 16, 2004—Tentative

Wednesday, August 18, 2004

9:30 a.m. Discussion of Security issues (Closed—Ex. 1)

Week of August 23, 2004—Tentative

There are no meetings scheduled for the Week of August 23, 2004.

*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: Dave Gameroni, (301) 415–1651.

* * * * *

ADDITIONAL INFORMATION: By a vote of 3–0 on July 6 and 7, the Commissions determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that ''Discussion of Security Issues (Closed—Ex. 1)'' be held July 15, and on less than one week's notice to the public.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *www.nrc.gov/what-we-do/policy-making/schdule.html*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify the NRC's Disability Program Coordinator, August Spector, at 301–415–7080, TDD: 301–415–2100, or by e-mail at *aks@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov.*

Dated: July 15, 2004.

Dave Gamberoni,

Office of the Secretary.

[FR Doc. 04–16529 Filed 7–16–04; 9:30 am]

BILLING CODE 7590–01–M

NUCLEAR REGULATORY COMMISSION

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

Background

Pursuant to section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. The Act requires the Commission to publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from, June 25, 2004, through July 8, 2004. The last biweekly notice was published on July 6, 2004 (69 FRN 40668).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; 2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner/requestor intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner/requestor intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of

the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; (2) courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff; (3) e-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *hearingdocket@nrc.gov;* or (4) facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff at (301) 415–1101, verification number is (301) 415–1966. A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and it is requested that copies be transmitted either by means of facsimile transmission to (301) 415–3725 or by e-mail to *OGCMailCenter@nrc.gov.* A copy of the request for hearing and petition for leave to intervene should also be sent to the attorney for the licensee.

Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the petition, request and/or the contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(a)(1)(i)–(viii).

For further details with respect to this action, *see* the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR Reference staff at 1–800–397–4209, (301) 415–4737 or by e-mail to *pdr@nrc.gov.*

Duke Energy Corporation, Docket Nos. 50–269, 50–270, and 50–287, Oconee Nuclear Station, Units 1, 2, and 3, Oconee County, South Carolina

Date of amendment request: May 25, 2004.

Description of amendment request: The proposed amendments would revise the licensing basis in the Updated Final Safety Analysis Report to support installation of a passive low-pressure injection (LPI) cross connect inside containment for Unit 3. The proposed changes would revise the licensing basis for selected portions of the core flood and LPI piping to allow exclusion of the dynamic effects associated with a postulated rupture of that piping by application of leak-before-break technology. Similar amendments were approved for Unit 1 by NRC letter dated September 29, 2003, and for Unit 2 by NRC letter dated February 5, 2004.

The proposed amendments would also delete technical specifications (TSs) which will no longer apply when the LPI cross connect modification has been implemented.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated: The proposed License Amendment Request (LAR) modifies the Unit 3 licensing basis to allow the dynamic effects associated with postulated pipe rupture of selected portions of the Unit 3 Low Pressure Injection (LPI)/Core Flood (CF) piping to be excluded from the design basis. The proposed LAR also removes Technical Specifications that are no longer applicable due to the completion of the LPI cross connect modification on all three Oconee Units. The proposed design allowances for these selected portions of piping continue to allow the LPI system design to meet General Design Criteria (GDC) 4 requirements related to environmental and dynamic effects. The proposed LAR will continue to ensure that ONS [Oconee Nuclear Station] can meet design basis requirements associated with the LPI safety function. The addition of the crossover line will enhance the ability of the control room operator to mitigate the consequences of specific events for which LPI is credited. Therefore, the proposed LAR does not involve a significant increase in the probability or consequences of an accident previously evaluated.

(2) Create the possibility of a new or different kind of accident from any kind of accident previously evaluated: The proposed LAR modifies the Unit 3 licensing basis to allow the dynamic effects associated with postulated pipe rupture of selected portions of Unit 3 LPI/CF piping to be excluded from the design basis and removes TS requirements that are no longer applicable due to the completion of the LPI cross connect modification on all three Oconee Units. The proposed design allowances for these selected portions of piping continue to allow the LPI system design to meet GDC 4 requirements related to environmental and dynamic effects. The systems affected by the changes are used to mitigate the consequences of an accident that has already occurred. The proposed licensing basis change does not affect the mitigating function of these systems. Consequently, these changes do not alter the nature of events postulated in the Safety Analysis Report nor do they introduce any unique precursor mechanisms. Therefore, the proposed amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated.

(3) Involve a significant reduction in a margin of safety: The proposed licensing basis and TS changes do not unfavorably affect any plant safety limits, set points, or design parameters. The changes also do not unfavorably affect the fuel, fuel cladding, RCS [Reactor Coolant System], or containment integrity. Therefore, the proposed changes, which add new design allowances associated with the passive LPI cross connect modification and remove obsolete TS requirements, do not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Anne W. Cottingham, Winston and Strawn LPP, 1400 L Street, NW., Washington, DC 20005.

NRC Section Chief: Stephanie M. Coffin (Acting).

Entergy Nuclear Operations, Inc., Docket No. 50–333, James A. FitzPatrick Nuclear Power Plant (JAFNPP), Oswego County, New York

Date of amendment request: June 4, 2004.

Description of amendment request: The proposed amendment would revise the safety limit values in Technical Specification (TS) 2.1.1.2 for the minimum critical power ratio (MCPR) for both single and two recirculation loop operation.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The operation of JAFNPP in accordance with the proposed amendment, will not involve a significant increase in the probability or consequences of an accident previously evaluated.

The basis of the Safety Limit Minimum Critical Power Ratio (SLMCPR) is to ensure no mechanistic fuel damage is calculated to occur if the limit is not violated. The new SLMCPR values preserve the existing margin to transition boiling and probability of fuel damage is not increased. The derivation of the revised SLMCPR for JAFNPP for incorporation into the Technical Specifications, and its use to determine plant and cycle-specific thermal limits, have been performed using NRC approved methods. These plant-specific calculations are performed each operating cycle and if necessary, will require future changes to these values based upon revised core designs. The revised SLMCPR values do not change the method of operating the plant and have no effect on the probability of an accident initiating event or transient.

Based on the above, JAFNPP has concluded that the proposed change will not result in a significant increase in the probability or consequences of an accident previously evaluated.

2. The operation of JAFNPP in accordance with the proposed amendment, will not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes result only from a specific analysis for the JAFNPP core reload design. These changes do not involve any new or different methods for operating the facility. No new initiating events or transients result from these changes.

Based on the above, JAFNPP has concluded that the proposed change will not create the possibility of a new or different kind of accident from those previously evaluated.

3. The operation of JAFNPP in accordance with the proposed amendment, will not involve a significant reduction in a margin of safety.

The new SLMCPR is calculated using NRC approved methods with plant and cycle specific parameters for the current core design. The SLMCPR value remains high enough to ensure that greater than 99.9% of all fuel rods in the core will avoid transition boiling if the limit is not violated, thereby preserving the fuel cladding integrity. The operating MCPR limit is set appropriately above the safety limit value to ensure adequate margin when the cycle specific transients are evaluated. Accordingly, the margin of safety is maintained with the revised values.

As a result, JAFNPP has determined that the proposed change will not result in a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. David E. Blabey, 1633 Broadway, New York, New York 10019.

NRC Section Chief: Richard J. Laufer.

Entergy Operations Inc., Docket No. 50–382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: June 17, 2004.

Description of amendment request: The amendment will (1) modify Technical Specifications (TSs) 5.3.1, Fuel Assemblies, to allow a limited number of lead test assemblies (LTAs) and limited substitutions of zirconium alloy or stainless steel filler rods for fuel rods, (2) include ZIRLO™ as an acceptable fuel rod cladding which is consistent with 10 CFR 50.46, (3) relocate some of the information in TS 5.3.1 to TS 5.6.1, (4) change TS 6.9.1.11.1 to allow the use of the Westinghouse Nuclear Physics code package and to incorporate the methodology used to support ZIRLO™ cladding material, and (5) delete the Index from the TSs.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

TS 5.3.1, Fuel Assemblies and TS 5.6.1, Criticality

The proposed change allows the use of a limited number of lead test assemblies; the use of limited substitutions of zirconium alloy or stainless steel filler rods for fuel rods; and the use of methods required for the implementation of ZIRLO™ clad fuel rods. Inasmuch as the revision identifies codes previously approved by the NRC [Nuclear Regulatory Commission] for CE [Combustion Engineering] cores, the amendment is administrative in nature and has no impact on any plant configuration or system performance relied upon to mitigate the consequences of an accident.

The proposed change in part represents a relocation of a portion of the information previously located in the TSs design features section to the FSAR [Final Safety Analysis Report], which is controlled under 10 CFR 50.59, ''Changes, Tests, and Experiments.'' This change is administrative in nature because the design requirements for the facility remain the same.

The proposed change does not remove or modify any of the design requirements for the facility or affect any accident initiators, conditions or assumption[s] for an accident previously evaluated.

TS 6.9.1.11, Core Operating Limits Report COLR

The proposed amendment identifies a change in the nuclear physics codes used to confirm the values of selected cycle-specific reactor physics parameter limits and includes minor editorial changes which do not alter the intent of stated requirements. The proposed change also allows the use of methods required for the implementation of ZIRLO™ clad fuel rods. Inasmuch as the proposed change identifies codes previously approved by the NRC for CE cores, the amendment is administrative in nature and has no impact on any plant configuration or system performance relied upon to mitigate the consequences of an accident. Parameter limits specified in the site specific COLR are not changed from the values presently required by TSs. Future changes to the calculated values of such limits may only be made using NRC approved methodologies, must be consistent with all applicable safety analysis limits, and are controlled by the 10 CFR 50.59 process. Assumptions used for accident initiators and/or safety analysis acceptance criteria are not changed by this change.

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The proposed change is administrative in nature and does not affect any system or component functional requirements. This change does not affect the operation of the plant or affect any component that is used to mitigate the consequences of any accident.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

TS 5.3.1, Fuel Assemblies and TS 5.6.1, Criticality

The proposed change allows the use of methods required for the implementation of ZIRLO™ clad fuel rods. Inasmuch as the revision identifies codes previously approved by the NRC for CE cores, the amendment is administrative in nature and has no impact on any plant configuration or system performance relied upon to mitigate the consequences of an accident.

In addition, the proposed change allows the use of a limited number of lead test assemblies. The proposed change is administrative in nature. Prior to the use of lead test assemblies, fuel designs will be analyzed with applicable NRC staff approved codes and methods and shown by tests or analyses to comply with all fuel safety design bases to assure no new or different kind of accident from any accident previously evaluated will be created.

And finally the proposed change allows the relocation of a portion of the information previously located in the TSs design features section to the FSAR. This change is administrative in nature and does not create a new or different type of accident than previously evaluated because the design requirements for the facility remain the same.

The proposed change does not remove or modify any of the design requirements for the facility or affect any accident initiators, conditions or assumption[s] for an accident previously evaluated.

TS 6.9.1.11, Core Operating Limits Report COLR

The proposed change identifies a change in the Nuclear Physics codes used to confirm the values of selected cycle-specific reactor physics parameter limits contained in the COLR. The proposed change also allows the use of methodologies required for the implementation of ZIRLO™ clad fuel rods. Neither of these changes results in a change [to] the physical plant or the modes of operation defined in the facility license.

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The proposed change is administrative in nature and does not affect any system or component functional requirements. This change does not affect the operation of the plant or affect any component that is used to mitigate the consequences of any accident.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

TS 5.3.1, Fuel Assemblies and TS 5.6.1, Criticality

The proposed change allows the use of methods required for the implementation of ZIRLO™ clad fuel rods. Inasmuch as the revision identifies codes previously approved by the NRC for CE cores, the amendment is administrative in nature and has no impact on any plant configuration or system performance relied upon to mitigate the consequences of an accident.

In addition, the proposed change allows the use of a limited number of lead test assemblies. The proposed change is administrative in nature. Prior to the use of lead test assemblies, fuel designs will be analyzed with applicable NRC staff approved codes and methods and shown by tests or analyses to ensure compliance with any safety analysis acceptance criteria.

And finally the proposed change allows the relocation of a portion of the information previously located in the TSs design features section to the FSAR. This change is administrative in nature and does not create a new or different type of accident than previously evaluated because the design requirements for the facility remain the same.

The proposed change does not remove or modify any of the design requirements for the facility or affect any accident initiators, conditions or assumption[s] for an accident previously evaluated.

TS 6.9.1.11, Core Operating Limits Report COLR

The individual specifications continue to require operation of the plant within the bounds of the limits specified in COLR. Benchmarking has shown that uncertainties for the Westinghouse Physics code system (ANC/PHOENIX–P) yields are essentially the same or less than those obtained for the current ROCS/DIT methodology. Future changes to the values of these limits by the licensee may only be developed using NRC approved methodologies, remaining consistent with all applicable plant safety analysis limits addressed in the Safety Analysis Report, which are controlled by the 10 CFR 50.59 process. The relocation of the supplement numbers, revision numbers, and approval dates related to the analytical methods listed in the COLR does not affect the margin of safety. The analysis will continue to be performed using NRC approved methodology. Safety analysis acceptance criteria are not being altered by this change.

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The proposed change is administrative in nature and does not affect any system or component functional requirements. Safety analysis acceptance criteria are not being altered by this change.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: N.S. Reynolds, Esquire, Winston & Strawn, 1400 L Street, NW., Washington, DC 20005–3502.

NRC Section Chief: Robert A. Gramm.

Exelon Generation Company, LLC, and PSEG Nuclear LLC, Dockets Nos. 50–277 and 50–278, Peach Bottom Atomic Power Station, Units 2 and 3, York and Lancaster Counties, Pennsylvania

Date of application for amendments: June 15, 2004.

Description of amendment request: The proposed amendment would allow the licensee to conduct the monthly diesel surveillance test, the diesel full-load rejection test, the diesel 24-hour run test and the diesel hot restart test at the higher load of 2800 kW.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed revisions to Technical Specification [TS] Surveillance Requirements SR 3.8.1.3 (the monthly diesel surveillance test), SR 3.8.1.10 (the diesel full-load rejection test), SR 3.8.1.14.b (the diesel 24-hour run test), and SR 3.8.1.15 (the diesel hot restart test) to permit these tests to be conducted at the higher load value of 2800 kW do not involve any physical change to any EDG [emergency diesel generator] equipment. The Operator using existing EDG load controls will adjust the EDG to carry the increased load during surveillance testing.

The EDGs are designed to provide a reliable source of AC electrical power in the event of an accident coincident with a loss of offsite power. The failure of an EDG itself is not considered an accident evaluated in the UFSAR [Updated Final Safety Analysis Report]. This proposed loading change does not affect the current accident initiators or precursors that could lead to a previously evaluated accident.

The failure of a single EDG to perform when required to mitigate the consequences of an accident has already been considered as a subsequent single failure in the current plant safety analyses. The proposed change to increase the allowable load range does not alter the EDG design features, post-accident operation, or accident analysis assumptions which could affect the ability of the EDGs to mitigate the consequences of a previously evaluated accident. Current EDG testing requirements, *e.g.*, starting, timing, and post accident sequencing and loading will continue to ensure reliable EDG operation and are not being changed in this request.

Since the EDG TS surveillance test load is the only parameter involved in this request, the proposed changes will not increase the likelihood of the malfunction of another system, structure, or component that has been assumed as an accident initiator or credited in the mitigation of an accident.

Based on the above discussion, the proposed TS changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The EDGs are designed to provide a reliable source of AC electrical power in the event of an accident coincident with a loss of offsite power. No change in the ability of the EDGs to perform their design function is involved. Instrumentation setpoints, starting, sequencing, and post-accident loading functions associated with the EDGs are not affected by the proposed changes. No modifications to the EDGs are required to implement the proposed TS changes. Therefore, no new failure mechanism, malfunction, or accident initiator is considered credible.

Additionally, the proposed TS changes do not affect the other plant design, hardware, system operation, or procedures. Therefore, based on the above discussion, the above TS changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The underlying purpose of the four (4) diesel generators is to ensure an available source of onsite power to the ESF [engineered safety feature] systems. This

change does [sic] will not impact this underlying purpose. As discussed above, this change may result in a slight increase in engine wear due to the ability to operate at the higher load, but this increased wear is bounded by the existing 24 month maintenance inspection program. The OEM [original equipment manufacturer] has stated that the change to increase the allowable load value still remains well within the EDG 2000-hour rating, and the increased rate of wear is within the acceptable limits of the current maintenance program.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has found that, because the EDGs will continue to be operated within the bounds of the current maintenance program, there is no significant increase in the probability of an EDG failure; therefore, there is no significant increase in the probability or consequences of an accident previously evaluated. The NRC staff further finds that, because there is no significant increase in a failure of an EDG to perform its function, the proposed change does not create the possibility of an accident not previously evaluated.

The NRC staff has reviewed the licensee's analysis and, based on this review and the staff's own findings above, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for Licensee: Thomas S. O'Neill, Associate and General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Section Chief: James W. Clifford.

FirstEnergy Nuclear Operating Company, et al., Docket Nos. 50–334 and 50–412, Beaver Valley Power Station, Unit Nos. 1 and 2 (BVPS–1 and 2), Beaver County, Pennsylvania

Date of amendment request: June 2, 2004.

Description of amendment request: The proposed amendment would revise the BVPS–1 and 2 Technical Specifications to allow operation with atmospheric containment designs.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

(1) Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No. The Beaver Valley Power Station (BVPS) containments are designed to withstand the internal pressure and temperature resulting from a loss of coolant accident (LOCA), main steamline break (MSLB), feedwater line break, and a control rod ejection accident (CREA). Each of these accidents has been previously analyzed with the results provided in the Updated Final Safety Analysis Report (UFSAR) except the feedwater line break. This accident is not analyzed because the MSLB is more limiting. The affect on containment pressure and temperature due to a CREA is bounded by a LOCA, since a CREA is modeled after a small break LOCA. The probability of occurrence for these accidents is independent of the type of containment. Additionally the supporting plant modifications will not increase the probability of an accident because they perform an accident mitigation function and are not accident initiators. Therefore a change from sub-atmospheric to an atmospheric containment will not increase the probability of these accidents.

For accident conditions, the proposed changes will potentially impact the reported dose consequences of the LOCA and CREA for both BVPS units. The radiological consequences of these and the remaining design basis accidents are not adversely impacted by the proposed changes because they are within the current BVPS licensing and design basis.

From a containment integrity viewpoint, the limiting DBA [design-basis accident] presently is the MSLB for Unit 1 and the LOCA for Unit 2. Following the conversion to an atmospheric containment the limiting DBA will be the LOCA for both units. The revised containment integrity analysis demonstrates that with the installation of the supporting plant modifications that the pressures and temperatures associated with the applicable design basis accidents identified above are within the existing containment design limits.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

(2) Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No. The design basis accidents, which could be adversely affected by the proposed changes, have been reanalyzed. These [re]analyses demonstrate that all acceptance criteria have been satisfied. The revised containment integrity analysis demonstrates that the containment will not be subjected to temperatures or pressures that are beyond its design limits. Converting to an atmospheric containment will not result in any new or different kind of accidents because no new accident initiators will be introduced.

The affects of the supporting plant modifications and the proposed Technical Specification changes on plant structures, systems and components (SSC) have been evaluated and it has been verified that the capability of the SSCs to perform their design functions will be retained following approval of the proposed Technical Specification changes and installation of the supporting plant modifications.

Changes to instrumentation setpoints, surveillance requirements, installation of the supporting plant modifications, and the elimination of certain operability requirements will not create the possibility of a new or different type of accident since these changes would not result in significant changes to the manner in which the affected equipment is operated during normal plant operations.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any [accident] previously evaluated.

(3) Does the proposed change involve a significant reduction in a margin of safety?

Response: No. The margin of safety attributed to the containment involves both the pressures and temperatures the containment is subjected to following a DBA, and the on-site and offsite dose consequences associated with normal and post DBA operations.

The revised containment analyses demonstrates that, following a DBA; containment peak pressure and temperature will not exceed the containment's design limits and that the containment pressure will not decrease to below 8 psia following the intentional or inadvertent actuation of the quench spray system. Since the containment design limits are not exceeded, the existing margin of safety between these limits and the containment failure limits is not reduced.

Since the current radiological analyses impacted by the containment conversion are conservatively based on atmospheric operation, it is concluded that the existing dose consequence margin of safety will not be impacted when the BVPS units are operated with an atmospheric containment.

Therefore the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mary O'Reilly, FirstEnergy Nuclear Operating Company, FirstEnergy Corporation, 76 South Main Street, Akron, OH 44308.

NRC Section Chief: Richard J. Laufer.

Southern Nuclear Operating Company, Inc., et al., Docket Nos. 50–424 and 50–425, Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia

Date of amendment request: April 26, 2004.

Description of amendment request: The proposed amendments would revise Technical Specifications Limiting Conditions for Operation (LCO) 3.7.9, ''Ultimate Heat Sink (UHS)'' to allow the UHS to remain OPERABLE with three of four fans operating under certain environmental conditions.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed changes involve a significant increase in the probability or consequence of an accident previously evaluated?

No. The revised requirements will maintain OPERABILITY while allowing maintenance on one fan when ambient wet-bulb temperature is 63 °F or lower. Modifying the condition when one NSCW [nuclear service cooling water] tower is impacted is more restrictive. The UHS is not an initiator to any analyzed accident sequence. Operation in accordance with the proposed TS will continue to ensure that the UHS remains capable of performing its safety function and that all analyzed accidents will continue to be mitigated as previously analyzed. Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Do the proposed changes create the possibility of a new or different kind of accident from any previously evaluated?

No. The proposed changes do not introduce any new equipment, create new failure modes for existing equipment, or create any new limiting single failures. Plant operation will not be altered, and all safety functions previously addressed in accident analyses will continue to be performed. Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. Do the proposed changes involve a significant reduction in a margin of safety?

No. The proposed changes will not adversely affect operation of plant equipment-principally the UHS and the equipment supported by it. Modifying the condition where one NSCW tower is impacted is more restrictive and enhances the margin of safety. Therefore, the proposed changes do not involve a significant reduction in any margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. Arthur H. Domby, Troutman Sanders, NationsBank Plaza, Suite 5200, 600 Peachtree Street, NE., Atlanta, Georgia 30308–2216.

NRC Section Chief: Stephanie M. Coffin (Acting).

STP Nuclear Operating Company, Docket Nos. 50–498 and 50–499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: June 21, 2004.

Description of amendment request: The proposed one-time (per unit) change revises the steam generator (SG) inservice inspection frequency requirements in Technical Specification (TS) 4.4.5.3a for Unit 1 immediately after the tenth refueling outage for Unit 1 (1RE10) and for Unit 2 immediately after refueling outage 2RE10. The change would allow a 78-month inspection interval after one inspection resulting in C–1 classification, rather than a 40-month interval after two consecutive inspections resulting in C–1 classification.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

There is no direct increase in SG leakage because the proposed change does not alter the plant design. The scope of inspections performed during 1RE10 and 2RE10, the first refueling outage following SG replacement, exceeded the combined TS requirements for the first two refueling outages after replacement. That is, more tubes were inspected than were required by TS. Currently, neither Unit 1 nor Unit 2 has an active SG damage mechanism and will meet the current industry examination guidelines without performing inspections during the next 78 months. The Condition Monitoring Assessment after 1RE10 and 2RE10 demonstrated that all performance criteria were met during these outages. The Operational Assessment shows that all performance criteria will be met over the proposed operating period.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change will not alter any plant design basis or postulated accident resulting from potential SG tube degradation. The scope of inspections performed during 1RE10 and 2RE10, the first refueling outage for each unit following SG replacement, significantly exceeded the combined TS requirements for the scope of the first two refueling outages after SG replacement. The inspections already performed exceed those required by the current TS over the proposed 78-month period.

The proposed change does not affect the design of the SGs, the method of operation, or reactor coolant chemistry controls. No new equipment is being introduced and installed and equipment is not being operated in a new or different manner. The proposed change involves a one-time extension of the SG tube inservice inspection interval, and therefore will not give rise to new failure modes. In addition, the proposed change does not impact any other plant system or components.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

Steam generator tube integrity is a function of design, environment, and current physical condition. Extending the SG tube inservice inspection interval to 78 months will not alter the function or design of the SGs. Inspections conducted prior to placing the SGs into service (pre-service inspections) and inspection during the first refueling outages following SG replacement demonstrate that the SGs do not have fabrication damage or an active damage mechanism. The scope of those inspections significantly exceeded those required by the TS. These inspection results were comparable to similar inspection results for the same model of RSGs [replacement steam generators] installed at other plants, and subsequent inspections at those plants yielded results that support this extension request. The improved design of the RSGs also provides reasonable assurance that significant tube degradation is not likely to occur over the proposed operating period.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves no significant hazards consideration.

Attorney for licensee: A. H. Gutterman, Esq., Morgan, Lewis & Bockius, 1111 Pennsylvania Avenue, NW., Washington, DC 20004.

NRC Section Chief: Robert A. Gramm.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the

Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, (301) 415–4737 or by e-mail to *pdr@nrc.gov*.

Dominion Nuclear Connecticut, Inc., Docket No. 50–245, Millstone Power Station, Unit No. 1, New London County, Connecticut

Date of amendment request: September 18, 2003.

Brief description of amendment: The amendment revises Technical Specification 4.2, ''Fuel Storage,'' to eliminate all credit for Boraflex as a neutron absorber, reduce the number of fuel assemblies allowed to be stored in the spent fuel pool (SFP), change the required $SFPk_{eff}$ and eliminate design features requirements of new fuel storage.

Date of issuance: June 29, 2004.

Effective date: June 29, 2004, and shall be implemented within 60 days from the date of issuance.

Amendment No.: 113.

Facility Operating License No. DPR–21: The amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** December 9, 2003 (68 FR 68659). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated June 29, 2004.

No significant hazards consideration comments received: No.

Duke Energy Corporation, et al., Docket Nos. 50–413 and 50–414, Catawba Nuclear Station, Units 1 and 2, York County, South Carolina

Date of application for amendments: October 15, 2003.

Brief description of amendments: The amendments added a new Technical Specification (TS) 3.9.7, ''Unborated Water Source isolation Valves,'' and revised TS 3.9.2, ''Nuclear Instrumentation,'' to delete the requirement for Boron Dilution Mitigation System automatic valve actuations and makeup water pump trip during Mode 6 and to agree with the wording of NUREG–1431, ''Standard Technical Specifications Westinghouse Plants,'' Revision 2. The licensee proposed these changes to provide configuration control of the dilution valves during Mode 6 to preclude the possibility of a boron dilution event and to provide an opportunity to conduct maintenance on the volume control tank valves, refueling water storage tank valves, and their respective power supplies.

Date of issuance: June 21, 2004.

Effective date: As of the date of issuance and shall be implemented within 120 days from the date of issuance.

Amendment Nos.: 215 and 209.

Renewed Facility Operating License Nos. NPF–35 and NPF–52: Amendments revised the TSs.

Date of initial notice in ***Federal Register:*** March 16, 2004 (69 FR 12366).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated June 21, 2004.

No significant hazards consideration comments received: No.

Duke Energy Corporation, Docket Nos. 50–369 and 50–370, McGuire Nuclear Station, Units 1 and 2, Mecklenburg County, North Carolina

Date of application for amendments: June 25, 2003.

Brief description of amendments: The amendments are administrative in nature and incorporate several editorial changes.

Date of issuance: June 21, 2004.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment Nos.: 222 and 204.

Renewed Facility Operating License Nos. NPF–9 and NPF–17: Amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** April 13, 2004 (69 FR 19565).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated June 21, 2004.

No significant hazards consideration comments received: No.

Entergy Nuclear Operations, Docket Nos. 50–247 and 50–286, Indian Point Nuclear Generating Unit Nos. 2 and 3, Westchester County, New York

Date of application for amendment: March 3, 2004.

Brief description of amendments: The amendments revised the Technical Specifications administrative controls requirements regarding the reactor coolant pump flywheel inspection program to increase the inspection interval from 10 years to 20 years.

Date of issuance: July 2, 2004.

Effective date: As of the date of issuance to be implemented within 30 days.

Amendment Nos.: 240 and 221.

Facility Operating License Nos. DPR–26 and DPR–64: Amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** April 13, 2004 (69 FR 19566).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 2, 2004.

No significant hazards consideration comments received: No.

Indiana Michigan Power Company, Docket Nos. 50–315 and 50–316, Donald C. Cook Nuclear Plant, Units 1 and 2, Berrien County, Michigan

Date of application for amendments: August 27, 2003, as supplemented December 15, 2003, and February 27, 2004.

Brief description of amendments: The amendments modify Technical Specifications requirements to adopt the provisions of Industry/Technical Specification Task Force (TSTF) change TSTF–359, ''Increase Flexibility in Mode Restraints.''

Date of issuance: June 25, 2004.

Effective date: As of the date of issuance and shall be implemented within 45 days.

Amendment Nos.: 281 and 265.

Facility Operating License Nos. DPR–58 and DPR–74: Amendments revised the Technical Specifications.

*Date of initial notice in **Federal Register:*** October 14, 2003 (68 FR 59217).

The supplemental letters dated December 15, 2003, and February 27, 2004, provided clarifying information that did not change the scope of the original **Federal Register** notice or the original no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated June 25, 2004.

No significant hazards consideration comments received: No.

Nuclear Management Company, LLC, Docket No. 50–255, Palisades Plant, Van Buren County, Michigan

Date of application for amendment: June 3, 2003, as supplemented by letters dated October 6, 2003, January 15, and February 13, 2004.

Brief description of amendment: The amendment revises the operating license and technical specifications to increase the licensed rated power by 1.4 percent from 2530 megawatts thermal (MWt) to 2565.4 MWt using measurement uncertainty recapture.

Date of issuance: June 23, 2004.

Effective date: As of the date of issuance and shall be implemented within 90 days.

Amendment No.: 215.

Facility Operating License No. DPR–20. Amendment revised the Technical Specifications.

*Date of initial notice in **Federal Register:*** July 8, 2003 (68 FR 40714).

The supplemental letters contained clarifying information and did not change the initial no significant hazards consideration determination and did not expand the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated June 23, 2004.

No significant hazards consideration comments received: No.

Southern Nuclear Operating Company, Inc., et al., Docket Nos. 50–424 and 50–425, Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia

Date of application for amendments: February 20, 2004.

Brief description of amendments: The amendments revised the Technical Specification requirements for Shift Technical Advisor coverage.

Date of issuance: June 28, 2004.

Effective date: As of the date of issuance and shall be implemented within 60 days from the date of issuance.

Amendment Nos.: 132 and 111.

Facility Operating License Nos. NPF–68 and NPF–81: Amendments revised the Technical Specifications.

*Date of initial notice in **Federal Register:*** April 13, 2004 (69 FR 19574).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated June 28, 2004.

No significant hazards consideration comments received: No.

TXU Generation Company LP, Docket Nos. 50–445 and 50–446, Comanche Peak Steam Electric Station, Unit Nos. 1 and 2, Somervell County, Texas

Date of amendment request: June 6, 2003, as supplemented by letter dated February 24, 2004.

Brief description of amendments: The amendments revise the Technical Specifications (TSs) adopting the TS Task Force (TSTF) Standard TS Change Traveler TSTF–360, Revision 1, ''DC Electrical Rewrite.'' Specifically, the amendments revise the TS 3.8.4, ''DC Sources-Operating,'' TS 3.8.5, ''DC Sources-Shutdown,'' TS 3.8.6, ''Battery Cell Parameters,'' and TS 5.5.19, ''Battery Monitoring and Maintenance Program.''

Date of issuance: July 1, 2004.

Effective date: As of the date of issuance and shall be implemented within 60 days from the date of issuance.

Amendment Nos.: 113 and 113.

Facility Operating License Nos. NPF–87 and NPF–89: The amendments revised the Technical Specifications.

*Date of initial notice in **Federal Register:*** July 8, 2003 (68 FR 40721). The February 24, 2004, supplemental letter provided clarifying information that did not change the scope of the original **Federal Register** notice or the original no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 1, 2004.

No significant hazards consideration comments received: No.

Dated in Rockville, Maryland, this 12th day of July 2004.

For the Nuclear Regulatory Commission.

Ledyard B. Marsh,

Director, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 04–16157 Filed 7–19–04; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

[OMB No. 3206–0165]

Proposed Collection; Comment Request for Revised Information Collections

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13), this notice announces that the Office of Personnel Management intends to submit to the Office of Management and Budget a request for clearance of revised information collections. Depending upon the type of background investigation requested by the Federal agency, the Investigative Request for Employment Data and Supervisor information (INV 41), the Investigative Request for Personal Information (INV 42), the Investigative Request for Educational Registrar and Dean of Students Record Data (INV 43), and the Investigative Request for Law Enforcement Data (INV 44) are forms used in the processing of background investigations to assist in determining whether an applicant is suitable for Federal employment or should be granted a security clearance. OPM sends INV 41 questionnaires to past and present employers and supervisors identified on the applicant's investigative questionnaire. The form asks the recipient to address such questions as the reason the applicant left the employment and their eligibility for rehire. OPM sends INV 42 questionnaires to individuals listed by the subject of investigation as people knowledgeable of the applicant on the investigative questionnaire. OPM sends INV 43 questionnaires to registrars and dean of students of the educational institutions listed by the subject of investigation to verify enrollment and degree information, and determine whether there is any relevant adverse information. OPM sends the INV 44 questionnaires to law enforcement jurisdictions in which the subject has had any significant period of activity during the designated scope of investigation. The INV 44 inquires about any outstanding warrants or record of criminal activity involving the subject of investigation.

The INV 41, INV 42, INV 43, and INV 44 ask the recipient to respond to questions concerning the applicant's honesty and integrity, as well as other security-related questions involving general conduct, use of intoxicants, finances and mental health.

Comments are particularly invited on:

• Whether this collection of information is necessary for the proper performance of functions of the Office of Personnel Management and its Center for Federal Investigative Services, which administers its background investigations;

• Whether our estimate of the public burden of this collection is accurate, and based on valid assumptions and methodology; and,

• Ways in which we can minimize the burden of the collection of information on those who are asked to respond, through the use of the appropriate technological collection techniques or other forms of information technology.

It is estimated that 1.12 million INV 41 inquiries are sent to supervisors and employers annually. Each form takes approximately five minutes to complete. The estimated annual burden is approximately 93,300 hours. It is estimated that 434,000 INV 42 inquiries are sent to individuals annually. Each form takes approximately five minutes to complete. The estimated annual burden is approximately 36,170 hours. It is estimated that 168,000 INV 43 inquiries are sent to educational institutions annually. Each form takes approximately five minutes to complete. The estimated annual burden is approximately 14,000 hours. It is estimated that 871,000 INV 44 inquiries are sent to law enforcement agencies annually. Each form takes approximately five minutes to complete. The estimated annual burden is approximately 72,583 hours. The total number of respondents for the INV 41, INV 42, INV 43, and INV 44 is 1,417,500 and the total estimated burden is 118,125 hours.

For copies of this proposal, contact Mary Beth Smith-Toomey on (202) 606–8358, Fax (202) 418–3251 or e-mail to *mbtoomey@opm.gov.* Please be sure to include a mailing address with your request.

DATES: Comments on this proposal should be received within 60 calendar days from the date of this publication.

ADDRESSES: Send or deliver comments to: Kathy Dillaman, Deputy Associate Director, Center for Federal Investigative Services, U.S. Office of Personnel Management, 1900 E. Street, Room 5416, Washington, DC 20415.

FOR INFORMATION REGARDING ADMINISTRATIVE COORDINATION CONTACT: Sabrina Price—Program Analyst, Program Services Group, Center for Federal Investigative Services, U.S. Office of Personnel Management, (202) 606–3534.

U.S. Office of Personnel Management.

Kay Coles James,

Director.

[FR Doc. 04–16398 Filed 7–19–04; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Proposed Collection; Comment Request for Revised Information Collections Fingerprint Chart Standard Form 87 (SF–87) and Standard Form 87A (SF–87A), OMB No. 3206–0150

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13), this notice announces that the Office of Personnel Management (OPM) intends to submit to the Office of Management and Budget a request for clearance of revised information collections. The Fingerprint Charts (SF–87 and SF–87A) are used in processing fingerprint checks submitted to the Federal Bureau of Investigation (FBI) to assist in determining whether an applicant is suitable for Federal employment and should be granted a security clearance.

The SF–87 and SF–87A are completed by:

• Applicants to Government positions;

• Incumbents of Government positions;

• Contractors for the Government; and

• Military personnel.

The SF–87 and SF–87A are used as the basis for criminal history checks to establish suitability for:

• Initial employment or retention as a Government employee;

• Initial employment or retention as a contract employee;

• Public trust positions; and

• Sensitive or national security positions requiring access to classified national security information or special nuclear information or material.

Comments are particularly invited on:

• Whether this collection of information is necessary for the proper performance of functions of the Office of Personnel Management and its Center for Federal Investigative Services, which administers its background investigations.

• Whether our estimate of the public burden of this collection is accurate, and based on valid assumptions and methodology; and

• Ways in which we can minimize the burden of the collection of information on those who are asked to respond, through the use of the appropriate technological collection techniques or other forms of information technology.

It is estimated that 363,500 SF–87 or SF–87A inquiries are sent to individuals annually. Each form takes approximately five minutes to complete. The estimated annual burden is approximately 28,630 hours.

For copies of this proposal, contact Mary Beth Smith-Toomey on (202) 606–8358, fax (202) 418–3251 or e-mail to *mbtoomey@opm.gov.* Please be sure to include a mailing address with your request.

DATES: Comments on this proposal should be received within 60 calendar days from the date of this publication.

ADDRESSES: Send or deliver comments to: Kathy Dillaman, Deputy Associate Director, Center for Federal Investigative Services, U.S. Office of Personnel Management, 1900 E. Street, Room 5416, Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: SaBrina Price—Program Analyst, Program Services Group, Center for Federal Investigative Services, U.S. Office of Personnel Management, (202) 606–3534.

U.S. Office of Personnel Management.

Kay Coles James,

Director.

[FR Doc. 04–16399 Filed 7–19–04; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: This gives notice of OPM decisions granting authority to make appointments under Schedules A, B and C in the excepted service as required by 5 CFR 6.6 and 213.103 (b).

FOR FURTHER INFORMATION CONTACT: Ms. Cathy Penn, Center for Leadership and Executive Resources Policy, Division for Strategic Human Resources Policy, 202–606–2671.

SUPPLEMENTARY INFORMATION: Appearing in the listing below are the individual authorities established under Schedule C between June 1, 2004, and June 30, 2004. Future notices will be published on the fourth Tuesday of each month, or as soon as possible thereafter. A consolidated listing of all authorities as of June 30 is published each year.

Schedule A: No Schedule A appointments for June 2004.

Schedule B: No Schedule B appointments for June 2004.

Schedule C: The following Schedule C appointments were approved for June 2004:

Section 213.3303 Executive Office of the President

Office of Management and Budget

BOGS00022 Confidential Assistant to the Executive Associate Director. Effective June 10, 2004.

BOGS60034 Confidential Assistant to the Director, Office of Federal Financial Management. Effective June 10, 2004.

Office of National Drug Control Policy

QQGS60001 Special Assistant to the Director. Effective June 18, 2004.

Presidents Commission on White House Fellowships

WHGS00013 Education Director to the Director, President's Commission on White House Fellowships. Effective June 14, 2004.

Section 213.334 Department of State

DSGS60755 Special Assistant to the Assistant Secretary, Bureau of International Narcotics and Law Enforcement. Effective June 03, 2004.

DSGS60775 Special Assistant to the Senior Advisor to the Secretary and White House Liaison. Effective June 14, 2004.

DSGS60766 Supervisory Protocol Officer (Visits) to the Deputy Chief of Protocol. Effective June 15, 2004.

DSGS60774 Special Assistant to the Coordinator. Effective June 17, 2004.

DSGS60776 Special Assistant to the Coordinator. Effective June 17, 2004.

DSGS60777 Special Assistant to the Under Secretary for Public Diplomacy and Public Affairs. Effective June 24, 2004.

Section 213.3306 Department of Defense

DDGS16807 Defense Fellow to the Special Assistant to the Secretary of Defense for White House Liaison. Effective June 3, 2004.

DDGS16816 Defense Fellow to the Special Assistant to the Secretary of Defense for White House Liaison. Effective June 3, 2004.

DDGS16811 Special Assistant to the Director, Small and Disadvantaged Business Utilities. Effective June 18, 2004.

DDGS16818 Special Assistant to the Deputy Assistant Secretary of Defense (Military Community and Family Policy). Effective June 18, 2004.

DDGS16820 Defense Fellow to the Special Assistant to the Secretary of Defense for White House Liaison. Effective June 18, 2004.

DDGS16825 Personal & Confidential Assistant to the Principal Deputy Under Secretary of Defense for Policy. Effective June 22, 2004.

Section 213.3307 Department of the Army

DWGS00079 Confidential Assistant to the Principal Deputy Assistant Secretary of the Army (Manpower and Reserve Affairs)/Deputy Assistant Secretary (Training, Readiness and Mobilization). Effective June 3, 2004.

Section 213.3310 Department of Justice

DJGS00236 Press Assistant to the Director, Office of Public Affairs. Effective June 01, 2004.

DJGS60265 Press Assistant to the Director, Office of Public Affairs. Effective June 24, 2004.

Section 213.3311 Department of Homeland Security

DMGS00235 Press Secretary for Bureau of Citizenship and Immigration to the Chief of Staff. Effective June 1, 2004.

DMGS00242 Confidential Assistant to the Director, Local Affairs. Effective June 1, 2004.

DMGS00243 Writer-Editor to the Director of Speechwriting. Effective June 1, 2004.

DMGS00244 Operations Assistant to the Special Assistant. Effective June 2, 2004.

DMGS00238 Executive Assistant to the Director, Office of Systems Engineering and Acquisition. Effective June 4, 2004.

DMGS00241 Assistant Director of Legislative Affairs for Science and Technology to the Assistant Secretary for Legislative Affairs. Effective June 7, 2004.

DMGS00246 Special Assistant to the Assistant Secretary for Information Analysis. Effective June 15, 2004.

Section 213.3313 Department of Agriculture

DAGS00717 Special Assistant to the Administrator, Food and Nutrition Service. Effective June 4, 2004.

DAGS00719 Special Assistant to the Deputy Under Secretary for Rural Economic Community Development. Effective June 7, 2004.

DAGS00715 Confidential Assistant to the Secretary of Agriculture. Effective June 14, 2004.

DAGS00720 Special Assistant to the Administrator, Rural Utilities Service. Effective June 14, 2004.

DAGS00718 Special Assistant to the Administrator, Farm Service Agency. Effective June 18, 2004.

Section 213.3314 Department of Commerce

DCGS60193 Special Assistant to the Deputy Assistant Secretary for Transportation and Machinery. Effective June 10, 2004.

Section 213.3315 Department of Labor

DLGS60055 Special Assistant to the Assistant Secretary for Public Affairs. Effective June 2, 2004.

DLGS60135 Special Assistant to the Secretary of Labor. Effective June 22, 2004.

DLGS60177 Special Assistant to the Assistant Secretary for Public Affairs. Effective June 22, 2004.

Section 213.3316 Department of Health and Human Services

DHGS60685 Special Assistant to the Deputy Assistant Secretary for Legislation (Planning & Budget). Effective June 2, 2004.

DHGS60686 Special Assistant to the Director of Medicare Outreach and Special Advisor to the Secretary. Effective June 17, 2004.

Section 213.3317 Department of Education

DBGS00329 Special Assistant to the Chief of Staff. Effective June 2, 2004.

DBGS00333 Confidential Assistant to the Senior Advisor to the Secretary. Effective June 2, 2004.

DBGS00330 Confidential Assistant to the Deputy Under Secretary for Innovation and Improvement. Effective June 4, 2004.

DBGS00334 Special Assistant to the Deputy Secretary of Education. Effective June 14, 2004.

DBGS00335 Confidential Assistant to the Deputy Secretary of Education. Effective June 14, 2004.

DBGS00336 Special Assistant to the Senior Advisor to the Secretary. Effective June 16, 2004.

DBGS00337 Confidential Assistant to the Senior Advisor to the Secretary. Effective June 25, 2004.

Section 213.3325 United States Tax Court

JCGS60042 Secretary (Confidential Assistant) to the Chief Judge. Effective June 15, 2004.

Section 213.3328 Broadcasting Board of Governors

IBGS00017 Special Assistant to the Chairman, Broadcasting Board of Governors. Effective June 25, 2004.

Section 213.3331 Department of Energy

DEGS00421 Deputy Assistant Secretary for Budget and Appropriations to the Assistant Secretary for Congressional and Intergovernmental Affairs. Effective June 3, 2004.

DEGS00422 Deputy Director of Advance to the Director, Office of Scheduling and Advance. Effective June 18, 2004.

Section 213.3332 Small Business Administration

SBGS60550 Assistant Administrator for Congressional and Legislative Affairs to the Associate Administrator for Congressional and Legislative Affairs. Effective June 2, 2004.

SBGS60060 Special Assistant to the Associate Deputy Administrator for Management and Administration. Effective June 10, 2004.

Section 213.3337 General Services Administration

GSGS60079 Senior Advisor to the Regional Administrator, Region 2, New York. Effective June 7, 2004.

GSGS00157 Chief of Staff to the Commissioner, Public Buildings Service. Effective June 24, 2004.

Section 213.3342 Export-Import Bank

BGS60054 Special Assistant to the Vice President—Operations. Effective June 18, 2004.

Section 213.3384 Department of Housing and Urban Development

DUGS60423 Staff Assistant to the Assistant Secretary for Administration. Effective June 4, 2004.

Section 213.3394 Department of Transportation

DTGS60342 Special Assistant for Scheduling and Advance to the Director for Scheduling and Advance. Effective June 4, 2004.

DTGS60317 Deputy Assistant Administrator for Government and Industry Affairs to the Assistant Administrator for Government and Industry Affairs. Effective June 10, 2004.

DTGS60369 Deputy Assistant Secretary for Governmental Affairs to the Assistant Secretary for Governmental Affairs. Effective June 16, 2004.

Section 213.3396 National Transportation Safety Board

TBGS60104 Special Assistant to a Member. Effective June 18, 2004.

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., P.218

Office of Personnel Management.

Kay Coles James,

Director.

[FR Doc. 04–16400 Filed 7–19–04; 8:45 am]

BILLING CODE 6352–39–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Filings and Information Services, 450 Fifth Street, NW., Washington, DC 20549.

Extension:

Rule 15g–9; SEC File No. 270–325; OMB Control No. 3235–0385.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comment on the collection of information described below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Section 15(c)(2) of the Securities Exchange Act of 1934 (the ''Exchange Act'') authorizes the Commission to promulgate rules that prescribe means reasonably designed to prevent fraudulent, deceptive, or manipulative practices in connection with over-the-counter (''OTC'') securities transactions. Pursuant to this authority, the Commission in 1989 adopted Rule 15a–6 (the ''Rule''), which was subsequently redesignated as Rule 15g–9, 17 CFR 240.15g–9. The Rule requires broker-dealers to produce a written suitability determination for, and to obtain a written customer agreement to, certain recommended transactions in low-priced stocks that are not registered on a national securities exchange or authorized for trading on NASDAQ, and whose issuers do not meet certain minimum financial standards. The Rule is intended to prevent the indiscriminate use by broker-dealers of fraudulent, high pressure telephone sales campaigns to sell low-priced securities to unsophisticated customers. The staff estimates that approximately 240 broker-dealers incur an average burden of 78 hours per year to comply with this rule. Thus, the total burden hours to comply with the Rule is estimated at 18,720 hours (240 x 78).

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your comments to R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

Dated: July 13, 2004.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–16436 Filed 7–19–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50012; File No. PCAOB–2004–05]

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rule on Auditing Standard No. 3, Audit Documentation, and an Amendment to Interim Auditing Standards—AU Sec. 543.12, Part of Audit Performed by Other Independent Auditors

July 14, 2004.

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the ''Act''), notice is hereby given that on June 18, 2004, the Public Company Accounting Oversight Board (the ''Board'' or the ''PCAOB'') filed with the Securities and Exchange Commission (the ''Commission'' or ''SEC'') the proposed rules described in Items I and II below, which items have been prepared by the Board and are presented here in the form submitted by the Board. The Commission is publishing this notice to solicit comments on the proposed rules from interested persons. The text of the proposed rules consist of (1) proposed Auditing Standard No. 3, *Audit Documentation* and Appendix A, Background and Basis for Conclusions, and (2) proposed Amendment to Interim Auditing Standard—AU sec. 543.12, *Part of Audit Performed by Other Independent Auditors.*

I. Board's Statement of the Terms of Substance of the Proposed Rules

On June 9, 2004, the Board adopted Auditing Standard No. 3, *Audit Documentation,* and an amendment to interim auditing standards (''the proposed rules''). The text of the proposed rules is as follows:

Auditing Standard No. 3—Audit Documentation

Introduction

1. This standard establishes general requirements for documentation the auditor should prepare and retain in connection with engagements conducted pursuant to the standards of the Public Company Accounting Oversight Board (''PCAOB''). Such engagements include an audit of financial statements, an audit of internal control over financial reporting, and a review of interim financial information. This standard does not replace specific documentation requirements of other standards of the PCAOB.

Objectives of Audit Documentation

2. *Audit documentation* is the written record of the basis for the auditor's conclusions that provides the support for the auditor's representations, whether those representations are contained in the auditor's report or otherwise. Audit documentation also facilitates the planning, performance, and supervision of the engagement, and is the basis for the review of the quality of the work because it provides the reviewer with written documentation of the evidence supporting the auditor's significant conclusions. Among other things, audit documentation includes records of the planning and performance of the work, the procedures performed, evidence obtained, and conclusions reached by the auditor. Audit documentation also may be referred to as *work papers* or *working papers*.

Note: An auditor's representations to a company's board of directors or audit committee, stockholders, investors, or other interested parties are usually included in the auditor's report accompanying the financial statements of the company. The auditor also might make oral representations to the company or others, either on a voluntary basis or if necessary to comply with professional standards, including in connection with an engagement for which an auditor's report is not issued. For example, although an auditor might not issue a report in connection with an engagement to review interim financial information, he or she ordinarily would make oral representations about the results of the review.

3. Audit documentation is reviewed by members of the engagement team performing the work and might be reviewed by others. Reviewers might include, for example:

a. Auditors who are new to an engagement and review the prior year's documentation to understand the work performed as an aid in planning and performing the current engagement.

b. Supervisory personnel who review documentation prepared by assistants on the engagement.

c. Engagement supervisors and engagement quality reviewers who review documentation to understand how the engagement team reached significant conclusions and whether there is adequate evidential support for those conclusions.

d. A successor auditor who reviews a predecessor auditor's audit documentation.

e. Internal and external inspection teams that review documentation to assess audit quality and compliance with auditing and related professional practice standards; applicable laws, rules, and regulations; and the auditor's own quality control policies.

f. Others, including advisors engaged by the audit committee or representatives of a party to an acquisition.

Audit Documentation Requirement

4. The auditor must prepare audit documentation in connection with each engagement conducted pursuant to the standards of the PCAOB. Audit documentation should be prepared in sufficient detail to provide a clear understanding of its purpose, source, and the conclusions reached. Also, the documentation should be appropriately organized to provide a clear link to the significant findings or issues.[1] Examples of audit documentation include memoranda, confirmations, correspondence, schedules, audit programs, and letters of representation. Audit documentation may be in the form of paper, electronic files, or other media.

5. Because audit documentation is the written record that provides the support for the representations in the auditor's report, it should:

a. Demonstrate that the engagement complied with the standards of the PCAOB,

b. Support the basis for the auditor's conclusions concerning every relevant financial statement assertion, and

c. Demonstrate that the underlying accounting records agreed or reconciled with the financial statements.

6. The auditor must document the procedures performed, evidence obtained, and conclusions reached with respect to relevant financial statement assertions.[2] Audit documentation must clearly demonstrate that the work was in fact performed. This documentation requirement applies to the work of all those who participate in the engagement as well as to the work of specialists the auditor uses as evidential matter in evaluating relevant financial statement assertions. Audit documentation must contain sufficient information to enable an experienced auditor, having no previous connection with the engagement:

a. To understand the nature, timing, extent, and results of the procedures performed, evidence obtained, and conclusions reached, and

b. To determine who performed the work and the date such work was completed as well as the person who reviewed the work and the date of such review.

Note: An *experienced auditor* has a reasonable understanding of audit activities and has studied the company's industry as well as the accounting and auditing issues relevant to the industry.

7. In determining the nature and extent of the documentation for a financial statement assertion, the auditor should consider the following factors:

- Nature of the auditing procedure;
- Risk of material misstatement associated with the assertion;
- Extent of judgment required in performing the work and evaluating the results, for example, accounting estimates require greater judgment and commensurately more extensive documentation;
- Significance of the evidence obtained to the assertion being tested; and
- Responsibility to document a conclusion not readily determinable from the documentation of the procedures performed or evidence obtained.

Application of these factors determines whether the nature and extent of audit documentation is adequate.

8. In addition to the documentation necessary to support the auditor's final conclusions, audit documentation must include information the auditor has identified relating to significant findings or issues that is inconsistent with or contradicts the auditor's final conclusions. The relevant records to be

[1] *See* paragraph 12 of this standard for a description of significant findings or issues.

[2] *Relevant financial statement assertions* are described in paragraphs 68–70 of PCAOB Auditing Standard No. 2, *An Audit of Internal Control Over Financial Reporting Performed in Conjunction with An Audit of Financial Statements.*

retained include, but are not limited to, procedures performed in response to the information, and records documenting consultations on, or resolutions of, differences in professional judgment among members of the engagement team or between the engagement team and others consulted.

9. If, after the documentation completion date (defined in paragraph 15), the auditor becomes aware, as a result of a lack of documentation or otherwise, that audit procedures may not have been performed, evidence may not have been obtained, or appropriate conclusions may not have been reached, the auditor must determine, and if so demonstrate, that sufficient procedures were performed, sufficient evidence was obtained, and appropriate conclusions were reached with respect to the relevant financial statement assertions. To accomplish this, the auditor must have persuasive other evidence. Oral explanation alone does not constitute persuasive other evidence, but it may be used to clarify other written evidence.

- If the auditor determines and demonstrates that sufficient procedures were performed, sufficient evidence was obtained, and appropriate conclusions were reached, but that documentation thereof is not adequate, then the auditor should consider what additional documentation is needed. In preparing additional documentation, the auditor should refer to paragraph 16.
- If the auditor cannot determine or demonstrate that sufficient procedures were performed, sufficient evidence was obtained, or appropriate conclusions were reached, the auditor should comply with the provisions of AU sec. 390, *Consideration of Omitted Procedures After the Report Date*.

Documentation of Specific Matters

10. Documentation of auditing procedures that involve the inspection of documents or confirmation, including tests of details, tests of operating effectiveness of controls, and walkthroughs, should include identification of the items inspected. Documentation of auditing procedures related to the inspection of significant contracts or agreements should include abstracts or copies of the documents.

Note: The identification of the items inspected may be satisfied by indicating the source from which the items were selected and the specific selection criteria, for example:

- If an audit sample is selected from a population of documents, the documentation should include identifying characteristics (for example, the specific check numbers of the items included in the sample).
- If all items over a specific dollar amount are selected from a population of documents, the documentation need describe only the scope and the identification of the population (for example, all checks over $10,000 from the October disbursements journal).
- If a systematic sample is selected from a population of documents, the documentation need only provide an identification of the source of the documents and an indication of the starting point and the sampling interval (for example, a systematic sample of sales invoices was selected from the sales journal for the period from October 1 to December 31, starting with invoice number 452 and selecting every 40th invoice).

11. Certain matters, such as auditor independence, staff training and proficiency and client acceptance and retention, may be documented in a central repository for the public accounting firm (''firm'') or in the particular office participating in the engagement. If such matters are documented in a central repository, the audit documentation of the engagement should include a reference to the central repository. Documentation of matters specific to a particular engagement should be included in the audit documentation of the pertinent engagement.

12. The auditor must document significant findings or issues, actions taken to address them (including additional evidence obtained), and the basis for the conclusions reached in connection with each engagement. *Significant findings or issues* are substantive matters that are important to the procedures performed, evidence obtained, or conclusions reached, and include, but are not limited to, the following:

a. Significant matters involving the selection, application, and consistency of accounting principles, including related disclosures. Significant matters include, but are not limited to, accounting for complex or unusual transactions, accounting estimates, and uncertainties as well as related management assumptions.

b. Results of auditing procedures that indicate a need for significant modification of planned auditing procedures, the existence of material misstatements, omissions in the financial statements, the existence of significant deficiencies, or material weaknesses in internal control over financial reporting.

c. Audit adjustments. For purposes of this standard, an *audit adjustment* is a correction of a misstatement of the financial statements that was or should have been proposed by the auditor, whether or not recorded by management, that could, either individually or when aggregated with other misstatements, have a material effect on the company's financial statements.

d. Disagreements among members of the engagement team or with others consulted on the engagement about final conclusions reached on significant accounting or auditing matters.

e. Circumstances that cause significant difficulty in applying auditing procedures.

f. Significant changes in the assessed level of audit risk for particular audit areas and the auditor's response to those changes.

g. Any matters that could result in modification of the auditor's report.

13. The auditor must identify all significant findings or issues in an *engagement completion document.* This document may include either all information necessary to understand the significant findings, issues or cross-references, as appropriate, to other available supporting audit documentation. This document, along with any documents cross-referenced, should collectively be as specific as necessary in the circumstances for a reviewer to gain a thorough understanding of the significant findings or issues.

Note: The engagement completion document prepared in connection with the annual audit should include documentation of significant findings or issues identified during the review of interim financial information.

Retention of and Subsequent Changes to Audit Documentation

14. The auditor must retain audit documentation for seven years from the date the auditor grants permission to use the auditor's report in connection with the issuance of the company's financial statements (*report release date*), unless a longer period of time is required by law. If a report is not issued in connection with an engagement, then the audit documentation must be retained for seven years from the date that fieldwork was substantially completed. If the auditor was unable to complete the engagement, then the audit documentation must be retained for seven years from the date the engagement ceased.

15. Prior to the report release date, the auditor must have completed all necessary auditing procedures and obtained sufficient evidence to support the representations in the auditor's report. A complete and final set of audit documentation should be assembled for retention as of a date not more than 45 days after the report release date (*documentation completion date*). If a

report is not issued in connection with an engagement, then the documentation completion date should not be more than 45 days from the date that fieldwork was substantially completed. If the auditor was unable to complete the engagement, then the documentation completion date should not be more than 45 days from the date the engagement ceased.

16. Circumstances may require additions to audit documentation after the report release date. Audit documentation must not be deleted or discarded after the documentation completion date, however, information may be added. Any documentation added must indicate the date the information was added, the name of the person who prepared the additional documentation, and the reason for adding it.

17. Other standards require the auditor to perform procedures subsequent to the report release date in certain circumstances. For example, in accordance with AU sec. 711, *Filings Under Federal Securities Statutes*, auditors are required to perform certain procedures up to the effective date of a registration statement.[3] The auditor must identify and document any additions to audit documentation as a result of these procedures consistent with the previous paragraph.

18. The office of the firm issuing the auditor's report is responsible for ensuring that all audit documentation sufficient to meet the requirements of paragraphs 4–13 of this standard is prepared and retained. Audit documentation supporting the work performed by other auditors (including auditors associated with other offices of the firm, affiliated firms, or non-affiliated firms), must be retained by or be accessible to the office issuing the auditor's report.[4]

19. In addition, the office issuing the auditor's report must obtain, and review and retain, prior to the report release date, the following documentation related to the work performed by other auditors (including auditors associated with other offices of the firm, affiliated firms, or non-affiliated firms):

a. An engagement completion document consistent with paragraphs 12 and 13.

Note: This engagement completion document should include all cross-referenced, supporting audit documentation.

b. A list of significant fraud risk factors, the auditor's response, and the results of the auditor's related procedures.

c. Sufficient information relating to any significant findings or issues that are inconsistent with or contradict the final conclusions, as described in paragraph 8.

d. Any findings affecting the consolidating or combining of accounts in the consolidated financial statements.

e. Sufficient information to enable the office issuing the auditor's report to agree or to reconcile the financial statement amounts audited by the other auditor to the information underlying the consolidated financial statements.

f. A schedule of audit adjustments, including a description of the nature and cause of each misstatement.

g. All significant deficiencies and material weaknesses in internal control over financial reporting, including a clear distinction between those two categories.

h. Letters of representations from management.

i. All matters to be communicated to the audit committee.

If the auditor decides to make reference in his or her report to the audit of the other auditor, however, the auditor issuing the report need not perform the procedures in this paragraph and, instead, should refer to AU sec. 543, *Part of Audit Performed by Other Independent Auditors.*

20. The auditor also might be required to maintain documentation in addition to that required by this standard.[5]

Effective Date

21. This standard is effective for audits of financial statements, which may include an audit of internal control over financial reporting, with respect to fiscal years ending on or after [the later of November 15, 2004, or 30 days after the date of approval of this standard by the SEC]. For other engagements conducted pursuant to the standards of the PCAOB, including reviews of interim financial information, this standard takes effect beginning with the first quarter ending after the first financial statement audit covered by this standard.

Appendix A—Background and Basis for Conclusions

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[3] Section 11 of the Securities Act of 1933 makes specific mention of the auditor's responsibility as an expert when the auditor's report is included in a registration statement under the 1933 Act.

[4] Section 106(b) of the Sarbanes-Oxley Act of 2002 imposes certain requirements concerning production of the work papers of a foreign public accounting firm on whose opinion or services the auditor relies. Compliance with this standard does not substitute for compliance with Section 106(b) or any other applicable law.

[5] For example, the SEC requires auditors to retain, in addition to documentation required by this standard, memoranda, correspondence, communications (for example, electronic mail), other documents, and records (in the form of paper, electronic, or other media) that are created, sent, or received in connection with an engagement conducted in accordance with auditing and related professional practice standards and that contain conclusions, opinions, analyses, or data related to the engagement. (*Retention of Audit and Review Records*, 17 CFR 210.2–06, effective for audits or reviews completed on or after October 31, 2003.)

Introduction

A1. This appendix summarizes considerations that the Public Company Accounting Oversight Board (''PCAOB'' or ''Board'') deemed significant in developing this standard. This appendix includes reasons for accepting certain views and rejecting others.

A2. Section 103(a)(2)(A)(i) of the Sarbanes-Oxley Act of 2002 (the ''Act'') directs the Board to establish auditing standards that require registered public accounting firms to prepare and maintain, for at least seven years, audit documentation ''in sufficient detail to support the conclusions reached'' in the auditor's report. Accordingly, the Board has made audit documentation a priority.

Background

A3. Auditors support the conclusions in their reports with a work product called *audit documentation*, also referred to as *working papers* or *work papers*. Audit documentation supports the basis for the conclusions in the auditor's report. Audit documentation also facilitates the planning, performance, and supervision of the engagement and provides the basis for the review of the quality of the work by providing the reviewer with written documentation of the evidence supporting the auditor's significant conclusions. Examples of audit documentation include memoranda, confirmations, correspondence, schedules, audit programs, and letters of representation. Audit documentation may be in the form of paper, electronic files, or other media.

A4. The Board's standard on audit documentation is one of the fundamental building blocks on which both the integrity of audits and the Board's oversight will rest. The Board believes that the quality and integrity of an audit depends, in large part, on the existence of a complete and understandable record of the work the auditor performed, the conclusions the auditor reached, and the evidence the auditor obtained that supports those conclusions. Meaningful reviews, whether by the Board in the context of its inspections or through other reviews, such as internal quality control reviews, would be difficult or impossible without adequate documentation. Clear and comprehensive audit documentation is essential to enhance the quality of the audit and, at the same time, to allow the Board to fulfill its mandate to inspect registered public accounting firms to assess the degree of compliance of those firms with applicable standards and laws.

A5. The Board began a standards-development project on audit documentation by convening a public roundtable discussion on September 29, 2003, to discuss issues and hear views on the subject. Participants at the roundtable included representatives from public companies, public accounting firms, investor groups, and regulatory organizations.

A6. Prior to this roundtable discussion, the Board prepared and released a briefing paper on audit documentation that posed several questions to help identify the objectives—and the appropriate scope and form—of audit documentation. In addition, the Board asked participants to address specific issues in practice relating to, among other things, changes in audit documentation after release of the audit report, essential elements and the appropriate amount of detail of audit documentation, the effect on audit documentation of a principal auditor's decision to use the work of other auditors, and retention of audit documentation. Based on comments made at the roundtable, advice from the Board's staff, and other input the Board received, the Board determined that the pre-existing standard on audit documentation, Statement on Auditing Standards (''SAS'') No. 96, *Audit Documentation*, was insufficient for the Board to discharge appropriately its standard-setting obligations under Section 103(a) of the Act. In response, the Board developed and issued for comment, on November 17, 2003, a proposed auditing standard titled, *Audit Documentation.*

A7. The Board received 38 comment letters from a variety of interested parties, including auditors, regulators, professional associations, government agencies, and others. Those comments led to some changes in the requirements of the standard. Also, other changes made the requirements easier to understand. The following sections summarize significant views expressed in those comment letters and the Board's responses to those comments.

Objective of This Standard

A8. The objective of this standard is to improve audit quality and enhance public confidence in the quality of auditing. Good audit documentation improves the quality of the work performed in many ways, including, for example:

- Providing a record of actual work performed, which provides assurance that the auditor accomplishes the planned objectives.
- Facilitating the reviews performed by supervisors, managers, engagement partners, engagement quality reviewers,[1] and PCAOB inspectors.
- Improving effectiveness and efficiency by reducing time-consuming, and sometimes inaccurate, oral explanations of what was done (or not done).

A9. The documentation requirements in this standard should result in more effective and efficient oversight of registered public accounting firms and associated persons, thereby improving audit quality and enhancing investor confidence.

A10. Inadequate audit documentation diminishes audit quality on many levels. First, if audit documentation does not exist for a particular procedure or conclusion related to a significant matter, it casts doubt as to whether the necessary work was done. If the work was not documented, then it becomes difficult for the engagement team, and others, to know what was done, what conclusions were reached, and how those conclusions were reached. In addition, good audit documentation is very important in an environment in which engagement staff changes or rotates. Due to engagement staff turnover, knowledgeable staff on an engagement may not be available for the next engagement.

Audit Programs

A11. Several commenters suggested that audit documentation should include audit programs. Audit programs were specifically mentioned in SAS No. 96 as a form of audit documentation.

A12. The Board accepted this recommendation, and paragraph 4 in the final standard includes audit programs as an example of documentation. Audit programs may provide evidence of audit planning as well as limited evidence of the execution of audit procedures, but the Board believes that signed-off audit programs should generally not be used as the sole documentation that a procedure was performed, evidence was obtained, or a conclusion was reached. An audit program aids in the conduct and supervision of an engagement, but completed and initialed audit program steps should be supported with proper documentation in the working papers.

Reviewability Standard

A13. The proposed standard would have adapted a standard of reviewability from the U.S. General Accounting Office's (''GAO'') documentation standard for government and other audits conducted in accordance with generally accepted government auditing standards (''GAGAS''). The GAO standard provides that ''Audit documentation related to planning, conducting, and reporting on the audit should contain sufficient information to enable an experienced auditor who has had no previous connection with the audit to ascertain from the audit documentation the evidence that supports the auditors' significant judgments and conclusions.''[2] This requirement has been important in the field of government auditing because government audits have long been reviewed by GAO auditors who, although experienced in auditing, do not participate in the actual audits. Moreover, the Panel on Audit Effectiveness recommended that sufficient, specific requirements for audit documentation be established to enable public accounting firms' internal inspection teams as well as others, including reviewers outside of the firms, to assess the quality of engagement performance.[3] Audits and reviews of issuers' financial statements will now, under the Act, be subject to review by PCAOB inspectors. Therefore, a documentation standard that enables an inspector to understand the work that was performed in an audit or review is appropriate.

A14. Accordingly, the Board's proposed standard would have required that audit documentation contain sufficient information

[1] The engagement quality reviewer is referred to as the concurring partner reviewer in the membership requirements of the AICPA SEC Practice Section. The Board adopted certain of these membership requirements as they existed on April 16, 2003. Some firms also may refer to this designated reviewer as the second partner reviewer.

[2] U.S. General Accounting Office, *Government Auditing Standards,* ''Field Work Standards for Financial Audits'' (2003 Revision), paragraph 4.22.

[3] Panel on Audit Effectiveness, *Report and Recommendations* (Stamford, Ct: Public Oversight Board, August 31, 2000).

to enable an experienced auditor, having no previous connection with the engagement, to understand the work that was performed, the name of the person(s) who performed it, the date it was completed, and the conclusions reached. This experienced auditor also should have been able to determine who reviewed the work and the date of such review.

A15. Some commenters suggested that the final standard more specifically describe the qualifications of an experienced auditor. These commenters took the position that only an engagement partner with significant years of experience would have the experience necessary to be able to understand all the work that was performed and the conclusions that were reached. One commenter suggested that an auditor who is reviewing audit documentation should have experience and knowledge consistent with the experience and knowledge that the auditor performing the audit would be required to possess, including knowledge of the current accounting, auditing, and financial reporting issues of the company's industry. Another said that the characteristics defining an experienced auditor should be consistent with those expected of the auditor with final responsibility for the engagement.

A16. After considering these comments, the Board has provided additional specificity about the meaning of the term, *experienced auditor.* The standard now describes an experienced auditor as one who has a reasonable understanding of audit activities and has studied the company's industry as well as the accounting and auditing issues relevant to the industry.

A17. Some commenters also suggested that the standard, as proposed, did not allow for the use of professional judgment. These commenters pointed to the omission of a statement about professional judgment found in paragraph 4.23 of GAGAS that states, ''The quantity, type, and content of audit documentation are a matter of the auditors' professional judgment.'' A nearly identical statement was found in the interim auditing standard, SAS No. 96, *Audit Documentation.*

A18. Auditors exercise professional judgment in nearly every aspect of planning, performing, and reporting on an audit. Auditors also exercise professional judgment in the documentation of an audit and other engagements. An objective of this standard is to ensure that auditors give proper consideration to the need to document procedures performed, evidence obtained, and conclusions reached in light of time and cost considerations in completing an engagement.

A19. Nothing in the standard precludes auditors from exercising their professional judgment. Moreover, because professional judgment might relate to any aspect of an audit, the Board does not believe that an explicit reference to professional judgment is necessary every time the use of professional judgment may be appropriate.

Audit Documentation Must Demonstrate That the Work Was Done

A20. A guiding principle of the proposed standard was that auditors must document procedures performed, evidence obtained, and conclusions reached. This principle is not new and was found in the interim standard, SAS No. 96, *Audit Documentation,* which this standard supersedes. Audit documentation also should demonstrate compliance with the standards of the PCAOB and include justification for any departures.

A21. The proposed standard would have adapted a provision in the California Business and Professions Code which provides that if documentation does not exist, then there is a rebuttable presumption that the work had not been done.

A22. The objections to this proposal fell into two general categories: the effect of the rebuttable presumption on legal proceedings and the perceived impracticality of documenting every conversation or conclusion that affected the engagement. Discussion of these issues follows.

Rebuttable Presumption

A23. Commenters expressed concern about the effects of the proposed language on regulatory or legal proceedings outside the context of the PCAOB's oversight. They argued that the rebuttable presumption might be understood to establish evidentiary rules for use in judicial and administrative proceedings in other jurisdictions.

A24. Some commenters also had concerns that oral explanation alone would not constitute persuasive other evidence that work was done, absent any documentation. Those commenters argued that not allowing oral explanations when there was no documentation would essentially make the presumption ''irrebuttable.'' Moreover, those commenters argued that it was inappropriate for a professional standard to predetermine for a court the relative value of evidence.

A25. The Board believes that complete audit documentation is necessary for a quality audit or other engagement. The Board intends the standard to require auditors to document procedures performed, evidence obtained, and conclusions reached to improve the quality of audits. The Board also intends that a deficiency in documentation is a departure from the Board's standards. Thus, although the Board removed the phrase *rebuttable presumption*, the Board continues to stress, in paragraph 9 of the standard, that the auditor must have persuasive other evidence that the procedures were performed, evidence was obtained, and appropriate conclusions were reached with respect to relevant financial statement assertions.

A26. The term *should* (presumptively mandatory responsibility) was changed to *must* (unconditional responsibility) in paragraph 6 to establish a higher threshold for the auditor. Auditors have an unconditional requirement to document their work. Failure to discharge an unconditional responsibility is a violation of the standard and Rule 3100, which requires all registered public accounting firms to adhere to the Board's auditing and related professional practice standards in connection with an audit or review of an issuer's financial statements.

A27. The Board also added two new paragraphs to the final standard to explain the importance and associated responsibility of performing the work and adequately documenting all work that was performed. Paragraph 7 provides a list of factors the auditor should consider in determining the nature and extent of documentation. These factors should be considered by both the auditor in preparing the documentation and the reviewer in evaluating the documentation.

A28. In paragraph 9 of this standard, if, after the documentation completion date, as a result of a lack of documentation or otherwise, it appears that audit procedures may not have been performed, evidence may not have been obtained, or appropriate conclusions may not have been reached, the auditor must determine, and if so demonstrate, that sufficient procedures were performed, sufficient evidence was obtained, and appropriate conclusions were reached with respect to the relevant financial statement assertions. In those circumstances, for example, during an inspection by the Board or during the firm's internal quality control review, the auditor is required to demonstrate with persuasive other evidence that the procedures were performed, the evidence was obtained, and appropriate conclusions were reached. In this and similar contexts, oral explanation alone does not constitute persuasive other evidence. However, oral evidence may be used to clarify other written evidence.

A29. In addition, more reliable, objective evidence may be required depending on the nature of the test and the objective the auditor is trying to achieve. For example, if there is a high risk of a material misstatement with respect to a particular assertion, then the auditor should obtain and document sufficient procedures for the auditor to conclude on the fairness of the assertion.

Impracticality

A30. Some commenters expressed concern that the proposed standard could be construed or interpreted to require the auditor to document every conversation held with company management or among the engagement team members. Some commenters also argued that they should not be required to document every conclusion, including preliminary conclusions that were part of a thought process that may have led them to a different conclusion, on the ground that this would result in needless and costly work performed by the auditor. Commenters also expressed concern that an unqualified requirement to document procedures performed, evidence obtained, and conclusions reached without allowing the use of auditor judgment would increase the volume of documentation but not the quality. They stated that it would be unnecessary, time-consuming, and potentially counterproductive to require the auditor to make a written record of everything he or she did.

A31. The Board's standard distinguishes between (1) an audit procedure that must be documented and (2) a conversation with company management or among the members of the engagement team. Inquiries with management should be documented when an inquiry is important to a particular

procedure. The inquiry could take place during planning, performance, or reporting. The auditor need not document each conversation that occurred.

A32. A final conclusion is an integral part of a working paper, unless the working paper is only for informational purposes, such as documentation of a discussion or a process. This standard does not require that the auditor document each interim conclusion reached in arriving at the risk assessments or final conclusions. Conclusions reached early on during an audit may be based on incomplete information or an incorrect understanding. Nevertheless, auditors should document a final conclusion for every audit procedure performed, if that conclusion is not readily apparent based on documented results of the procedures.

A33. The Board also believes the reference to *specialists* is an important element of paragraph 6. Specialists play a vital role in audit engagements. For example, appraisers, actuaries, and environmental consultants provide valuable data concerning asset values, calculation assumptions, and loss reserves. When using the work of a specialist, the auditor must ensure that the specialist's work, as it relates to the audit objectives, also is adequately documented. For example, if the auditor relies on the work of an appraiser in obtaining the fair value of commercial property available for sale, then the auditor must ensure the appraisal report is adequately documented. Moreover, the term *specialist* in this standard is intended to include any specialist the auditor relies on in conducting the work, including those employed or retained by the auditor or by the company.

Audit Adjustments

A34. Several commenters recommended that the definition of *audit adjustments* in this proposed standard should be consistent with the definition contained in AU sec. 380, *Communication with Audit Committees.*

A35. Although the Board recognizes potential benefits of having a uniform definition of the term *audit adjustments,* the Board does not believe that the definition in AU sec. 380 is appropriate for this documentation standard because that definition was intended for communication with audit committees. The Board believes that the definition should be broader so that the engagement partner, engagement quality reviewer, and others can be aware of all proposed corrections of misstatements, whether or not recorded by the entity, of which the auditor is aware, that were or should have been proposed based on the audit evidence.

A36. Adjustments that should have been proposed based on known audit evidence are material misstatements that the auditor identified but did not propose to management. Examples include situations in which (1) the auditor identifies a material error but does not propose an adjustment and (2) the auditor proposes an adjustment in the working papers, but fails to note the adjustment in the summary or schedule of proposed adjustments.

Information That Is Inconsistent With or Contradicts the Auditor's Final Conclusions

A37. Paragraph .25 of AU sec. 326, *Evidential Matter,* states: ''In developing his or her opinion, the auditor should consider relevant evidential matter regardless of whether it appears to corroborate or to contradict the assertions in the financial statements.'' Thus, during the conduct of an audit, the auditor should consider all relevant evidential matter even though it might contradict or be inconsistent with other conclusions. Audit documentation must contain information or data relating to significant findings or issues that are inconsistent with the auditor's final conclusions on the relevant matter.

A38. Also, information that initially appears to be inconsistent or contradictory, but is found to be incorrect or based on incomplete information, need not be included in the final audit documentation, provided that the apparent inconsistencies or contradictions were satisfactorily resolved by obtaining complete and correct information. In addition, with respect to differences in professional judgment, auditors need not include in audit documentation preliminary views based on incomplete information or data.

Retention of Audit Documentation

A39. The proposed standard would have required an auditor to retain audit documentation for seven years after completion of the engagement, which is the minimum period permitted under Section 103(a)(2)(A)(i) of the Act. In addition, the proposed standard would have added a new requirement that the audit documentation must be assembled for retention within a reasonable period of time after the auditor's report is released. Such reasonable period of time should not exceed 45 days.

A40. In general, those commenting on this documentation retention requirement did not have concerns with the time period of 45 days to assemble the working papers. However, some commenters suggested the Board tie this 45-day requirement to the filing date of the company's financial statements with the SEC. One commenter recommended that the standard refer to the same trigger date for initiating both the time period during which the auditor should complete work paper assembly and the beginning of the seven-year retention period.

A41. For consistency and practical implications, the Board agreed that the standard should have the same date for the auditor to start assembling the audit documentation and initiating the seven-year retention period. The Board decided that the seven-year retention period begins on the *report release date,* which is defined as the date the auditor grants permission to use the auditor's report in connection with the issuance of the company's financial statements. In addition, auditors will have 45 days to assemble the complete and final set of audit documentation, beginning on the report release date. The Board believes that using the report release date is preferable to using the filing date of the company's financial statements, since the auditor has ultimate control over granting permission to use his or her report. If an auditor's report is not issued, then the audit documentation is to be retained for seven years from the date that fieldwork was substantially completed. If the auditor was unable to complete the engagement, then the seven-year period begins when the work on the engagement ceased.

Section 802 of Sarbanes-Oxley and the SEC's Implementing Rule

A42. Many commenters had concerns about the similarity in language between the proposed standard and the SEC final rule (issued in January 2003) on record retention, *Retention of Records Relevant to Audits and Reviews.*[4] Some commenters recommended that the PCAOB undertake a project to identify and resolve all differences between the proposed standard and the SEC's final rule. These commenters also suggested that the Board include similar language from the SEC final rule, Rule 2–06 of Regulation S–X, which limits the requirement to retain some items.

Differences between Section 802 and This Standard

A43. The objective of the Board's standard is different from the objective of the SEC's rule on record retention. The objective of the Board's standard is to require auditors to create certain documentation to enhance the quality of audit documentation, thereby improving the quality of audits and other related engagements. The records retention section of this standard, mandated by Section 103 of the Act, requires registered public accounting firms to ''prepare and maintain for a period of not less than 7 years, *audit work papers, and other information related to any audit report,* in sufficient detail to support the conclusions reached in such report.'' (emphasis added)

A44. In contrast, the focus of the SEC rule is to require auditors to *retain* documents that the auditor does create, in order that those documents will be available in the event of a regulatory investigation or other proceeding. As stated in the release accompanying the SEC's final rule (SEC Release No. 33–8180):

Section 802 of the Sarbanes-Oxley Act is intended to address the destruction or fabrication of evidence and the preservation of ''financial and audit records.'' We are directed under that section to promulgate rules related to the retention of records relevant to the audits and reviews of financial statements that companies file with the Commission.

A45. The SEC release further states, ''New rule 2–06 * * * addresses the retention of documents relevant to enforcement of the securities laws, Commission rules, and criminal laws.''

A46. Despite their different objectives, the proposed standard and SEC Rule 2–06 use similar language in describing documentation generated during an audit or review. Paragraph 4 of the proposed standard stated that, ''Audit documentation ordinarily consists of *memoranda, correspondence,*

[4] SEC Regulation S–X, 17 CFR 210.2–06 (SEC Release No. 33–8180, January 2003). (The final rule was effective in March 2003.)

schedules, and *other documents created* or *obtained in connection with* the engagement and may be in the form of paper, electronic files, or other media.'' Paragraph (a) of SEC Rule 2–06 describes ''records relevant to the audit or review'' that must be retained as, (1) ''workpapers and other documents that form the basis of the audit or review and (2) *memoranda, correspondence,* communications, *other documents,* and records (including electronic records), which: [a]re *created,* sent or received *in connection with* the audit or review and [c]ontain conclusions, opinions, analyses, or financial data related to the audit or review. * * *'' (numbering and emphasis added).

A47. The SEC makes a distinction between the objectives of categories (1) and (2). Category (1) includes audit documentation. Documentation to be retained according to the Board's standard clearly falls within category (1). Items in category (2) include ''desk files'' which are more than ''what traditionally has been thought of as auditor's 'workpapers'.'' The SEC's rule requiring auditors to retain items in category (2) have the principal purpose of facilitating enforcement of securities laws, SEC rules, and criminal laws. This is not an objective of the Board's standard. According to SEC Rule 2–06, items in category (2) are limited to those which: (a) Are created, sent or received in connection with the audit or review, and (b) contain conclusions, opinions, analyses, or financial data related to the audit or review. The limitations, (a) and (b), do not apply to category (1).

A48. Paragraph 4 of the final standard deletes the reference in the proposed standard to ''other documents created or obtained in connection with the engagement.'' The Board decided to keep ''correspondence'' in the standard because correspondence can be valid audit evidence. Paragraph 20 of the standard reminds the auditor that he or she may be required to maintain documentation in addition to that required by this standard.

Significant Matters and Significant Findings or Issues

A49. Some commenters asked how the term *significant matters,* in Rule 2–06, relates to the term *significant findings or issues* in the Board's standard. The SEC's release accompanying its final Rule 2–06 states that ''* * * *significant matters* is intended to refer to the documentation of substantive matters that are important to the audit or review process or to the financial statements of the issuer. * * *'' This is very similar to the term *significant findings or issues* contained in paragraph 12 of the Board's standard which requires auditors to document *significant findings or issues,* actions taken to address them (including additional evidence obtained), and the basis for the conclusions reached. Examples of significant findings or issues are provided in the standard.

A50. Based on the explanation in the SEC's final rule and accompanying release, the Board believes that *significant matters* are included in the meaning of *significant findings or issues* in the Board's standard. The Board is of the view that *significant findings or issues* is more comprehensive and provides more clarity than *significant matters* and, therefore, has not changed the wording in the final standard.

Changes to Audit Documentation

A51. The proposed standard would have required that any changes to the working papers after completion of the engagement be documented without deleting or discarding the original documents. Such documentation must indicate the date the information was added, by whom it was added, and the reason for adding it.

A52. One commenter recommended that the Board provide examples of auditing procedures that should be performed before the report release date and procedures that may be performed after the report release date. Some commenters also requested clarification about the treatment of changes to documentation that occurred after the completion of the engagement but before the report release date. Many commenters recommended that the Board more specifically describe post-issuance procedures. The Board generally agreed with these comments.

A53. The final standard includes two important dates for the preparation of audit documentation: (1) The report release date and (2) the documentation completion date.

- Prior to the report release date, the auditor must have completed all necessary auditing procedures, including clearing review notes and providing support for all final conclusions. In addition, the auditor must have obtained sufficient evidence to support the representations in the auditor's reports before the report release date.
- After the report release date and prior to the documentation completion date, the auditor has 45 calendar days in which to assemble the documentation.

A54. During the audit, audit documentation may be superseded for various reasons. Often, during the review process, reviewers annotate the documentation with clarifications, questions, and edits. The completion process often involves revising the documentation electronically and generating a new copy. The SEC's final rule on record retention, *Retention of Records Relevant to Audits and Reviews,*[5] explains that the SEC rule does not require that the following documents generally need to be retained: Superseded drafts of memoranda, financial statements or regulatory filings; notes on superseded drafts of memoranda, financial statements or regulatory filings that reflect incomplete or preliminary thinking; previous copies of workpapers that have been corrected for typographical errors or errors due to training of new employees; and duplicates of documents. This standard also does not require auditors to retain such documents as a general matter.

A55. Any documents, however, that reflect information that is either inconsistent with or contradictory to the conclusions contained in the final working papers may not be discarded. Any documents added must indicate the date they were added, the name of the person who prepared them, and the reason for adding them.

A56. If the auditor obtains and documents evidence after the report release date, the auditor should refer to the interim auditing standards, AU sec. 390, *Consideration of Omitted Procedures After the Report Date* and AU sec. 561, *Subsequent Discovery of Facts Existing at the Date of the Auditor's Report.* Auditors should not discard any previously existing documentation in connection with obtaining and documenting evidence after the report release date.

A57. The auditor may perform certain procedures subsequent to the report release date. For example, pursuant to AU sec. 711, *Filings Under Federal Securities Statutes,* auditors are required to perform certain procedures up to the effective date of a registration statement. The auditor should identify and document any additions to audit documentation as a result of these procedures. No audit documentation should be discarded after the documentation completion date, even if it is superseded in connection with any procedures performed, including those performed pursuant to AU sec. 711.

A58. Additions to the working papers may take the form of memoranda that explain the work performed, evidence obtained, and conclusions reached. Documentation added to the working papers must indicate the date the information was added, the name of the person adding it, and the reason for adding it. All previous working papers must remain intact and not be discarded.

A59. Documentation added to the working papers well after completion of the audit or other engagement is likely to be of a lesser quality than that produced contemporaneously when the procedures were performed. It is very difficult to reconstruct activities months, and perhaps years, after the work was actually performed. The turnover of both firm and company staff can cause difficulty in reconstructing conversations, meetings, data, or other evidence. Also, with the passage of time memories fade. Oral explanation can help confirm that procedures were performed during an audit, but oral explanation alone does not constitute persuasive other evidence. The primary source of evidence should be documented at the time the procedures are performed, and oral explanation should not be the primary source of evidence. Furthermore, any oral explanation should not contradict the documented evidence, and appropriate consideration should be given to the credibility of the individual providing the oral explanation.

Multi-Location Audits and Using the Work of Other Auditors

A60. The proposed standard would have required the principal auditor to maintain specific audit documentation when he or she decided not to make reference to the work of another auditor.

A61. The Board also proposed an amendment to AU sec. 543 concurrently with the proposed audit documentation standard. The proposed amendment would have required the principal auditor to review the

[5] See footnote 4

documentation of the other auditor to the same extent and in the same manner that the audit work of all those who participated in the engagement is reviewed.

A62. Commenters expressed concerns that these proposals could present conflicts with certain non-U.S. laws. Those commenters also expressed concern about the costs associated with the requirement for the other auditor to ship their audit documentation to the principal auditor. In addition, the commenters also objected to the requirement that principal auditors review the work of other auditors as if they were the principal auditor's staff.

Audit Documentation Must Be Accessible to the Office Issuing the Auditor's Report

A63. After considering these comments, the Board decided that it could achieve one of the objectives of the proposed standard (that is, to require that the issuing office have access to those working papers on which it placed reliance) without requiring that the working papers be shipped to the issuing office. Further, given the potential difficulties of shipping audit documentation from various non-U.S. locations, the Board decided to modify the proposed standard to require that audit documentation either be retained by or be accessible to the issuing office.

A64. In addition, instead of requiring that all of the working papers be shipped to the issuing office, the Board decided to require that the issuing office obtain, review, and retain certain summary documentation. Thus, the public accounting firm issuing an audit report on consolidated financial statements of a multinational company may not release that report without the documentation described in paragraph 19 of the standard.

A65. The auditor must obtain and review and retain, prior to the report release date, documentation described in paragraph 19 of the standard, in connection with work performed by other offices of the public accounting firm or other auditors, including affiliated or non-affiliated firms, that participated in the audit. For example, an auditor that uses the work of another of its offices or other affiliated or non-affiliated public accounting firms to audit a subsidiary that is material to a company's consolidated financial statements must obtain the documentation described in paragraph 19 of the standard, prior to the report release date. On the other hand, an auditor that uses the work of another of its offices or other affiliated or non-affiliated firms, to perform selected procedures, such as observing the physical inventories of a company, may not be required to obtain the documentation specified in paragraph 19 of the standard. However, this does not reduce the need for the auditor to obtain equivalent documentation prepared by the other auditor when those instances described in paragraph 19 of the standard are applicable.

Amendment to AU Sec. 543, *Part of Audit Performed by Other Independent Auditors*

A66. Some commenters also objected to the proposed requirement in the amendment to AU sec. 543, *Part of Audit Performed by Other Independent Auditors,* that the principal auditor review another auditor's audit documentation. They objected because they were of the opinion such a review would impose an unnecessary cost and burden given that the other auditor will have already reviewed the documentation in accordance with the standards established by the principal auditor. The commenters also indicated that any review by the principal auditor would add excessive time to the SEC reporting process, causing even more difficulties as the SEC Form 10–K reporting deadlines have become shorter recently and will continue to shorten next year.

A67. The Board accepted the recommendation to modify the proposed amendment to AU sec. 543, *Part of Audit Performed by Other Independent Auditors.* Thus, in the final amendment, the Board imposes the same unconditional responsibility on the principal auditor to obtain certain audit documentation from the other auditor prior to the report release date. The final amendment also provides that the principal auditor should consider performing one or more of the following procedures:

- Visit the other auditors and discuss the audit procedures followed and results thereof.
- Review the audit programs of the other auditors. In some cases, it may be appropriate to issue instructions to the other auditors as to the scope of the audit work.
- Review additional audit documentation of the other auditors relating to significant findings or issues in the engagement completion document.

Effective Date

A68. The Board proposed that the standard and related amendment would be effective for engagements completed on or after June 15, 2004. Many commenters were concerned that the effective date was too early. They pointed out that some audits, already begun as of the proposed effective date, would be affected and that it could be difficult to retroactively apply the standard. Some commenters also recommended delaying the effective date to give auditors adequate time to develop and implement processes and provide training with respect to several aspects of the standard.

A69. After considering the comments, the Board has delayed the effective date. However, the Board also believes that a delay beyond 2004 is not in the public interest.

A70. The Board concluded that the implementation date of this standard should coincide with that of PCAOB Auditing Standard No. 2, *An Audit of Internal Control Over Financial Reporting Performed in Conjunction with an Audit of Financial Statements,* because of the documentation issues prevalent in PCAOB Auditing Standard No. 2. Therefore, the Board has decided that the standard will be effective for audits of financial statements with respect to fiscal years ending on or after [the later of November 15, 2004, or 30 days after the date of approval of this standard by the SEC]. The effective date for reviews of interim financial information and other engagements, conducted pursuant to the standards of the PCAOB, would occur beginning with the first quarter ending after the first financial statement audit covered by this standard.

Reference to Audit Documentation as the Property of the Auditor

A71. Several commenters noted that SAS No. 96, *Audit Documentation,* the interim auditing standard on audit documentation, referred to audit documentation as the property of the auditor. This was not included in the proposed standard because the Board did not believe ascribing property rights would have furthered this standard's purpose to enhance the quality of audit documentation.

Confidential Client Information

A72. SAS No. 96, *Audit Documentation,* also stated that, ''the auditor has an ethical, and in some situations a legal, obligation to maintain the confidentiality of client information,'' and referenced Rule 301, *Confidential Client Information,* of the AICPA's Code of Professional Conduct. Again, the Board's proposed standard on audit documentation did not include this provision. In adopting certain interim standards and rules as of April 16, 2003, the Board did not adopt Rule 301 of the AICPA's Code of Professional Conduct. In this standard on audit documentation, the Board seeks neither to establish confidentiality standards nor to modify or detract from any existing applicable confidentiality requirements.

Addendum

This addendum is not a part of PCAOB Auditing Standard No. 3.

Additional Documentation Requirements of SEC Rule 2–06

B1. Auditors should be aware of the additional record retention requirements in SEC Rule 2–06 of Regulation S–X (''Rule 2–06''). The Board is providing additional information below to remind auditors of the SEC requirements. This addendum is not an interpretation of Rule 2–06. Instead, this addendum provides excerpts from the SEC release accompanying the final rule which provides the SEC's interpretation of the rule's requirements, particularly paragraphs (a) and (c) of Rule 2–06.

B2. Paragraph (a) of Rule 2–06 requires that: * * * the accountant shall retain * * * memoranda, correspondence, communications, other documents, and records (including electronic records) which: (1) Are created, sent or received in connection with the audit or review, and (2) Contain conclusions, opinions, analyses, or financial data related to the audit or review.

B3. Paragraph (c) of Rule 2–06 states: Memoranda, correspondence, communications, other documents, and records (including electronic records) described in paragraph (a) of this section shall be retained whether they support the auditor's final conclusions regarding the audit or review, or contain information or data relating to a significant matter, that is inconsistent with the auditor's final conclusions regarding that matter or the audit or review. Significance of a matter shall be determined based on an objective analysis of the facts and circumstances. Such documents and records include, but are not limited to, those documenting a consultation on or

resolution of differences in professional judgment.

Other Statements by the SEC

B4. In the excerpt below, from the SEC's release accompanying its final Rule 2–06, the SEC discusses *documents that generally are not required to be retained* under Rule 2–06.

In the Proposing Release, we stated that non-substantive materials that are not part of the workpapers, such as administrative records, and other documents that do not contain relevant financial data or the auditor's conclusions, opinions or analyses would not meet the second of the criteria in rule 2–06(a) and would not have to be retained. Commentators questioned whether the following documents would be considered substantive and have to be retained:

- Superseded drafts of memoranda, financial statements or regulatory filings,
- Notes on superseded drafts of memoranda, financial statements or regulatory filings that reflect incomplete or preliminary thinking,
- Previous copies of workpapers that have been corrected for typographical errors or errors due to training of new employees,
- Duplicates of documents, or
- Voice-mail messages.

These records generally would not fall within the scope of new rule 2–06 provided they do not contain information or data, relating to a significant matter that is inconsistent with the auditor's final conclusions, opinions or analyses on that matter or the audit or review. For example, rule 2–06 would require the retention of an item in this list if that item documented a consultation or resolution of differences of professional judgment.

B5. The excerpt below, from the SEC's release accompanying its final Rule 2–06, provides further explanation about *documents to be retained* under Rule 2–06:

In consideration of the comments received, we have revised paragraph (c) of the rule. We have removed the phrase ''cast doubt'' to reduce the possibility that the rule mistakenly would be interpreted to reach typographical errors, trivial or ''fleeting'' matters, or errors due to ''on-the-job'' training. We continue to believe, however, that records that either support or contain significant information that is inconsistent with the auditor's final conclusions would be relevant to an investigation of possible violations of the securities laws, Commission rules, or criminal laws and should be retained. Paragraph (c), therefore, now provides that the materials described in paragraph (a) shall be retained whether they support the auditor's final conclusions or contain information or data, relating to a significant matter that is inconsistent with the final conclusions of the auditor on that matter or on the audit or review. Paragraph (c) also states that the documents and records to be retained include, but are not limited to, those documenting consultations on or resolutions of differences in professional judgment.

The reference in paragraph (c) to ''significant'' matters is intended to refer to the documentation of substantive matters that are important to the audit or review process or to the financial statements of the issuer or registered investment company. Rule 2–06(c) requires that the documentation of such matters, once prepared, must be retained even if it does not ''support'' the auditor's final conclusions, because it may be relevant to an investigation. Similarly, the retention of records regarding a consultation about, and resolution of, differences in professional judgment would be relevant to such an investigation and must be retained. We intend for Rule 2–06 to be incremental to, and not to supersede or otherwise affect, any other legal or procedural requirement related to the retention of records or potential evidence in a legal, administrative, disciplinary, or regulatory proceeding.

Finally, we recognize that audits and reviews of financial statements are interactive processes and views within an accounting firm on accounting, auditing or disclosure issues may evolve as new information or data comes to light during the audit or review. We do not view ''differences in professional judgment'' within subparagraph (c) to include such changes in preliminary views when those preliminary views are based on what is recognized to be incomplete information or data.

Amendment to Interim Auditing Standards

AU sec. 543.12 is amended as follows: When the principal auditor decides not to make reference to the audit of the other auditor, in addition to satisfying himself as to the matters described in AU sec. 543.10, the principal auditor must obtain, and review and retain, the following information from the other auditor:

a. An engagement completion document consistent with paragraphs 12 and 13 of PCAOB Auditing Standard No. 3

Note: This engagement completion document should include all cross-referenced, supporting audit documentation.

b. A list of significant fraud risk factors, the auditor's response, and the results of the auditor's related procedures.

c. Sufficient information relating to significant findings or issues that are inconsistent with or contradict the auditor's final conclusions, as described in paragraph 8 of PCAOB Auditing Standard No. 3.

d. Any findings affecting the consolidating or combining of accounts in the consolidated financial statements.

e. Sufficient information to enable the office issuing the auditor's report to agree or reconcile the financial statement amounts audited by the other firm to the information underlying the consolidated financial statements.

f. A schedule of audit adjustments, including a description of the nature and cause of each misstatement.

g. All significant deficiencies and material weaknesses in internal control over financial reporting, including a clear distinction between those two categories.

h. Letters of representations from management.

i. All matters to be communicated to the audit committee.

The principal auditor must obtain, and review and retain, such documents prior to the report release date.[1] In addition, the principal auditor should consider performing one or more of the following procedures:

- Visit the other auditor and discuss the audit procedures followed and results thereof.
- Review the audit programs of the other auditor. In some cases, it may be appropriate to issue instructions to the other auditor as to the scope of the audit work.
- Review additional audit documentation of the other auditor relating to significant findings or issues in the engagement completion document.

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rules and discussed any comments it received on the proposed rules. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

(a) Purpose

Section 103(a)(1) of the Act authorizes the PCAOB to establish, by rule, auditing standards to be used by registered public accounting firms in the preparation and issuance of audit reports, as required by the Act. PCAOB Rule 3100, ''Compliance with Auditing and Related Professional Practice Standards,'' requires auditors to comply with all applicable auditing and related professional practice standards established by the PCAOB. The Board has adopted as interim standards, on an initial, transitional basis, the generally accepted auditing standards described in the American Institute of Certified Public Accountants' (''AICPA'') Auditing Standards Board's Statement on Auditing Standards No. 95, *Generally Accepted Auditing Standards*, as in existence on April 16, 2003 (the ''interim standards'').

Section 103(a)(2)(A)(i) of the Act expressly directs the Board to establish auditing standards that require registered public accounting firms to prepare, and maintain for at least seven years, audit documentation ''in sufficient detail to support the conclusions reached'' in the auditor's report. These proposed rules are the

[1] As it relates to the direction in paragraph .19 of AU sec. 324, for the auditor to ''give consideration to the guidance in section 543.12,'' the auditor need not, in this circumstance, obtain the previously enumerated documents.

standards referred to in Section 103(a)(2)(A)(i) of the Act.

(b) Statutory Basis

The statutory basis for the proposed rules is Title I of the Act.

B. Board's Statement on Burden on Competition

The Board does not believe that the proposed rule will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Pursuant to the Act and PCAOB Rule 3100, auditing and related professional practice standards established by the PCAOB must be complied with by all registered public accounting firms.

C. Board's Statement on Comments on the Proposed Rule Received From Members, Participants or Others

The Board released the proposed rule for public comment in PCAOB Release No. 2003–023 (November 21, 2003). A copy of PCAOB Release No. 2003–023 and the comment letters received in response to the PCAOB's request for comment are available on the PCAOB's web site at www.pcaobus.org. The Board received 38 written comments. The Board has clarified and modified certain aspects of the proposed rules in response to comments it received, as discussed below:

Several commenters suggested that audit documentation should include audit programs. Audit programs were specifically mentioned in SAS No. 96 as a form of audit documentation. The Board accepted this recommendation, and paragraph 4 in the final standard includes audit programs as an example of documentation. Audit programs may provide evidence of audit planning as well as limited evidence of the execution of audit procedures, but the Board believes that signed-off audit programs should generally not be used as the sole documentation that a procedure was performed, evidence was obtained, or a conclusion was reached. An audit program aids in the conduct and supervision of an engagement, but completed and initialed audit program steps should be supported with proper documentation in the working papers.

Some commenters suggested that the final standard more specifically describe the qualifications of an experienced auditor. These commenters took the position that only an engagement partner with significant years of experience would have the experience necessary to be able to understand all the work that was performed and the conclusions that were reached. One commenter suggested that an auditor who is reviewing audit documentation should have experience and knowledge consistent with the experience and knowledge that the auditor performing the audit would be required to possess, including knowledge of the current accounting, auditing, and financial reporting issues of the company's industry. Another said that the characteristics defining an experienced auditor should be consistent with those expected of the auditor with final responsibility for the engagement.

After considering these comments, the Board has provided additional specificity about the meaning of the term, *experienced auditor.* The standard now describes an experienced auditor as one who has a reasonable understanding of audit activities and has studied the company's industry as well as the accounting and auditing issues relevant to the industry.

Some commenters also suggested that the standard, as proposed, did not allow for the use of professional judgment. These commenters pointed to the omission of a statement about professional judgment found in paragraph 4.23 of GAGAS that states, ''The quantity, type, and content of audit documentation are a matter of the auditors' professional judgment.'' A nearly identical statement was found in the interim auditing standard, SAS No. 96, *Audit Documentation.*

Auditors exercise professional judgment in nearly every aspect of planning, performing, and reporting on an audit. Auditors also exercise professional judgment in the documentation of an audit and other engagements. An objective of this standard is to ensure that auditors give proper consideration to the need to document procedures performed, evidence obtained, and conclusions reached in light of time and cost considerations in completing an engagement.

Nothing in the standard precludes auditors from exercising their professional judgment. Moreover, because professional judgment might relate to any aspect of an audit, the Board does not believe that an explicit reference to professional judgment is necessary every time the use of professional judgment may be appropriate.

A guiding principle of the proposed standard was that auditors must document procedures performed, evidence obtained, and conclusions reached. This principle is not new and was found in the interim standard, SAS No. 96, *Audit Documentation,* which this standard supersedes. Audit documentation also should demonstrate compliance with the standards of the PCAOB and include justification for any departures.

The proposed standard would have adapted a provision in the California Business and Professions Code which provides that if documentation does not exist, then there is a rebuttable presumption that the work had not been done.

The objections to this proposal fell into two general categories: The effect of the rebuttable presumption on legal proceedings and the perceived impracticality of documenting every conversation or conclusion that affected the engagement. Discussion of these issues follows.

Commenters expressed concern about the effects of the proposed language on regulatory or legal proceedings outside the context of the PCAOB's oversight. They argued that the rebuttable presumption might be understood to establish evidentiary rules for use in judicial and administrative proceedings in other jurisdictions.

Some commenters also had concerns that oral explanation alone would not constitute persuasive other evidence that work was done, absent any documentation. Those commenters argued that not allowing oral explanations when there was no documentation would essentially make the presumption ''irrebuttable.'' Moreover, those commenters argued that it was inappropriate for a professional standard to predetermine for a court the relative value of evidence.

The Board believes that complete audit documentation is necessary for a quality audit or other engagement. The Board intends the standard to require auditors to document procedures performed, evidence obtained, and conclusions reached to improve the quality of audits. The Board also intends that a deficiency in documentation is a departure from the Board's standards. Thus, although the Board removed the phrase *rebuttable presumption,* the Board continues to stress, in paragraph 9 of the standard, that the auditor must have persuasive other evidence that the procedures were performed, evidence was obtained, and appropriate conclusions were reached with respect to relevant financial statement assertions.

The term *should* (presumptively mandatory responsibility) was changed to *must* (unconditional responsibility) in paragraph 6 to establish a higher threshold for the auditor. Auditors have an unconditional requirement to document their work. Failure to discharge an unconditional

responsibility is a violation of the standard and Rule 3100, which requires all registered public accounting firms to adhere to the Board's auditing and related professional practice standards in connection with an audit or review of an issuer's financial statements.

The Board also added two new paragraphs to the final standard to explain the importance and associated responsibility of performing the work and adequately documenting all work that was performed. Paragraph 7 provides a list of factors the auditor should consider in determining the nature and extent of documentation. These factors should be considered by both the auditor in preparing the documentation and the reviewer in evaluating the documentation.

Some commenters expressed concern that the proposed standard could be construed or interpreted to require the auditor to document every conversation held with company management or among the engagement team members. Some commenters also argued that they should not be required to document every conclusion, including preliminary conclusions that were part of a thought process that may have led them to a different conclusion, on the ground that this would result in needless and costly work performed by the auditor. Commenters also expressed concern that an unqualified requirement to document procedures performed, evidence obtained, and conclusions reached without allowing the use of auditor judgment would increase the volume of documentation but not the quality. They stated that it would be unnecessary, time-consuming, and potentially counterproductive to require the auditor to make a written record of everything he or she did.

The Board's standard distinguishes between (1) an audit procedure that must be documented and (2) a conversation with company management or among the members of the engagement team. Inquiries with management should be documented when an inquiry is important to a particular procedure. The inquiry could take place during planning, performance, or reporting. The auditor need not document each conversation that occurred.

A final conclusion is an integral part of a working paper, unless the working paper is only for informational purposes, such as documentation of a discussion or a process. This standard does not require that the auditor document each interim conclusion reached in arriving at the risk assessments or final conclusions. Conclusions reached early on during an audit may be based on incomplete information or an incorrect understanding. Nevertheless, auditors should document a final conclusion for every audit procedure performed, if that conclusion is not readily apparent based on documented results of the procedures.

The Board also believes the reference to *specialists* is an important element of paragraph 6. Specialists play a vital role in audit engagements. For example, appraisers, actuaries, and environmental consultants provide valuable data concerning asset values, calculation assumptions, and loss reserves. When using the work of a specialist, the auditor must ensure that the specialist's work, as it relates to the audit objectives, also is adequately documented. For example, if the auditor relies on the work of an appraiser in obtaining the fair value of commercial property available for sale, then the auditor must ensure the appraisal report is adequately documented. Moreover, the term *specialist* in this standard is intended to include any specialist the auditor relies on in conducting the work, including those employed or retained by the auditor or by the company.

Several commenters recommended that the definition of *audit adjustments* in this proposed standard should be consistent with the definition contained in AU sec. 380, *Communication with Audit Committees.*

Although the Board recognizes potential benefits of having a uniform definition of the term *audit adjustments,* the Board does not believe that the definition in AU sec. 380 is appropriate for this documentation standard because that definition was intended for communication with audit committees. The Board believes that the definition should be broader so that the engagement partner, engagement quality reviewer, and others can be aware of all proposed corrections of misstatements, whether or not recorded by the entity, of which the auditor is aware, that were or should have been proposed based on the audit evidence.

The proposed standard would have required an auditor to retain audit documentation for seven years after completion of the engagement, which is the minimum period permitted under Section 103(a)(2)(A)(i) of the Act. In addition, the proposed standard would have added a new requirement that the audit documentation must be assembled for retention within a reasonable period of time after the auditor's report is released. Such reasonable period of time should not exceed 45 days.

In general, those commenting on this documentation retention requirement did not have concerns with the time period of 45 days to assemble the working papers. However, some commenters suggested the Board tie this 45-day requirement to the filing date of the company's financial statements with the SEC. One commenter recommended that the standard refer to the same trigger date for initiating both the time period during which the auditor should complete work paper assembly and the beginning of the seven-year retention period.

For consistency and practical implications, the Board agreed that the standard should have the same date for the auditor to start assembling the audit documentation and initiating the seven-year retention period. The Board decided that the seven-year retention period begins on the *report release date,* which is defined as the date the auditor grants permission to use the auditor's report in connection with the issuance of the company's financial statements. In addition, auditors will have 45 days to assemble the complete and final set of audit documentation, beginning on the report release date. The Board believes that using the report release date is preferable to using the filing date of the company's financial statements, since the auditor has ultimate control over granting permission to use his or her report. If an auditor's report is not issued, then the audit documentation is to be retained for seven years from the date that fieldwork was substantially completed. If the auditor was unable to complete the engagement, then the seven-year period begins when the work on the engagement ceased.

Many commenters had concerns about the similarity in language between the proposed standard and the SEC final rule (issued in January 2003) on record retention, *Retention of Records Relevant to Audits and Reviews.*[2] Some commenters recommended that the PCAOB undertake a project to identify and resolve all differences between the proposed standard and the SEC's final rule. These commenters also suggested that the Board include similar language from the SEC final rule, Rule 2–06 of Regulation S–X, which limits the requirement to retain some items.

The objective of the Board's standard is different from the objective of the SEC's rule on record retention. The objective of the Board's standard is to require auditors to *create* certain documentation to enhance the quality of

[2] SEC Regulation S–X, 17 CFR 210.2–06 (SEC Release No. 33–8180, January 2003). (The final rule was effective in March 2003.)

audit documentation, thereby improving the quality of audits and other related engagements. The records retention section of this standard, mandated by Section 103 of the Act, requires registered public accounting firms to ''prepare and maintain for a period of not less than 7 years, *audit work papers, and other information related to any audit report,* in sufficient detail to support the conclusions reached in such report.'' (emphasis added)

In contrast, the focus of the SEC rule is to require auditors to *retain* documents that the auditor does create, in order that those documents will be available in the event of a regulatory investigation or other proceeding.

Despite their different objectives, the proposed standard and SEC Rule 2–06 use similar language in describing documentation generated during an audit or review. Paragraph 4 of the proposed standard stated that, ''Audit documentation ordinarily consists of *memoranda, correspondence,* schedules, and *other documents created* or obtained *in connection with* the engagement and may be in the form of paper, electronic files, or other media.'' Paragraph (a) of SEC Rule 2–06 describes ''records relevant to the audit or review'' that must be retained as, (1) ''workpapers and other documents that form the basis of the audit or review and (2) *memoranda, correspondence,* communications, *other documents,* and records (including electronic records), which: [a]re *created,* sent or received *in connection with* the audit or review and [c]ontain conclusions, opinions, analyses, or financial data related to the audit or review. * * *'' (numbering and emphasis added).

The SEC makes a distinction between the objectives of categories (1) and (2). Category (1) includes audit documentation. Documentation to be retained according to the Board's standard clearly falls within category (1). Items in category (2) include ''desk files'' which are more than ''what traditionally has been thought of as auditor's 'workpapers'.'' The SEC's rule requiring auditors to retain items in category (2) have the principal purpose of facilitating enforcement of securities laws, SEC rules, and criminal laws. This is not an objective of the Board's standard. According to SEC Rule 2–06, items in category (2) are limited to those which: (a) Are created, sent or received in connection with the audit or review, and (b) contain conclusions, opinions, analyses, or financial data related to the audit or review. The limitations, (a) and (b), do not apply to category (1).

Paragraph 4 of the final standard deletes the reference in the proposed standard to ''other documents created or obtained in connection with the engagement.'' The Board decided to keep ''correspondence'' in the standard because correspondence can be valid audit evidence. Paragraph 20 of the standard reminds the auditor that he or she may be required to maintain documentation in addition to that required by this standard.

Some commenters asked how the term *significant matters,* in Rule 2–06, relates to the term *significant findings or issues* in the Board's standard. The SEC's release accompanying its final Rule 2–06 states that ''* * * *significant matters* is intended to refer to the documentation of substantive matters that are important to the audit or review process or to the financial statements of the issuer. * * *'' This is very similar to the term *significant findings or issues* contained in paragraph 12 of the Board's standard which requires auditors to document *significant findings or issues,* actions taken to address them (including additional evidence obtained), and the basis for the conclusions reached. Examples of significant findings or issues are provided in the standard.

Based on the explanation in the SEC's final rule and accompanying release, the Board believes that *significant matters* are included in the meaning of *significant findings* or issues in the Board's standard. The Board is of the view that *significant findings* or issues is more comprehensive and provides more clarity than *significant matters* and, therefore, has not changed the wording in the final standard.

The proposed standard would have required that any changes to the working papers after completion of the engagement be documented without deleting or discarding the original documents. Such documentation must indicate the date the information was added, by whom it was added, and the reason for adding it.

One commenter recommended that the Board provide examples of auditing procedures that should be performed before the report release date and procedures that may be performed after the report release date. Some commenters also requested clarification about the treatment of changes to documentation that occurred after the completion of the engagement but before the report release date. Many commenters recommended that the Board more specifically describe post-issuance procedures. The Board generally agreed with these comments.

The final standard includes two important dates for the preparation of audit documentation: (1) The report release date and (2) the documentation completion date.

- Prior to the report release date, the auditor must have completed all necessary auditing procedures, including clearing review notes and providing support for all final conclusions. In addition, the auditor must have obtained sufficient evidence to support the representations in the auditor's reports before the report release date.
- After the report release date and prior to the documentation completion date, the auditor has 45 calendar days in which to assemble the documentation.

During the audit, audit documentation may be superseded for various reasons. Often, during the review process, reviewers annotate the documentation with clarifications, questions, and edits. The completion process often involves revising the documentation electronically and generating a new copy. The SEC's final rule on record retention explains that the SEC rule does not require that the following documents generally need to be retained: Superseded drafts of memoranda, financial statements or regulatory filings; notes on superseded drafts of memoranda, financial statements or regulatory filings that reflect incomplete or preliminary thinking; previous copies of workpapers that have been corrected for typographical errors or errors due to training of new employees; and duplicates of documents. This standard also does not require auditors to retain such documents as a general matter.

Any documents, however, that reflect information that is either inconsistent with or contradictory to the conclusions contained in the final working papers may not be discarded. Any documents added must indicate the date they were added, the name of the person who prepared them, and the reason for adding them.

If the auditor obtains and documents evidence after the report release date, the auditor should refer to the interim auditing standards, AU sec. 390, *Consideration of Omitted Procedures After the Report Date* and AU sec. 561, *Subsequent Discovery of Facts Existing at the Date of the Auditor's Report.* Auditors should not discard any previously existing documentation in connection with obtaining and documenting evidence after the report release date.

The auditor may perform certain procedures subsequent to the report release date. For example, pursuant to AU sec. 711, *Filings Under Federal Securities Statutes*, auditors are required

to perform certain procedures up to the effective date of a registration statement. The auditor should identify and document any additions to audit documentation as a result of these procedures. No audit documentation should be discarded after the documentation completion date, even if it is superseded in connection with any procedures performed, including those performed pursuant to AU sec. 711.

Additions to the working papers may take the form of memoranda that explain the work performed, evidence obtained, and conclusions reached. Documentation added to the working papers must indicate the date the information was added, the name of the person adding it, and the reason for adding it. All previous working papers must remain intact and not be discarded.

Documentation added to the working papers well after completion of the audit or other engagement is likely to be of a lesser quality than that produced contemporaneously when the procedures were performed. It is very difficult to reconstruct activities months, and perhaps years, after the work was actually performed. The turnover of both firm and company staff can cause difficulty in reconstructing conversations, meetings, data, or other evidence. Also, with the passage of time memories fade. Oral explanation can help confirm that procedures were performed during an audit, but oral explanation alone does not constitute persuasive other evidence. The primary source of evidence should be documented at the time the procedures are performed, and oral explanation should not be the primary source of evidence. Furthermore, any oral explanation should not contradict the documented evidence, and appropriate consideration should be given to the credibility of the individual providing the oral explanation.

The proposed standard would have required the principal auditor to maintain specific audit documentation when he or she decided not to make reference to the work of another auditor.

The Board also proposed an amendment to AU sec. 543 concurrently with the proposed audit documentation standard. The proposed amendment would have required the principal auditor to review the documentation of the other auditor to the same extent and in the same manner that the audit work of all those who participated in the engagement is reviewed.

Commenters expressed concerns that these proposals could present conflicts with certain non-U.S. laws. Those commenters also expressed concern about the costs associated with the requirement for the other auditor to ship their audit documentation to the principal auditor. In addition, the commenters also objected to the requirement that principal auditors review the work of other auditors as if they were the principal auditor's staff.

After considering these comments, the Board decided that it could achieve one of the objectives of the proposed standard (that is, to require that the issuing office have access to those working papers on which it placed reliance) without requiring that the working papers be shipped to the issuing office. Further, given the potential difficulties of shipping audit documentation from various non-U.S. locations, the Board decided to modify the proposed standard to require that audit documentation either be retained by or be accessible to the issuing office.

In addition, instead of requiring that all of the working papers be shipped to the issuing office, the Board decided to require that the issuing office obtain, review, and retain certain summary documentation. Thus, the public accounting firm issuing an audit report on consolidated financial statements of a multinational company may not release that report without the documentation described in paragraph 19 of the standard.

Some commenters also objected to the proposed requirement in the amendment to AU sec. 543, *Part of Audit Performed by Other Independent Auditors*, that the principal auditor review another auditor's audit documentation. They objected because they were of the opinion such a review would impose an unnecessary cost and burden given that the other auditor will have already reviewed the documentation in accordance with the standards established by the principal auditor. The commenters also indicated that any review by the principal auditor would add excessive time to the SEC reporting process, causing even more difficulties as the SEC Form 10–K reporting deadlines have become shorter recently and will continue to shorten next year.

The Board accepted the recommendation to modify the proposed amendment to AU sec. 543, *Part of Audit Performed by Other Independent Auditors.* Thus, in the final amendment, the Board imposes the same unconditional responsibility on the principal auditor to obtain certain audit documentation from the other auditor prior to the report release date. The final amendment also provides that the principal auditor should consider performing one or more of the following procedures:

- Visit the other auditors and discuss the audit procedures followed and results thereof.
- Review the audit programs of the other auditors. In some cases, it may be appropriate to issue instructions to the other auditors as to the scope of the audit work.
- Review additional audit documentation of the other auditors relating to significant findings or issues in the engagement completion document.

The Board proposed that the standard and related amendment would be effective for engagements completed on or after June 15, 2004. Many commenters were concerned that the effective date was too early. They pointed out that some audits, already begun as of the proposed effective date, would be affected and that it could be difficult to retroactively apply the standard. Some commenters also recommended delaying the effective date to give auditors adequate time to develop and implement processes and provide training with respect to several aspects of the standard.

After considering the comments, the Board has delayed the effective date. However, the Board also believes that a delay beyond 2004 is not in the public interest. The Board concluded that the implementation date of this standard should coincide with that of PCAOB Auditing Standard No. 2, *An Audit of Internal Control Over Financial Reporting Performed in Conjunction with an Audit of Financial Statements*, because of the documentation issues prevalent in PCAOB Auditing Standard No. 2. Therefore, the Board has decided that the standard will be effective for audits of financial statements with respect to fiscal years ending on or after [the later of November 15, 2004, or 30 days after the date of approval of this standard by the SEC]. The effective date for reviews of interim financial information and other engagements, conducted pursuant to the standards of the PCAOB, would occur beginning with the first quarter ending after the first financial statement audit covered by this standard.

Several commenters noted that SAS No. 96, *Audit Documentation*, the interim auditing standard on audit documentation, referred to audit documentation as the property of the auditor. This was not included in the proposed standard because the Board did not believe ascribing property rights would have furthered this standard's purpose to enhance the quality of audit documentation.

SAS No. 96, *Audit Documentation*, also stated that, ''the auditor has an ethical, and in some situations a legal, obligation to maintain the confidentiality of client information,'' and referenced Rule 301, *Confidential Client Information*, of the AICPA's Code of Professional Conduct. Again, the Board's proposed standard on audit documentation did not include this provision. In adopting certain interim standards and rules as of April 16, 2003, the Board did not adopt Rule 301 of the AICPA's Code of Professional Conduct. In this standard on audit documentation, the Board seeks neither to establish confidentiality standards nor to modify or detract from any existing applicable confidentiality requirements.

III. Date of Effectiveness of the Proposed Rule 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 Board consents, the Commission will:

(a) By order approve such proposed rule; or

(b) Institute proceedings to determine whether the proposed rule 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 is consistent with the requirements of Title I of the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/pcaob.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. PCAOB–2004–05 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File No. PCAOB–2004–05. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/pcaob.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of PCAOB. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. PCAOB–2004–05 and should be submitted on or before August 10, 2004.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–16440 Filed 7–19–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50020]

Extension of Order Regarding Broker-Dealer Financial Statement Requirements Under Section 17 of the Exchange Act

July 14, 2004.

The Securities and Exchange Commission (''Commission'') is extending its Order, originally issued on August 4, 2003 (the ''2003 Order'') [1] under Section 17(e) of the Securities Exchange Act of 1934 (''Exchange Act''), regarding audits of financial statements of broker-dealers that are not issuers (''non-public broker-dealers''). The 2003 Order provided that non-public broker-dealers may file with the Commission and may send to their customers documents and information required by Section 17(e) certified by an independent public accountant, instead of by a registered public accounting firm, until January 1, 2005, unless rules are in place regarding Board registration of auditors of non-public broker-dealers that set an earlier date.

Section 17(e)(1)(A) of the Exchange Act requires that every registered broker-dealer annually file with the Commission a certified balance sheet and income statement, and Section 17(e)(1)(B) requires that the broker-dealer annually send to its customers its ''certified balance sheet.'' [2] The Sarbanes-Oxley Act of 2002 (''Act'') [3] established the Public Company Accounting Oversight Board (''Board'') [4] and amended Section 17(e) to replace the words ''an independent public accountant'' with ''a registered public accounting firm.'' [5]

The Act establishes a deadline for registration with the Board of auditors of financial statements of ''issuers,'' as that term is defined in the Act.[6] The Act does not provide a deadline for registration of auditors of non-public broker-dealers.

The 2003 Order expires January 1, 2005. Application of registration requirements and procedures to auditors of non-public broker-dealers is still being considered. The Commission has therefore determined that extending the Order is consistent with the public interest and the protection of investors.

Accordingly, *it is ordered,* pursuant to Section 17(e) of the Exchange Act, that non-public broker-dealers may file with the Commission a balance sheet and income statement and may send to their customers a balance sheet certified by an independent public accountant, instead of by a registered public accounting firm, for fiscal years ending before January 1, 2006, unless the Commission has approved rules regarding Board registration of auditors of non-public broker-dealers that set an earlier date.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–16439 Filed 7–19–04; 8:45 am]

BILLING CODE 8010–01–P

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[1] Exchange Act Release No. 48281.

[2] Exchange Act Rule 17a–5 requires registered broker-dealers to provide to the Commission and to customers of the broker-dealer other specified financial information.

[3] Public Law 107–204.

[4] Section 101 of the Act.

[5] Section 205(c)(2) of the Act.

[6] Section 2 of the Act defines ''issuer.'' Section 102 of the Act establishes a specific deadline by which auditors of issuers must register with the Board. Based on the statutory deadline of 180 days after the Commission determined the Board was ready to carry out the requirements of the Act, that date was October 22, 2003. *See* Exchange Act Release No. 48180 (July 16, 2003). The registration deadline for non-U.S. public accounting firms has been extended to July 19, 2004. *See* Exchange Act Release No. 49473 (March 25, 2004).

DEPARTMENT OF STATE

[Public Notice 4766]

Notice of Receipt of Application for Presidential Permit for the Construction of a New International Border Crossing

Notice is hereby given that the Department of State has received an application for a permit authorizing the construction, operation and maintenance of an international toll bridge in the Laredo, Texas area. The application has been filed by the County of Webb, Texas for a permit for a new crossing of the Rio Grande 7.6 miles downstream from the existing Gateway to the Americas Bridge (International Bridge I).

The Department's jurisdiction with respect to this application is based upon Executive Order 11423, dated August 16, 1968, as amended, and the International Bridge Act of 1972, (Pub. L. 92–343, 86 Stat. 731, approved September 26, 1972).

As required by E.O. 11423, the Department is circulating this application to concerned agencies for comment.

Interested persons may submit their views regarding this application in writing within thirty days from the publication date of this notice to Mr. Dennis M. Linskey, Coordinator, U.S.–Mexico Border Affairs, Room 4258, Department of State, 2201 C St., NW., Washington, DC 20520.

The application and related documents made part of the record to be considered by the Department of State in connection with this application are available for review in the Office of Mexican Affairs during normal business hours throughout the comment period.

Any questions related to this notice may be addressed to Mr. Linskey at the above address or by fax at (202) 647–5752.

Dated: July 13, 2004.

Dennis M. Linskey,

Coordinator U.S.-Mexico Border Affairs, Department of State.

[FR Doc. 04–16467 Filed 7–19–04; 8:45 am]

BILLING CODE 4710–29–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Runway Incursion Information Evaluation Program

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of program renewal.

SUMMARY: This document announces the renewal and expansion for a 24-month period of the Runway Incursion Information Evaluation Program (RIIEP) for the purpose of gathering further information about the causal factors of runway incursions and surface incidents through in-depth interviews of pilots or maintenance technicians involved in such events. This document expands the collection of information under the RIIEP to include surface incidents as defined in this document. Additionally, this document states the FAA's policy concerning enforcement-related incentives for pilots and maintenance technicians to encourage them to participate in the program, and the FAA's policy concerning the use for enforcement purposes of information provided by pilots and maintenance technicians under the program.

DATES: The program is in effect from August 19, 2004 through July 20, 2006.

FOR FURTHER INFORMATION CONTACT: Will Swank, AVR/AFS Representative, Office of Runway Safety and Operational Services, Federal Aviation Administration, 490 L'Enfant Plaza, Suite 7225, Washington, DC 20024; Telephone (202) 385–4776; E-mail *will.swank@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

One of the FAA's top safety priorities is to prevent runway incursions.[1] To help achieve this goal, the FAA has implemented several initiatives to reduce runway incursions through enhanced education and training of pilots and maintenance technicians, and by gathering and evaluating data on the causes of runway incursions and surface incidents.[2]

The Flight Standards Service ordinarily is immediately aware of all reported surface incidents because it is notified by the Air Traffic Organization. However, often the FAA knows little about why the reported incident happened or the factors and events that led to it. Accordingly, in March 2000, the FAA implemented the Runway Incursion Information and Evaluation Program (RIIEP) for a period of 1 year. Through the RIIEP the FAA sought information about runway incursions by interviewing pilots involved in such events. Under the original RIIEP, pilots involved in runway incursions who cooperated with FAA inspectors by providing information about the incident were generally not subjected to punitive legal enforcement action for an apparent violation involving the incursion. We expected the pilot to share valuable safety information that would help us identify the cause of the runway incursion in which the pilot was involved. We wanted this information to determine root causes of runway incursions and to develop effective corrective actions to help reduce or eliminate this problem.

Over the course of a year, the RIIEP produced new information about some causes of runway incursions. The program showed promise as a useful tool for gathering information to develop strategies to prevent runway incursions. The FAA learned, however, that we needed to change certain processes to make the RIIEP a more effective program. In particular, we needed a more extensive interview questionnaire to give us detailed information that could help us determine the root causes of runway incursions more directly. In addition, we needed an improved method for processing information collected under the RIIEP. With these changes, the FAA believes the RIIEP could be a much more effective program for analyzing the causes of runway incursions and surface incidents, particularly the human factors aspects of those causes. Accordingly, we have modified the RIIEP and decided to renew the program for 24 months. Ninety days before the end of this period, the FAA will evaluate the RIIEP to determine whether the program is providing valuable safety information and whether we should continue the program or let it expire.

Renewed Runway Incursion Information and Evaluation Program

Under the renewed RIIEP, any pilot or maintenance technician taxiing an aircraft involved in an apparent runway incursion or surface incident may expect to be contacted by an FAA inspector within a few days after the incident. The inspector will inform the pilot or maintenance technician that participation in the RIIEP interview process is voluntary. The inspector may conduct the interview in person or by telephone.

The Flight Standards Service has developed standardized RIIEP interview questionnaires, one for pilots and one

[1] Runway Incursion is defined as ''any occurrence in the airport runway environment involving an aircraft, vehicle, person, or object on the ground that creates a collision hazard or results in a loss of required separation with an aircraft taking off, intending to take off, landing, or intending to land.'' Runway incursions are identified and tracked at towered airports (those airports with an operating FAA or contract tower).

[2] Surface incidents, for the purpose of the RIIEP, are defined as only those incidents where an aircraft operated by a pilot or maintenance technician taxiing enters a runway safety area without a clearance but another aircraft was not present.

for maintenance technicians, from which the inspector will ask the pilot or maintenance technician questions. To get complete information about the runway incursion or surface incident for analysis and to implement future preventive measures, the inspector will also encourage pilots and maintenance technicians to provide additional comments to the inspector. The inspector will record any comments in the RIIEP questionnaire ''comments section.'' These comments may be on anything about the event and may range from general to specific.

RIIEP Enforcement Policy

The FAA opens an enforcement investigation when it receives a report of a pilot deviation or a vehicle or pedestrian deviation, which are categories of runway incursion or surface incidents that involve possible regulatory violations by a pilot or maintenance technician. If the investigation reveals a violation of the FAA's regulations, the pilot or maintenance technician is subject to a legal enforcement action (certificate action or civil penalty). However, as an incentive to encourage participation in the RIIEP, for airmen who cooperate and provide detailed information regarding the deviation, the FAA plans to forgo punitive legal enforcement actions (certificate suspension for a fixed period or civil penalty), and instead use administrative action [3] or counseling [4], which involve no finding of violation, provided:

1. The nature of the apparent violation does not indicate that a certificate holder lacks qualification to hold a certificate;
2. The apparent violation was inadvertent, that is, it was not the result of purposeful conduct;
3. The apparent violation was not a substantial disregard for safety or security;
4. The apparent violator has a constructive attitude toward complying with the regulations; and
5. The apparent violation does not indicate a trend of noncompliance.

In certain cases, the FAA may determine an airman should complete corrective action to help prevent another runway incursion or surface incident, such as remedial training. Such corrective action is voluntary; however, refusal by the pilot or maintenance technician to undertake it could result in punitive legal enforcement action being taken for the apparent violation.

If an apparent violation resulting from the runway incursion or surface incident, or the circumstances surrounding the runway incursion or surface incident, demonstrate or raise a question of lack of qualification of an airman, the FAA will proceed with appropriate action. This may include reexamination, certificate suspension pending successful reexamination, or certificate revocation.

Foreign airmen may not participate in the RIIEP.

Runway Safety Education Demonstrating a Constructive Attitude

In determining whether an apparent violator has a constructive attitude toward complying with the regulations, FAA may consider documentation showing the completion of an FAA-sponsored, industry-conducted safety seminar on the subject implicated in the apparent violation.

The FAA is sponsoring an industry-conducted Pilot and Mechanic Runway Safety Education program available on the Internet at *http://www.aopa.org/asf/runway_Safety/*. We will consider successful completion and documentation of this Runway Safety education program favorably in determining the course of action we will take when a pilot or maintenance technician is involved in a runway incursion or surface incident. The Runway Safety Education program will also qualify for credit under the Pilot Proficiency Awards (WINGS) Program or the Aviation Maintenance Technician Awards (AMT) Program.

Using Information Provided By Pilots or Maintenance Technicians Under the RIIEP

The FAA recognizes pilots and maintenance technicians will have concerns that the information they provide under this program will be used by the FAA to take legal enforcement actions against them. The FAA, however, does not expect to use information provided by pilots or maintenance technicians during interviews conducted by FAA inspectors under the RIIEP in any FAA punitive legal enforcement action.

RIIEP Application Under an Approved Aviation Safety Action Programs (ASAP)

Reports of runway incursion and surface incident events that are accepted under an approved ASAP will be handled in accordance with Advisory Circular (AC) 120–66, Aviation Safety Action Programs (ASAP), as amended, and the Memorandum of Understanding between the FAA and the certificate holder. As with ASAP, the objective of the RIIEP is to encourage the voluntary reporting of safety information that may be critical to identifying potential precursors to accidents. Incorporation of the RIIEP under an approved ASAP is therefore strongly encouraged, to include:

1. Certificate holder's participation in the RIIEP;
2. Use of the RIIEP questionnaire during the ASAP report investigation; and
3. Compliance with FAA Order 8400.10, Volume 1, Chapter 5, Section 1, paragraph 293E concerning enforcement investigation coordination of possible violations reported under an approved ASAP.

RIIEP Renewal

This renewal of the RIIEP will be in effect for 24 months beginning the effective date listed above.

Issued in Washington, DC, on July 13, 2004.

Marion C. Blakey,

Administrator.

[FR Doc. 04–16518 Filed 7–16–04; 11:22 am]

BILLING CODE 4910–13–P

[3] An administrative action is either a warning notice or letter of correction, which is generally issued when remedial training is taken.

[4] Counseling is an action carried out under the guidance of the FAA's Aviation Safety Program, which is a program designed to promote safety and technical proficiency by providing guidance and support for the aviation community through education and cooperative efforts.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34451]

Atlantic & Pacific Railroad and Transportation Company—Lease and Operation Exemption—Kansas & Oklahoma Railroad

Atlantic & Pacific Railroad and Transportation Company (APR), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to lease, from Kansas & Oklahoma Railroad (KO),[1] and operate approximately 4 miles of rail line extending from the point of interchange with KO's line at approximately milepost 87.0 (at or near Chase, KS) to the point of interchange with KO's line at approximately milepost 91.0 (at or near Silica, KS).[2]

In a related proceeding, KO is expected to file a notice of exemption in STB Finance Docket No. 34520, pursuant to 49 CFR 1180.2(d)(7), to

[1] KO is a subsidiary of Watco Companies, Inc.

[2] APR indicates that it is close to reaching an agreement with KO for APR's operation of the line.

acquire trackage rights over the subject line.

AP certifies that its projected revenues as a result of this transaction will not exceed those that would qualify it as a Class III rail carrier and states that such revenues will not exceed $5 million annually. The transaction was scheduled to be consummated on or after July 2, 2004.

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. 34451, 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 Troy W. Garris, Weiner Brodsky Sidman Kider PC, 1300 19th St., NW., Fifth Floor, Washington, DC 20036–1609.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: July 12, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–16080 Filed 7–19–04; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–303 (Sub–No. 27)]

Wisconsin Central Ltd.—Abandonment—in Ozaukee, Sheboygan and Manitowoc Counties, WI

On June 30, 2004, Wisconsin Central Ltd. (WCL) filed with the Board an application for permission to abandon a line of railroad, known as the Plymouth Line, extending from milepost 114.8 near Saukville to milepost 151.8 near Kiel, a distance of approximately 37 miles in Ozaukee, Sheboygan and Manitowoc Counties, WI. The line includes stations at Fredonia, Random Lake, Adell, Waldo, Plymouth, and Elkhart Lake, and traverses U.S. Postal Service ZIP Codes 53001, 53014, 53020, 53021, 53042, 53061, 53073, 53075, 53080, and 53093.

The line does not contain federally granted rights-of-way. Any documentation in WCL's possession will be made available promptly to those requesting it. The applicant's entire case for abandonment (case-in-chief) was filed with the application.

This line of railroad has appeared on WCL's system diagram map in category 1 since October 15, 2001.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line R.Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

Any interested person may file with the Board written comments concerning the proposed abandonment or protests (including the protestant's entire opposition case) by August 16, 2004. All interested persons should be aware that following any abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 U.S.C. 10905 (49 CFR 1152.28) and any request for a trail use condition under 16 U.S.C. 1247(d) (49 CFR 1152.29) must also be filed by August 16, 2004. Each trail use request must be accompanied by a $200 filing fee. *See* 49 CFR 1002.2(f)(27). Applicant's reply to any opposition statements and its response to trail use requests must be filed by August 30, 2004. *See* 49 CFR 1152.26(a). A final decision will be issued by October 18, 2004.

Persons opposing the abandonment who wish to participate actively and fully in the process should file a protest. Persons who oppose the abandonment but who do not wish to participate fully in the process by submitting verified statements of witnesses containing detailed evidence should file comments. Persons seeking information concerning the filing of protests should refer to 49 CFR 1152.25. Persons interested only in seeking public use or trail use conditions should also file comments.

In addition, a commenting party or protestant may provide: (i) An offer of financial assistance (OFA) for continued rail service under 49 U.S.C. 10904 (due 120 days after the application is filed or 10 days after the application is granted by the Board, whichever occurs sooner); (ii) recommended provisions for protection of the interests of employees; (iii) a request for a public use condition under 49 U.S.C. 10905; and (iv) a statement pertaining to prospective use of the right-of-way for interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29.

All filings in response to this notice must refer to STB Docket No. AB–303 (Sub-No. 27) and must be sent to: (1) Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001; and (2) Thomas J. Litwiler, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606–2832. The original and 10 copies of all comments or protests shall be filed with the Board with a certificate of service. Except as otherwise set forth in part 1152, every document filed with the Board must be served on all parties to the abandonment proceeding. 49 CFR 1104.12(a).

The line sought to be abandoned will be available for subsidy or sale for continued rail use, if the Board decides to permit the abandonment, in accordance with applicable laws and regulations (49 U.S.C. 10904 and 49 CFR 1152.27). Each OFA must be accompanied by a $1,100 filing fee. *See* 49 CFR 1002.2(f)(25). No subsidy arrangement approved under 49 U.S.C. 10904 shall remain in effect for more than 1 year unless otherwise mutually agreed by the parties (49 U.S.C. 10904(f)(4)(B)). Applicant will promptly provide upon request to each interested party an estimate of the subsidy and minimum purchase price required to keep the line in operation. The carrier's representative to whom inquiries may be made concerning sale or subsidy terms is set forth above.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Services at (202) 565–1592 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis (SEA) at (202) 565–1539. (Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.)

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by SEA will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact SEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 33 days of the filing of the application. The deadline for submission of comments on the EA will generally be within 30 days of its service. The comments received will be addressed in the Board's decision. A supplemental EA or EIS may be issued where appropriate.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: July 14, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–16455 Filed 7–19–04; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Small Business/Self Employed—Payroll Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Small Business/Self Employed—Payroll Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The TAP will be discussing issues pertaining to increasing compliance and lessening the burden for Small Business/Self Employed individuals. Recommendations for IRS systemic changes will be developed.

DATES: The meeting will be held Thursday, August 12, 2004.

FOR FURTHER INFORMATION CONTACT: Mary O'Brien at 1–888–912–1227, or 206–220–6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Small Business/Self Employed—Payroll Committee of the Taxpayer Advocacy Panel will be held Thursday, August 12, 2004 from 3 p.m. EDT to 4:30 p.m. EDT via a telephone conference call. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 206–220–6096, or write to Mary O'Brien, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174 or you can contact us at *www.improveirs.org.* Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Mary O'Brien. Ms. O'Brien can be reached at 1–888–912–1227 or 206–220–6096.

The agenda will include the following: Various IRS issues.

Dated: July 13, 2004.

Bernard Coston,

Director, Taxpayer Advocacy Panel.

[FR Doc. 04–16475 Filed 7–19–04; 8:45 am]

BILLING CODE 4830–01–P

Federal Register

Tuesday,
July 20, 2004

Part II

Department of Housing and Urban Development

24 CFR Part 583

Supportive Housing Program; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 583

[Docket No. FR–4616–P–01; HUD–2004–0001]

RIN 2506–AC07

Supportive Housing Program

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend HUD's Supportive Housing Program regulations. The regulations would be updated to improve the implementation of existing program requirements in conformance with recent statutory changes. The Department believes that the changes made by this proposed rule will promote a better understanding of the Supportive Housing Program by program participants and allow for the full implementation of the Stewart B. McKinney-Vento Homeless Act.

DATES: *Comment Due Date:* September 20, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500. Comments should refer to the above docket number and title. A copy of each comment submitted will be available for public inspection and copying weekdays between 8 a.m. and 5 p.m. at the above address. Comments submitted by facsimile (FAX) will not be accepted.

Interested persons are also invited to submit comments electronically through *http://www.epa.gov/fedocket.* Commenters should follow the electronic submission instructions given on that site. A copy of the public comments submitted, and if applicable, other supporting documents will be available for viewing at that time.

FOR FURTHER INFORMATION CONTACT: Mark Johnston, Office of Special Needs Assistance Programs, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000; telephone 202 708–1226 (this is not a toll-free number). Hearing- or speech-impaired persons may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

HUD's regulations at 24 CFR part 583 implement the Supportive Housing Program, which provides assistance for housing and supportive services for homeless persons, as authorized by Title IV, subtitle C, of the Stewart B. McKinney-Vento Homeless Assistance Act of 1987 (42 U.S.C. 11381 *et seq.*) (the McKinney-Vento Act). Under the program, HUD provides grants to local governments or nonprofit entities for (1) acquisition, rehabilitation, new construction, and leasing of supportive housing, (2) operating costs in connection with supportive housing, and (3) supportive services provided to homeless persons. Supportive services may include services such as child care, employment assistance, outpatient health services, nutritional counseling, assistance in finding permanent housing, providing security arrangements necessary for the protection of residents and homeless persons using a facility, and providing assistance in obtaining assistance under other federal, state, and local programs.

The current regulations require revision because statutory changes have occurred subsequent to the last regulatory revision in 1996. For example, the current regulations are written to apply to Indian tribes. However, the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*) (NAHASDA) recognized the right of Native American tribes to self-governance by providing for a general federal grant to tribes, which the tribes then can use for various assisted housing programs. As a consequence, NAHASDA eliminated tribal participation in some assistance programs, including programs under the McKinney-Vento Act.

In addition, the Fiscal Year (FY) 1999, 2000, and 2001 HUD appropriations acts (Pub. L. 105–276, approved October 21, 1998; Pub. L. 106–74, approved October 20, 1999; and Pub. L. 106–377, approved October 27, 2000, respectively) added requirements for local matching and permanent housing as a prerequisite for obtaining McKinney-Vento Act funds and modified the requirements regarding environmental reviews. The FY2001 appropriation for the Supportive Housing Program provides that ''not less than 30 percent of these funds shall be used for permanent housing, and all funding for services must be matched by 25 percent in funding for each grantee.'' As a result, in order to obtain funding, grantees must be prepared to meet these requirements.

Current HUD regulations allow grantees in the Supportive Housing Program to use their grant funds to purchase HUD-held, single family properties leased by the grantee for use as facilities for the homeless (see 24 CFR 583.100(b)(5) and 24 CFR part 291). However, HUD suspended leasing under this component of the Supportive Housing Program and has continued this suspension to the present. HUD does not plan currently to reinstate this aspect of the supportive housing program.

In 1992, the Safe Havens for Homeless Individuals Demonstration Program (Safe Havens Program) was enacted into law. (See 42 U.S.C. 11391–11399.) The purpose of the Safe Havens Program is to provide through grants to local nonprofit organizations and governmental entities extremely low-cost housing and supportive services to eligible homeless persons, that is, those who are mentally ill, reside in places not designed for human habitation, and are unwilling to participate in supportive services or mental health counseling. The types of supportive services eligible in the Safe Havens Program are those known as ''low demand services and referrals'' and include health care, mental health and substance abuse services, medication management, education, counseling, job training, and assistance in obtaining entitlement benefits and other supportive services. Although HUD funded Safe Havens Program activities through notices of funding availability (NOFAs), the program was not referenced specifically in the Supportive Housing Program regulations.

II. This Proposed Rule

This proposed rule would amend 24 CFR part 583 to implement the statutory authority discussed above, as well as to make other changes designed to improve the program.

Matching requirement. The Supportive Housing Program statute and current regulations require grant recipients to match the funds provided by HUD for acquisition, rehabilitation, and new construction of a facility to provide supportive housing or supportive services. (See 42 U.S.C. 11386(e) and 24 CFR 583.145.) In addition to this matching requirement, recent appropriations acts have imposed a grant recipient matching requirement for all supportive services, requiring grantees to pay 25 percent of such costs. (See Pub. L. 105–276, 112 Stat. 2479, approved October 21, 1998; Pub. L. 106–74, 113 Stat. 1063, approved October 20, 1999; and Pub. L. 106–377, 114 Stat.

1441, approved October 27, 2000.) Furthermore, the McKinney-Vento Act provides that grants for annual operating costs may not exceed 75 percent of the annual operating costs for supportive housing.

Consistent with the recent appropriations acts, HUD proposes to revise 24 CFR 583.145 to implement all these statutory provisions. Accordingly, the proposed rule would revise § 583.145 to incorporate the requirement that the grantee pay for the portion of the assistance for supportive services and operating costs not provided by HUD. The proposed rule retains § 583.145(a) of the current regulations, implementing statutory requirements for matching grants for acquisition, rehabilitation, and new construction. The regulations on grants for supportive services and operating costs, §§ 583.120 and 583.125, have been revised to cross-reference the new requirement in § 583.145.

Term of grant. In order to make the program more flexible, this rule proposes to eliminate 24 CFR 583.130. That section currently provides that HUD grant terms for leasing, supportive services, and operating costs not exceed five operating years. Instead, under the proposed rule, HUD grant agreements would be flexible as to operating term for such purposes, as long as the purposes are in compliance with the regulations under 24 CFR part 583.

With respect to funding to construct, rehabilitate, or acquire structures, the rule retains the requirement of 24 CFR 583.305 (proposed § 583.355). This section requires that grantees receiving grants for new construction for supportive housing, or for acquisition or rehabilitation of buildings to provide supportive housing or supportive services, agree to continue to operate the supportive housing or supportive services for 20 years after the date of initial occupancy or initial provision of services. This period could be shortened upon a determination by HUD that the structure was no longer needed for supportive housing or supportive services and HUD's approval of its conversion for another use for the direct benefit of low-income persons. The proposed rule strengthens the 20-year commitment by requiring the grantee to record a deed restriction or covenant running with the land embodying this restriction, as well as a lien against the property in favor of HUD to secure HUD's interest in the repayment of the grant if the facility is not used for its intended purpose for the prescribed time.

Relationship between grantee and other project sponsor. This proposed rule would include a new section to specify the relationship between the supportive housing grantee or other project sponsor, and the residents, a matter on which the current regulations are silent. Proposed 24 CFR 583.325 provides that project sponsors not be required to enter into a landlord-tenant relationship with the residents, but may enter into an ''occupancy agreement'' containing a procedure for termination of residency. The minimum requirements for such a procedure are written notice containing a clear statement of reasons for the termination, an opportunity for review of the termination decision before a person other than the person or persons who made the original decision, and prompt written notice to the resident of the final decision to terminate the occupancy agreement.

The proposed rule would add a provision to clarify the administration of grants where the grantee is not the project sponsor, but rather contracts with another entity to operate the supportive housing project. In such a case, proposed 24 CFR 583.400 would provide that the grantee and project sponsor enter into a written agreement that contains the following basic elements: A statement of work; an agreement that the project sponsor follow 24 CFR part 583; an agreement as to records and reports that the project sponsor must maintain and prepare; the procedures and duties incumbent on the grantee; a requirement that the grantee monitor the goals and performance of the project sponsor; and a provision for suspension or termination of the project sponsor, if the sponsor materially fails to comply with any term of the grant. In addition, the grant agreement must incorporate the provisions of proposed § 583.355. New § 583.355 would, in the case of a grant for acquisition, new construction, or rehabilitation of a facility where there is a 20-year commitment, provide a schedule for the repayment of unused grant amounts and would prevent undue benefit to the grantee in the event the project is sold. If appropriate, the grant agreement also would incorporate the provisions of new § 583.155. Section 583.155 (§ 583.150(b) of the current regulations) would govern grants to primarily religious organizations. Office of Management and Budget (OMB) Circular A–122, ''Cost Principles for Non-profit Organizations,'' specifies allowable and unallowable costs.

Safe Havens Program. The proposed rule incorporates the Safe Havens Program as an activity for which recipients may use grant funds. (See 42 U.S.C. 11391–11399.) The Safe Havens Program is designed to reach the population of homeless persons who are unwilling or unable to receive mental health treatment or other supportive services. While the Safe Havens Program, enacted in 1992, was not previously incorporated into the Supportive Housing Program regulations, homeless assistance funds for this purpose have been made available through the NOFA process. The proposed rule adds safe havens as a component under proposed 24 CFR 583.3 (former § 583.1(b)), and a definition for safe havens in § 583.5. The rule also adds safe havens as a permissible use of grant assistance under § 583.100(c).

Program Income and Grant Closeout. The proposed rule adds two sections to clarify (1) disposition of program income, and (2) grant closeout procedures. Proposed § 583.420 specifies that program income received prior to closeout of the grant generally must be treated as supportive housing funds, except for occupancy charges, which are governed by § 583.330(b). Section 583.330(b) allows occupancy fees to be used to assist residents of transitional housing to move to permanent housing. Program income received after grant closeout need not be so treated except where the project involved is renewed with a new grant, in which case the program income is treated as income of the renewed project, in accordance with § 583.420.

Proposed § 583.425 deals with grant closeout procedures. The criteria for closeout are based on usage of the grant funds as well as on completion of the activities for which the grant was provided. Section 583.425 also specifies the actions to be taken after the closeout, including grantee submission of all financial, final performance, and other reports as required within 90 days, deobligation of any unused grant amounts, which are returned to HUD, and repayment to HUD of disallowed costs, if any. Section 583.425 further provides that HUD will prepare a closeout agreement regarding any final obligations remaining after the grant closeout (*e.g.*, identification of closeout costs eligible to be paid with supportive housing funds).

Proposed § 583.505 deals with nondiscrimination and equal opportunity requirements. Currently the regulations, at § 583.325, recite that projects may serve designated populations of disabled persons without further explanation. Section 583.505 clarifies the rights of persons with disabilities to be assisted in a particular project. In very limited circumstances, a project may lawfully establish a

preference for serving a specified type of disability. (See 24 CFR 8.4(b)(iv).) This may be done only if the preference was proposed in the initial application to HUD, the project will provide services appropriate for the intended population, and if excluding other persons is necessary to serve the intended population as effectively as others are served elsewhere. HUD will determine the necessity on a case-by-case basis, from information provided in the application. HUD anticipates that, in many cases, addiction treatment projects will be able to meet the necessity test. In projects with an established preference, the provider will be able to hold space open in the project for persons meeting the established preference.

Projects that either do not seek or do not receive approval to establish a preference for a type of disability may still advertise themselves as offering services for a particular type of disability, which the rule calls ''targeted'' projects. If there is space available in a targeted project, it may not be held open for someone with the targeted disability. HUD expects that a person with a different type of disability who wishes to participate in the services will be offered the available space.

Notwithstanding the establishment of these two categories of projects, HUD expects the majority of projects to serve persons with all types of disabilities and remind grantees and project sponsors that the McKinney-Vento Act requires them, to the extent practicable, to allow project participants to design the services provided by the project.

Additionally, § 583.505(b)(2) is updated to include reference to the provisions of Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, issued by the president on December 12, 2002 (67 FR 77141, December 16, 2002).

Miscellaneous additional proposed changes. A number of additional changes are proposed to take into consideration new legal developments, such as removing references to Indian tribes, which are now covered by grants under (1) NAHASDA rather than under the Supportive Housing Program, and (2) HUD-owned single family housing, since such housing is not currently being made available for supportive housing. In addition, a number of sections are being amended for clarification or organizational purposes. For example, §§ 583.105(b) and 583.110(b) are proposed to be revised to clarify that the funding limitations in those sections apply to each structure to be acquired, rehabilitated, or built. Other sections proposed to be revised or amended for clarification or organizational purposes are the following:

Section 583.105 clarifies that rehabilitation funds cannot be used on leased properties.

Section 583.120 would be revised to reflect that only a portion of the supportive services costs may be funded under the Supportive Housing Program.

Section 583.125(b) has a definition of ''operating costs'' that differs from the definition of the same term in § 583.5. This rule proposes to amend § 583.125(b) to cross-reference the definition of operating costs in § 583.5.

Section 583.140, which addresses technical assistance, is revised to update and clarify this section.

Section 583.150 is revised to change the title from ''limitations on use of assistance'' to ''maintenance of effort'.

Section 583.150(b) is redesignated as a new section, § 583.155, but makes no changes to the regulatory text. The full text of what is now being redesignated as § 583.155 was published in the final rule of September 30, 2003 (68 FR 56396).

Section 583.230, captioned ''Environmental Review,'' is changed to show that for FY2001 and later, grants provided to private nonprofit organizations and limited or special purpose governmental agencies, including housing agencies under the Supportive Housing Program, are governed by section 443 of the McKinney-Vento Homeless Assistance Act as amended by the FY2001 HUD Appropriations Act (Pub. L. 106–377, approved October 27, 2000). The FY2001 Appropriations Act provides for the assumption of environmental responsibilities by a state or unit of local government, regardless of whether or not it is the recipient for such grants for FY2001 and later.

New § 583.210 (former § 583.235) is amended to remove references to non-competitive renewal grants since these grants are now subject to the competitive award process.

New § 583.300 is amended to add a paragraph (d) on participant control of site.

Section 583.505 identifies the eligibility of projects serving disabled persons and allows for targeting and establishing preferences for certain subpopulations.

Subpart D is amended to change its title to ''Project Implementation,'' which more accurately identifies the subject of the subpart.

The following existing sections are proposed to be redesignated for organizational purposes, in some cases moving subsections, which were substantively separate topics, into their own sections, making the rule easier to read:

Section 583.150(b) is redesignated as § 583.155 (the section title also is changed).

Section 583.155, regarding the consolidated plan, is redesignated as § 583.220, to conform to redesignations of other sections (also amended to remove references to the former comprehensive housing affordability strategy (CHAS), which has been replaced by the consolidated plan).

Section 583.235 is redesignated as § 583.210 to conform to the redesignation above.

Section 583.300 is redesignated as § 583.305 and the section title is changed to ''Property Standards,'' with each topic broken out into a separate section.

Section 583.300(c), which addresses meals, is redesignated as § 583.316.

Section 583.320, which addresses site control, is redesignated as § 583.300.

All sections in subpart E are redesignated to accommodate new sections.

Sections 583.310, 583.325, and 583.330 are reorganized into a new subpart F, ''Other Program Requirements,'' for easier reference.

The proposed rule removes § 583.130, regarding commitment of grant amounts for leasing, supportive services and operating costs, because grant terms are now flexible. The rule adds the following new definitions in § 583.5 for ''project sponsor,'' ''program income,'' and ''safe haven'' to reflect how the Supportive Housing Program has changed over the years. The rule also clarifies the definitions of ''homeless persons,'' ''operating costs,'' ''date of initial occupancy,'' ''transitional housing,'' and ''permanent housing.''

III. Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The information collection requirements contained in 24 CFR part 583 were approved previously by OMB under section 3507(d) of the Paperwork Reduction Act of 1995, and assigned OMB control number 2506–0145. This rule adds two new collections of information requirements at §§ 583.420 and 583.425, which have been submitted to OMB for review under section 3507(d)). These new collection

of information requirements are not effective until such time as OMB grants its approval. The approval numbers will be published in the **Federal Register** by separate notice. Information on these requirements is provided as follows:

Estimates of the total reporting and recordkeeping burden that will result from the collection of information are as follows:

REPORTING AND RECORDKEEPING BURDEN

Section No. and procedure	No. of persons affected	No. of minutes per procedure	Burden hours
24 CFR 583.420, recording program income	Dependent on grantee, but average 20	15	5
24 CFR 583.425, Grantee's annual progress report.	Dependent on grantee, but average 20	60	20

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Comments must be received within sixty days from the date of publication of this rule. Comments must refer to the rule by name and docket number (FR–4616) and must be sent to:

Mark D. Menchik, HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503

and

Sheila Jones, Reports Liaison Officer, Office of the Assistant Secretary for Community Planning and Development, Department of Housing & Urban Development, 451 7th Street, SW., Room 7232, Washington, DC 20410–7000.

Environmental Impact

A Finding of No Significant Impact with respect to the environment for this rule has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4223). The Finding of No Significant Impact is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of the General Counsel, Department of Housing and Urban Development, Room 10276, 451 Seventh Street, SW., Washington, DC 20410–5000.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this rule, and in so doing certifies that this rule would not have a significant economic impact on a substantial number of small entities. The rule would update existing regulations of a program that provides grants for State and local governments and nonprofit corporations to operate supportive housing for homeless persons. These revisions will not result in a significant economic impact on a substantial number of small entities.

Notwithstanding HUD's determination that this rule would not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed rule does not have federalism implications and would not impose substantial direct compliance costs on State and local governments nor preempt State law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This proposed rule does not impose any Federal mandates on any State, local, or tribal governments, nor on the private sector, within the meaning of the UMRA.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance (CFDA) program number is 14.235.

List of Subjects in 24 CFR Part 583

Homeless, Rent subsidies, Reporting and recordkeeping requirements, Supportive housing programs—housing and community development, Supportive services.

Accordingly, for the reasons stated in the preamble, HUD proposes to amend 24 CFR part 583 as follows:

PART 583—SUPPORTIVE HOUSING PROGRAM

1. The authority citation for 24 CFR part 583 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 11381–11389.

2. Subpart A is revised to read as follows:

Subpart A—General

Sec.
583.1 Purpose and scope.
583.3 Components.
583.5 Definitions.

§ 583.1 Purpose and scope.

The Supportive Housing Program is authorized by title IV of the Stewart B. McKinney-Vento Homeless Assistance Act (42 U.S.C. 11381–11389) (McKinney-Vento Act). The Supportive Housing Program is designed to promote the development of supportive housing and supportive services for homeless persons to enable them to live as independently as possible.

§ 583.3 Components.

Funds under this part may be used for:

(a) Transitional housing to facilitate the movement of homeless individuals and families to permanent housing;

(b) Permanent housing that provides long-term housing for homeless persons with disabilities;

(c) Housing that is, or is part of, a particularly innovative project for, or alternative method of, meeting the immediate and long-term needs of homeless persons;

(d) Supportive services for homeless persons not provided in conjunction with supportive housing; or

(e) Safe havens as defined in § 583.5.

§ 583.5 Definitions.

As used in this part:

Applicant means a State, metropolitan city, urban county, governmental entity, private nonprofit organization, or community mental health association that is a public nonprofit organization that is eligible to receive and submits an

application for assistance under this part. For purposes of this definition, governmental entities include those that have general governmental powers (such as a city or county), as well as those that have limited or special powers (such as public housing agencies).

Consolidated plan means the plan that a jurisdiction prepares and submits to HUD in accordance with 24 CFR part 91.

Date of initial occupancy means the date that the supportive housing is initially occupied by a homeless person. If the assistance is for an existing homeless facility, the date of initial occupancy is the date that housing or services are first provided to the residents of supportive housing with funding under this part.

Date of initial service provision means the date that supportive services are initially provided with funds under this part to homeless persons. This definition applies only to projects funded under this part that do not provide supportive housing.

Disability means:

(1) A disability as defined in section 223 of the Social Security Act (42 U.S.C. 423);

(2) Having a physical, mental, or emotional impairment that:

(i) Is expected to be of long-continued and indefinite duration;

(ii) Substantially impedes an individual's ability to live independently; and

(iii) Is of such a nature that such a disability could be improved by more suitable housing conditions;

(3) A developmental disability as defined in section 102 of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 15002); or

(4) The disease of acquired immunodeficiency syndrome (AIDS) or any conditions arising from the etiological agent for acquired immunodeficiency syndrome. This paragraph shall not be construed to limit eligibility under paragraphs (1), (2), and (3) of this definition or the provisions referred to in those paragraphs.

Homeless person means:

(1) An individual or family who resides in places not meant for human habitation, such as cars, parks, streets, sidewalks, and abandoned buildings;

(2) An individual or family who resides in an emergency shelter;

(3) An individual or family who resides in transitional or supportive housing for homeless persons who previously resided in places categorized in paragraphs (1) and (2) of this definition;

(4) An individual who resides in any of the places listed in paragraphs (1) through (3) of this definition but is spending up to 30 consecutive days in a hospital or other institution;

(5) An individual or family who is being evicted within the week from a private dwelling unit and no subsequent residence has been identified and the individual or family lacks the resources and support networks needed to obtain housing upon eviction; or

(6) An individual who is being discharged within the week from an institution in which the individual has been a resident for more than 30 consecutive days and no subsequent residence has been identified and the individual lacks the resources and support networks needed to obtain housing upon discharge.

Metropolitan city is defined in section 102(a)(4) of the Housing and Community Development Act of 1974 (42 U.S.C. 5302(a)(4)). In general, metropolitan cities are those cities that are eligible for an entitlement grant under 24 CFR part 570, subpart D.

New construction means the building of a structure where none existed or an addition to an existing structure that increases the floor area by more than 100 percent.

Operating costs means expenses incurred by a grantee operating supportive housing with respect to:

(1) Day-to-day management (including staff salaries), maintenance, repair, and security for the supportive housing;

(2) Utilities, insurance, fuel, furnishings, and equipment for the supportive housing;

(3) Relocation assistance under § 583.500, including payments and services; and

(4) Other costs associated with operating the supportive housing.

Permanent housing for homeless persons with disabilities means community-based housing for homeless persons with disabilities that provides long-term housing and supportive services for not more than:

(1) Eight such persons in a single-family structure or contiguous single-family structures;

(2) Sixteen such persons in a multifamily structure, but only if not more than 20 percent of the units are designated for such persons; or

(3) More than 16 persons, if the applicant demonstrates that local market conditions dictate the development of a large project and such development will achieve the neighborhood integration objectives of the program within the context of the affected community.

Private nonprofit organization means an organization:

(1) No part of the net earnings of which may inure to the benefit of any member, founder, contributor, or individual;

(2) That has a voluntary board;

(3) That has a functioning accounting system that is operated in accordance with generally accepted accounting principles, or has designated an entity that will maintain a functioning accounting system for the organization in accordance with generally accepted accounting principles; and

(4) That practices nondiscrimination in the provision of assistance.

Program income means gross income received by the grantee or project sponsor directly generated from the use of Supportive Housing Program funds.

Project, except as provided in § 583.500(h), means a supportive services only project or a structure or structures (or portion of such structure or structures) that is acquired, rehabilitated, constructed, or leased with assistance provided under this part or to which assistance for operating costs or supportive services are provided under this part. A project may provide supportive housing or supportive services in single room occupancy dwelling units that do not contain bathrooms or kitchen facilities and are appropriate for use as supportive housing or in projects containing some or all such dwelling units. A project may be for supportive housing or supportive services only. (Supportive services only projects are defined separately.)

Project sponsor means the organization that is responsible for carrying out the daily operation of the project, if the organization is an entity other than the grantee. A project sponsor is a State, metropolitan city, urban county, governmental entity, private nonprofit organization, or community mental health association that is a public nonprofit organization.

Rehabilitation means the improvement or repair of an existing structure or an addition to an existing structure that does not increase the floor area by more than 100 percent. Rehabilitation does not include minor or routine repairs.

Safe haven means supportive housing in a structure, or clearly identifiable portion of a structure, that meets the following criteria: It—

(1) Serves hard-to-reach homeless persons who have a severe mental illness, are on the streets, and have been

unable or unwilling to receive supportive services;

(2) Provides 24-hour residence for an unspecified duration;

(3) Provides private or semi-private accommodations; and

(4) Has overnight occupancy limited to 25 persons. A safe haven may also provide supportive services on a drop-in basis to eligible persons who are not residents.

State means each of the several states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

Supportive housing (1) Supportive housing means housing in conjunction with which supportive services are provided for homeless persons if the housing:

(i) Is transitional housing;

(ii) Is permanent housing for homeless persons with disabilities;

(iii) Is a safe haven; or

(iv) Is or is a part of, a particularly innovative project for, or alternative method of, meeting the immediate and long-term needs of homeless persons.

(2) In a supportive housing project, a project sponsor provides housing in one or more structures and delivers services, or arranges with other organizations to deliver services, to the residents.

Supportive services means services designed to address the special needs of the homeless persons to be served by the project. Supportive services include, but are not limited to, providing:

(1) Child care services for homeless families;

(2) Employment assistance;

(3) Outpatient health services, food, and case management;

(4) Assistance in obtaining permanent housing, employment counseling, and nutritional counseling;

(5) Assistance in obtaining other Federal, State, and local assistance available including mental health benefits, employment counseling, veterans' benefits, medical assistance, but not including major medical equipment, and income support assistance, such as supplemental security income benefits, general assistance, and food stamps; and

(6) Other services as appropriate.

Supportive services only project means a project in which a sponsor delivers services to homeless persons, but the sponsor does not provide housing to the same persons receiving the services. Supportive services can be delivered from a structure or they can be delivered independent of a structure (*e.g.*, by street outreach).

Technical assistance means the facilitating of skills and knowledge in planning, developing, and administering activities under the Supportive Housing Program for entities that may need, but do not possess, such skills and knowledge.

Transitional housing means housing designed for homeless persons to reside in for at least three months that will facilitate movement to permanent housing within 24 months or within a longer period as described in § 583.325. Emergency shelters are not considered transitional housing.

Urban county is defined in section 102(a)(6) of the Housing and Community Development Act of 1974 (42 U.S.C. 5302(a)(6)). In general, urban counties are those counties that are eligible for an entitlement grant under 24 CFR part 570, subpart D.

3. Sections 583.100, 583.105, 583.110, 583.115, 583.120, and 583.125 are revised to read as follows:

§ 583.100 Types and uses of assistance.

(a) *Grant Assistance.* Assistance in the form of grants is available for acquisition of structures, rehabilitation of structures, new construction for supportive housing, leasing, operating costs for supportive housing, and supportive services, as described in §§ 583.105 through 583.125 of this part.

(b) *Beneficiaries of grant assistance.* Grants must be used to assist projects, including supportive services only projects, which provide assistance to homeless persons only.

(c) *Uses of grant assistance.* Grant assistance may be used to:

(1) Establish new supportive housing facilities or new facilities to provide supportive services;

(2) Expand existing facilities in order to increase the number of homeless persons served;

(3) Bring existing facilities up to a level that meets State and local government health and safety standards;

(4) Provide additional supportive services for residents of supportive housing or for homeless persons not residing in supportive housing;

(5) Continue funding supportive housing where the grantee has received funding under this part for leasing, supportive services, or operating costs;

(6) Construct, rehabilitate, acquire, lease, or operate a structure for use as a safe haven for supportive housing; or

(7) Replace the loss of nonrenewable funding from private, Federal, or other sources except from the State or local government. Grants may not be used to replace State or local government funds previously used, or designated for use, to assist homeless persons (except as provided in § 583.150).

(d) *Structures used for multiple purposes.* Structures used to provide supportive housing or supportive services may also be used for other purposes, except that assistance under this part will be available only in proportion to the use of the structure for supportive housing or supportive services.

(e) *Technical assistance.* HUD may offer technical assistance, as described in § 583.140.

§ 583.105 Grants for acquisition and rehabilitation.

(a) *Use.* HUD may grant funds to:

(1) Pay a portion of the cost of the acquisition of structures and real property for use in the provision of supportive housing (other than emergency shelter) or supportive services, including the repayment of any outstanding debt on a loan made to purchase property that has not been used previously as supportive housing or for supportive services; or

(2) Pay a portion of the cost of rehabilitation of structures to provide supportive housing or supportive services, including cost-effective energy measures and bringing an existing structure to a level that meets State and local government health and safety standards.

(b) *Amount.* Except as provided in paragraph (c) of this section, the maximum grant available for acquisition, rehabilitation, or acquisition and rehabilitation is the lower of:

(1) $200,000 per structure; or

(2) The total cost of the acquisition, rehabilitation, or acquisition and rehabilitation minus the grantee's contribution toward these costs.

(c) *Increased amounts.* In areas determined by HUD to have high acquisition and rehabilitation costs, grants of not more than $400,000 per structure may be available.

(d) *Limitation.* Rehabilitation Funds shall not be used to rehabilitate leased properties.

§ 583.110 Grants for new construction.

(a) *Use.* HUD may grant funds to pay a portion of the cost of new construction, including cost-effective energy measures, and the cost of land associated with that construction, for use in the provision of supportive housing. If the grant funds are used for new construction, the grantee must demonstrate that the costs associated with new construction are substantially less than the costs associated with rehabilitation or that there is a lack of available appropriate units that could be rehabilitated at a cost less than new construction. For purposes of this cost comparison, costs associated with

rehabilitation or new construction may include the cost of real property acquisition.

(b) *Amount.* The maximum grant available for new construction is the lower of:

(1) $400,000 per structure; or

(2) The total cost of the new construction, including the cost of land associated with that construction, minus the grantee's contribution toward the cost of same.

§ 583.115 Grants for leasing.

(a) *General.* HUD may provide grants to pay for the actual costs of leasing a structure or structures (including security deposits), or portions thereof, used to provide supportive housing or supportive services. Under no circumstances may leasing funds be used to lease units or structures owned by the project sponsor, the grantee, their parent organization, a partnership of which the sponsor or grantee is a member, or any other related organization.

(b) *Leasing structures.* Where grants are used to pay rent for all or part of a structure, the rent paid must be reasonable in relation to rents being charged in the area for comparable space. In addition, the rent paid may not exceed rents currently being charged by the same owner for comparable space.

(c) *Leasing individual units.* Where grants are used to pay rent for an individual housing unit, the rent paid must be reasonable in relation to rents being charged for comparable units, taking into account the location, size, type, quality, amenities, facilities, and management services. In addition, the rent may not exceed rents currently being charged by the same owner for comparable unassisted units, and the portion of rent paid with grant funds may not exceed the HUD-determined fair market rent. Grantees may use grant funds in an amount up to one month's rent to pay the landlord for any damages by homeless participants to a leased unit.

§ 583.120 Grants for supportive services costs.

(a) *General.* HUD may provide grants to pay a portion (as described in § 583.145(b)) of the actual costs of supportive services for homeless persons. Homeless persons receiving supportive services need not be residents of supportive housing. All or part of the supportive services may be provided directly by the grantee or project sponsor or by arrangement with public or private service providers.

(b) *Supportive services costs.* Costs associated with providing supportive services include salaries paid to providers of supportive services and any other cost directly associated with providing such services. Supportive services costs also include the costs of services provided to former residents of supportive housing to assist in their adjustment to independent living. Such services may be provided for up to six months after the former residents leave the supportive housing facility.

§ 583.125 Grants for operating costs.

(a) *General.* HUD may provide grants to pay a portion (as described in § 583.145(c)) of the actual operating costs of supportive housing.

(b) *Operating costs.* Operating costs are as defined in § 583.5.

§ 583.130 [Removed]

4. Section 583.130 is removed.

5. Sections 583.135, 583.140, and 583.145 are revised to read as follows:

§ 583.135 Administrative costs.

(a) *General.* Up to five percent of any grant awarded under this part may be used for the purpose of paying costs of administering the assistance.

(b) *Administrative costs.* Administrative costs include the costs associated with accounting for the use of grant funds, preparing reports for submission to HUD, obtaining project audits, similar costs related to administering the grant after the award, and staff salaries associated with these administrative costs. Administrative costs do not include the costs of carrying out eligible activities under §§ 583.105 through 583.125.

§ 583.140 Technical assistance.

(a) *General.* HUD may set aside funds annually to provide technical assistance either directly by HUD staff or indirectly through third-party providers. This technical assistance is for the purpose of promoting the development of supportive housing and supportive services, including innovative approaches to assist homeless persons in the transition from homelessness, and promoting the provision of supportive housing to homeless persons to enable them to live as independently as possible.

(b) *Uses of technical assistance.* HUD may use these funds to provide technical assistance to prospective applicants, applicants, grantees, project sponsors, or other providers of supportive housing or supportive services for homeless persons.

(c) *Selection of providers.* As HUD determines the need, HUD may advertise and competitively select providers to deliver technical assistance. HUD may enter into contracts, grants, or cooperative agreements, when necessary, to implement the technical assistance.

§ 583.145 Matching requirements.

(a) *Grantee share of acquisition, rehabilitation, and new construction costs.* The grantee must match the funds provided by HUD for grants for acquisition, rehabilitation, and new construction with an equal amount of funds from other sources for these activities.

(b) *Grantee share of supportive services costs.* Assistance for supportive services will be available for 80 percent of the total supportive service costs. The grantee must contribute 20 percent of the total supportive services costs. At the end of each operating year, the grantee must demonstrate that it has met its share of the costs for that year. While the grantee's contribution equals 20 percent of the total supportive services costs, it simultaneously represents 25 percent of the HUD Supportive Housing Program assistance requested for supportive services.

(c) *Grantee share of operating costs.* Assistance for operating costs will be available for up to 75 percent of the total operating costs. The grantee must contribute 25 percent of the total operating costs. At the end of each operating year, the grantee must demonstrate that it has met its share of the costs for that year.

(d) *Cash resources.* The matching funds must be cash resources provided to the project by one or more of the following: The grantee, the Federal government, State government, local government, or private resources.

§ 583.155 [Removed]

6. Section 583.155 is removed.

7. Section 583.150 is amended as follows:

a. Revise the section heading to read as set forth below;

b. Remove the paragraph (a) designation and amend the paragraph by adding to the end of the paragraph the words ''except when State or local government funds were used as interim or emergency funding to continue a project which was unsuccessful in seeking renewal.''

c. Remove paragraph (c);

d. Remove the heading of paragraph (b) and redesignate paragraph (b) as new § 583.155;

e. Add a section heading to new § 583.155 to read as set forth below; and

f. In § 583.155, former paragraphs (b)(1) through (6) are redesignated as paragraphs (a) through (f).

§ 583.150 Maintenance of effort.

* * * * *

§ 583.155 Grants involving primarily religious organizations.

* * * * *

8. Revise subparts C, D, E, and F to read as follows:

Subpart C—Application and Grant Award Process

Sec.
583.200 Application and grant award.
583.210 Renewal grants.
583.220 Consolidated plan.
583.230 Environmental review.

§ 583.200 Application and grant award.

When funds are made available for assistance, HUD will publish a notice of funding availability (NOFA) in the **Federal Register**, in accordance with the requirements of 24 CFR part 4. HUD will review and screen applications in accordance with the requirements in section 426 of the McKinney-Vento Act (42 U.S.C. 11386) and the guidelines, selection criteria, and procedures published in the NOFA.

§ 583.210 Renewal grants.

(a) *General.* Grants made under this part, and grants made under subtitles C and D (Supportive Housing Demonstration and Supplemental Assistance for Facilities to Assist the Homeless (SAFAH), respectively) of the McKinney-Vento Act as in effect before October 28, 1992, may be renewed on a competitive or noncompetitive basis to continue ongoing leasing, operations, and supportive services for additional years beyond the initial funding period. To be considered for renewal funding for leasing, operating costs, or supportive services, recipients must submit a request for such funding in the form specified by HUD, must meet the requirements of this part, and must submit requests within the time period established by HUD.

(b) *Assistance available.* Assistance during each year of the renewal period, subject to maintenance of effort requirements under § 583.100(c)(6) and § 583.150 of this part, may be for up to the average annual amount awarded for leasing, operations, and supportive services in the previous grant.

(c) *HUD review.* HUD will review and screen applicants in accordance with the requirements of section 426 of the McKinney-Vento Act (42 U.S.C. 11386) and the guidelines, selection criteria, and procedures published in the NOFA.

(d) *Term of renewal grant.* The grant term may be up to three years.

§ 583.220 Consolidated plan.

(a) *Applicants that are States or units of general local government.* An applicant must have a HUD-approved complete or abbreviated consolidated plan, in accordance with 24 CFR part 91, and must submit a certification that the application for funding is consistent with the HUD-approved consolidated plan. Funded applicants must certify in a grant agreement that they are following the HUD-approved consolidated plan.

(b) *Applicants that are not States or units of general local government.* An applicant must submit a certification by the jurisdiction in which the proposed project will be located that the applicant's application for funding is consistent with the jurisdiction's HUD-approved consolidated plan. The certification must be made by the unit of general local government or the State, in accordance with the consistency certification provisions of the consolidated plan regulations, 24 CFR part 91, subpart F.

(c) *The Insular Areas of Guam, the U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands.* Notwithstanding any other provision of this section, these entities are not required to have a consolidated plan or to make consolidated plan certifications. (For a project that will be located on a reservation of an Indian tribe, a consolidated plan certification will not be required.)

(d) *Timing of consolidated plan certification submissions.* Unless otherwise set forth in the NOFA, the required certification that the application for funding is consistent with the HUD-approved consolidated plan must be submitted by the funding application submission deadline announced in the NOFA.

§ 583.230 Environmental review.

(a) *Generally.* Project selection is subject to completion of an environmental review of the proposed site, and the project may be modified or the site rejected as a result of that review. Activities under this part are subject to HUD's environmental regulations in 24 CFR part 58, except that HUD will perform an environmental review in accordance with 24 CFR part 50 prior to its approval of any conditionally selected applications for fiscal year 2000 and prior years that were received directly from private nonprofit entities and governmental entities with special or limited purpose powers. For activities under a grant that generally would be subject to review under 24 CFR part 58, HUD may make a finding in accordance with 24 CFR 58.11 and may itself perform the environmental review under the provisions of 24 CFR part 50. Among other reasons, this action may be initiated if the recipient objects in writing to the responsible entity performing the review under 24 CFR part 58. Irrespective of whether the responsible entity in accordance with 24 CFR part 58 (or HUD in accordance with 24 CFR part 50) performs the environmental review, the recipient shall supply all available, relevant information necessary for the responsible entity (or HUD, if applicable) to perform for each property any environmental review required by this part. The recipient also shall carry out all mitigating measures required by the responsible entity (or HUD, if applicable) or select alternate eligible property. HUD may eliminate from consideration any application that would require an environmental impact statement (EIS).

(b) The recipient, its project partners, and their contractors may not acquire, rehabilitate, convert, lease, repair, dispose of, demolish, or construct property for a project under this part, or commit or expend HUD or local funds for such eligible activities under this part, until the responsible entity (as defined in 24 CFR 58.2) has completed the environmental review procedures required by 24 CFR part 58 and the environmental certification and request for release of funds (RROF) have been approved or HUD has performed an environmental review under 24 CFR part 50 and the recipient has received HUD approval of the property. HUD will not release grant funds if the recipient or any other party commits grant funds (*i.e.*, incurs any costs or expenditures to be paid or reimbursed with such funds) before the recipient submits and HUD approves its RROF (where such submission is required).

Subpart D—Project Implementation

Sec.
583.300 Site control.
583.305 Property standards.
583.310 Ongoing assessment of supportive services.
583.315 Residential supervision.
583.316 Provision for meals.
583.320 Participation of homeless persons in decisionmaking.
583.325 Relationship between grantee and supportive housing residents.
583.330 Occupancy charge.
583.335 Limitation of stay in transitional housing.
583.340 Confidentiality.
583.345 Records and reports.
583.350 Annual assurances.

583.355 Period of commitment; repayment of grants; prevention of undue benefits.

§ 583.300 Site control.

(a) *Site control.* Where grant funds will be used for acquisition, rehabilitation, or new construction to provide supportive housing or supportive services, or where grant funds will be used for operating costs of supportive housing, or where grant funds will be used to provide supportive services except where grantee and project sponsor will provide services at sites not operated by the grantee or project sponsor, the grantee or project sponsor must demonstrate site control before HUD will execute a grant agreement (*e.g.*, through a deed or other proof of ownership, executed lease agreement, executed contract of sale, executed option to purchase or lease). For projects financed by use of Low Income Housing Tax Credits, site control may be demonstrated by a limited partnership wherein the grantee or project sponsor is the general partner or owns a controlling interest in the general partner. If site control is not demonstrated within one year after initial notification of the award of assistance under this part, the grant will be deobligated as provided in paragraph (c) of this section.

(b) *Site change.* (1) A grantee or project sponsor may obtain ownership or control of a suitable site different from the one specified in its application. Retention of an assistance award is subject to the new site's meeting all requirements under this part for suitable sites.

(2) If the acquisition, rehabilitation, acquisition and rehabilitation, or new construction costs for the substitute site are greater than the amount of the grant awarded for the site specified in the application, the grantee or project sponsor must provide for all additional costs. If the grantee or project sponsor is unable to demonstrate to HUD that it is able to provide for the difference in costs, HUD may deobligate the award of assistance.

(c) *Failure to obtain site control within one year.* HUD will recapture or deobligate any award for assistance under this part if the grantee or project sponsor is not in control of a suitable site before the expiration of one year after initial notification of an award.

(d) *Participant control of site.* The site control requirement in paragraph (a) of this section does not apply where a project assists homeless families or individuals in obtaining a lease (which may include assistance with rent payments and receiving supportive services), after which time the family or individual remains in the same housing without further assistance under this part. Such projects may not receive assistance for acquisition, rehabilitation, or new construction.

§ 583.305 Property standards.

(a) *State and local requirements.* Each grantee or project sponsor under this part must provide housing or services that are in compliance with all applicable State and local housing codes, licensing requirements, and any other requirement in the jurisdiction in which the project is located regarding the condition of the structure and the operation of the housing or services.

(b) *Habitability standards.* Except for such variations as are proposed by the grantee and approved by HUD, supportive housing must meet the following requirements:

(1) *Structure and materials.* The structures must be structurally sound so as to protect the residents from the elements and not pose any threat to their health or safety.

(2) *Location.* The housing must be capable of being utilized without unauthorized use of other private properties. Structures must provide alternative means of egress in case of fire.

(3) *Space and security.* Each resident must be afforded adequate space and security for himself/herself and his/her belongings. Each resident must be provided an acceptable place to sleep.

(4) *Interior air quality.* Every room or space must be provided with natural or mechanical ventilation. Structures must be free of pollutants in the air at levels that threaten the health of residents.

(5) *Water supply.* The water supply must be free from contamination.

(6) *Sanitary facilities.* Residents must have access to sufficient sanitary facilities that are in proper operating condition, may be used in privacy, and are adequate for personal cleanliness and the disposal of human waste.

(7) *Thermal environment.* The housing must have adequate heating or (as appropriate to the climate) cooling facilities in proper operating condition.

(8) *Illumination and electricity.* The housing must have adequate natural or artificial illumination to permit normal indoor activities and to support the health and safety of residents. Sufficient electrical sources must be provided to permit use of essential electrical appliances while assuring safety from fire.

(9) *Food preparation and refuse disposal.* All food preparation areas must contain suitable space and equipment to store, prepare, and serve food in a sanitary manner.

(10) *Sanitary condition.* The housing and any equipment must be maintained in sanitary condition.

(11) *Fire safety.* (i) Each unit must include at least one battery-operated or hard-wired smoke detector, in proper working condition, on each occupied level of the unit. Smoke detectors must be located, to the extent practicable, in a hallway adjacent to a bedroom. If the unit is occupied by a hearing-impaired person, smoke detectors must have an alarm system designed for hearing-impaired persons in each bedroom occupied by a hearing-impaired person.

(ii) The public areas of all housing must be equipped with a sufficient number, but no fewer than one for each area, of battery-operated or hard-wired smoke detectors. Public areas include, but are not limited to, laundry rooms, community rooms, day care centers, hallways, stairwells, and other common areas.

§ 583.310 Ongoing assessment of supportive services.

Each grantee under this part must conduct an ongoing assessment of the supportive services required by program participants, as well as the availability of such services, and make adjustments as appropriate.

§ 583.315 Residential supervision.

Each grantee or project sponsor under this part must provide residential supervision as necessary throughout the term of the commitment to operate supportive housing. Residential supervision may include the employment of a full-or part-time residential supervisor with sufficient knowledge to provide or to supervise the provision of supportive services to the residents.

§ 583.316 Provision for meals.

Each grantee under this part that provides supportive housing for homeless persons with disabilities must provide meals or meal preparation facilities for residents.

§ 583.320 Participation of homeless persons in decisionmaking.

(a) Each grantee or project sponsor must provide for the participation of no fewer than one homeless person or formerly homeless person on the board of directors or equivalent policy-making entity, to the extent that such entity considers and makes policies and decisions regarding any project, supportive services, or assistance provided under this part. This requirement is waived if a grantee or project sponsor is unable to meet it and presents to HUD and obtains HUD's approval of a plan to consult otherwise

with homeless or formerly homeless persons in considering and making policies and decisions. (See also § 583.525.)

(b) Each grantee or project sponsor under this part must, to the maximum extent practicable, involve homeless individuals and families, through employment, volunteer services, or otherwise, in constructing, rehabilitating, maintaining, and operating the project and in providing supportive services for the project.

§ 583.325 Relationship between grantee and supportive housing residents.

(a) Grantees or project sponsors using grant funds to provide supportive housing are not required to create a landlord-tenant relationship with residents of that supportive housing. Grantees or project sponsors may require residents to execute an occupancy agreement establishing conditions for residency.

(b) Occupancy agreements shall include a process for termination of participation, which shall, at a minimum, consist of:

(1) Written notice to the participant containing a clear statement of the reasons for termination;

(2) A review of the decision, in which the participant is given the opportunity to present written or oral objections before a person other than the person (or subordinate of that person) who made or approved the termination decision; and

(3) Prompt written notice of the final decision to the participant.

§ 583.330 Occupancy charge.

(a) *Calculation of occupancy charge.* Homeless persons residing in supportive housing may be required to pay an occupancy charge in an amount determined by the grantee that may not exceed the highest of:

(1) 30 percent of the family's monthly adjusted income (adjustment factors include the number of people in the family, age of family members, medical expenses, and child care expenses);

(2) 10 percent of the family's monthly income; or

(3) If the family is receiving payments for welfare assistance from a public agency and a part of the payments, adjusted in accordance with the family's actual housing costs, is specifically designated by the agency to meet the family's housing costs, the portion of the payments that is designated for housing costs.

(b) *Use of occupancy charge.* The occupancy charge may be used in the operation of the project or may be reserved, in whole or in part, to assist residents of transitional housing in moving to permanent housing.

(c) *Fees.* In addition to resident rent, residents may be charged reasonable fees for services not paid with grant funds.

§ 583.335 Limitation of stay in transitional housing.

A homeless individual or family is expected to move to permanent housing within 24 months after entering transitional housing. However, the homeless individual or family may remain in transitional housing for a period longer than 24 months, if permanent housing for the individual or family has not been located or if the individual or family requires additional time to prepare for independent living. However, HUD may discontinue assistance for a transitional housing project if more than half of the homeless individuals or families remain in the project longer than 24 months.

§ 583.340 Confidentiality.

Each grantee or project sponsor that provides family violence prevention or treatment services must develop and implement procedures to ensure the confidentiality of records pertaining to any individual provided services and that the address or location of any project assisted will not be made public, except with written authorization of the person or persons responsible for the operation of the project.

§ 583.345 Records and reports.

Each grantee or project sponsor under this part must keep any records and make any reports (including those pertaining to race, ethnicity, gender, and disability status data) that HUD may require within the timeframe specified. At a minimum, this includes an annual progress report.

§ 583.350 Annual assurances.

Grantees or project sponsors that receive assistance restricted to leasing, operating costs, or supportive services costs must provide an annual assurance for each year such assistance is received that the project will be operated for the purpose specified in the application.

§ 583.355 Period of commitment; repayment of grants; prevention of undue benefits.

(a) *Period of commitment and conversion.* All grantees receiving assistance for acquisition, rehabilitation, or new construction must agree to operate the supportive housing or supportive services in accordance with the regulations in this part for a period of at least 20 years from the date of initial occupancy or the date of initial service provision. If HUD determines during the 20-year period that a project is no longer needed for use as supportive housing or to provide supportive services and approves a different use of the project for the direct benefit of low-income persons pursuant to a request for such use by the grantee, HUD may authorize the grantee to convert the project for such use for the remaining time.

(b) *Repayment of grant.* If the facility is not operated as supportive housing or to provide supportive services for homeless persons for 10 years following the date of initial occupancy or date of initial service provision, HUD shall require repayment of the entire amount of the grant used for acquisition, rehabilitation, or new construction, unless conversion of the project has been authorized by HUD under paragraph (a) of this section. If the supportive housing or supportive services facility is used for homeless persons for more than 10 years, the grantee's repayment amount will be reduced by 10 percent for each full year beyond the 10-year period in which the project is used for homeless persons.

(c) *Prevention of undue benefits.* If the assisted structure is sold or otherwise disposed of within the 20-year period, the grantee must comply with any terms or conditions that HUD may prescribe to prevent the grantee from unduly benefiting from the sale or disposition. HUD will not impose any terms or conditions when the sale or disposition results in the subsequent use of the assisted structure for the direct benefit of very low-income persons (below 50 percent of area median) or all the proceeds are used to provide supportive housing meeting the requirements of this part 583.

(d) *Recordation.* Grantees shall be required to execute and file for record a deed restriction, covenant running with the land, or similar provision that will ensure, to HUD's satisfaction, compliance with the twenty-year term of commitment. In addition, grantees shall record a lien against the property, in a form to be prescribed by HUD, to secure HUD's interest in the repayment of the grant.

Subpart E—Administration

Sec.

583.400 Grant agreement.
583.405 Agreement with project sponsor.
583.410 Program changes.
583.415 Obligation and deobligation of funds.
583.420 Program income.
583.425 Grant closeout procedures.

§ 583.400 Grant agreement.

(a) *General.* The duty to provide supportive housing or supportive

services as described in the application and in accordance with the requirements of this part will be incorporated in a grant agreement executed by HUD and the grantee.

(b) *Enforcement.* HUD will enforce the obligations in the grant agreement through such action as may be appropriate, including requiring repayment of funds that have already been disbursed to the grantee.

§ 583.405 Agreement with project sponsor.

(a) Before disbursing any Supportive Housing Program funds to a project sponsor, the grantee shall sign a written agreement with the project sponsor. The agreement shall remain in effect during the grant period.

(b) At a minimum, the written agreement with the project sponsor shall include the following:

(1) *Statement of work.* The agreement shall contain a description of the project's activities, time schedule, performance measures, program income, and budget, in accordance with the approved application and the Supportive Housing Program regulations. The agreement also shall state the overall goals of the McKinney-Vento Act homeless assistance programs—to help homeless persons achieve residential stability, increase their skill levels or incomes, and obtain greater self-determination.

(2) *Agreement to follow part 583.* The agreement shall specify that the project sponsor will abide by the regulations in this part.

(3) *Records and reports.* The agreement shall specify the particular records the project sponsor must maintain and the particular reports the project sponsor must submit to assist the grantee in meeting its recordkeeping and reporting requirements.

(4) *Grantee duties.* The agreement shall specify procedures and any other information pertinent to the grantee's release of grant funds to the project sponsor.

(5) *Monitoring.* The agreement shall state that the grantee will monitor the performance of the project sponsor against the goals and performance standards in the agreement with the project sponsor. The agreement also shall state that contract suspension or termination procedures will be initiated if the project sponsor does not correct substandard performance within a reasonable period of time after being notified by the grantee.

(6) *Suspension and termination.* The agreement shall specify that, in accordance with 24 CFR 85.43, suspension or termination may occur if the project sponsor materially fails to comply with any term of the award, and that the award may be terminated for convenience in accordance with 24 CFR 85.44.

(7) *Commitment, repayment and undue benefits.* The agreement shall specify the term of commitment, repayment of grants, and the prevention of undue benefits or exceptions as set forth in § 583.355.

(8) *Uniform administrative requirements.* The agreement shall include a statement that the project sponsor will comply with the requirements and standards of OMB Circular A–122. A copy of the document shall be attached to the agreement with the project sponsor.

(9) *Conditions for religious organizations.* Where applicable, the conditions prescribed in § 583.155 for use of Supportive Housing Program funds by religious organizations shall be included in the agreement.

§ 583.410 Program changes.

(a) *HUD approval.* (1) A grantee may not make any significant changes to an approved project without prior HUD approval. Significant changes include, but are not limited to, a change in the grantee, a change in the project site, additions or deletions in the types of activities listed in § 583.100 approved for the project, a shift of more than 10 percent of funds from one approved type of activity to another, or a change in the category of participants to be served. Depending on the nature of the change, HUD may require a new certification of consistency with the consolidated plan (see § 583.220).

(2) Approval for a change is contingent upon whether the proposed change would not reduce or lower the quality of the original project on any rating factor. HUD will not approve a change that departs from the integrity of the project as proposed in the application.

(b) *Documentation of other changes.* Any change to an approved program that does not require prior HUD approval must be fully documented in the grantee's records.

§ 583.415 Obligation and deobligation of funds.

(a) *Obligation of funds.* When HUD and the applicant execute a grant agreement, funds are obligated to cover the amount of the approved assistance under subpart B of this part.

(b) *Increases.* After the initial obligation of funds, HUD will not make revisions to increase the amount obligated.

(c) *Deobligation.* (1) HUD may deobligate all or parts of grants:

(i) If the actual cost is less than the total cost anticipated in the application; or

(ii) If proposed activities for which funding was approved are not begun within three months, or residents do not begin to occupy the facility within nine months after grant execution.

(2) The grant agreement may set forth in detail other circumstances under which funds may be deobligated, as well as other sanctions that may be imposed.

(d) *Readvertisement.* HUD may re-advertise the availability of funds that have been deobligated under this section in a NOFA under § 583.200, or award deobligated funds to applications previously submitted in response to the most recently published NOFA.

§ 583.420 Program income.

(a) *Recording program income.* The receipt and expenditure of program income as defined in § 583.5 shall be recorded as part of the financial transactions of the project.

(b) *Disposition of program income.* (1) Program income received before grant closeout must be treated as additional Supportive Housing Program funds (except for occupancy charges) subject to all applicable requirements governing the use of Supportive Housing Program funds. Program income received before grant closeout must be used for previously approved eligible activities in the project. (See § 583.330(b) regarding the use of resident rent.)

(2) Program income received before grant closeout must be used before additional cash withdrawals are made from the Supportive Housing Program grant account.

(3) Program income received after closeout shall not be governed by the provisions of this part, except that, if the grant from which the program income was generated is renewed under Supportive Housing Program, funds received after closeout of the grant being renewed shall be treated as program income of the renewal project.

(c) *Disposition of program income received by project sponsors.* The written agreement between the grantee and the project sponsor, as required by § 583.405, shall specify that program income is to be used by the project sponsor according to § 583.420(b).

§ 583.425 Grant closeout procedures.

(a) *Criteria for closeout.* A grant will be closed out when HUD determines, in consultation with the grantee, that the following criteria have been met:

(1) The grant term has expired and has not been extended.

(2) All costs to be paid with Supportive Housing Program funds have

been incurred, with the exception of closeout costs (*e.g.*, audit costs) and costs from contingent liabilities described in the closeout agreement in paragraph (c) of this section. Contingent liabilities include, but are not limited to, third-party claims against the grantee, as well as related administrative costs.

(3) With respect to activities that are financed with Supportive Housing Program funds (excluding program income), the activities have actually been completed.

(4) Other responsibilities of the grantee under the grant agreement and applicable laws and regulations have been carried out satisfactorily or there is no further Federal interest in keeping the grant agreement open for the purpose of securing performance.

(b) *Closeout actions.* (1) Within 90 days of the grant term expiration date or earlier completion of the grant activities, the grantee shall submit to HUD its financial, final performance, and other reports, as required by the terms and conditions of the award.

(2) Based on the information provided in the final performance report and other relevant information, HUD, in consultation with the grantee, will prepare a closeout agreement in accordance with paragraph (c) of this section.

(3) HUD will deobligate any unused portion of the awarded grant, as required by the signed grant closeout agreement. Any unused grant funds that are in the possession of the grantee shall be refunded to or recaptured by HUD.

(4) The grantee may be required to repay HUD any disallowed costs based on HUD reviews provided for in the closeout agreement.

(c) *Closeout agreement.* Any obligation remaining as of the date of the closeout shall be covered by the terms of a closeout agreement. The agreement shall be prepared by HUD in consultation with the grantee. The agreement shall identify the grant being closed out, and include provisions with respect to the following:

(1) Identification of any closeout costs or contingent liabilities subject to payment with Supportive Housing Program funds after the closeout agreement is signed;

(2) Identification of any unused grant funds to be deobligated by HUD;

(3) Identification of any program income on deposit in financial institutions at the time the closeout agreement is signed;

(4) Description of the grantee's responsibility after closeout for:

(i) Compliance with all program requirements, certifications, and assurances in using program income on deposit at the time the closeout agreement is signed and in using any other remaining Supportive Housing Program funds available for closeout costs and contingent liabilities;

(ii) Use of real property assisted with Supportive Housing Program funds in accordance with the terms of commitment and principles described in § 583.355;

(iii) Use of personal property purchased with Supportive Housing Program funds; and

(iv) Compliance with requirements governing program income received subsequent to grant closeout, as described in § 583.420.

(5) Other provisions appropriate to any special circumstances of the grant closeout, in modification of or in addition to the obligations in paragraphs (c)(1) through (c)(4) of this section. The agreement shall provide that findings of noncompliance may be taken into account by HUD as unsatisfactory performance of the grantee, in HUD's consideration of any future grant award under this part.

Subpart F—Other Program Requirements

Sec.

583.500 Displacement, relocation, and acquisition.
583.505 Nondiscrimination and equal opportunity requirements.
583.510 Applicability of OMB Circulars.
583.515 Lead-based paint.
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§ 583.500 Displacement, relocation, and acquisition.

(a) *Minimizing displacement.* Consistent with the other goals and objectives of this part, grantees must ensure that they have taken all reasonable steps to minimize the displacement of persons (families, individuals, businesses, nonprofit organizations, and farms) as a result of supportive housing assisted under this part.

(b) *Relocation assistance for displaced persons.* A displaced person (defined in paragraph (f) of this section) must be provided relocation assistance at the levels described in, and in accordance with, the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601–4655) (URA) and implementing regulations at 49 CFR part 24.

(c) *Real property acquisition requirements.* The acquisition of real property for supportive housing is subject to the URA and the requirements described in 49 CFR part 24, subpart B.

(d) *Responsibility of grantee.* (1) The grantee must certify (*i.e.*, provide assurance) that it will comply with the URA, the regulations at 49 CFR part 24, and the requirements of this section, and must ensure such compliance notwithstanding any third party's contractual obligation to the grantee to comply with these provisions.

(2) The cost of required relocation assistance is an eligible project cost in the same manner and to the same extent as other project costs. Such costs also may be paid for with local public funds or funds available from other sources.

(3) The grantee must maintain records in sufficient detail to demonstrate compliance with provisions of this section.

(e) *Appeals.* A person who disagrees with the grantee's determination concerning whether the person qualifies as a ''displaced person,'' or the amount of relocation assistance for which the person is eligible, may file a written appeal of that determination with the grantee. A low-income person who is dissatisfied with the grantee's determination on his or her appeal may submit a written request for review of that determination to the HUD field office.

(f) *Definition of displaced person.* (1) For purposes of this section, the term ''displaced person'' means a person (family, individual, business, nonprofit organization, or farm) that moves from real property, or moves personal property from real property permanently as a direct result of acquisition, rehabilitation, or demolition for a supportive housing project assisted under this part. The term ''displaced person'' includes, but may not be limited to:

(i) A person who moves permanently from the real property after the property owner (or person in control of the site) issues a vacate notice, or refuses to renew an expiring lease in order to evade the responsibility to provide relocation assistance, if the move occurs on or after the date the grantee submits to HUD the application or application amendment designating the project site;

(ii) Any person, including a person who moves before the date described in paragraph (f)(1)(i) of this section, if the grantee or HUD determines that the displacement resulted directly from acquisition, rehabilitation, or demolition for the assisted project; or

(iii) A tenant-occupant of a dwelling unit who moves permanently from the building or complex on or after the date of the ''initiation of negotiations'' (see paragraph (g) of this section), if the move occurs before the tenant has been provided written notice offering him or

her the opportunity to lease and occupy a suitable, decent, safe, and sanitary dwelling in the same building or complex, under reasonable terms and conditions, upon completion of the project. Such reasonable terms and conditions must include a monthly rent and estimated average monthly utility costs that do not exceed the greater of:

(A) The tenant's monthly rent before the initiation of negotiations and estimated average utility costs; or

(B) 30 percent of gross household income. If the initial rent is at or near the maximum, there must be a reasonable basis for concluding at the time the project is initiated that future rent increases will be modest.

(iv) A tenant of a dwelling who is required to relocate temporarily, but does not return to the building or complex, if either:

(A) A tenant is not offered payment for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation, or

(B) Other conditions of the temporary relocation are not reasonable.

(v) A tenant of a dwelling who moves from the building or complex permanently after having been required to move to another unit in the same building or complex, if either:

(A) The tenant is not offered reimbursement for all reasonable out-of-pocket expenses incurred in connection with the move; or

(B) Other conditions of the move are not reasonable.

(2) Notwithstanding the provisions of paragraph (f)(1) of this section, a person does not qualify as a ''displaced person'' (and is not eligible for relocation assistance under the URA or this section), if:

(i) The person has been evicted for serious or repeated violation of the terms and conditions of the lease or occupancy agreement, violation of applicable Federal, State, local, or tribal law, or for other good cause, and HUD determines that the eviction was not undertaken for the purpose of evading the obligation to provide relocation assistance;

(ii) The person moved into the property after the submission of the application and, before signing a lease and commencing occupancy, was provided written notice of the project, its possible impact on the person (*e.g.*, the person may be displaced, temporarily relocated, or suffer a rent increase) and the fact that the person would not qualify as a ''displaced person'' (or for any assistance provided under this section), if the project were approved;

(iii) The person is ineligible under 49 CFR 24.2(g)(2); or

(iv) HUD determines that the person was not displaced as a direct result of acquisition, rehabilitation, or demolition of the project.

(3) The grantee may request, at any time, HUD's determination of whether a displacement is or would be covered under this section.

(g) *Definition of initiation of negotiations.* For purposes of determining the formula for computing the replacement housing assistance to be provided to a residential tenant displaced as a direct result of privately undertaken rehabilitation, demolition, or acquisition of the real property, the term ''initiation of negotiations'' means the execution of the agreement between the grantee and HUD.

(h) *Definition of project.* For purposes of this section, the term ''project'' means an undertaking paid for in whole or in part with assistance under this part. Two or more activities that are integrally related, each essential to the others, are considered a single project, whether or not all component activities receive assistance under this part.

§ 583.505 Nondiscrimination and equal opportunity requirements.

(a) *Projects serving persons with disabilities.* (1) *General.* Generally, all projects must be available to all eligible persons without regard to their type of disability.

(2) *Targeted.* A grantee or project sponsor may advertise its project as offering services for a particular type of disability, however, the project shall be open to all otherwise eligible persons with disabilities who may benefit from services provided in the project.

(3) *Established preference.* If proposed in the application, the grantee or project sponsor may establish a preference for individuals with specific types of disabilities in accordance with 24 CFR part 8 if:

(i) The project offers services appropriate for that population; and

(ii) Serving this population in this manner is necessary to provide qualified individuals with disabilities housing, aid, benefit, or services that are as effective as those provided to others.

(b) *Other requirements in effect.* (1) The prohibitions against discrimination on the basis of age under the Age Discrimination Act of 1975 (42 U.S.C. 6101–07) and implementing regulations at 24 CFR part 146, and the prohibitions against discrimination against handicapped individuals under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations at 24 CFR part 8.

(2) The requirements of Executive Order 11246 (3 CFR 1964–65, Comp., p. 339) (Equal Employment Opportunity), as amended by Executive Order 13279 (67 FR 77141, December 2, 2002) (3 CFR, 2002 Comp., p. 258) (Equal Protection of the Law for Faith-based and Community Organizations) and the regulations issued under the order at 41 CFR chapter 60.

(3) The requirements of section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) and the regulations at 24 CFR part 135.

(4) The requirements of Executive order 11625, as amended by Executive Order 12007 (3 CFR, 1971–1975 Comp., p. 616 and 3 CFR, 1977 Comp., p.39) (Minority Business Enterprises); Executive Order 12432 (3 CFR, 1983 Comp., p. 198) (Minority Business Enterprises Development); and Executive Order 12138 (3 CFR, 1977 Comp., p. 393) (Women's Business Enterprises). Consistent with HUD's responsibilities under these orders, grantees must make efforts to encourage the use of minority and women's business enterprises in connection with funded activities.

(c) *Procedures.* (1) If the procedures that the grantee intends to use to make known the availability of the supportive housing are unlikely to reach persons of any particular race, color, religion, sex, age, national origin, familial status, or handicap who may qualify for admission to the housing, the grantee must establish additional procedures that will ensure that such persons can obtain information concerning availability of the housing.

(2) The grantee must adopt procedures to make available information on the existence and locations of facilities and services that are accessible to persons with a handicap and maintain evidence of implementation of the procedures.

(d) *Accessibility requirements.* The grantee must comply with the new construction accessibility requirements of the Fair Housing Act and section 504 of the Rehabilitation Act of 1973, and the reasonable accommodation and rehabilitation accessibility requirements of section 504 as follows:

(1) All new construction must meet the accessibility requirements of 24 CFR 8.22 and, as applicable, 24 CFR 100.205: and

(2) Projects of 15 or more units in which costs of rehabilitation are 75 percent or more of the replacement cost of the building must meet the requirements of 24 CFR 8.23(a). Other rehabilitation must meet the requirements of 24 CFR 8.23(b).

§ 583.510 Applicability of OMB Circulars.

The policies, guidelines, and requirements of OMB Circular No. A–87 (Cost Principles Applicable to Grants, Contracts and Other Agreements with State and Local Governments), 24 CFR part 84, and 24 CFR part 85 apply to the award, acceptance, and use of assistance under this program by governmental entities. OMB Circular Nos. A–110 (Grants and Cooperative Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations) and A–122 (Cost Principles Applicable to Grants, Contracts and Other Agreements with Nonprofit Institutions) apply to the acceptance and use of assistance by private nonprofit organizations, except where inconsistent with the provisions of the McKinney-Vento Act, other Federal statutes, or this part. (Copies of OMB Circulars may be obtained from E.O.P. Publications, Room 2200, New Executive Office Building, Washington, DC 20503–0009; telephone (202) 395–7332 (this is not a toll-free number). There is a limit of two free copies.

§ 583.515 Lead-based paint.

The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at 24 CFR part 35, subparts A, B, J, K, and R of this title apply to activities under this program.

§ 583.520 Conflicts of interest.

(a) In addition to the conflict of interest requirements in 24 CFR part 84 and part 85, a person who is an employee, agent, consultant, officer, or elected or appointed official of the grantee and who either exercises or has exercised any functions or responsibilities with respect to assisted activities or is in a position to participate in a decision-making process or gain inside information with regard to such activities, may not obtain a personal or financial interest or benefit from the activity, nor have an interest in any contract, subcontract, or agreement with respect thereto, or the proceeds thereunder, either for himself/herself or for those with whom he/she has family or business ties, during his/her tenure or for one year thereafter. Participation in policy or decision-making under § 583.320 by a homeless individual who is also a participant under the program does not constitute a conflict of interest.

(b) Upon the written request of the grantee, HUD may grant an exception to the provisions of paragraph (a) of this section on a case-by-case basis when it determines that the exception will serve to further the purposes of the program and the effective and efficient administration of the grantee's project. An exception may be considered only after the grantee has provided the following:

(1) For states and other governmental entities, a disclosure of the nature of the conflict, accompanied by an assurance that there has been public disclosure of the conflict and a description of how the public disclosure was made; and

(2) For all grantees, an opinion of the grantee's attorney that the interest for which the exception is sought would not violate State or local law.

(c) In determining whether to grant a requested exception after the grantee has satisfactorily met the requirement of paragraph (b) of this section, HUD will consider the cumulative effect of the following factors, where applicable:

(1) Whether the exception would provide a significant cost benefit or an essential degree of expertise to the project that would otherwise not be available;

(2) Whether the person affected is a member of a group or class of eligible persons and the exception will permit such person to receive generally the same interests or benefits as are being made available or provided to the group or class;

(3) Whether the affected person has withdrawn from the functions or responsibilities or from the decisionmaking process with respect to the specific assisted activity in question;

(4) Whether the interest or benefit was present before the affected person was in a position as described in paragraph (a) of this section;

(5) Whether undue hardship will result either to the grantee or to the person affected when weighed against the public interest served by avoiding the prohibited conflict; and

(6) Any other relevant consideration.

§ 583.525 Audits.

The financial management systems used by grantees under this program must provide for audits in accordance with 24 CFR part 44 or part 45, as applicable. HUD may perform or require additional audits as it finds necessary or appropriate.

§ 583.530 Davis-Bacon wage rates.

Assistance under this part does not require payment of prevailing wage rates determined under the Davis-Bacon Act. Such wage rates may apply if a Supportive Housing Program project is also assisted with additional funds that carry a Davis-Bacon requirement.

Dated: June 7, 2004.

Roy A. Bernardi,

Assistant Secretary for Community Planning and Development.

[FR Doc. 04–16390 Filed 7–19–04; 8:45 am]

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July 20, 2004

Part III

Department of Housing and Urban Development

24 CFR Parts 25 and 203

FHA Single Family Mortgage Insurance; Lender Accountability for Appraisals; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 25 and 203

[Docket No. FR–4722–F–02]

RIN 2502–AH78

FHA Single Family Mortgage Insurance; Lender Accountability for Appraisals

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This final rule clarifies HUD's regulations concerning the responsibilities of lenders approved by the Federal Housing Administration (FHA) with respect to appraisals on properties that will be the security for FHA insured mortgages. The final rule clarifies that lenders are accountable for the quality of appraisals on properties securing FHA-insured mortgages. The final rule specifically provides that lenders that submit appraisals to HUD that do not meet FHA requirements are subject to the imposition of sanctions by the HUD Mortgagee Review Board. The final rule applies to both sponsor lenders that underwrite loans, and loan correspondent lenders that originate loans on behalf of their sponsors. The codification of this clarification is designed to ensure lenders are aware of their responsibilities with respect to appraisals, and homebuyers receive an accurate statement of the appraised value of their homes. This final rule follows publication of a January 13, 2003, proposed rule, and takes into consideration the public comments received on the proposed rule. After careful review of the comments, HUD has decided to adopt the proposed rule with minor changes to the regulatory text.

DATES: *Effective Date:* August 19, 2004.

FOR FURTHER INFORMATION CONTACT: Vance T. Morris, Director, Office of Single Family Program Development, Office of Insured Single Family Housing, Room 9266, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000; telephone (202) 708–2121 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background—The January 13, 2003, Proposed Rule

HUD published a proposed rule on January 13, 2003 (68 FR 1766), to clarify HUD's regulations concerning the responsibilities of lenders approved by FHA in the selection of appraisers to perform appraisals on properties that will be the security for FHA insured mortgages.

The success of the FHA single family mortgage insurance program, and HUD's ability to protect the FHA Insurance Fund, depends significantly on the quality of appraisals on properties that secure FHA mortgages. Section 203(b)(2) of the National Housing Act (12 U.S.C. 1709(b)(2)) provides the method for calculating the maximum mortgage amount that FHA can insure. The calculations required by the statute are based on the appraised value of the property that is security for the mortgage. If an appraisal is deficient, a mortgagor may be subsequently confronted with unexpected and costly repairs, which could result in default and a mortgage insurance claim. Further, if a mortgagor defaults and the lender conveys property title to HUD in exchange for payment of mortgage insurance benefits, FHA then must manage and sell the property in order to recoup its insurance loss. (Please note that this rule uses the terms ''mortgagee'' and ''lender'' interchangeably.) HUD's return on any such sale could be significantly reduced if the appraisal is deficient.

The purpose of the January 13, 2003, proposed rule, was to clarify HUD's regulations concerning the responsibilities of lenders in assuring the quality of FHA appraisals. HUD proposed to codify in regulations that lenders will be held accountable, along with appraisers, for the quality of appraisals on properties securing FHA insured mortgages. HUD also proposed to codify in regulations that lenders that submit appraisals to HUD that do not meet FHA requirements are subject to the imposition of sanctions by the HUD Mortgagee Review Board (MRB).

The January 13, 2003, rule proposed, to enhance accountability of lenders for poor appraisals and thereby protect the FHA Insurance Fund, promote better compliance with appraisal standards, and ensure that homebuyers receive an accurate statement of appraised value. The proposed changes would apply to both sponsor lenders that underwrite loans and loan correspondent lenders that originate loans on behalf of their sponsors. Interested readers are invited to review the preamble of the January 13, 2003, proposed rule, for additional details regarding the proposed regulatory changes.

II. This Final Rule

This final rule follows publication of the January 13, 2003, proposed rule, and takes into consideration the public comments received on the proposed rule. After careful consideration of the public comments, HUD has decided to modify the proposed rule at this final rule stage to clarify that the standard of accountability to which lenders, sponsor lenders, and loan correspondent lenders will be held is the same as the standard used to impose civil money penalties for program violations, and that standard is one of knowing (actual knowledge) or had reason to know.

In the ''Summary'' of the preamble to the proposed rule (68 FR 1766, column one), and only in the Summary, HUD used the term ''strictly accountable.'' In using this term, HUD did not intend to indicate ''strict'' liability in the sense that fault or rather no fault would be disregarded when a deficient or inaccurate appraisal was submitted on a HUD-insured property. The proposed rule intended to clarify and emphasize that where an appraisal is deficient or inaccurate, HUD would not look solely to the appraiser as the responsible party for the deficiency. HUD would also look to the lender for the lender's submission of a deficient appraisal and whether the lender knew or had reason to know the appraisal was deficient.

In addition to the clarification of lender responsibility with respect to appraisals codified in this final rule, HUD handbooks and mortgagee letters specify certain actions that a mortgagee should take to help ensure that appraisals comply with FHA requirements. However, the fact that a mortgagee has taken such actions does not automatically mitigate the standard imposed by this final rule if despite compliance with the requirements, the lender is found to have known or had reason to know about the deficient appraisal. HUD will hold both the mortgagee and the appraiser as accountable for the quality of the appraisal in satisfying such requirements. A Direct Endorsement Mortgagee (and any of its loan correspondent lenders) that submits, or causes to be submitted, an appraisal or related documentation that does not satisfy FHA requirements is subject to administrative sanction and civil money penalties by the MRB pursuant to 24 CFR part 25 and part 30.

The following section of this preamble presents a summary of the significant issues raised by the public commenters on the January 13, 2003, proposed rule, and HUD's responses to these issues.

III. Summary of Public Comments on January 13, 2003, Proposed Rule

The public comment period on the proposed rule closed on March 14, 2003. HUD received 34 public comments on the proposed rule. Comments were received from lenders and mortgage companies; private citizens; associations representing realtors, mortgage bankers, home builders, mortgage brokers, and other participants in the FHA mortgage insurance programs; nonprofits; a housing authority; and the state of Colorado.

A. Comments Supporting the Proposed Rule

Comment: Support for proposed rule. Several commenters expressed unqualified support for the proposed rule. The commenters wrote that the proposed rule represents an appropriate step in clarifying and reiterating HUD's policies regarding lender accountability for FHA appraisals. The commenters wrote that it is appropriate that lenders participating in the FHA mortgage insurance programs accept the responsibility of establishing partnerships with reputable appraisers. The commenters wrote that the proposed rule would not establish an undue burden on lenders, since most lenders already exercise care in the selection of appraisers.

HUD response. HUD appreciates the support expressed by the commenters. HUD agrees that the regulatory changes will help to better protect the FHA Insurance Fund and ensure more accurate appraisals with no additional burden imposed on lenders. HUD has modified the proposed rule to clarify that the accountability standard that is being codified through this rulemaking is the standard to which lenders have been held to date.

B. Specific Objections to the Proposed Rule

Comment: Lenders do not have the necessary expertise to be held strictly liable for faulty appraisals. Several commenters wrote that lenders are not trained in the intricacies of the appraisal process and, therefore, would have difficulty reviewing appraisals and catching inaccuracies or readily observable defects. The commenters wrote that it is unfair to hold lenders strictly liable for faulty appraisals or to ask lenders to substitute their opinions for the judgment of the appraiser. The commenters wrote that the obligation of the lender is appropriately limited to selecting a duly qualified appraiser from the FHA Appraiser Roster and to review, through the lender's underwriter, the appraisal documentation to assure it meets FHA requirements.

HUD response. HUD has revised the rule at the final rule stage to clarify that lender accountability does not mean a no fault liability. Through this rule, HUD is clarifying and emphasizing that if an appraisal is deficient or inaccurate, HUD will not look solely to the appraiser as the responsible party. HUD will also look to the lender to determine whether the lender acted responsibly in submission of the bad appraisal. HUD does not agree that the regulatory changes made final by this rule, will impose burdensome new requirements on lenders. Rather, the changes made by this final rule clarify, and are consistent with, existing HUD policy regarding lenders' responsibility for FHA appraisals. For example, under the Direct Endorsement process, the lender's Direct Endorsement underwriter (or, in the case of a loan correspondent, its sponsor's Direct Endorsement underwriter) is already required to review the appraisal documentation. Under 24 CFR 203.255(b)(5), when a mortgage is submitted to FHA under the Direct Endorsement process, the application must contain, among other things, ''[a]n underwriter certification, on a form prescribed by the Secretary, stating that the underwriter has personally reviewed the appraisal report * * * and that the proposed mortgage complies with HUD underwriting requirements.'' Consequently, a lender is already required, through its underwriter, to review the appraisal documentation to assure that the documentation meets the FHA appraisal requirements contained in HUD Handbook 4150.2 (entitled ''Valuation Analysis for Home Mortgage Insurance'') and amendatory issuances. Further, in numerous issuances, including Mortgagee Letters 94–54, 97–22, and 97–45, HUD has stated that mortgagees, in selecting their appraisers, must bear responsibility, along with the appraisers for the integrity, the accuracy, and the thoroughness of appraisals and will be held accountable by HUD. This handbook and these mortgagee letters may be downloaded from HUD's Client Information and Policy System (HUDCLIPS) Internet home page at *http://www.hudclips.org.*

Comment: Rather than imposing new regulations, FHA should more strictly enforce existing requirements. Several commenters wrote that the proposed rule is unnecessary because there already are several existing statutory and regulatory systems in place to safeguard the integrity of FHA appraisals. For example, the commenters wrote that the licensing of appraisers is currently regulated by the individual states in which the appraisers do business. The commenters also wrote that HUD has several measures to monitor the quality of FHA appraisals and the performance of lenders, such as the FHA Appraiser Roster and the Credit Watch Termination Initiative. These commenters wrote that, rather than imposing additional regulatory requirements, HUD could address its concerns regarding faulty appraisals by more strictly enforcing these existing standards. For example, three of the commenters suggested that HUD could require that appraisers must maintain errors and omissions insurance in order to qualify for placement on the Appraiser Roster.

HUD response. Through this rule, HUD is not imposing new requirements on lenders but is codifying the standards to which lenders have been held to date. In response to some of the specific suggestions of the commenters, HUD notes that few if any states have programs in place that routinely or periodically monitor and review the quality and integrity of appraisals performed by licensed/certified appraisers. Rather, the licensing authority in the individual states typically review or regulate appraisers upon the filing of a complaint against the appraiser. The overall goal of this final rule is to achieve full compliance with FHA appraisal standards and the Uniform Standards of Professional Appraisal Practice. The intent of this rule is to be proactive rather than reactive in maintaining quality appraisals of properties with loans secured by FHA insurance.

Although HUD has other measures to monitor the quality of FHA appraisals and the performance of lenders, this rule will reinforce FHA efforts to ensure accountability in the appraisal process and the performance of lenders. Further, although some lenders may determine that maintaining errors and omissions insurance is advisable, HUD does not believe it would be appropriate to mandate that lenders obtain this type of insurance. Such a requirement will not necessarily ensure a better quality and more accurate appraisal, and might impose an undue financial burden on the FHA appraisers.

Comment: Proposed rule appears to conflict with the purpose of the FHA Appraiser Roster. Several commenters wrote that the proposed rule appears to conflict with the purposes of the FHA Appraiser Roster. The Appraiser Roster lists those appraisers that have the

necessary qualifications to perform FHA appraisals. The commenters wrote that the Appraiser Roster is the best place for ensuring the competency of appraisers. The commenters wrote that placement on the Appraiser Roster constitutes tacit approval by HUD of the appraiser and, therefore, it is not fair or reasonable for lenders to be held liable for faulty appraisals performed by appraisers on the Roster.

HUD response. HUD has not revised the proposed rule in response to these comments. In the past, FHA performed the required appraisals for properties securing FHA-insured mortgages. In response to statutory changes over the years, responsibility for selecting appraisers was transferred from FHA to the mortgagees. To ensure that appraisers selected to appraise FHA-insured properties meet minimum standards and have experience with FHA-insured mortgages, however, a mortgagee's selection is limited to appraisers listed on the FHA Appraiser Roster. A mortgagee may select any appraiser on the FHA Appraiser Roster.

The FHA Appraiser Roster, established in 1994, presents mortgagees with a list of appraisers who meet minimum qualification standards. These minimum standards include (1) an appropriate state licensure/certification with credentials based on the minimum licensing/certification criteria issued by the Appraiser Qualifications Board (AQB) of the Appraisal Foundation in the individual state where the appraiser practices, and (2) knowledge of and familiarity with FHA appraisal requirements, policies, and regulations as evidenced by passing the FHA Appraisal Exam. Placement on the FHA Appraiser Roster means that an appraiser is eligible to perform FHA appraisals. It does not mean that the appraiser is approved by FHA nor does it provide a guarantee or warranty that the appraiser's work will meet FHA standards. The lender who selects the appraiser must ensure that the appraiser is complying with FHA requirements when conducting appraisals for HUD-insured properties. Consequently, the FHA Single Family Appraiser Roster is not in conflict with this rule; it provides the lender a list that denotes appraisers have met FHA's minimum eligibility requirements.

Comment: HUD lacked the legal authority to issue the proposed rule. Several commenters questioned HUD's legal authority for issuing the proposed rule. The commenters wrote that the National Housing Act (12 U.S.C. 1701 *et seq.*) does not explicitly provide HUD with the authority to hold lenders strictly liable for the quality of appraisal reports. The commenters also wrote that the proposed rule conflicts with the intent of Congress in enacting those provisions of the National Housing Act concerning FHA appraisal requirements, such as sections 1708(c) and (e), 1709, and 1735f–14. The commenters also questioned HUD's authority to issue the proposed rule pursuant to the general rulemaking authority granted by section 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)). The commenters also wrote that the proposed rule conflicts with agency law principles. The commenters wrote that, as a general rule, an employer using an independent contractor, such as a third-party appraiser, is not liable for the wrongdoing of the contractor or the contractor's employees because the employer does not have the right to control the contractor's work.

HUD response. As discussed earlier in this preamble, through this rule HUD is clarifying that mortgagees accept the same responsibility for the quality of appraisals submitted to HUD to which they have been held responsible to date. To the extent there remains disagreement among mortgagees with HUD's authority to impose this standard of responsibility on mortgagees, HUD advises that its legal authority is based on the National Housing Act and the general rulemaking authority provided to HUD under section 211 of the National Housing Act and HUD's rulemaking authority under section 7(d) of the Department of Housing and Urban Development Act. Further, HUD has determined that issuance of this rule is consistent with Congressional intent as reflected in the provisions of the National Housing Act.

Section 211 of the National Housing Act grants the Secretary of HUD with broad rulemaking authority ''to make such rules and regulations as may be necessary to carry out the provisions of this title.'' Section 211 provides statutory authority for HUD's issuance of rules to implement substantive provisions of the National Housing Act (see below), which would provide for the imposition of liability upon mortgage lenders for faulty appraisals.

Under section 203(a) of the National Housing Act, the Secretary establishes terms and conditions under which a mortgage loan will be endorsed for insurance. HUD's regulations at 24 CFR 203.5(e)(1) provide that the Direct Endorsement (DE) mortgagee, in originating mortgage loans under the DE process, will have the property appraised in accordance with ''such standards and requirements as the Secretary may prescribe.'' HUD is issuing this rule pursuant to section 211 to ensure a mortgagee is aware of its responsibility for the accuracy of the appraisals that they are required to submit pursuant to 24 CFR 203.5(e).

The amount of FHA mortgage insurance is based upon the value of the property that will be the security for a mortgage loan and the creditworthiness of the borrower. Sections 203(b)(2)(B)(ii)(I) through (IV) of the National Housing Act provide the formulas, based upon the appraised value of a property, for calculating the maximum mortgage amount that FHA is statutorily authorized to insure. Consequently, it is imperative that appraisals be accurate in order to comply with this statutory requirement. In addition, the mortgagee, not the appraiser, submits an appraisal to FHA as part of a mortgage insurance application package. The mortgagee selects an appraiser, and pursuant to 24 CFR 203.255(b)(5), certifies to HUD that its underwriter has reviewed personally [1] the appraisal report and credit application and that the proposed mortgage complies with HUD underwriting requirements.

Section 202(c)(1) of the National Housing Act provides that the mortgage lender may be sanctioned by the MRB for ''engaging in activities in violation of Federal Housing Administration requirements.'' Nothing in the National Housing Act would prohibit FHA from establishing a requirement that mortgage lenders submit only appraisals that comport with FHA appraisal requirements. In fact, as noted above, section 203(a) provides the Secretary with broad authority to insure mortgage loans under such terms and conditions as he may provide, and under section 211, to make such rules and regulations as may be necessary to carry out the provisions of Title II of the National Housing Act.

FHA can insure only those mortgage loans that are made to, and held by, a mortgagee approved by the Secretary as ''responsible'' (*see* section 203(b)(1) of the National Housing Act). FHA believes this final rule is consistent with appraisal standards used in the conventional marketplace. FHA also believes that responsible mortgage lenders will take appropriate steps to ensure that appraisals of properties that will be security for FHA-insured mortgage loans conform to FHA requirements.

[1] Section 203.255(b)(5) contains an exception to this requirement for an underwriter to review personally a credit application when FHA's TOTAL Scorecard has determined that the application represents an acceptable risk under FHA terms and conditions.

C. Possible Effects of the Proposed Rule

Comment: The proposed rule will increase costs to FHA homebuyers. Several commenters wrote that the proposed rule would force lenders to incur the cost of hiring appraisal experts to review and evaluate all FHA appraisals ''a cost that would inevitably be passed on the FHA consumers and make FHA products unattractive when compared to other loan products on the marketplace.

HUD response. HUD does not agree with the commenters. As noted above in this preamble, Direct Endorsement lenders have had a long-standing requirement to provide appraisal oversight and review for all FHA-insured loans. This final rule does not place any additional burden upon FHA lenders who, by FHA policy and guidance, have been performing appraisal review functions. It only codifies and reinforces existing policy. Consequently, promulgation of this regulation is not expected to increase costs to FHA homebuyers.

Comment: The proposed rule will discourage lenders from participating in the FHA loans programs. Several commenters wrote that the imposition of strict liability on lenders for faulty appraisals would cause lenders to question whether originating FHA mortgages presents an unacceptable business risk and lead them to abandon the FHA market. The commenters wrote that the burden of the increased risk would be particularly difficult for small lenders, who have less ability to fully attest to the quality of independent third-party contractors and to absorb the additional risk and cost the rule would impose on them. The commenters wrote that even if some lenders are able to incur the added costs, low-income consumers might not be able to afford the increased expenses and thereby lose a valuable source of credit.

HUD response. As discussed in this preamble, this final rule does not impose a no fault liability on the lender, but rather emphasizes and reinforces that lenders are being held to the standard that HUD has held them to date, one of known or had reason to know. With this clarification, HUD does not agree that this final rule will reduce lender participation in the FHA programs. As noted elsewhere in this preamble, this final rule does not impose any additional burdensome requirements on lenders. Therefore, HUD does not expect any lender to withdraw from the FHA-insured mortgage program as a result of this rule.

Comment: The proposed rule may have the unintended consequence of having appraisers be less concerned with the quality of appraisals, since the appraiser can rely on the lender to ensure that the appraisal meets FHA requirements. Two commenters wrote that the proposed rule might create this unintended disincentive for appraisers to meet FHA requirements.

HUD response. The appraisal industry is a regulated profession with established education and experience criteria and continuing education requirements. HUD expects all FHA Appraisers to abide by the Uniform Standards of Professional Appraisal Practice (USPAP) of the Appraisal Foundation and FHA requirements. Those FHA appraisers who fail to abide by USPAP and do not meet FHA requirements are subject to administrative actions by the Department. It is also expected that FHA mortgage lenders will not select FHA appraisers that are not knowledgeable in the property type appraised or do not adequately perform their trade.

D. Other Comments and Recommendations

Comment: HUD should establish a single Web site for posting all procedures and policies regarding FHA appraisals. Two commenters made this suggestion. The commenters wrote that it is currently very difficult for lenders and appraisers to locate all of the relevant FHA policies since they are scattered throughout several Web sites and sources.

HUD response. HUD's home page *http://www.hud.gov* contains links to Web pages that enable appraisers and lenders to obtain information on FHA requirements and to keep abreast of changes. In addition, information can be found at Web page *http://www.hudclips.org* (Client Information and Policy System), which enables the user to search for all of HUD's official policies, procedures and directives, including notices, handbooks, Mortgagee Letters, **Federal Register** publications, the Congressional Record, and the U.S. Code.

Comment: HUD should establish a system to consider complaints from appraisers alleging inappropriate lender pressure to inflate the appraised value of a property. Two commenters made this suggestion. The commenters wrote that such a procedure should inform the appraiser of the information that must be submitted to HUD as part of the complaint, and whether HUD will hold the appraiser's identity in confidence during the investigation. The commenters also suggested that HUD should establish a ''hotline'' or designate a single point of contact for these complaints.

HUD response. HUD currently has a system in place where complaints may be channeled. Each HUD Homeownership Center can be contacted through a toll-free telephone number, e-mail, or written correspondence. Each Homeownership Center has a Technical Support Branch to handle complaints and a Customer Service Division, which can also receive complaints and make referrals to the Inspector General's hotline. Contact information for the Homeownership Centers may be found on HUD's Home page at *http://www.hud.gov.*

Comment: HUD should require lenders to inform State appraisal licensing agencies when problems with a particular appraiser are identified. One commenter made this suggestion. The commenter wrote that removing an appraiser from the Appraiser Roster without providing information to the State-licensing agency protects HUD, but does not protect the public.

HUD response. HUD will not impose an additional burden on lenders by mandating that they inform State appraisal licensing agencies when problems with a particular appraiser are identified. However, FHA will continue to make referrals to State certification and licensing boards.

Comment: Care must be taken in the use of AVMs to conduct appraisal reviews. Two commenters wrote that the use of Automated Valuation Models (AVMs) does not constitute an effective appraisal review program. The commenters wrote that AVMs are not appraisals, but a form of computerized statistical modeling. According to the commenters, AVMs fail to consider the unique characteristics of properties, as they rely primarily on public records and proprietary databases for information. The commenters recommended that if a lender chooses to use AVMs, a qualified appraiser employed by the lender should conduct the AVM appraisal review.

HUD response. HUD agrees with the commenters that AVMs do not constitute an effective stand-alone check on the quality of appraisals. An AVM can be a useful tool, however, when used in conjunction with more traditional appraisal review techniques to preliminarily assess the credibility and accuracy of an appraisal, as well as assess the probability of ancillary concerns such as the probability of property ''flipping''.

Comment: Lenders should be held strictly liable only for substantive appraisal defects. One commenter

suggested that the final rule should clarify that lenders will be held strictly liable only for substantive defects in an appraisal. The commenter wrote that the goal of the rule should be to prevent bad appraisals, not to punish lenders for insignificant errors. The commenter further suggested that the final rule should specify the appraisal elements that would be considered significant enough to trigger strict liability.

HUD response. In this preamble, HUD already has thoroughly addressed the issue of strict liability but notes that HUD Handbook 4000.4 (''Single Family Direct Endorsement Program'') details the procedures for an underwriter's appraisal review, which include verification that factual information is correctly reported in the appraisal; assessment of the plausibility and consistency of conclusions based upon data presented in the report; determination of consistency of reported conclusions with other data conclusions reported in similar cases recently processed; and compliance with HUD underwriting instructions. If the underwriter concludes that the appraisal report findings are inconsistent, or otherwise unacceptable, the appraiser may be contacted or the report returned for reconsideration. In addition, HUD Handbook 4060.1 REV–1, dated September 30, 1993, and Handbook 4330.1 REV–5, dated September 1994, provide guidance on a mortgagee's quality control plan. Given this existing policy guidance and the fact that this final rule codifies and clarifies HUD's existing policy regarding lender review of appraisals, HUD does not consider any additional clarification necessary. Copies of the handbooks referenced above may be downloaded through the HUDCLIPS Web site: *http://www.hudclips.org.*

Comment: Lenders should not be permitted to select appraisers. Two commenters wrote that the proposed rule demonstrates that the system of permitting FHA lenders to select their own appraisers has been a mistake. The commenters suggested that HUD return to the system of HUD selecting the appraisers, on a rotation system, from an approved list of independent appraisers.

HUD response. The change requested by the commenters is outside the scope of the January 13, 2003, proposed rule. Lender selection of the appraiser is statutorily mandated. There are no plans to recommend changes to the existing regulations.

Comment: Rule should provide greater clarity regarding liability. One commenter wrote that the proposed rule was unclear regarding how HUD would allocate liability for a faulty appraisal between the lender and appraiser. The commenter requested that HUD clarify this matter in the final rule.

HUD response. This final rule states that the lender and appraiser shall both bear responsibility for the quality of the appraisal. To that end, if an appraisal is determined to be faulty and/or non-compliant with FHA requirements, HUD may seek administrative sanctions against either or both of the parties, depending upon the particular circumstances of the case. This final rule clarifies the authority of the MRB to sanction lenders for deficient appraisals. HUD Handbook 4150.2 details administrative and civil sanctions as well as criminal penalties available against appraisers who have violated FHA regulations and/or the USPAP.

IV. Small Business Concerns Related to MRB Actions Against Lenders

As discussed below in this preamble, HUD has determined that this rule will not have a significant economic impact on a substantial number of small entities. The final rule does clarify that HUD's MRB may impose administrative sanctions on small lenders for submitting appraisals that are inconsistent with FHA requirements, and for which the lenders knew were inconsistent or had reason to know were inconsistent. With respect to such enforcement efforts, HUD is cognizant that section 222 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (referred to as ''SBREFA'') requires the Small Business and Agriculture Regulatory Enforcement Ombudsman to ''work with each agency with regulatory authority over small businesses to ensure that small business concerns that receive or are subject to an audit, on-site inspection, compliance assistance effort, or other enforcement related communication or contact by agency personnel are provided with a means to comment on the enforcement activity conducted by this personnel.'' To implement this statutory provision, the Small Business Administration has requested that agencies include the following language on agency publications and notices that are provided to small businesses at the time the enforcement action is undertaken. The language is as follows:

Your Comments Are Important

The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you wish to comment on the enforcement actions of [insert agency name], call 888–REG–FAIR (888–734–3247).

As HUD stated in its notice describing HUD's actions on the implementation of SBREFA, which was published on May 21, 1998 (63 FR 28214), HUD intends to work with the Small Business Administration to provide small entities with information on the Fairness Boards and National Ombudsman program, at the time enforcement actions are taken, to ensure that small entities have the full means to comment on the enforcement activity conducted by HUD.

V. Findings and Certifications

Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, *Regulatory Planning and Review*. OMB determined that this rule is a ''significant regulatory action'' as defined in section 3(f) of the order (although not an economically significant regulatory action under the order). Any changes made to this rule as a result of that review are identified in the docket file, which is available for public inspection in the office of the Regulations Division, Office of General Counsel, Room 10276, 451 Seventh Street, SW., Washington, DC 20410–0500.

Environmental Impact

This final rule does not direct, provide for assistance, or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c), this final rule is categorically excluded from the requirements of the National Environmental Policy Act (42 U.S.C. 4332 *et seq.*).

Regulatory Flexibility Act

The Secretary has reviewed this final rule before publication, and by approving it certifies, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), that this final rule will not have a significant economic impact on a substantial number of small entities. The final rule will not establish, or substantively modify, HUD policy and procedures regarding lender accountability for FHA appraisals. Rather, the regulatory changes will clarify HUD's existing policy of holding lenders responsible along with

appraisers for the quality of such appraisals. Further, the regulatory changes are designed to ensure the integrity of appraisals on properties securing FHA-insured mortgages. To the extent that the regulatory amendments have an economic impact, it will be on those lenders and appraisers who submit appraisals that are inconsistent with FHA requirements.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule will not have federalism implications and would not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This final rule will not impose any Federal mandates on any State, local, or tribal governments or on the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance Numbers for the programs affected by this final rule are 14.117 and 14.133.

List of Subjects

24 CFR Part 25

Administrative practice and procedure, Loan programs—housing and community development, Organization and functions (Government agencies).

24 CFR Part 203

Hawaiian Natives, Home improvement, Indians—lands, Loan programs—housing and community development, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy.

■ Accordingly, for the reasons described in the preamble, HUD amends 24 CFR parts 25 and 203 as follows:

PART 25—MORTGAGEE REVIEW BOARD

■ 1. The authority citation for 24 CFR part 25 continues to read as follows:

Authority: 12 U.S.C. 1708(c), 1708(d), 1709(s), 1715b and 1735(f)–14; 42 U.S.C. 3535(d).

■ 2. Amend § 25.9 by redesignating paragraph (ee) as paragraph (ff) and adding a new paragraph (ee) to read as follows:

§ 25.9 Grounds for an administrative action.

* * * * *

(ee) Submitting, or causing to be submitted, with an application for FHA mortgage insurance an appraisal, valuation condition sheet, or any other documentation relating to an appraisal that does not satisfy FHA requirements.

* * * * *

PART 203—SINGLE FAMILY MORTGAGE INSURANCE

■ 3. The authority citation for 24 CFR part 203 continues to read as follows:

Authority: 12 U.S.C. 1709, 1710, 1715b, and 1715u; 42 U.S.C. 3535(d).

■ 4. Amend § 203.5 by adding a sentence at the end of paragraph (e)(1) and adding a new paragraph (e)(3) to read as follows:

§ 203.5 Direct Endorsement process.

* * * * *

(e) * * *

(1) * * * A mortgagee must select an appraiser whose name is on the FHA Appraiser Roster, in accordance with 24 CFR part 200, subpart G.

* * * * *

(3) A mortgagee and an appraiser must ensure that an appraisal and related documentation satisfy FHA appraisal requirements and both bear responsibility for the quality of the appraisal in satisfying such requirements. A Direct Endorsement Mortgagee (and any of its loan correspondent lenders) that submits, or causes to be submitted, an appraisal or related documentation that does not satisfy FHA requirements is subject to administrative sanction by the Mortgagee Review Board pursuant to 24 CFR part 25 and part 30.

Dated: July 12, 2004.

Alphonso Jackson,

Secretary.

[FR Doc. 04–16391 Filed 7–19–04; 8:45 am]

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The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

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AGOA Acceleration Act of 2004 (July 13, 2004; 118 Stat. 820)

H.R. 1731/P.L. 108–275

Identity Theft Penalty Enhancement Act (July 15, 2004; 118 Stat. 831)

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